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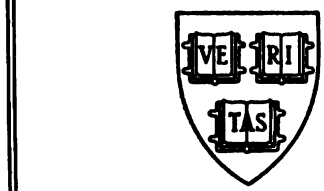

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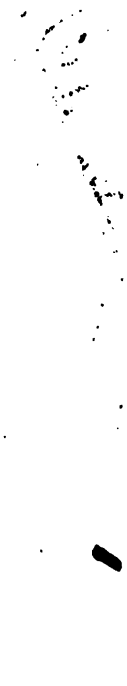

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CENTURY EDITION

OF THE

AMERICAN DIGEST

A COMPLETE DIGEST OF ALL REPORTED AMERICAN CASES FROM THE EARLIEST TIMES TO 1896

VOL. 50

Witnesses—Year

CROSS-REFERENCE INDEX TO VOLS. 1-50

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TABLE OF ABBREVIATIONS.

A

Abb. Adm.	Abbott's Admiralty (U. S.)
Abb. Dec.	Abbott's Decisions (N. Y.)
Abb. N. C.	Abbott's New Cases (N. Y.)
Abb. Prac.	Abbott's Practice (N. Y.)
Abb. Prac. (N. S.)	Abbott's Practice, New Series (N. Y.)
Abb. (U. S.)	Abbott's United States.
Adams	Adams (N. H.)
Add.	Addison (Pa.)
Aikens	Aikens (Vt.)
A. K. Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama.
Alb. Law J.	Albany Law Journal.
Allen	Allen (Mass.)
Am. Dec.	American Decisions.
Am. Law J.	American Law Journal.
Am. Law Rec.	American Law Record (Cin.)
Am. Law Reg. (N. S.)	American Law Register, New Series.
Am. Law Reg. (O. S.)	American Law Register, Old Series.
Am. Law T. Rep.	American Law Times Reports.
Am. Rep.	American Reports.
Am. St. Rep.	American State Reports.
Anth. N. P.	Anthon's Nisi Prius Reports (N. Y.)
App.	Appleton (Me.)
App. D. C.	Appeal Cases (D. C.)
App. Div.	Appellate Division (N. Y.)
Ariz.	Arizona.
Ark.	Arkansas.
Ashm.	Ashmead (Pa.)
Atl.	Atlantic Reporter.

B

Bailey	Bailey (S. C.)
Bailey, Eq.	Bailey's Equity (S. C.)
Baldw.	Baldwin (U. S.)
Ban. & A.	Banning & Arden's Patent Cases (U. S.)
Barb.	Barbour (N. Y.)
Barb. (Ark.)	Barber (Ark.)
Barb. Ch.	Barbour's Chancery (N. Y.)
Barr	Barr (Pa.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S. C.)
Beasl.	Beasley (N. J.)
Bee	Bee (U. S.)
Ben.	Benedict (U. S.)
Benn.	Bennett (Cal.)
Bibb	Bibb (Ky.)
Bin.	Binney (Pa.)
Biss.	Bissell (U. S.)
Black	Black (U. S.)
Blackf.	Blackford (Ind.)
Bland	Bland (Md.)
Blatchf.	Blatchford (U. S.)
Blatchf. Prize Cas.	Blatchford's Prize Cases (U. S.)
Blatchf. & H.	Blatchford & Howland (U. S.)
B. Mon.	B. Monroe (Ky.)
Bond	Bond (U. S.)
Bosw.	Bosworth (N. Y.)
Bradf. Sur.	Bradford's Surrogate (N. Y.)
Bradw.	Bradwell (Ill.)
Branch	Branch (Fla.)
Brayt.	Brayton (Vt.)
Breese	Breese (Ill.)
Brev.	Brevard (S. C.)
Brewst.	Brewster (Pa.)
Brightly, Elect. Cas.	Brightly's Leading Election Cases (Pa.)
Brightly, N. P.	Brightly's Nisi Prius Reports (Pa.)
Brock.	Brockenbrough (U. S.)
Brock. & H.	Brockenbrough & Holmes (Va.)
Brown, Adm.	Brown's Admiralty (U. S.)
Browne	Browne (Pa.)
Brunner, Col. Cas.	Brunner's Collected Cases (U. S.)
Burn.	Burnett (Wis.)
Busb.	Busbee (N. C.)
Busb. Eq.	Busbee's Equity (N. C.)
Bush	Bush (Ky.)

C

Caines	Caines (N. Y.)
Caines, Cas.	Caines' Cases (N. Y.)
Cal.	California.
Call	Call (Va.)
Cam. & N.	Cameron & Norwood's Conference (N. C.)
Car. Law Repos.	Carolina Law Repository (N. C.)
Cart.	Carter (Ind.)
Casey	Casey (Pa.)
C. C. A.	Circuit Court of Appeals (U. S.)
C. E. Green	C. E. Green (N. J.)
Chand.	Chandler (Wis.)
Chan. Sentinel	Chancery Sentinel (N. Y.)
Charlt., R. M.	R. M. Charlton (Ga.)
Charlt., T. U. P.	T. U. P. Charlton (Ga.)
Chase	Chase (U. S.)
Chest. Co. Rep.	Chester County Reports (Pa.)
Cheves	Cheves (S. C.)
Cheves, Eq.	Cheves' Equity (S. C.)
Chi. Leg. N.	Chicago Legal News (Ill.)
Chip., D.	D. Chipman (Vt.)
Chip., N.	N. Chipman (Vt.)
Cin. R.	Cincinnati Superior Court Reports (Ohio)
Cin. Super. Ct. Rep'r.	Cincinnati Superior Court Reporter (Ohio)
Cir. Ct. Dec.	Circuit Court Decisions (Ohio)
City Ct. R.	City Court Reports (N. Y.)
City Ct. R. Supp.	City Court Reports, Supplement (N. Y.)
City H. Rec.	City Hall Recorder (N. Y.)
Civ. Proc. R.	Civil Procedure Reports (N. Y.)
Clark	Clark (Pa.)
Clarke	Clarke (Iowa)
Clarke, Ch.	Clarke's Chancery (N. Y.)
Cleve. Law Rec.	Cleveland Law Recorder (Ohio)
Cleve. Law Rep.	Cleveland Law Reporter (Ohio)
Cliff.	Clifford (U. S.)
Code R. (N. S.)	Code Reports, New Series (N. Y.)
Code Rep.	Code Reporter (N. Y.)
Cold.	Coldwell (Tenn.)
Colem. Cas.	Coleman's Cases (N. Y.)
Colem. & C. Cas.	Coleman & Caines' Cases (N. Y.)

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Colo.	Colorado.
Colo. App.	Colorado Appeals.
Colo. Law Rep.	Colorado Law Reporter.
C. P. Rep.	Common Pleas Reporter (Pa.)
Comst.	Comstock (N. Y.)
Conf. R.	Conference Reports (N. C.)
Conn.	Connecticut.
Con. Sur.	Connoly's Surrogate (N. Y.)
Cooke	Cooke (Tenn.)
Cow.	Cowen (N. Y.)
Cox	Cox (Ark.)
Coxe	Coxe (N. J.)
Crabbe	Crabbe (U. S.)
Cranch	Cranch (U. S.)
Cranch, C. C.	Cranch's Circuit Court (U. S.)
Cranch, Pat. Dec.	Cranch's Patent Decisions (U. S.)
Cr. Law Mag.	Criminal Law Magazine (N. J.)
Ct. Cl.	Court of Claims (U. S.)
Curt.	Curtis (U. S.)
Cush.	Cushing (Mass.)
Cushm.	Cushman (Miss.)

D

Dak.	Dakota.
Dall. (Pa.)	Dallas (Pa.)
Dall. (U. S.)	Dallas (U. S.)
Dall. Dig.	Dallam's Digest and Opinions (Tex.)
Daly	Daly (N. Y.)
Dana	Dana (Ky.)
Day	Day (Conn.)
D. C.	District of Columbia.
D. Chip.	D. Chipman (Vt.)
Deady	Deady (U. S.)
Del.	Delaware.
Del. Ch.	Delaware Chancery.
Del. Co. R.	Delaware County Reports (Pa.)
Dem. Sur.	Demarest's Surrogate (N. Y.)
Denio	Denio (N. Y.)
Desaus.	Desaussure's Equity (S. C.)
Dev.	Devereux (N. C.)
Dev. Ct. Cl.	Devereux's Court of Claims (U. S.)
Dev. Eq.	Devereux's Equity (N. C.)
Dev. & B.	Devereux & Battle (N. C.)
Dev. & B. Eq.	Devereux & Battle's Equity (N. C.)
Dick.	Dickinson (N. J.)
Dill.	Dillon (U. S.)
Disn.	Disney (Ohio)
Doug.	Douglas (Mich.)
Dud.	Dudley (Ga.)
Dud. Eq.	Dudley's Equity (S. C.)
Dud. Law	Dudley's Law (S. C.)
Duer	Duer's Superior Court (N. Y.)
Dutch.	Dutcher (N. J.)
Duv.	Duvall (Ky.)

E

Edm. Sel. Cas.	Edmonds' Select Cases (N. Y.)
E. D. Smith	E. D. Smith (N. Y.)
Edw. Ch.	Edwards' Chancery (N. Y.)
Eng.	English (Ark.)

F

Fairf.	Fairfield (Me.)
Fed.	Federal Reporter (U. S.)
Fed. Cas.	Federal Cases (U. S.)
Fish. Pat. Cas.	Fisher's Patent Cases.
Fish. Pat. Rep.	Fisher's Patent Reports.
Fish. Prize Cas.	Fisher's Prize Cases (U. S.)
Fla.	Florida.
Flip.	Flippin (U. S.)
Fost.	Foster (N. H.)
Freem.	Freeman (Ill.)
Freem. Ch.	Freeman's Chancery (Miss.)

G

Ga.	Georgia.
Ga. Dec.	Georgia Decisions.
Gall.	Gallison (U. S.)
George	George (Miss.)
Gil.	Gilfillan (Minn.)
Gill	Gill (Md.)
Gill & J.	Gill & Johnson (Md.)
Gilman	Gilman (Ill.)
Gilmer	Gilmer (Va.)
Gilp.	Gilpin (U. S.)
Grant, Cas.	Grant's Cases (Pa.)
Grat.	Grattan (Va.)
Gray	Gray (Mass.)
Green, C. E.	C. E. Green (N. J.)
Green, Cr. Law R.	Green's Criminal Law Reports (N. Y.)
Green, H. W.	H. W. Green (N. J.)
Green, J. S.	J. S. Green (N. J.)
Greene, G.	G. Greene (Iowa)
Greenl.	Greenleaf (Me.)

H

Hall	Hall's Superior Court (N. Y.)
Halst.	Halsted (N. J.)
Halst. Ch.	Halsted's Chancery (N. J.)
Ham.	Hammond (Ohio)
Hand	Hand (N. Y.)
Handy	Handy (Ohio)
Har. (Del.)	Harrington (Del.)
Har. (Mich.)	Harrington (Mich.)
Har. (N. J.)	Harrison (N. J.)
Hardin	Hardin (Ky.)
Harp.	Harper (S. C.)
Harp. Eq.	Harper's Equity (S. C.)
Harris	Harris (Pa.)
Har. & G.	Harris & Gill (Md.)
Har. & J.	Harris & Johnson (Md.)
Har. & McH.	Harris & McHenry (Md.)
Hask.	Haskell (U. S.)
Hawks	Hawks (N. C.)
Hayw. (N. C.)	Haywood (N. C.)
Hayw. (Tenn.)	Haywood (Tenn.)
Hayw. & H.	Hayward & Hazelton (U S.)
Haz. Reg.	Hazard's Register (Pa.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hemp.	Hempstead (U. S.)
Hen. & M.	Hening & Munford (Va.)
Hill	Hill (N. Y.)
Hill, Eq.	Hill's Equity (S. C.)
Hill, Law	Hill's Law (S. C.)
Hill & D. Supp.	Hill & Denio, Lalor's Supplement (N. Y.)
Hilt.	Hilton (N. Y.)
Hoff. Ch.	Hoffman's Chancery (N. Y.)
Hoff. Land Cas.	Hoffman's Land Cases (U. S.)
Holmes	Holmes (U. S.)
Hopk. Ch.	Hopkins' Chancery (N. Y.)
Houst.	Houston (Del.)
Houst Cr. Cas.	Houston's Criminal Cases (Del.)
How. (Miss.)	Howard (Miss.)
How.	Howard (U. S.)
How. Prac.	Howard's Practice (N. Y.)
How. Prac. (N. S.)	Howard's Practice, New Series (N. Y.)
Howell, N. P.	Howell's Nisi Prius Reports (Mich.)
Hughes (Ky.)	Hughes (Ky.)
Hughes	Hughes (U. S.)
Humph.	Humphrey (Tenn.)
Hun	Hun (N. Y.)

I

Idaho	Idaho.
Ill.	Illinois.
Ill. App.	Illinois Appellate Court Reports.
Ind.	Indiana.
Ind. App.	Indiana Appellate Court Reports.
Ind. T.	Indian Territory.

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Ins. Law J.	Insurance Law Journal (Pa.)
Interst. Com. R.	Interstate Commerce Reports.
Iowa	Iowa.
Ired.	Iredell's Law (N. C.)
Ired. Eq.	Iredell's Equity (N. C.)

J

Jeff.	Jefferson (Va.)
J. J. Marsh.	J. J. Marshall (Ky.)
Johns.	Johnson (N. Y.)
Johns. Cas.	Johnson's Cases (N. Y.)
Johns. Ch.	Johnson's Chancery (N. Y.)
Jones	Jones (Pa.)
Jones, Eq.	Jones' Equity (N. C.)
Jones, Law	Jones' Law (N. C.)
Jones & S.	Jones & Spencer (N. Y.)
Jour. Juris.	Journal of Jurisprudence.
Jud. Repos.	Judicial Repository (N. Y.)

K

Kan.	Kansas.
Kan. App.	Kansas Appeals.
Kelly	Kelly (Ga.)
Kern.	Kernan (N. Y.)
Keyes	Keyes (N. Y.)
Kirby	Kirby (Conn.)
Kulp	Kulp (Pa.)
Ky.	Kentucky.
Ky. Dec.	Kentucky Decisions.
Ky. Law Rep.	Kentucky Law Reporter.

L

La.	Louisiana.
La. Ann.	Louisiana Annual.
Lack. Jur.	Lackawanna Jurist (Pa.)
Lack. Leg. N.	Lackawanna Legal News (Pa.)
Lalor, Supp.	Lalor's Supplement to Hill & Denio's Reports (N. Y.)
Lanc. Bar	Lancaster Bar.
Lanc. Law Rev.	Lancaster Law Review.
Lans.	Lansing (N. Y.)
Lans. Ch.	Lansing's Chancery (N. Y.)
Law Rep.	Law Reporter (Mass.)
Law T. (N. S.)	Law Times, New Series.
Lea	Lea (Tenn.)
L. Ed.	Lawyers' Edition Supreme Court Reports.
Lee	Lee (Cal.)
Leg. Chron.	Legal Chronicle.
Leg. Gaz.	Legal Gazette (Pa.)
Leg. Gaz. R.	Legal Gazette Reports (Pa.)
Leg. Int.	Legal Intelligencer (Pa.)
Leg. Op.	Legal Opinions.
Leg. Rec. Rep.	Legal Record Reports.
Leg. Rep.	Legal Reporter (Tenn.)
Leg. & Ins. Rep.	Legal & Insurance Reporter.
Lehigh Val. Law Rep.	Lehigh Valley Law Reporter.
Leigh	Leigh (Va.)
Litt.	Littell (Ky.)
Litt. Sel. Cas.	Littell's Select Cases (Ky.)
Low.	Lowell (U. S.)
Lower Ct. Dec.	Lower Court Decisions (Ohio)
L. R. A.	Lawyers' Reports Annotated.
Luz. Law T.	Luzerne Law Times.
Luz. Leg. Obs.	Luzerne Legal Observer (Pa.)
Luz. Leg. Reg.	Luzerne Legal Register (Pa.)

M

McAll.	McAllister (U. S.)
MacArthur	MacArthur (D. C.)
MacArthur, Pat. Cas.	MacArthur's Patent Cases (U. S.)
MacArthur & M.	MacArthur & Mackey (D. C.)
Mackey	Mackey (D. C.)
McCahon	McCahon (Kan.)
McCart.	McCarter (N. J.)
McCarty, Civ. Proc.	McCarty's Civil Procedure Reports (N. Y.)
McCord	McCord's Law (S. C.)
McCord, Eq.	McCord's Equity (S. C.)
McCrary	McCrary (U. S.)
McGloin	McGloin (La.)
McLean	McLean (U. S.)
McMul.	McMullan (S. C.)
McMul. Eq.	McMullan's Equity (S. C.)
Man.	Manning (Mich.)
Man. Unrep. Cas.	Manning's Unreported Cases (La.)
Marsh., A. K.	A. K. Marshall (Ky.)
Marsh., J. J.	J. J. Marshall (Ky.)
Mart. (N. C.)	Martin (N. C.)
Mart. (N. S.)	Martin's New Series (La.)
Mart. (O. S.)	Martin's Old Series (La.)
Mart. & Y.	Martin & Yerger (Tenn.)
Marv.	Marvel's Reports (Del.)
Mason	Mason (U. S.)
Mass.	Massachusetts.
Md.	Maryland.
Md. Ch.	Maryland Chancery.
Me.	Maine.
Meigs	Meigs (Tenn.)
Metc. (Ky.)	Metcalfe (Ky.)
Metc. (Mass.)	Metcalf (Mass.)
Mich.	Michigan.
Mich. N. P.	Michigan Nisi Prius.
Miles	Miles (Pa.)
Mill, Const.	Mill's Constitutional Reports (S. C.)
Minn.	Minnesota.
Minor	Minor (Ala.)
Misc. Rep.	Miscellaneous Reports (N. Y.)
Miss.	Mississippi.
Mo.	Missouri.
Mo. App.	Missouri Appeals.
Mo. App. Rep'r.	Missouri Appellate Reporter.
Monag.	Monaghan (Pa.)
Mon., B.	B. Monroe (Ky.)
Mon., T. B.	T. B. Monroe (Ky.)
Mont.	Montana.
Month. Law Bul.	Monthly Law Bulletin (N. Y.)
Montg. Co. Law Rep'r	Montgomery County Law Reporter (Pa.)
Moore	Moore (Ark.)
Morris	Morris (Iowa)
Munf.	Munford (Va.)
Murph.	Murphey (N. C.)
Myr. Prob.	Myrick's Probate Court Reports (Cal.)

N

N. B. R.	National Bankruptcy Register (U. S.)
N. C.	North Carolina.
N. C. Term R.	North Carolina Term Reports.
N. Chip.	N. Chipman (Vt.)
N. D.	North Dakota.
N. E.	Northeastern Reporter.
Neb.	Nebraska.
Nev.	Nevada.
Newb. Adm.	Newberry's Admiralty (U. S.)
N. H.	New Hampshire.
N. J. Eq.	New Jersey Equity.
N. J. Law	New Jersey Law.
N. J. Law J.	New Jersey Law Journal.
N. M.	New Mexico.
Nisi Prius & Gen. T. Rep.	Nisi Prius & General Term Reports (Ohio)
Norris	Norris (Pa.)
Northam. Law Rep.	Northampton Law Reporter.
Northumb. Co. Leg. N.	Northumberland County Legal News.

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Nott & McC. ..... Nott & McCord (S. C.)
N. W. ..... Northwestern Reporter.
N. Y. ..... New York.
N. Y. Ann. Cas. .... New York Annotated Cases.
N. Y. Cr. R. ..... New York Criminal Reports.
N. Y. Law J. ..... New York Law Journal.
N. Y. Leg. Obs. .... New York Legal Observer.
N. Y. St. Rep. ..... New York State Reporter.
N. Y. Super. Ct. .... New York Superior Court.
N. Y. Supp. ..... New York Supplement.

O

Ohio ..... Ohio.
Ohio Cir. Ct. R. .... Ohio Circuit Court Reports.
O. C. D. ..... Ohio Circuit Decisions.
Ohio Dec. ..... Ohio Decisions.
Ohio Law J. ..... Ohio Law Journal.
Ohio Leg. N. ..... Ohio Legal News.
O. L. D. ..... Ohio Lower Court Decisions.
Ohio N. P. ..... Ohio Nisi Prius.
Ohio St. ..... Ohio State.
Ohio S. & C. P. Dec. .. Ohio Superior and Common Pleas Decisions.
Okl. ..... Oklahoma.
Olcott ..... Olcott (U. S.)
Or. ..... Oregon.
Outerbridge ..... Outerbridge (Pa.)
Overt. ..... Overton (Tenn.)

P

Pac. ..... Pacific Reporter.
Pa. Co. Ct. R. ..... Pennsylvania County Court Reports.
Pa. Dist. R. ..... Pennsylvania District Reports.
Pa. ..... Pennsylvania State.
Paige. ..... Paige's Chancery (N. Y.)
Paine ..... Paine (U. S.)
Pa. Law J. ..... Pennsylvania Law Journal.
Parker, Cr. R. ..... Parker's Criminal Reports (N. Y.)
Pars. Eq. Cas. ..... Parsons' Select Equity Cases (Pa.)
Pa. Super. Ct. ..... Pennsylvania Superior Court Reports.
Pat. & H. ..... Patton & Heath (Va.)
Pears. ..... Pearson (Pa.)
Peck (Ill.) ..... Peck (Ill.)
Peck (Tenn.) ..... Peck (Tenn.)
Penning. ..... Pennington (N. J.)
Penny. ..... Pennypacker (Pa.)
Pen. & W. ..... Penrose & Watts (Pa.)
Pet. ..... Peters (U. S.)
Pet. Adm. ..... Peters' Admiralty (U. S.)
Pet. C. C. ..... Peters' Circuit Court (U. S.)
P. F. Smith. ..... P. F. Smith (Pa.)
Phila. ..... Philadelphia (Pa.)
Phil. ..... Phillips' Law (N. C.)
Phil. Eq. ..... Phillips' Equity (N. C.)
Pick. ..... Pickering (Mass.)
Pickle ..... Pickle (Tenn.)
Pike ..... Pike (Ark.)
Pin. ..... Pinney (Wis.)
Pittsb. Leg. J. ..... Pittsburgh Legal Journal (Pa.)
Pittsb. R. ..... Pittsburgh Reports (Pa.)
Port. (Ala.) ..... Porter (Ala.)
Posey, Unrep. Cas. .. Posey's Unreported Cases (Tex.)
Prob. R. ..... Probate Reports (Ohio)

Q

Quincy ..... Quincy (Mass.)

R

Rand. ..... Randolph (Va.)
Rawle ..... Rawle (Pa.)
Redf. Sur. ..... Redfield's Surrogate (N. Y.)
R. I. ..... Rhode Island.
Rice ..... Rice's Law (S. C.)
Rice Eq. ..... Rice's Equity (S. C.)
Rich. Eq. ..... Richardson's Equity (S. C.)
Rich. Eq. Cas. ..... Richardson's Equity Cases (S. C.)
Rich. Law ..... Richardson's Law (S. C.)
Rich. (S. C.) ..... Richardson (S. C.)
Riley ..... Riley's Law (S. C.)
Riley, Eq. ..... Riley's Equity (S. C.)
R. M. Charlt. ..... R. M. Charlton (Ga.)
Rob. (N. Y.) ..... Robertson (N. Y.)
Rob. (La.) ..... Robinson (La.)
Rob. (Va.) ..... Robinson (Va.)
Robb, Pat. Cas. ..... Robb's Patent Cases (U. S.)
Root ..... Root (Conn.)

S

Sandf. ..... Sandford (N. Y.)
Sandf. Ch. ..... Sandford's Chancery (N. Y.)
Sawy. ..... Sawyer (U. S.)
Saxt. Ch. ..... Saxton's Chancery (N. J.)
S. C. ..... South Carolina.
Scam. ..... Scammon (Ill.)
S. D. ..... South Dakota.
S. E. ..... Southeastern Reporter.
Seld. ..... Selden (N. Y.)
Seld. Notes ..... Selden's Notes (N. Y.)
Serg. & R. ..... Sergeant & Rawle (Pa.)
Sheld. ..... Sheldon (N. Y.)
Shep. ..... Shepley (Me.)
Silvernail ..... Silvernail (N. Y.)
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Smith, E. D. ..... E. D. Smith (N. Y.)
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Smith (N. Y.) ..... Smith (N. Y.)
Smith, P. F. ..... P. F. Smith (Pa.)
Sneed ..... Sneed (Tenn.)
South. ..... Southern Reporter.
Southard ..... Southard (N. J.)
Speers ..... Speers' Law (S. C.)
Speers, Eq. ..... Speers' Equity (S. C.)
Spencer ..... Spencer (N. J.)
Spr. ..... Sprague (U. S.)
Stew. (Ala.) ..... Stewart (Ala.)
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Strob. ..... Strobhart's Law (S. C.)
Strob. Eq. ..... Strobhart's Equity (S. C.)
Sumn. ..... Sumner (U. S.)
Sup. Ct. ..... Supreme Court Reporter.
Super. Ct. Rep. ..... Superior Court Reports (Pa.)
Sus. Leg. Chron. .... Susquehanna Legal Chronicle (Pa.)
S. W. ..... Southwestern Reporter.
Swan ..... Swan (Tenn.)
Sweeny ..... Sweeny (N. Y.)

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T. B. Mon. ..... T. B. Monroe (Ky.)
Tenn. ..... Tennessee.
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Tenn. Ch. ..... Tennessee Chancery.
Tex. ..... Texas.
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Tex. Civ. App. ..... Texas Civil Appeals.
Tex. Cr. R. ..... Texas Criminal Reports.
Tex. Supp. ..... Texas Supplement.
Thacher, Cr. Cas. .... Thacher's Criminal Cases (Mass.)
Thomp. Tenn. Cas. .. Thompson's Unreported Tennessee Cases.
Thomp. & C. ..... Thompson & Cook (N. Y.)
Tiffany ..... Tiffany (N. Y.)
Tread. Const. ..... Treadway's Constitutional Reports (S. C.)
Troub. & H. Prac. .. Troubat & Haly's Practice (Pa.)

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Tuck. ..... Tucker's Surrogate (N. Y.)
T. U. P. Charlt. ..... T. U. P. Charlton (Ga.)
Turn. ..... Turner (Ark.)
Tyler ..... Tyler (Vt.)

U

U. S. ..... United States.
U. S. App. ..... United States Appeals.
U. S. Month. Law Mag. ..... United States Monthly Law Magazine.
Utah ..... Utah.

V

Va. ..... Virginia.
Va. Cas. ..... Virginia Cases.
Van Ness, Prize Cas. Van Ness' Prize Cases (U. S.)
Vroom ..... Vroom (N. J.)
Vt. ..... Vermont.

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West. Law Month. .. Western Law Monthly (Ohio)
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York Leg. Rec. ..... York Legal Record.

Z

Zab. ..... Zabriskie (N. J.)

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CENTURY EDITION

OF

THE AMERICAN DIGEST

VOLUME 50.

A COMPLETE DIGEST OF ALL REPORTED AMERICAN CASES FROM THE EARLIEST TIMES TO 1896.

Witnesses.

Scope-Note.

[INCLUDES production of oral testimony at the trial of causes in general, civil or criminal; competency to testify; procuring attendance for that purpose, and production of documents by witnesses; examination of witnesses; their credibility; and corroborating, impeaching, or contradicting their testimony.

[EXCLUDES witnesses attesting or subscribing instruments in writing (see "*Deeds*"; "*Wills*"; and titles of particular instruments); taking and use of testimony in writing (see "*Depositions*"; "*Affidavits*"); competency of evidence in general, and of experts or others to testify as to matters of opinion (see "*Evidence*"); testimony in criminal prosecutions of accomplices, conspirators, and codefendants, and other matters peculiar to such prosecutions (see "*Criminal Law*"; and titles of particular crimes); and crime of giving false testimony (see "*Perjury*").]

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Presumptions from failure to call witness, see "Criminal Law," vol. 14, cc. 1328, 1329, § 732; "Evidence," vol. 20, cc. 164–168, § 97.
Process, abatement because served on witness in general, see "Process," vol. 40, c. 2786, § 219 [yy].
—— *abatement of writ of arrest served on witness, see* "Abatement and Revival," vol. 1, c. 147, § 180 [e].
—— *exemption of witness before legislative committee from service of, see* "Process," vol. 40, c. 2690, § 145.
—— *exemption of witness from service of, see* "Process," vol. 40, cc. 2696–2699, § 150.
—— *exemption of witness who is also party, see* "Process," vol. 40, cc. 2690, 2691, § 146.
—— *immunity of witness from arrest in civil actions, see* "Arrest," vol. 4, cc. 616, 617, § 21.
—— *mandamus to set aside service on witness, see* "Mandamus," vol. 33, c. 2172, § 77 [b].

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Process, service on witness as interference with commerce see "Commerce," vol. 10, c. 699, § 45.
Return and filing of list of witnesses before grand jury, see "Indictment and Information," vol. 27, cc. 336, 337, § 76.
Review of rulings as to witnesses, see "Appeal and Error," vol. 3, cc. 1126, 1127, § 3309.
—— *appealability of orders relating to witnesses, see* "Appeal and Error," vol. 2, cc. 1027, 1028, § 371; c. 1233, § 603; cc. 1254, 1255, § 632; c. 1312, § 711.
—— *record on review of exclusion of witness, see* "Appeal and Error," vol. 3, cc. 675, 676, § 2906.
—— *review of errors before bringing them up on motion for new trial, see* "Appeal and Error," vol. 2, cc. 2032, 2033, §§ 1694–1696.
Right of party to confront witnesses, see "Trial," vol. 46, c. 800, § 100.
—— *to recover property transferred under illegal contract to procure testimony, see* "Contracts," vol. 11, c. 664, § 688 [h].
Separation and exclusion of witnesses, see "Criminal Law," vol. 14, cc. 2279–2287, §§ 1549–1566½; "Trial," vol. 46, cc. 800–806, §§ 101–105.
Tampering with witnesses as contempt of court, see "Contempt," vol. 10, cc. 2399–2405, §§ 27–35.
Testimony of parties or witnesses and others present to prove marriage, see "Marriage," vol. 34, c. 266, § 72; cc. 279–283, §§ 80, 81.
—— *of witness as ground of estoppel, see* "Estoppel," vol. 19, cc. 2137–2139, §§ 170–172; c. 2147, § 176.
Transfer of criminal cause from state to federal court on ground that a witness is a negro and incompetent to testify in state court, see "Criminal Law," vol. 14,cc. 807, § 198 [a].
Validity of contract to give or procure evidence, see "Contracts," vol. 11, cc. 597, 598, § 617.
—— *to withdraw or suppress evidence, see* "Contracts," vol. 11, cc. 598, 599, § 618.
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To Written Instruments.

Absence or death of subscribing witnesses as ground for secondary evidence of execution of written instruments, see "Evidence," vol. 20, cc. 2252–2255, § 1596.
Attestation of assignment, see "Assignments," vol. 4, c. 1236, § 81 [a].
—— *of assignment for benefit of creditors, see* "Assignments for Benefit of Creditors," vol. 4, cc. 1775, 1776, § 254.
—— *of award of arbitrators, see* "Arbitration and Award," vol. 4, cc. 218, 219, § 271.
—— *of bill or note, see* "Bills and Notes," vol. 7, cc. 114, 115, § 76.
—— *of bond, see* "Bonds," vol. 8, cc. 28, 29, § 18.
—— *of bond for costs, see* "Costs," vol. 13, c. 471, § 486.
—— *of chattel mortgage, see* "Chattel Mortgages," vol. 9, cc. 2386–2388, § 115.
—— *of contract, see* "Contracts," vol. 11, c. 166, § 167.
—— *of conveyance of wife's separate estate, see* "Husband and Wife," vol. 26, cc. 2355, 2356, § 726.
—— *of deed, see* "Deeds," vol. 16, cc. 127–135, §§ 104–110.
—— *of documentary evidence, see* "Evidence," vol. 20, c. 2209, § 1569; cc. 2231–2275, §§ 1583–1612; c. 2290, §§ 1620, 1621.
—— *of indorsement of change of beneficiaries of mutual benefit insurance, see* "Insurance," vol. 28, cc. 3119, 3120, § 1952.
—— *of instrument of execution of power, see* "Powers," vol. 40, cc. 570, 571, § 127.
—— *of lease, see* "Landlord and Tenant," vol. 32, cc. 82, 83, § 71.
—— *of mortgage, see* "Mortgages," vol. 35, cc. 513, 514, §§ 153, 154.
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—— *of submission to arbitration, see* "Arbitration and Award," vol. 4, cc. 48, 49, § 42 [h, n–p].
—— *of will, see* "Wills," vol. 49, cc. 337–402, §§ 277–331; c. 410, § 344; cc. 422–426, §§ 354–356; cc. 429–432, §§ 361, 362; cc. 763–770, §§ 679–684.
—— *of witnesses to levy of attachment, see* "Attachment," vol. 5, cc. 642, 643, § 460.
Authentication of instruments in evidence by subscribing witnesses, see "Evidence," vol. 20, cc. 2235–2240, §§ 1587–1589.
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Instruments attested by mark, production in evidence, see "Evidence," vol. 20, cc. 2233, 2234, § 1584.
—— *unwitnessed and attested without authority, production in evidence, see* "Evidence," vol. 20, cc. 2231–2233, § 1583.
—— *valid without attestation, production in evidence, see* "Evidence," vol. 20, cc. 2209, 2210, § 1569.
Liability of one signing under style of witness as surety, see "Principal and Surety," vol. 40, c. 1661, § 24.
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To Written Instruments—Continued.

Probate by witnesses, see "Acknowledgment," vol. 1, cc. 916, 917, § 181 [v, w]; c. 926, § 186; cc. 934–938, § 191; cc. 939–941, § 195; cc. 972, 973, § 223 [a, b]; c. 976, § 224 [o]; c. 987, § 234; c. 1013, § 255 [b]; c. 1031, § 278 [e].

Proof of lost instruments by subscribing witnesses, see "Evidence," vol. 20, cc. 989, 990, § 665.

Recollection of circumstances by subscribing witness as evidence of execution of ancient deed, see "Evidence," vol. 20, c. 2290, § 1620.

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WITNESSES.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS AND COMPENSATION, §§ 1-76.
II. COMPETENCY, §§ 77-787.
III. EXAMINATION, §§ 788-1071.
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I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

(A) COMPELLING ATTENDANCE IN GENERAL, §§ 1-9.
(B) PROCESS AND PROCEEDINGS TO COMPEL ATTENDANCE AND PRODUCTION OF DOCUMENTS, §§ 10-43.
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Application for continuance for absence of witness, see "Criminal Law," vol. 14, cc. 2113–2142, §§ 1348–1366.

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Best and secondary evidence of presence or absence of witness, see "Evidence," vol. 20, cc. 727, 728, § 482.

Compelling calling of witness in criminal prosecution, see "Criminal Law," vol. 14, cc. 2288–2294, §§ 1567–1579.

Disbarment of attorney, for failure to appear as witness, see "Attorney and Client," vol. 5, c. 1485, § 59 [e].

Discretion of lower court as to continuance for absence of witnesses in criminal prosecutions, see "Criminal Law," vol. 15, cc. 815–817, § 3046.

Effect of presence of defendant as witness as constituting appearance, see "Appearance," vol. 3, c. 2973, § 34; c. 3023, § 84.

—— *of setting aside voluntary dismissal as discharge of witnesses, see* "Dismissal and Nonsuit," vol. 17, c. 87, § 91 [c].

Expense of summoning witnesses element of damages in action for property irregularly sold on execution, see "Damages," vol. 15, c. 1819, § 148 [j].

In probate proceedings, see "Wills," vol. 49, cc. 835, 836, § 737; cc. 862, 863, § 757.

In supplementary proceedings, see "Execution," vol. 21, cc. 2012, 2013, § 1147.

On preliminary examination of accused, see "Criminal Law," vol. 14, cc. 1120, 1121, § 487.

Presence of witness at trial as affecting offer of proof, see "Trial," vol. 46, c. 810, § 112.

Preventing witness from attending trial or testifying, see "Obstructing Justice," vol. 37, cc. 1781, 1782, § 13.

Refusal of witness to attend, ground for continuance, see "Continuance," vol. 10, cc. 2737, 2738, § 81; c. 2740, § 86; "Criminal Law," vol. 14, cc. 2046–2049, §§ 1321, 1322; vol. 15, cc. 22–26, § 2162.

(A) COMPELLING ATTENDANCE IN GENERAL.

AUTHORITY TO COMPEL ATTENDANCE, § 1.
RIGHT OF ACCUSED TO COMPULSORY PROCESS, § 2.
—— CONSTITUTIONAL AND STATUTORY PROVISIONS, § 3.
—— NUMBER OF WITNESSES, § 4.
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—— PARTIES AND PERSONS INTERESTED, § 6.
—— CONVICTS, § 7.
—— PRIVILEGES AND EXEMPTIONS, § 8.
RESIDENCE OF WITNESS AND PLACE WHERE ATTENDANCE MAY BE REQUIRED, §§ 9.

§ 1. Authority to compel attendance.

Authority to issue attachment, see post, § 28.

—— *habeas corpus ad testificandum, see* post, § 33.

—— *subpœna duces tecum, see* post, § 19.

Authority of grand juries to summon witnesses, see "Grand Jury," vol. 24, cc. 2758–2760, § 75.

Coroner's right to compel attendance of witness at inquisition, see "Coroners," vol. 11, cc. 2382, 2383, § 11 [e, f].

Power and duty of board of equalization of taxes to summon and examine, see "Taxation," vol. 45, c. 1190, § 867.

[a] (U. S. 1887) The United States circuit court in one district has power, under rule 78 in equity, regulating the summoning of witnesses, to issue a subpœna requiring a person living in that district to appear and testify before an examiner, or before a master appointed in another circuit, and who is discharging the duties of his office in the former district, and may also, under that rule, punish the witness for refusing to obey the subpœna.—In re Steward (C. C.) 29 Fed. 813.

[b] (U. S. 1888) The power of a United States district court cannot be invoked to secure, by its subpœna, the attendance of a witness before a special examiner of the pension bureau in the matter of a pension claim.—In re McLean (D. C.) 37 Fed. 648.

[c] (Cal. 1887) The supreme court of California will not issue a writ of mandamus to compel a judge of the superior court to issue a subpœna to a witness to appear, and testify before a register and receiver of the United States land-office, as Code Civ. Proc. § 1986, subd. 3, regulating the issuing of subpœnas to a witness

to appear before a commissioner appointed by a court of a foreign country or another state, does not apply to a United States land-office, located and doing business in California.—Boom v. De Haven, 72 Cal. 280, 13 Pac. 694.

[d] (Mass. 1886) The supreme court or a justice thereof under St. 1883, c. 195, has a discretionary power to compel a witness to testify before a committee of city councils, but will not make such an order where the witness has become defendant in an action brought against him by the city in the same matter.—In re Osborne, 141 Mass. 307, 4 N. E. 618.

[e] (Mo. 1894) Under Rev. St. § 8927, a justice of the peace has authority to issue a subpœna for the attendance of a witness at a trial in a court of record in his county.—McHoney v. Kerwin, 56 Mo. App. 459.

[f] (N. Y. 1878) Laws 1844, c. 152, provided for the construction of a penitentiary in the county of Albany, and that the management thereof should be under the control of the board of supervisors of the county, and the mayor and recorder of the city of Albany, who were authorized to make all laws as to the regulation and government thereof as they should deem expedient. At a joint meeting of the supervisors of the county and the mayor and recorder of the city, a committee was appointed consisting of five supervisors, the mayor, and recorder, charged with an investigation as to the effect of convict labor, and authorized to send for persons and papers and take evidence under oath. An application for attachment against the superintendent of the penitentiary to compel him to give evidence and produce his books before the committee was made under 1 Rev. St. (6th Ed.) pp. 879–880, providing for examination by the board of supervisors of any county of any county officer on matters within the jurisdiction of the board. *Held*, that the application must fail because no committee of "the board of supervisors" appointed by the board, or any committee consisting of supervisors only, had required the witness' attendance before it.—In re Pilsbury, 56 How. Prac. 290.

[g] (N. C. 1802) A witness may be summoned to testify in equity as well as at law.—Mourning v. Davis, 3 N. C. 219.

[h] (Ohio, 1887) Rev. St. § 1686, empowering the committee of either branch of a city council to compel the attendance of witnesses in the investigation of charges against officers, does not authorize one branch of the council to investigate, but the whole council must first provide by ordinance for such investigation before a witness can be compelled to attend.—Muhlhauser v. Morgan, 10 Ohio Dec. 90, 18 Wkly. Law Bul. 340.

[i] (Pa. 1876) The courts of oyer and terminer and of quarter sessions of any county may award subpœnas and attachments for witnesses in any part of the state for execution by the sheriff of the county in which they are awarded, and may compel the attendance of such witnesses on the trial of any criminal proceeding before such courts.—Kirkendall v. Luzerne County, 33 Leg. Int. 313.

[j] (Pa. 1881) An objection by a witness who appeared on subpœna before a subcommittee of the finance committee of councils, which was investigating a default by the city treasurer, under Act June 1, 1885, that the power to issue subpœnas was vested in councils, is of no avail when the witness appeared in obedience to the subpœna.—In re Yard, 48 Leg. Int. 288.

[k] (Pa. 1892) Where persons have been appointed commissioners to take the testimony of witnesses in Pennsylvania by a court of another state, but the witnesses refuse to answer, the court of common pleas will order the commissioners to issue subpœnas for the witnesses, and, if they fail to obey these, to issue attachments directed to the sheriff to compel their attendance.—In re Robb (Com. Pl.) 11 Pa. Co. Ct. R. 298.

§ 2. Right of accused to compulsory process.

Liability for witness' fees, see post, § 71.
Place where attendance may be required, see post, § 9.
Discretion of lower court as to summoning witnesses in criminal prosecutions, see "Criminal Law," vol. 15, c. 820, § 3052.
Right of accused to witnesses on preliminary examination, see "Criminal Law," vol. 14, cc. 1118, 1119, § 480.

[a] (U. S. 1807) Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.—United States v. Burr, Fed. Cas. No. 14,692d.

[b] (U. S. 1870) It is the duty of the court, on application of the prisoner, showing that he is unable to send for his witnesses, to summon them at the expense of the government.—United States v. Kenneally, Fed. Cas. No. 15,522 [5 Biss. 122].

[c] (U. S. 1891) Rev. St. § 878, authorizing a judge to order witnesses to be subpœnaed in behalf of an indicted indigent person, gives no authority to order subpœnas for one against whom a bill of indictment is pending before a grand jury.—United States v. Stewart (D. C.) 44 Fed. 483.

[d] (Fla. 1893) An application under Rev. St. § 2868, for the procurement of witnesses at the cost of the state, by one charged with crime, should be made at the earliest reasonable opportunity, and not withheld until the cause is called for trial.—Jenkins v. State, 31 Fla. 190, 12 South. 680.

[e] (Fla. 1893) Under Rev. St. § 2868, prescribing the requisites to be complied with by one charged with crime upon application for the procurement of witnesses at the cost of the state, a sound judicial discretion is reposed in the trial judge to decide whether the statutory requisites have been properly complied with, and as to the bona fides of the application.—Jenkins v. State, 31 Fla. 190, 12 South. 680.

[f] (Idaho, 1896) To entitle a defendant to the benefit of Rev. St. § 8151, as amended by Laws 1893, relating to payment of expenses of the defense by the state, there must be a strict compliance with the section; and the necessity and materiality of witnesses desired by defendant must be shown before a subpœna will be issued, or any expense incurred will be charged to the county.—State v. Godard, 4 Idaho, 750, 44 Pac. 643.

[g] (Mass. 1816) In capital trials defendant's witnesses may be summoned at the expense of the state; but this is not done in cases not capital.—Commonwealth v. Williams, 13 Mass. 501.

[h] (N. H. 1874) An accused is allowed the process of the state to compel the attendance of his witnesses only in a capital case, and not even in such a case unless he is poor and unable to furnish the witnesses himself.—State v. Archer, 54 N. H. 465.

[i] (S. C. 1796) A witness may be compelled by a subpœna to attend to give testimony of the extenuating circumstances attending the assault, to the court, before the passing of the sentence, where a party has been indicted for an assault and battery and pleaded not guilty.—State v. Smith, 2 Bay, 62.

[j] (S. C. 1894) Gen. St. § 835, giving the accused in felony cases the same process as the state to compel the attendance of witnesses, is not restricted to capital felonies.—Eustace v. Greenville County, 42 S. C. 190, 20 S. E. 88.

[k] (Wash. 1893) The constitutional right to have compulsory process to secure the attendance of witnesses does not apply to a preliminary examination.—State v. Grimes, 7 Wash. 445, 35 Pac. 361.

[l] (Wyo. 1895) On the hearing of the application for admission to bail by one under indictment for murder in the first degree, to determine whether the proof is evident or the presumption great, both parties are entitled to compulsory process to secure the attendance of witnesses.—State v. Crocker, 5 Wyo. 385, 40 Pac. 681.

§ 3. —— Constitutional and statutory provisions.

[a] (Ark. 1887) Cr. Code, § 190, makes applicable to prosecutions the provisions as to continuances in civil cases. Civ. Code, § 340, as amended by act March 5, 1879, provides for the refusal of a continuance on the admission by the adverse party that the absent witnesses, if present, would testify to the statement contained in the application. *Held*, that the statute denies the accused the right granted by Const. art. 2, § 10, of compulsory process for witnesses in his favor, and is unconstitutional.—Graham v. State, 50 Ark. 161, 6 S. W. 721.

[b] (Fla. 1893) Rev. St. § 2868, prescribing the requisites to be complied with by the parties charged with crime in applications for the procurement of witnesses at the cost of the state, is a proper legislative regulation of the right given by the constitution to one accused of crime to have "compulsory process for the attendance of witnesses in his favor."—Jenkins v. State, 31 Fla. 190, 12 South. 680.

[c] (Tex. 1884) The bill of rights guaranties to persons charged with crime compulsory process for obtaining witnesses in their favor. *Held*, that Code Cr. Proc. arts. 488, 489, regulating the matter, is not so repealed or modified by Act April 23, 1883, as to give the court a discretion if the application is made in term, the only object of the act of 1883 being to provide for the payment of the expense.—Roddy v. State, 16 Tex. App. 502.

[d] (Tex. 1887) The constitution guaranties to any one accused of crime the right to have compulsory process for his witnesses, and the act of the eighteenth legislature, "to provide for the payment of attached witnesses in felony cases," in so far as it deprives a defendant of his right to an attachment for his absent witnesses, is unconstitutional.—Homan v. State, 23 Tex. App. 212, 4 S. W. 575.

§ 4. —— Number of witnesses.

[a] (U. S. 1895) The court allowed 15 witnesses for defendant to be summoned at government expense, and disallowed 10, of whom 2 were already summoned, 7 were the wives of witnesses whom the court ordered summoned (the affidavit stating that the husband and wife were relied on to prove the same fact), and 1 was relied on merely to corroborate the testimony of other witnesses. *Held*, that the action of the court was proper.—Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343.

[b] (Ark. 1894) Defendant was indicted for murder, and applied to the clerk for subpœnas for 18 witnesses, which were refused on account of a rule of court prohibiting the issuing of more than 5 subpœnas without an order of court, obtainable on application showing the materiality of the witnesses. Application for an order was afterwards made, and refused on the ground that it did not show that the witnesses were material. *Held* that, though the rule was in violation of defendant's constitutional right to have compulsory process for obtaining witnesses, yet, where it does not appear that an application for a continuance was made, nor that defendant was prejudiced, it is not ground for reversal.—Aikin v. State, 58 Ark. 544, 25 S. W. 840.

[c] (Idaho, 1894) Under Rev. St. § 8151, as amended by 2 Sess. Laws, p. 20, providing that when a defendant in a criminal case requires more than five witnesses he must make an affidavit that they are material to his defense, the affidavit must state what defendant expects to prove by such witnesses.—De Lano v. Logan County, 4 Idaho, 83, 35 Pac. 841.

[d] (Mo. 1893) Under Const. art. 2, § 22, providing that an "accused shall have process to compel the attendance of witnesses in his behalf," a rule of court limiting to 15 the number of subpœnas for witnesses to which one accused of murder is entitled as of right is void.—State v. Gideon, 119 Mo. 94, 24 S. W. 748, 41 Am. St. Rep. 634.

[e] (Mont. 1896) Pol. Code, § 4656, providing, in criminal cases, that the clerk must not issue subpœnas for more than six witnesses for each side except on order of court is constitutional, and authorizes the court to refuse defendant an order for subpœnas for additional witnesses unless he discloses the materiality of their expected testimony.—State v. O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

[f] (Wash. 1896) Under Const. art. 1, § 22, and 2 Code, § 1363, providing that accused shall have compulsory process to compel the attendance of witnesses in his behalf, accused is entitled to have only necessary witnesses subpœnaed for him at public expense, and only on an order of court.—State v. Graves, 13 Wash. 485, 43 Pac. 376.

§ 5. Persons who may be required to appear and testify.

Compelling husband or wife to testify, see post, § 136.

Persons entitled to compensation as witnesses, see post, §§ 50–54.

Privilege of witness, see post, §§ 1008–1071.

[a] (U. S. 1854) The court will not compel the attendance of an interpreter who has neglected to obey a subpœna, unless in case of necessity.—Ex parte Roelker, Fed. Cas. No. 11,995 [1 Spr. 276].

[b] (U. S. 1875) Rev. St. § 1080, authorizes the government to examine the claimant in the court of claims before trial, and if he fails to appear or refuses to testify the court in its discretion should order the cause not to be brought to trial. *Held*, that the claimant cannot be required to produce his assignor as a witness under penalty that the case shall not be brought to trial.—Macauley v. United States, 11 Ct. Cl. 575.

[c] (Ala. 1893) Code, § 2813, providing that when the deposition of a witness has been taken, if affidavit be made that the personal attendance of the witness, residing in the county, is necessary, then such attendance shall be required, applies to women, whose evidence, by the provision of section 2801, may be taken by deposition.—Ex parte Jenks, 101 Ala. 429, 13 South. 564.

[d] (Ga. 1889) Plaintiff can introduce the testimony of a female witness, taken by interrogatories, though he produces other female witnesses at the trial, but the court, on proper representations, can compel the attendance of the absent witness, under Code, § 206, par. 4, giving it power, in the furtherance of justice, to control all persons connected with a judicial

proceeding before it.—Western & A. R. Co. v. Denmead, 83 Ga. 351, 9 S. E. 683.

[e] (Ga. 1890) It is not error to refuse to compel female witnesses to come into court and testify, or to continue the case in order that their interrogatories may be taken, where what they will testify, or the materiality of their testimony, is not shown to the court.—Augusta & S. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706.

[f] (Ind. 1862) After a party to a suit has answered interrogatories propounded by his opponent, he may still be personally examined as a witness on the trial.—Smith v. Rosenham, 19 Ind. 256.

§ 6. —— Parties and persons interested.

[a] (U. S. 1874) Rev. St. § 858, providing that in the courts of the United States no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, operates not merely to give a privilege to each party which may be availed of or not as a matter of choice, but places the parties to a suit (except those named in a proviso to the enactment) on a footing of equality with other witnesses; it makes all admissible to testify for themselves, and all compellable to testify for others.—Texas v. Chiles, 88 U. S. (21 Wall.) 488, 22 L. Ed. 650.

[b] (U. S. 1812) A witness will be compelled to testify, though he be interested, if he voluntarily became interested after he had acquired his knowledge on the subject; but if this interest is created by act of law or of the party who calls him, he cannot be so compelled to testify.—Tatum v. Lofton, Fed. Cas. No. 13,766 [Brunner, Col. Cas. 175; 3 Tenn. (Cooke) 115].

[c] (U. S. 1868) At common law parties were not competent witnesses, and they could not be compelled to attend, by writ of subpœna, or bring with them any writings pertinent to the issue, by the writ of subpœna duces tecum.—Merchants' Nat. Bank of Boston v. State Nat. Bank of Boston, Fed. Cas. No. 9,448 [3 Cliff. 201].

[d] (Ala. 1831) A mere nominal plaintiff in an action is a competent witness in favor of defendant; but he cannot be compelled to testify in such action.—Prewett v. Marsh, 1 Stew. & P. 17, 21 Am. Dec. 645.

[e] (Ala. 1842) Where there are two defendants, and one pleads usury, the other defendant cannot be compelled, against his will, to be examined as a witness to prove the usury.—Bolling v. Logan, 4 Ala. 169.

[f] (Conn. 1820) One who signed a note as attorney for another, and afterwards gave bonds for his principal to prosecute an appeal from a judgment on the note, was not privileged thereby from giving evidence for the payee of the note to prove its execution.—Phelps v. Riley, 3 Conn. 266.

[g] (Iowa, 1859) Though a party to a suit present in court may be called on as a witness without being subpœnaed, he cannot be compelled to testify if he prefers the alternative provided by Code 1873, §§ 2421, 2422.—Goodpaster v. Voris, 8 Iowa (8 Clarke) 334, 74 Am. Dec. 313.

[h] (Iowa, 1864) Where the taking of the testimony of a codefendant involved a continuance of the cause, and it further appeared that the proposed witness was interested in the suit, the application for a rule to take the testimony was properly refused.—Greither v. Alexander, 15 Iowa, 470.

[i] (Me. 1842) A stockholder in a bank may legally refuse to testify in an action brought by the bank in its corporate name.—Bank of Oldtown v. Houlton, 21 Me. (8 Shep.) 501.

[j] (Md. 1833) Plaintiff upon the record, at common law, unless he voluntarily waive his privilege, cannot be compelled to give testimony for defendant.—Owings v. Low, 5 Gill. & J. 134.

[k] (Md. 1855) Under the bill of rights it is competent for the legislature to alter the rules of evidence so as to compel a party to give evidence against himself; but the exercise of such power will be strictly watched and confined within the narrowest possible limits by the courts.—Broadbent v. State, 7 Md. 416.

[l] (Md. 1869) The provision of the Code in regard to the compulsory attendance of witnesses has no application to a party who is a witness in his own behalf.—Gambrill v. Parker, 31 Md. 1.

[m] (Mass. 1833) In an action against the parties concerned in a voyage, brought by one of the vendors of goods supplied for the use of himself and other vendors, upon several notes given by the defendants' agent, of one of which notes plaintiff was the payee, and of the others the indorser, *held*, that the payees of such other notes were competent witnesses on the part of defendants, and compellable to testify on the question whether at the time when the notes were taken plaintiff and the other vendors had knowledge that other persons besides the agent were interested in the purchases of the goods.—French v. Price, 41 Mass. (24 Pick.) 13.

[n] (Mo. 1882) A party to a suit is as much bound to depose as any one.—Ex parte Priest, 76 Mo. 229.

[o] (Neb. 1887) Under Civ. Code, § 328, the parties to a civil action are competent witnesses, and each may be compelled to testify in favor of the adverse party, the same as any other witness.—Dogge v. State, 21 Neb. 272, 31 N. W. 929.

[p] (N. H. 1889) Defendant cannot call plaintiff when an executor and compel him to testify against his will.—Sheehan v. Hennessey, 65 N. H. 101, 18 Atl. 652.

[q] (N. Y. 1828) A party in interest, in a suit in another state, cannot be compelled to testify before a magistrate as a witness in that suit.—People v. Irving, 1 Wend. 20.

[r] (N. Y. 1829) In an action of ejectment against the Reformed Protestant Dutch Church in the city of New York, the treasurer of the corporation, who was likewise one of the corporators and a pewholder, was not so far a party to the suit as to exempt him from testifying against the corporation.—In re Kip, 1 Paige, 601.

[s] (N. Y. 1841) A member of a partnership or unincorporated banking association is not obliged to testify against them in a suit prosecuted for their benefit in the names of others.—Cook v. Spaulding, 1 Hill, 586.

[t] (N. Y. 1874) A party to an action cannot be compelled to submit to an examination at the instance of the adverse party, save as a general witness in the cause as prescribed by the Code.—King v. Leighton, 58 N. Y. 383.

[u] (N. C. 1830) On an indictment against a slave for a capital offense, the master cannot be compelled to testify.—State v. Charity, 13 N. C. 543.

[v] (Pa.) Though in an action against two partners one of them who has not been arrested is a competent witness for plaintiff as to the amount of the demand, he cannot be compelled to give evidence.—(1796) Norman v. Norman, 2 Yeates, 154; (1828) Taylor v. Henderson, 17 Serg. & R. 453.

[w] (Pa. 1883) In proceedings to dissolve an attachment, defendant and the judgment creditor whose judgment is attacked as fraudulent can be compelled to testify on behalf of

plaintiff.—Sullivan v. Wallace (Com. Pl.) 82 Wkly. Notes Cas. 440.

[x] (Vt. 1839) The real party to a suit at law, although not the party of record, cannot be compelled to testify.—Flint v. Allyn, 12 Vt. 615.

[y] (Vt. 1844) A person may be compelled to testify as a witness against his interest, if he be not the real party to the suit.—Stevens v. Whitcomb, 16 Vt. 121.

§ 7. —— Convicts.

Habeas corpus ad testificandum, see post, § 33.

[a] (U. S. 1885) A United States district court will not grant a process by subpœna, attachment, or otherwise, on application of the United States district attorney, for a party confined in a state penitentiary for assault with intent to murder, whose testimony it is desired to have in a criminal prosecution pending in such court.—United States v. Barefield (D. C.) 23 Fed. 136.

[b] (Cal. 1890) The provision of Const. § 13, art. 1, that the accused shall have the right to have the process of the court to compel the attendance of witnesses in his behalf, is limited by the provision that the legislature may provide for the taking, in the presence of the accused and his counsel, of depositions of witnesses in criminal cases other than homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial, and does not secure to defendant in a criminal action an absolute right to the process of the court to compel attendance, as a witness, of a convict imprisoned in the state prison.—Willard v. Superior Court, 82 Cal. 456, 22 Pac. 1120.

[c] (Cal. 1891) Code Civ. Proc. §§ 1878–1881, make convicted felons competent witnesses. Const. art. 1, § 13, confers on defendants in criminal cases the right to have the process of the court to compel the attendance of witnesses. Pen. Code, § 1567, provides that a person imprisoned in the state prison may, on order for that purpose, be brought before a court sitting in another county. *Held*, on an information for receiving stolen goods from W., that where notice had been given to the state of an application to produce W. from the state prison to testify on behalf of defendants, and it was clearly shown that his testimony was the only evidence obtainable, and would exonerate defendant, the application should have been granted.—People v. Willard, 92 Cal. 482, 28 Pac. 585.

[d] (Ga. 1894) In order that a defendant in a criminal case may secure the benefit of the act of September 27, 1883, touching the production of convicts in the penitentiary as witnesses, he must first apply to the governor, as the act requires, such requirement being mandatory.—Roberts v. State, 94 Ga. 66, 21 S. E. 132.

[e] (Ga. 1894) Under Code, § 4027, providing for compulsory process to obtain witnesses for a defendant in a criminal case, a judge of the superior court is not bound to require the production of a convict from the penitentiary at the public expense, though defendant is unable to defray such expense.—Roberts v. State, 94 Ga. 66, 21 S. E. 132.

[f] (Iowa, 1866) Under Revision, § 4019, providing that "a person confined in any prison * * * may be produced for oral examination in a criminal case in any county in the state," the court in its discretion may refuse to require the personal attendance of a convict.—State v. Kennedy, 20 Iowa, 872.

[g] (Mo. 1886) Rev. St. § 4031, provides that "courts of record * * * shall have power upon the application of any party to a suit, * * * civil or criminal, pending in any court of record, * * * to issue a writ of habeas corpus for the purpose of bringing before such court * * * any person who may be detained within the state, for any cause, except a sentence for felony, to be examined as a witness in such suit on behalf of the applicant." *Held*, that such section does not conflict with Const. 1875, art. 2, § 22, providing that "in all criminal prosecutions the accused shall have the right * * * to have process to compel the attendance of witnesses in his behalf"; and a jailer is not guilty of contempt in refusing to produce such felon.—Ex parte Marmaduke, 91 Mo. 228, 4 S. W. 91, 60 Am. Rep. 250.

[h] (Nev. 1876) A convict confined in jail may be required to give his testimony or deposition in a civil action then pending.—Maxwell v. Rives, 11 Nev. 213.

§ 8. —— Privileges and exemptions.

[a] (U. S. 1795) Judges of a county court are not excused from obeying a subpœna to appear as witnesses, on the ground that the judges of the state supreme court are holding a nisi prius court in the county, and that the occasion seems to require respectful attention to them on the part of the county judges.—United States v. Caldwell, Fed. Cas. No. 14,708 [2 Dall. 333, 1 L. Ed. 404].

[b] (U. S. 1806) Persons who are material as witnesses for a party in a federal court may be compelled to appear notwithstanding they are members of the cabinet of the president of the United States.—United States v. Smith, Fed. Cas. No. 16,342.

[c] (U. S. 1807) That a witness summoned to give his deposition was employed in the collector's office and could not attend without detriment to the public service does not excuse his contempt in refusing to respond to the subpœna.—Hodgson v. Butts, Fed. Cas. No. 6,563 [1 Cranch, C. C. 447].

[d] (U. S. 1807) A subpœna may issue to the president of the United States to compel his attendance as a witness, and an accused person is entitled to it of course.—United States v. Burr, Fed. Cas. No. 14,692d.

[e] (U. S. 1847) The court will not issue an attachment against a member of congress who declines to attend as a witness.—United States v. Thomas, Fed. Cas. No. 16,476 [1 Hayw. & H. 243].

[f] (U. S. 1854) The provision of the federal constitution which secures to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor does not authorize the issuing of such process to ambassadors or consuls who by public law or express treaty are not amenable to the process of the courts.—In re Dillon, Fed. Cas. No. 3,914 [7 Sawy. 561].

[g] (U. S. 1870) Members of congress are not exempt from compulsory process to require their attendance as witnesses in behalf of one charged with crime.—United States v. Cooper, Fed. Cas. No. 14,861 [4 Dall. 341, 1 L. Ed. 859].

[h] (U. S. 1885) The exemption of a witness or party to a suit from service of process does not extend to service of a subpœna to testify in the same cause on which he is giving attendance.—Norris v. Hassler (C. C.) 23 Fed. 581.

[i] (U. S. 1891) In a prosecution against private individuals for violating the neutrality laws of the United States by fitting out a warlike vessel to aid a rebellion against a foreign power, the vice consul of that power cannot be compelled by legal process to attend as a witness in behalf of the United States, when it appears that the insurgent party has been successful, and the government establish-

ed by it has been recognized by the United States.—United States v. Trumbull (D. C.) 48 Fed. 94.

[j] (U. S. 1891) A vice consul of a foreign nation who possesses an unrebuked exequatur issued by the president of the United States must still be recognized by the courts as the accredited representative of his country, entitled to all the privileges appertaining to that office, notwithstanding that the government which sent him has been overthrown and an apparently successful revolutionary government established in its place.—United States v. Trumbull (D. C.) 48 Fed. 94.

[k] (U. S. 1896) Service of a subpœna to attend hearings as a witness, upon an attorney who has come from another state to attend to business of his clients pending in the court, before he has had reasonable time to take his departure, will be set aside, on his motion, as a violation of the protection which the law extends to all necessarily attending on a court, especially when the business of his clients requires his immediate presence in other states.—Central Trust Co. v. Milwaukee St. Ry. Co. (C. C.) 74 Fed. 442.

[l] (D. C. 1874) The privilege of a witness before congress or any of its committees stands on the same footing as the privilege of the members of that body, and does not extend to freedom from the service of a simple summons, but only from arrest.—Wilder v. Welsh, 1 MacArthur, 566.

[m] (N. Y. 1878) If a witness, instead of returning to his residence within a reasonable time, proceeds about his own business, he loses his privilege, and is not entitled to have set aside an order to appear and be examined in supplementary proceedings on the ground that he was privileged from service of the order.—Shults v. Andrews, 54 How. Prac. 380.

[n] (Pa. 1807) An attachment will lie against a member of congress for not obeying a subpœna, if he is not attending a session, or going to or returning from congress.—Respublica v. Duane, 4 Yeates, 347.

[o] (Pa. 1885) The courts will not grant an attachment against a physician for nonattendance as a witness, because his duty requires his attendance at the bedside of his patients. He is classed among going witnesses, and his deposition should be taken.—Vanriper v. Vanriper, 3 Lanc. Law Rev. 155.

§ 9. Residence of witness and place where attendance may be required.

Place where subpœna may be served, see post, § 13.

Right to recover compensation, see post, § 45.

[a] (U. S. 1831) A witness residing more than 100 miles from a court of the United States is not compelled to attend on a subpœna, but his deposition may be taken, and his residence is proved prima facie by the certificate of the magistrate who takes it.—Patapsco Ins. Co. v. Southgate, 30 U. S. (5 Pet.) 604, 8 L. Ed. 243.

[b] (U. S. 1806) The circuit court of the District of Columbia has power to send an attachment into Virginia for a witness in a civil case, who resides within 100 miles of the place of trial.—Voss v. Luke, Fed. Cas. No. 17,014 [1 Cranch, C. C. 331]; Woods v. Young, Fed. Cas. No. 17,994 [1 Cranch, C. C. 346].

[c] (U. S. 1807) The circuit court for the District of Columbia will send attachments into Maryland for witnesses who reside within 100 miles of Washington, where they fail to attend according to summons.—Sommerville v. French, Fed. Cas. No. 13,173 [1 Cranch, C. C. 474].

[d] (U. S. 1809) The court will not, in a civil suit, attach a witness who resides more than 100 miles from the place of trial, nor issue a subpœna commanding him to go and testify before a magistrate.—Henry v. Ricketts, Fed. Cas. No. 6,386 [1 Cranch, C. C. 580].

[e] (U. S. 1831) The attendance of a witness living within 100 miles, but outside, of the District of Columbia, may be compelled by the circuit court of the District.—Gustine v. Ringgold, Fed. Cas. No. 5,877 [4 Cranch, C. C. 191].

[f] (U. S. 1833) A witness residing in Virginia cannot be compelled, by attachment, to attend the circuit court of the District of Columbia, in a criminal cause.—Ex parte Pleasants, Fed. Cas. No. 11,225 [4 Cranch, C. C. 314].

[g] (Ala. 1894) Code, § 2793, provides that no subpoena shall issue for a witness residing over a certain distance from the place of trial, except on affidavit of the party summoning him stating that his personal attendance is necessary. Section 2801 provides for the taking the deposition of a witness in certain cases. Section 2813 provides that any witness "residing in the county where the cause is pending," whose deposition has been taken, may, on application of either party, supported by affidavit stating that his personal attendance is necessary, be required to attend. *Held*, that a witness residing out of the county, whose deposition has been taken, cannot be compelled to attend.—Ex parte Branch, 105 Ala. 231, 16 South. 926.

[h] (Ill. 1866) A witness residing in another county than the one in which his deposition is to be taken cannot be compelled by the officer taking the deposition to attend at such place.—Harding v. Larkin, 41 Ill. 413.

[i] (Ind. 1891) The Code provides that witnesses residing in the county where the court is held may be required to attend without prepayment of their fees; that a witness from another county is entitled to prepayment of fees and mileage; and that, where a witness does not reside in the county where the court is held, or in an adjoining county, his deposition may be taken. *Held*, that a witness cannot be compelled to attend court in a civil case in any other county than that in which he lives, or in an adjoining county.—Alexander v. Harrison, 2 Ind. App. 47, 28 N. E. 119; Same v. Horn, 28 N. E. 122.

[j] (Iowa, 1896) Const. art. 1, § 10, providing that in all criminal trials the accused shall have the right to have compulsory process for his witnesses, does not apply to witnesses beyond the reach of compulsory process of the court.—State v. Yetzer, 97 Iowa, 423, 66 N. W. 737.

[k] (Kan. 1890) A resident of one county who while in another county for one day only was subpœnaed to appear four days thereafter and give his deposition in the latter county is not in contempt for failing to return after he had gone home to his own county, for he was not obliged to obey the subpœna.—In re Hughbanks, 44 Kan. 105, 24 Pac. 75.

[l] (Kan. 1890) Under Comp. Laws, c. 80, § 328, which provides that a witness shall not be compelled to attend to give his deposition out of the county where he resides or where he may be when the subpœna is served upon him, a person is not obliged to obey a subpœna served upon him during his temporary presence in a county in which he does not reside, requiring him to attend in such foreign county several days thereafter to give his deposition.—In re Hughbanks, 44 Kan. 105, 24 Pac. 75.

[m] (Miss. 1894) A motion by defendant to compel the attendance, pursuant to Code 1892, § 1756, of a witness for plaintiff whose deposition has been taken, is properly overruled where the witness is outside of the jurisdiction, so that any attempt to procure his attendance would be futile.—Fidelity & Casualty Co. v.

Johnson, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206.

[n] (Mo. 1887) The right to compulsory process for witnesses does not extend to nonresident witnesses.—State v. Pagels, 92 Mo. 300, 4 S. W. 931.

[o] (N. H. 1859) Under the commissioner act a party cannot be compelled to appear and testify before a trial commissioner unless within the jurisdiction of our laws.—Cheever v. Scott, 38 N. H. 32.

[p] (N. H. 1860) A witness who after being summoned and paid removes to another state is still bound to attend unless released.—Gunnison v. Gunnison, 41 N. H. 121, 77 Am. Dec. 764.

[q] (N. C. 1845) A resident of one state, while temporarily in another, if subpœnaed to attend court as a witness in the latter, is not liable to amercement for not attending, if he be out of the state when called out on the subpœna.—Kinzey v. King, 28 N. C. 76.

[r] (Ohio, 1860) Under Code, § 320, providing that a witness shall not be obliged to attend the trial of a civil action except in the county of his residence nor to attend to give his deposition out of the county where he resides or where he may be when the subpœna is served on him, a witness cannot be required to attend on the trial of a civil action out of the county of his residence, no matter where served with subpœna.—Anonymous, 2 Ohio Dec. 407.

[s] (S. C. 1896) It is not error, in a prosecution for a felony, to refuse to issue a compulsory process for a witness who is a resident of another state.—State v. Murphy, 48 S. C. 1, 25 S. E. 43.

[t] (Wash. 1893) Code, § 1650, declares that no person shall be obliged to attend as a witness in any civil action or proceeding out of the county where he resides unless he resides within 20 miles of the place where he is required to testify. *Held*, that where a witness was served with process in one county, commanding him to appear and testify in supplementary proceedings had in another county, the court had no jurisdiction to punish him for contempt in failing to appear, where no proof was submitted to the court to show that the witness lived within 20 miles of the place of holding court; since, as supplementary proceedings are special in their nature, no presumption can attach in favor of the jurisdiction of the court.—State v. Trounce, 5 Wash. 804, 32 Pac. 750.

(B) PROCESS AND PROCEEDINGS TO COMPEL ATTENDANCE AND PRODUCTION OF DOCUMENTS.

1. SUBPŒNA, §§ 10-18.
2. SUBPŒNA DUCES TECUM, §§ 19-27.
3. ATTACHMENT TO COMPEL ATTENDANCE AND HABEAS CORPUS AD TESTIFICANDUM, §§ 28-33.
4. SECURITY FOR APPEARANCE AND TAKING INTO CUSTODY, COMMITMENT, OR DETENTION OF WITNESSES, §§ 34-36.
5. PUNISHMENT OF DISOBEDIENCE TO SUBPŒNA AS CONTEMPT, AND DAMAGES AND PENALTIES FOR FAILURE TO OBEY SUBPŒNA, §§ 37-42.

Authority to compel attendance, see ante, § 1.
Persons who may be compelled to attend in general, see ante, §§ 5–7.
Privileges and exemptions, see ante, § 8.
Right of accused to compulsory process, see ante, §§ 2–4.

1. SUBPŒNA.

NECESSITY, § 10.
APPLICATION AND ISSUANCE, § 11.
FORM AND REQUISITES, § 12.
PLACES WHERE WRIT MAY BE SERVED, § 13.
SERVICE, § 14.
PAYMENT OR TENDER OF FEES AND EXPENSES, § 15.
—— DUTY TO ATTEND ON SUBSEQUENT DAY, § 16.
RETURN AND PROOF OF SERVICE, § 17.
OPERATION AND EFFECT, § 18.

Damages and penalties for failure to obey, see post, §§ 42, 43.
Excuses for nonattendance, see post, § 37.
Necessity and sufficiency to entitle witness to compensation, see post, § 46.
Punishment of disobedience as contempt, see post, § 38.
Allowance of costs for summoning witnesses, see "Costs," vol. 13, cc. 549, 550, § 583.
Compensation of sheriffs and constables for serving subpœna, see "Sheriffs and Constables," vol. 43, cc. 3382–3384, § 67.
Diligence in procuring witnesses affecting right to continuance, see "Criminal Law," vol. 14, cc. 2084–2090, § 1336.
Direct consequences of failure to respond to subpœna, see "Damages," vol. 15, c. 1677, § 34 [d].
Failure to subpœna as ground for continuance, see "Continuance," vol. 10, cc. 2735–2739, §§ 79, 80, 82–84.
—— *to sue out process for witness as affecting right to continuance, see* "Criminal Law," vol. 14, cc. 2095–2098, § 1338.
Fees of clerk, for issuance of subpœna in state court, see "Clerks of Courts," vol. 10, cc. 100, 101, § 42.
—— *of United States marshal for procuring attendance of witness, see* "United States Marshals," vol. 47, c. 2008, § 11.
Right of detective to compensation for serving subpœna, see "Detectives," vol. 16, c. 1883, § 3 [c].

§ 10. Necessity.

As condition precedent to attachment, see post, § 29.
For making translations under oath, see ante, § 798 [c].
Of second subpœna to compel further attendance, see post, § 18.

[a] (Ala. 1852) The court may, in its discretion, refuse a motion to have a person, who is about the court, but has not been subpœnaed, brought in to testify as a witness in a cause.—Woodward v. Purdy, 20 Ala. 379.

[b] (Iowa, 1859) Where a party to a suit is present in court, he may be called on as a witness, without being served with a subpœna.—Goodpaster v. Voris, 8 Iowa (8 Clarke) 334, 74 Am. Dec. 313.

[c] (La. 1836) Any person within the verge of the court may be called to testify, without previous summons.—Leckie v. Scott, 10 La. 412.

[d] (N. H. 1859) Under the commissioner act a party is not bound to appear and testify before a trial commissioner at the request of the other party unless duly summoned.—Cheever v. Scott, 38 N. H. 32.

[e] (N. H. 1860) Before an auditor, neither party can properly refuse to testify when interrogated by the auditor or by counsel by per-

mission of the auditor, because he had not been summoned and paid as a witness.—Whitney v. Pierce, 40 N. H. 114.

[f] (N. Y. 1848) Where a party undertakes to examine the adverse party as a witness, under the Code of Procedure, he must summon or subpœna the latter.—Anderson v. Johnson, 3 Super. Ct. (1 Sandf.) 713.

[g] (N. Y. 1867) The proper method of obtaining the attendance of a witness before a county judge, on a hearing in supplementary proceedings, is by a subpœna issued out of the court in which the judgment is obtained; and disobedience to such subpœna should be tried and punished by that court.—People v. Dutcher, 3 Abb. Prac. (N. S.) 151.

[h] (N. Y. 1889) Under Code Civ. Proc. § 2444, providing that witnesses in supplementary proceedings, other than the parties, may be produced and examined as on the trial of an action, an order requiring a witness to appear before the referee on a future day, and submit to an examination, is void, as the appearance of such third person can only be compelled by service of a subpœna.—People v. Warner, 51 Hun, 53, 3 N. Y. Supp. 768.

[i] (Ohio, 1825) Where other proof can be had that a witness is dead or absent, it is unnecessary to take out a subpœna.—Clark v. Boyd, 2 Ohio (2 Ham.) 56.

§ 11. Application and issuance.

[a] (Ala. 1846) Where a party directs a subpœna for a witness, it is the duty of the clerk to issue it to each succeeding term, until the order is countermanded, or the suit disposed of.—Marsh v. Branch Bank at Mobile, 10 Ala. 57.

[b] (N. Y. 1860) A subpœna to a witness is a "process" within 2 Rev. St. 287, § 70, prohibiting any one not a general law partner of an attorney, nor his clerk, from suing out any process in his name.—Yorks v. Peck, 31 Barb. 350.

[c] (Pa. 1885) To the end that the allowance of fees to unnecessary witnesses may be avoided in criminal cases, the clerk of the court should give a subpœna on behalf of the commonwealth only on the order of the district attorney, who should see that none but necessary and proper witnesses are subpœnaed.—Commonwealth v. Shell, 1 Pa. Co. Ct. R. 41.

[d] (Tex. 1875) The issuance of a subpœna for a witness during the progress of a cause, at the request of a party, is a matter of right when it is not shown that the witness' attendance cannot be procured, and is not a matter vesting in the discretion of the judge or clerk.—Edmondson v. State, 43 Tex. 230.

§ 12. Form and requisites.

[a] (U. S. 1847) By the laws of Arkansas, a subpœna is to be directed to the witness, and not to the officer summoning him.—Russell v. Ashley, Fed. Cas. No. 12,150 [Hemp. 546].

[b] (U. S. 1883) Under Rev. St. § 877, the witnesses for the United States must be summoned to testify, not only in the cause in which the subpœna is entitled, but generally for the United States, "before the grand or petit jury, or both."—United States v. Ralston (C. C.) 17 Fed. 895.

[c] (U. S. 1883) Rev. St. § 877, commanding the clerk to issue "one general subpœna" for witnesses in behalf of the United States who reside in the same locality, does not authorize the clerk to issue subpœnas in criminal cases as for a cause pending in court, for if the subpœna did not indicate the cause for which the witness was specially wanted, the provisions of Const. Amend. 6, that the accused shall have the right to be confronted with the witnesses who testify against him, would be violated.—United States v. Ralston (C. C.) 17 Fed. 895.

[d] (U. S. 1894) A subpœna describing the case as "now pending in this court," correctly states the condition of the case, if a motion for new trial is pending.—In re McKay, 30 Ct. Cl. 1.

[e] (D. C. 1883) A subpœna issued in a criminal case out of a federal court, which does not command the witness to attend from day to day, and not to depart without leave of court, is defective; and the witness having appeared on the day named therein, and having afterwards departed without leave, cannot be deemed guilty of contempt.—In re Spencer, MacArthur & M. 433.

[f] (N. Y. 1805) A subpœna for a person to attend the supreme court as a witness, without stating the place where, is good.—People v. Van Wyck, 2 Caines, 333.

[g] (N. C. 1825) A subpœna is good, though tested in a certain year of American independence, and not of our Lord.—Goodman's Adm'r v. Armistead, 11 N. C. 9.

§ 13. Places where writ may be served.

Place where attendance may be required, see ante, § 9.

[a] (U. S. 1851) A subpœna runs, like all other process, throughout the district, and also 100 miles from the place of holding court.—Dreskill v. Parish, Fed. Cas. No. 4,075 [5 McLean, 218]; Id. 4,076 [5 McLean, 241].

[b] (U. S. 1875) A subpœna for a witness may be served in another district, if he does not live more than 100 miles from the place where the register who issues it requires the witness to attend.—In re Woodward, Fed. Cas. No. 18,000 [8 Ben. 112].

[c] (Nev. 1879) A sheriff has no authority to serve a subpœna on witnesses residing in any other than his county, unless such other county is within the same judicial district.—Washoe County v. Humbolt County, 14 Nev. 123.

§ 14. Service.

Personal service to render competent parties in action for divorce, see post, § 169.

[a] (U. S. 1868) In the federal courts it is not necessary that the subpœna for witnesses should be served by the marshal, and the party who serves the same is entitled to recover for service and mileage.—Gordon v. Scott, Fed. Cas. No. 5,620.

[b] (D. C. 1883) While a witness' subpœna, issued by the supreme court of the District of Columbia, may run out of the District, it must be served by a marshal, or, under his order, by a deputy; it cannot be served by any one, although such service might be valid under the law of the state where made.—In re Spencer, MacArthur & M. 433.

[c] (Ill. 1857) A witness is bound to obey a subpœna directed to him, no matter by what means it comes to his hands.—Chicago & A. R. Co. v. Dunning, 18 Ill. (8 Peck) 494.

[d] (La. 1831) A party wishing witnesses summoned must inform the sheriff of their residence.—Saul v. See's Curator, 2 La. 130.

[e] (La. 1851) Where notice is served at 6 o'clock in the evening to attend the next morning at 10, and the witness remaining some days afterwards in the city the party notified can have him resummoned and cross-examined, the testimony will be received, though the notice is short.—Wright v. Abbott, 6 La. Ann. 569.

[f] (Mo. 1893) Under Rev. St. § 8937, providing that a subpœna may be served by the sheriff, coroner, marshal, or any constable in the county in which the witness to be summoned may be found, or by any disinterested person who would be a competent witness in the cause, the service may be by a party to a suit,

though interested therein.—Larimore v. Bobb, 114 Mo. 446, 21 S. W. 922.

[g] (N. C. 1853) Where two subpœnas are served the same day on a witness, requiring his attendance at different places distant from each other, he may make his election which he will obey.—Icehour v. Martin, 44 N. C. 478.

[h] (Pa. 1851) The rule of court requiring the subpœna to be taken out and served on the witness five days before the trial applies only to applications for a continuance on account of the absence of witnesses who might have been found within reach of the process within five days.—Scriber v. Reeves, 1 Phila. 284.

[i] (Pa. 1885) It is not necessary that an officer serve a subpœna, but it may be served by any person as agent for the party or by the party himself.—Lyon v. Marshall, 1 Pa. Co. Ct. R. 90.

[j] (Tex. 1854) A plaintiff cannot safely wait for the coming in of the answer, before subpœnaing his witnesses; it will be at his peril.—Osborne v. Scott, 13 Tex. 59.

§ 15. Payment or tender of fees and expenses.

Payment as condition precedent to duty to testify, see post, § 73.

Refusal of expert to testify without additional compensation as contempt, see post, § 66.

[a] (U. S. 1869) If a witness subpœnaed by the government has means to travel, it is not necessary for the officer to tender his traveling expenses; and the court will attach a witness who, on that ground, neglects to attend.—United States v. Durling, Fed. Cas. No. 15,010 [4 Biss. 509].

[b] (U. S. 1869) The officer summoning witnesses should see that those who have no means to travel are provided with necessary funds.—United States v. Durling, Fed. Cas. No. 15,010 [4 Biss. 509].

[c] (U. S. 1871) A federal court will be regulated by the statute of the state which provides that a witness who makes a demand for his traveling fees and his fees for one day's attendance at the time of the service of the subpœna shall not be liable to attachment for contempt where he fails to obey the writ.—In re Thomas, Fed. Cas. No. 13,889 [1 Dill. 420].

[d] (U. S. 1885) In the federal courts, witnesses, if they have the means, are obliged to obey the process of the court and attend, whether their fees are advanced or not, and a witness who can pay his expenses and refuses to attend because the money is not tendered him may be punished for contempt.—Norris v. Hassler (C. C.) 23 Fed. 581.

[e] (U. S. 1885) A witness who has been served with a subpœna and received money for traveling expenses cannot refuse to obey such subpœna because the proper amount of mileage has not been paid.—Norris v. Hassler (C. C.) 23 Fed. 581.

[f] (Colo. 1883) The refusal of the court to compel the attendance of witnesses, who had been subpœnaed, but whose fees had not been paid, does not justify a reversal, especially where the party complaining makes no affidavit as to what was expected to be proved by them, or that their testimony was material.—People v. Com'rs of Grand County, 7 Colo. 190, 2 Pac. 912.

[g] (Ill. 1891) A party made a witness for his adversary in a civil case will not be punished for contempt for failing to attend as a witness unless his fees are tendered.—Bonner v. People, 40 Ill. App. 628.

[h] (Ky. 1858) A person summoned as a witness out of the county in which he resides is not bound to attend unless his traveling expenses of going to, and returning from, the place to which he is summoned, are paid or tendered to him, or payment thereof waived by him.—Thurman v. Virgin, 57 Ky. (18 B. Mon.) 785.

[i] (Mo. 1893) The statute requiring mileage, and fees to be tendered a witness in advance, when the witness resides over 40 miles from the place of trial, does not apply where a witness resides without the state.—Larimore v. Bobb, 114 Mo. 446, 21 S. W. 922.

[j] (N. H. 1859) Under the commissioner act a party was not bound to appear and testify before a trial commissioner at the request of the other party, unless duly paid as a witness.—Cheever v. Scott, 38 N. H. 32.

[k] (N. H. 1860) A witness is not bound to attend court unless his fees for travel and one day's attendance are paid or tendered to him.—Bliss v. Brainard, 42 N. H. 255.

[l] (N. H. 1874) It is the duty of a witness on whom is duly served a subpœna sent out under the indorsement of the attorney general or county solicitor to attend court and testify according to its command without the payment or tender of any fees to him, such indorsement of the subpœna by the prosecuting officer being a sufficient guaranty that his fees will be paid by the county.—State v. Tebbetts, 54 N. H. 240.

[m] (N. J. 1819) A witness is not bound to attend unless his fees are advanced when the subpœna is served.—Ogden v. Gibbons, 5 N. J. Law (2 Southard) 518.

[n] (N. Y. 1825) In prosecutions for misdemeanors, witnesses for the defense are not bound to attend unless their fees are paid or tendered, as in civil cases; but it is otherwise in prosecutions for felony.—Ex parte Chamberlain, 4 Cow. 49.

[o] (N. Y. 1846) A witness is not liable to the penalty fixed by the statute for not attending when subpœnaed, unless his fees were paid for attendance.—Courtney v. Baker, 3 Denio, 27.

[p] (N. Y. 1847) Where less than the legal amount was paid to a witness when he was subpœnaed, and it did not appear that he objected to the amount, and he actually attended pursuant to the subpœna, but left court before the cause was tried, *held*, notwithstanding, in a suit against him by plaintiff, on the ground of his default, that the nonpayment of the full amount was a fatal objection to a recovery.—Hurd v. Swan, 4 Denio, 75.

[q] (N. Y. 1847) To enable plaintiff to recover the costs of the circuit against a defaulting witness, it must appear that he had been paid his fees for travel and one day's attendance.—Hurd v. Swan, 4 Denio, 75.

[r] (N. Y. 1848) Where a party summons the adverse party for examination as a witness, he must pay him his fees for attending.—Anderson v. Johnson, 3 N. Y. Super. Ct. (1 Sandf.) 713, 1 Code Rep. 94.

[s] (N. Y. 1849) A person examined as a witness in supplementary proceedings (section 295) is entitled to fees as a witness as allowed by statute, which he may insist on as a condition of attending or testifying.—Davis v. Turner, 4 How. Prac. 190.

[t] (N. Y. 1858) A party made a witness by his adversary is as much entitled to fees as a condition precedent to creating a duty to attend, as a third person.—Hewlett v. Brown, 14 N. Y. Super. Ct. (1 Bosw.) 655, 7 Abb. Prac. 74.

[u] (R. I. 1850) A witness who is subpœnaed is bound to attend at the trial unless he has given notice that he shall refuse to appear without payment of the fees due him.—Holden v. Shove, 1 R. I. 287.

[v] (Tenn. 1836) In a civil suit a witness is bound to attend and give evidence when subpœnaed, although the party summoning him did not tender or offer him his necessary expenses.—Smith v. Barger, 17 Tenn. (9 Yerg.) 322.

[w] (Wis. 1853) A witness is bound to obey the process of subpœna in a criminal prosecution, as well on the part of defendant as on that of the state, without payment or tender of fees.—West v. State, 1 Wis. 209.

[x] (Wis. 1894) A person who attends as a witness without the payment or tender of his fees waives their payment or tender in advance.—Rozek v. Redzinski, 87 Wis. 525, 58 N. W. 262.

§ 16. —— Duty to attend on subsequent day.

[a] (N. H. 1860) At the close of each day, if a witness' fees for the next day are not paid, he has the right to return home; but if the case has not terminated, he must first give notice to the party who has summoned him, or his attorney, of his intention to leave unless his fees are paid.—Bliss v. Brainard, 42 N. H. 255.

[b] (N. Y. 1847) To enable plaintiff to recover the costs of the circuit, against a defaulting witness, it is not sufficient that the proper fees were paid in the first instance, if the witness left court after a default in payment for further attendance, although he had not applied to the party for such payment.—Hurd v. Swan, 4 Denio, 75.

[c] (Vt. 1838) When a witness attends, if he is wanted for a further day, his fees must be tendered each day for the succeeding day.—Mattocks v. Wheaton, 10 Vt. 493.

§ 17. Return and proof of service.

Validity of subpœna returnable on Sunday, see "Sunday," vol. 45, c. 159, § 78 [c].

[a] (Ind. 1856) Certain witnesses for defendant in ejectment appeared, by the return of the sheriff to the process issued, which was admitted without objection, to be tenant of defendant. *Held*, that the return was prima facie evidence of this fact.—Stump v. Town of Attica, 7 Ind. 641.

[b] (Iowa, 1888) Where the proof of service of a notice of witnesses for the state consists of the sheriff's return, which states that "the within notice was read, * * * and a copy of the same delivered, to defendants," in the absence of any showing to the contrary, it will be presumed that the return of the sheriff is written on the original notice; and, the sheriff being an officer of the court, whose duty it is to send such notices, the return needs no further verification.—State v. Pugsley, 75 Iowa, 742, 38 N. W. 498.

[c] (La. 1891) An accused is not entitled to a new subpœna in place of a previous one not returned on the day of trial, when it appears that he has been wanting in due diligence, and that he rested on his motion for a new subpœna after an intimation of the trial judge that relief would be given if a reasonable showing were made in support of a motion for a continuance.—State v. Stevens, 43 La. Ann. 610, 9 South. 113.

[d] (Tex. 1878) A return of a subpœna, "Served by reading in hearing of" the witness, is not a compliance with Pasch. Dig. art. 1434, requiring the return to show that the service was "by being read to the witness."—Tooney v. State, 5 Tex. App. 163.

[e] (Tex. 1883) A return on a subpœna "not executed," or "not found," does not conform to Cr. Code. art. 479, requiring a return of the mode of service, or the cause of the failure to serve.—Neyland v. State, 13 Tex. App. 536.

§ 18. Operation and effect.

[a] (Ala. 1850) Where a witness is subpœnaed as well to testify as to bring papers into court, the party at whose instance the subpœna issues may require the production of the papers without introducing the witness generally.—Martin v. Williams, 18 Ala. 190.

[b] (N. C. 1849) A witness summoned to attend at court, though a verdict may be rendered in the cause, yet if a new trial be granted, is bound to attend without a new subpœna.—Fulbright v. McElroy, 32 N. C. 41.

[c] (Tenn. 1651) Upon a change of venue, the witnesses, unless resummoned, are not required to attend the court of the county to which the venue has been changed; and if this be not done, their failure to appear at the final trial is no reason why the costs of their attendance at the court from which the cause was removed should not be allowed them.—Hodges v. Nance, 31 Tenn. (1 Swan) 57.

[d] (Tex. 1886) Service of a subpœna is good only for the particular occasion for which it is issued, and a witness cannot be forced, by reason of such service, to attend the trial of the cause at a subsequent term. Rule applied to a nonresident witness served within the county.—Sapp v. King, 66 Tex. 570, 1 S. W. 466.

[e] (Vt. 1838) Where a witness attends, if he is wanted for a further day, it is not necessary that he should be served each time with a subpœna.—Mattocks v. Wheaton, 10 Vt. 493.

2. SUBPŒNA DUCES TECUM.

AUTHORITY TO ISSUE, § 19.
NECESSITY AND GROUNDS, § 20.
APPLICATION AND ISSUANCE, § 21.
FORM AND REQUISITES, § 22.
SERVICE AND RETURN, § 23.
PAYMENT OR TENDER OF FEES, § 24.
COMPLIANCE WITH WRIT, § 25.
VACATION OF WRIT, § 26.
OPERATION AND EFFECT, § 27.

Amount of compensation, see post, § 58.
Compelling production of documents by bill of discovery, see "Discovery," vol. 16, c. 1975, § 18.
Production and inspection of writings before trial, see "Discovery," vol. 16, cc. 2118–2168, §§ 103–140.
—— *of writings on bill of discovery, see* "Discovery," vol. 16, cc. 2008–2011, §§ 35, 36; cc. 2101, 2102, § 89.
Right to compel production of documentary evidence, see "Equity," vol. 19, cc. 1145, 1146, § 677.
Voluntary dismissal for failure to produce document, see "Dismissal and Nonsuit," vol. 17, cc. 115, 116, § 119.

§ 19. Authority to issue.

[a] (U. S. 1892) Rev. St. § 4906, providing that, on the application of any party to a contested case pending in the patent office the clerk of any federal court shall issue a subpœna for a witness commanding him "to appear and testify," does not include an authority to issue a subpœna duces tecum.—Ex parte Moses (C. C.) 53 Fed. 346.

§ 20. Necessity and grounds.

[a] (U. S. 1802) A subpœna duces tecum will not be ordered to the clerk of a court in Vir-

ginia, to bring into a court of the District of Columbia original papers filed in his court.—Craig v. Richards, Fed. Cas. No. 3,337 [1 Cranch, C. C. 84].

[b] (U. S. 1807) A subpœna duces tecum may issue to the president of the United States, directing him to bring any paper of which the party praying it has a right to avail himself as testimony.—United States v. Burr, Fed. Cas. No. 14,692d.

[c] (U. S. 1807) Where it does not affirmatively appear that letters and executive orders in the hands of the president of the United States which may be material to the defense of an accused contain any matter which it would be imprudent to disclose, a subpœna duces tecum will issue. The fact that such letters and orders may contain matter not essential to the defense, and which ought not to be disclosed, will appear on the return.—United States v. Burr, Fed. Cas. No. 14,692d.

[d] (U. S. 1847) In an equity case, the court will give a subpœna duces tecum for any witness to bring in the books who is supposed to have them.—Russell v. McLellan, Fed. Cas. No. 12,158 [3 Woodb. & M. 157].

[e] (U. S. 1854) On application for a subpœna duces tecum directed to a consul, it must appear that the document is not an official paper protected by law from examination and seizure.—In re Dillon, Fed. Cas. No. 3,914 [7 Sawy. 561].

[f] (U. S. 1871) An officer of a corporation, party to a suit, can be compelled by subpœna duces tecum to bring its books before a master to whom the cause is referred.—Erie Ry. Co. v. Heath, Fed. Cas. No. 4,513 [8 Blatchf. 413].

[g] (U. S. 1878) Under Code Civ. Proc. N. Y. § 868, which provides for the production of books and papers of a corporation upon a subpœna duces tecum, directed to the officer "in whose custody the book or paper is," the vice president, who is also secretary and treasurer of a foreign railroad corporation, and who has an office in New York, cannot be required to produce books of the company which were at one time in his control but have since been sent to the home office, in another state, where they are in charge of a co-ordinate officer over whom the officer resident in New York has no control.—In re Sykes, Fed. Cas. No. 13,707 [10 Ben. 162].

[h] (U. S. 1878) Code Civ. Proc. N. Y. § 868, which provides for the production of books, etc., of a corporation, upon a subpœna duces tecum, to the officer in whose custody the same are, relates as well to foreign as to domestic corporations.—In re Sykes, Fed. Cas. No. 13,707 [10 Ben. 162].

[i] (U. S. 1879) The major general commanding the department of the East was served with a subpœna duces tecum, requiring him to produce in court official papers on file in the office of the headquarters of the department. *Held*, that the subpœna should be set aside on its appearing that copies of such papers could be read in evidence.—Corbett v. Gibson, Fed. Cas. No. 3,221 [16 Blatchf. 334].

[j] (U. S. 1880) A subpœna duces tecum under Rev. St. § 869, cannot be used to compel the production of "patterns" for a stove, such process applying only to documentary evidence.—In re Shephard (C. C.) 3 Fed. 12.

[k] (U. S. 1883) The officers of a corporation may be compelled by a subpœna duces tecum in a suit in equity to produce its books and papers in evidence, though the corporation is not a party to the suit, where they are necessary to determine the rights of parties to the litigation.—Wertheim v. Continental Ry. & Trust Co. (C. C.) 15 Fed. 716.

[l] (U. S. 1891) Defendant, in an action for infringement of a patent, claimed that complainant, in a divisional application upon which letters patent were never issued, made admissions which greatly restrict the claim of the patent in suit, and, a foundation for secondary evidence being laid, sought to compel complainant to bring into court a copy thereof, which was in its possession. *Held*, that a subpœna duces tecum was the proper method when the paper was identified by a specific description.—Edison Electric Light Co. v. United States Electric Lighting Co. (C. C.) 45 Fed. 55.

[m] (U. S. 1891) In a suit for infringing a patent on steel rails, where the defense is want of invention, in view of the prior state of the art, and that rails of the kind patented were in public use more than two years before the application, and it appears that rails of that general character were manufactured by a certain company for several years prior thereto, it is prima facie material to inquire into the exact shape of such rails, and therefore a subpœna duces tecum will issue to compel the production of drawings descriptive thereof.—Johnson Steel Street Rail Co. v. North Branch Steel Co. (C. C.) 48 Fed. 191.

[n] (U. S. 1891) A subpœna duces tecum can only be used to require the production of documents, and a piece of metal in the nature of a form or model is not the subject thereof.—Johnson Steel Street Rail Co. v. North Branch Steel Co. (C. C.) 48 Fed. 191.

[o] (Del. 1866) An adverse party cannot be compelled to produce a document in his possession by a subpœna duces tecum.—Campbell v. Johnston, 3 Del. Ch. 94.

[p] (Ga. 1883) Where in ejectment against a grantee his warrantor, though not nominally a party, employed counsel to defend the case, and placed in his hands a deed to be used in the litigation, the paper is legally in the custody of the warrantor, and must be produced under a subpœna duces tecum.—Steed v. Cruise, 70 Ga. 168.

[q] (Ga. 1886) The mayor of Savannah, who is ex officio presiding judge of the police court, a court of record, is not subject to subpœna duces tecum requiring him to bring into the superior court the "information docket" of the police court, to be used as evidence before the grand jury.—In re Lester, 77 Ga. 143.

[r] (Ind. 1835) If a party wishes to introduce a written instrument in evidence which is in the hands of a third person, he must take out a subpœna duces tecum.—Carlton v. Litton, 4 Blackf. 1.

[rr] (Ind. 1862) Under 2 Rev. St. §§ 305, 306, a party to an action cannot be compelled, by service of a subpœna duces tecum issued ex parte, to produce his books on the trial. An order by the court or a judge thereof is necessary.—Duke v. Brown, 18 Ind. 111.

[s] (Iowa, 1888) Code 1873, § 3672, providing that a witness may be required by subpœna to produce books or writings in his possession, and section 3675, making disobedience of the subpœna contempt of court, apply to witnesses only, and not to parties.—Beebe v. Equitable Mut. L. & E. Ass'n, 76 Iowa, 129, 40 N. W. 122.

[ss] (Kan. 1875) The district court has no power to require that the books and records of the county treasurer and county clerk of one county shall be removed, 50 miles from the place where they are usually kept, into another county, so that they may be used as evidence in a criminal action pending in such other county. Copies may be used where the original cannot be procured.—State v. Smithers, 14 Kan. 629.

[t] (Md. 1818) Documents and vouchers upon which an account has been passed in the orphans' court, lodged with the register of wills, may be produced by a subpœna duces tecum.—Randall v. Hodges, 3 Bland, 477.

[tt] (Md. 1829) A corporation, by its officers, may be compelled to produce books and papers in its possession, containing matter pertinent to the issue in an action between third parties, as a private individual may.—Winder v. Diffenderffer, 2 Bland, 166.

[u] (N. Y. 1825) The court will not, on motion, compel a stranger to the suit to produce a deed of his own, for the inspection of a party, but plaintiff must compel its production by a subpœna duces tecum.—Davenbagh v. McKinnie, 5 Cow. 27.

[uu] (N. Y. 1826) In an action where a bank is a party, the opposite party cannot compel the cashier to produce the books of the bank by a subpœna duces tecum.—Utica Bank v. Hillard, 5 Cow. 419.

[v] (N. Y. 1845) Where a deed or other instrument which a party wishes to prove, as an exhibit, is in the hands of a third person, who will not produce it voluntarily for that purpose, the proper course is to compel him to produce it, by a subpœna duces tecum.—Aiken v. Martin, 11 Paige, 499.

[vv] (N. Y. 1852) A party to an action is not bound, upon a mere subpœna duces tecum, and without a previous order, to produce his books and papers.—Trotter v. Latson, 7 How. Prac. 261.

[w] (N. Y.) Under Code Proc. § 390, a party may be required by subpœna duces tecum to bring his books and papers. The adverse party is not restricted to obtaining an inspection and copies before the trial.—(1853) Bonesteel v. Lynde, 8 How. Prac. 226; (1861) In re Mitchell, 12 Abb. Prac. 249; (1862) People v. Dyckman, 24 How. Prac. 222.

[ww] (N. Y. 1870) A subpœna duces tecum must in all cases be issued for the purpose of obtaining profert of books and papers; and on taking conditionally the testimony of a witness, whether a party to the action or not, he may be required, by such a subpœna, to produce any books or papers specified in the writ, and for disobedience is guilty of contempt and liable in damages to any party aggrieved thereby.—Central Nat. Bank v. Arthur, 32 N. Y. Super. Ct. (2 Sweeny) 194.

[x] (N. Y. 1874) Corporations cannot be compelled to produce their books by a subpœna duces tecum.—Central Nat. Bank v. White, 37 N. Y. Super. Ct. (5 Jones & S.) 297.

[xx] (N. Y. 1884) A witness in supplementary proceedings may be required to produce papers by a subpœna duces tecum.—Pruden v. Tallman, 6 Civ. Proc. R. 360.

[y] (Pa. 1794) A subpœna duces tecum should not be issued to a public officer to bring official original papers into court, where certified copies would be evidence.—Delaney v. Regulators of City of Philadelphia, 1 Yeates, 403.

[yy] (Pa. 1797) A subpœna duces tecum cannot be issued to the printer of a newspaper to produce his papers containing the advertisements of notices of the sale of unseated lands for taxes.—Shippen's Lessee v. Wells, 2 Yeates, 260.

[z] (Pa. 1873) A servant cannot ordinarily be compelled to produce his master's books, because his custody of them is, in law, the master's custody, and the latter is the person amenable to process for their production.—Lorenz v. Lehigh Co., 5 Leg. Gaz. 174.

[zz] (Pa. 1873) If the master of a servant is out of the jurisdiction or is a mere legal entity, i. e., a corporation, which can be acted on only through its officers or servants, then a subpœna duces tecum to produce books and papers before a commissioner appointed under Court Rule No. 10, § 35, will properly go against the person having the actual custody, without regard to the master's orders.—Lorenz v. Lehigh Co., 5 Leg. Gaz. 174.

§ 21. Application and issuance.

[a] (U. S. 1807) A motion for a subpœna duces tecum, though addressed to the discretion of a court, is a motion not to its inclination, but to its judgment, which is to be guided by sound legal principles.—United States v. Burr, Fed. Cas. No. 14,692d.

[b] (U. S. 1807) A motion for a subpœna duces tecum is to the discretion of the court; and as a legal means of obtaining testimony it cannot be regularly opposed by the opposite party in his character as such.—United States v. Burr, Fed. Cas. No. 14,692d.

[c] (U. S. 1882) When the district attorney, either upon his own motion or at the instance of the grand jury, applies for a subpœna duces tecum, he should state that there is a question either pending before, or which is intended to be brought before, the grand jury or the court, in which certain telegrams, sent from or received at the telegraph office in charge of the witness named, are believed to be pertinent to the question to be considered, and should state the names of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, they were sent or received, which should be a reasonable time; or, if the names of the parties should not be known, then the time and the subject-matter which the dispatches contain, or to which they relate, should be stated.—United States v. Hunter (D. C.) 15 Fed. 712.

[d] (U. S. 1891) When, under the 67th rule in equity, a court has appointed a special examiner to take testimony in another district, a subpœna duces tecum may issue from the clerk's office of the latter district in the usual way, without a direct order of court, and the court of that district has power to punish a disobedience thereof. Rev. St. § 869, requiring an order of court for the issuance of such a subpœna, does not apply, as it is restricted to the taking of depositions de bene esse, or in perpetuam rei memoriam and under a dedimus potestatem, according to the provisions of sections 863 and 866.—Johnson Steel Street Rail Co. v. North Branch Steel Co. (C. C.) 48 Fed. 191.

[e] (W. Va. 1884) In a suit by a municipality a subpœna duces tecum may be awarded for the production of a document in defendant's possession, on the affidavit of plaintiff's counsel, having peculiar knowledge of the importance of such document as evidence for the municipality.—City of Wheeling v. Black, 25 W. Va. 266.

§ 22. Form and requisites.

[a] (U. S. 1876) When a writ of subpœna duces tecum is issued out of a federal court, directed to an officer of a telegraph company, to produce certain messages, it need only describe the messages with such practicable certainty that the witness may know what is required of him, and it is the duty of the person to whom the writ is directed, to use reasonable diligence to obey it, and to find and produce the required instruments of evidence if they are within his custody.—United States v. Babcock, Fed. Cas. No. 14,484 [3 Dill. 566].

[b] (U. S. 1882) Where a subpœna duces tecum is issued to a person in charge of a telegraph office with the intention to bring certain telegrams before the grand jury or the court, the subpœna should describe the telegrams required to be produced as they are described in the application for the writ, either naming

the parties sending or receiving them and the subject-matter to which they relate, or, if the names are unknown, then the subject-matter and the times or the periods between which they were sent or received.—United States v. Hunter (D. C.) 15 Fed. 712.

[c] (U. S. 1892) A subpœna duces tecum should be vacated which orders the witness to look through the papers of a decedent of whom the witness was administrator, and select and produce all the papers which, in his judgment, "shall in any wise bear" on the merits of 17 claims involved in a suit under the French spoliation act.—Elting v. United States, 27 Ct. Cl. 158.

[d] (U. S. 1894) A subpœna duces tecum, directed to the superintendent of a telegraph company, to produce telegrams between a number of parties, is not defective merely because it does not describe the messages by date, or identify the particular ones required, if they are described with such particularity as appears to be practicable.—In re Storror (D. C.) 63 Fed. 564.

[e] (U. S. 1896) A paper directing the registrar of voters to furnish the number of white and colored voters, without specifying any paper in his possession the production of which is sought, is not a subpœna duces tecum.—Murray v. Louisiana, 163 U. S. 101, 16 Sup. Ct. 990, 41 L. Ed. 87.

[f] (U. S. 1896) A paper directing the jury commissioners to furnish the names and residences of citizens who appeared for qualification as jurors, and of those who qualified, and from whom the grand jury was drawn, is not a subpœna duces tecum.—Murray v. Louisiana, 163 U. S. 101, 16 Sup. Ct. 990, 41 L. Ed. 87.

[g] (Cal. 1886) A witness served with a subpœna duces tecum, requiring him to search for and produce all telegraphic messages from a number of persons to many other persons, between certain specified dates, with no further identification of the messages, is not bound to respond.—Ex parte Jaynes, 70 Cal. 638, 12 Pac. 117; Jaynes v. Superior Court of San Francisco, 12 Pac. 117.

[h] (Ga. 1878) After a document has been produced under a subpœna duces tecum, the sufficiency of the subpœna as a means of compelling its production is immaterial.—Starr v. Mayer, 60 Ga. 546.

[i] (Mo. 1880) A subpœna duces tecum for the production of certain telegraphic messages, that merely gives the names of the senders and the persons addressed and as having been sent "within fifteen months last past," is not a sufficient description to render the person subpœnaed guilty of contempt in failing to produce them.—Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426.

[j] (Mo. 1893) A subpœna duces tecum, which requires a druggist to produce all prescriptions filed in his store since a certain day, is too indefinite, since the grand jury is not authorized to inspect all the prescriptions, but only such as relate to the matter under investigation.—State v. Davis, 117 Mo. 614, 23 S. W. 759.

[k] (N. J. 1872) A party to a suit can be compelled by a subpœna duces tecum to produce papers and documents to be used on the trial as evidence. But such a subpœna commanding a party only to appear at a certain place and time named in the writ, and bring with him a certain book, but omitting the direction to testify, is invalid, and the party refusing to obey it cannot be attached for contempt.—Murray v. Elston, 23 N. J. Eq. (8 C. E. Green) 212.

§ 23. Service and return.

[a] (U. S. 1892) A second subpœna duces tecum is void while the first is unexecuted and unreturned.—Elting v. United States, 27 Ct. Cl. 158.

[b] (N. C. 1886) The return by a sheriff on a notice to defendants to produce a paper, to the effect that it was "executed by delivering a copy," is sufficient to prove service on a particular party, as such return implies a delivery to each defendant.—McDonald v. Carson, 94 N. C. 497.

[c] (S. C. 1815) The party has a right to require that a witness who has been served with a subpœna duces tecum should make a return to the subpœna before the cause is opened.—Treasurer v. Moore's Ex'rs, 3 Brev. 550.

§ 24. Payment or tender of fees.

[a] (U. S. 1894) A subpœna duces tecum, requiring a witness to appear before the federal grand jury, and bring telegrams, will not be quashed because no fees were tendered in advance.—In re Storror (D. C.) 63 Fed. 564.

[b] (Tex. 1896) A defendant to whom a subpœna duces tecum has been issued, requiring him to produce his account books to be used as evidence for plaintiff, may be compelled to produce them, though he has received no witness fees.—Cullers v. Birge (Civ. App.) 34 S. W. 986.

§ 25. Compliance with writ.

Punishment of disobedience as contempt, see post, § 40.

[a] (U. S. 1807) On a motion to compel the production of a letter written to the president of the United States, and in the hands of the prosecuting attorney, averred to be material to the defense, parts of it cannot be withheld, in the discretion of the prosecuting attorney, on the ground of public interest. The president alone may decide as to the propriety of withholding them, and he cannot delegate his discretion.—United States v. Burr, Fed. Cas. No. 14,694.

[b] (U. S. 1882) It is the duty of the witness served with a subpœna duces tecum by the district attorney on his own motion or at the instance of the grand jury to appear before the grand jury or court and produce the telegrams stated in the subpœna, and if he has doubts as to whether or not he should produce any telegram called for, he may submit it to the inspection of the court, which may decide on the question of its production.—United States v. Hunter (D. C.) 15 Fed. 712.

[c] (U. S. 1891) A subpœna duces tecum, requiring a witness not a party to the suit to produce certain drawings, must be obeyed, although the papers relate to a valuable secret method of producing a manufactured article.—Johnson Steel Street Rail Co. v. North Branch Steel Co. (C. C.) 48 Fed. 191.

[d] (U. S. 1896) An internal revenue collector is not justified in refusing to produce, in obedience to a subpœna duces tecum issued by a state court, the application or return made by a person to obtain a retail liquor license, either by the nature of such documents or instructions from the commissioner of internal revenue.—In re Hirsch (C. C.) 74 Fed. 928.

[e] (Ga. 1891) In proceedings to establish lost county records, the secretary and treasurer of a private abstract company is not bound to obey a subpœna duces tecum calling on him to produce "all the abstract books of the company, in which appear the abstracts of Deed Books B, F, and H, and Mortgage Book E," since such information is valuable, and its disclosure is not sought as testimony for the proof

of any alleged fact, but as a substitute in the first instance for the allegation of facts unknown, or not known sufficiently to enable the plaintiff to set them forth conformably to general laws applicable to pleading.—Ex parte Calhoun, 87 Ga. 359, 13 S. E. 694.

[f] (Iowa, 1864) It is no ground for the reversal of a judgment that the court refused to compel a party to obey a subpœna duces tecum. —Manning v. Perkins, 16 Iowa, 71.

[g] (Mass. 1830) A witness may be compelled, under a subpœna duces tecum, to produce a document in his possession, unless he has a lawful or reasonable excuse for withholding it, although the production of it will adversely affect his pecuniary interest.—Bull v. Loveland, 27 Mass. (10 Pick.) 9.

[h] (Mass. 1830) In an action on a note, a witness served by plaintiff with a subpœna duces tecum to produce the note testified that defendant, a mechanic, assigned his property to the witness, who was a creditor; that plaintiff and the other creditors put their demands, including the note in question, into the hands of the witness for collection, under an agreement that he might furnish stock to the defendant to work up for the benefit of the creditors, and that the proceeds of all the property should be applied, first, to the repayment of the advances made by the witness, and the surplus to the payment of the demands; and that a large sum was due to the witness on account of his advances. *Held*, that the witness had such an equitable interest in the note, and such a right to its custody and control under the agreement, that he could not be required to surrender it for the purpose of maintaining a suit and thereby fixing a lien on the funds placed in his hands for the benefit of all creditors.—Bull v. Loveland, 27 Mass. (10 Pick.) 9.

[i] (Miss. 1845) A witness, under subpœna duces tecum, is compelled to produce all documents in his possession, unless he have a reasonable excuse to the contrary, of the validity of which excuse the court and not the witness is to judge.—Chaplain v. Briscoe, 13 Miss. (5 Smedes & M.) 198.

[j] (N. H. 1858) The court will not, on the motion of a party, order a witness, summoned on a subpœna duces tecum, to produce the papers mentioned in the subpœna, until it appears from his own admission, or from other conclusive evidence, that he has them under his control; and it seems an order will not be made upon him, in the alternative, to produce them, or show cause why, until he has been asked whether he has them in his possession.—Hall v. Young, 37 N. H. 134.

[k] (N. J. 1871) Where a subpœna duces tecum had been served on the governor of the state, commanding him to appear in court and to bring with him a certain document, and he declined to appear, but his refusal to appear was based upon what he deemed to be his official duty, the court will not compel his appearance.—Thompson v. German Valley R. Co., 22 N. J. Eq. (7 C. E. Green) 111.

[l] (N. J. 1892) A postmaster cannot refuse to obey a subpœna to produce in court the record of his office containing the names of box holders, on the ground that it would be contrary to the regulations of the post office department. —Rice v. Rice (Ch.) 25 Atl. 321.

[m] (N. Y. 1825) A clerk in a bank is not bound, on a subpœna duces tecum, to produce the books of the bank, they not being under his control.—Utica Bank v. Hillard, 5 Cow. 153.

[n] (N. Y. 1845) If the reasons stated by a witness for not producing a paper in compliance with a subpœna duces tecum are overruled by the examiner, he will be bound to produce the paper; or, if the court sustains the ruling of the examiner, the witness will be bound to pay the costs occasioned by his former refusal. —Aiken v. Martin, 11 Paige, 499.

[o] (N. Y. 1845) A witness is not bound to produce a paper, in compliance with a subpœna duces tecum, until he has been sworn as a witness, to enable him to state on oath his reasons why he should not be compelled to produce it.—Aiken v. Martin, 11 Paige, 499.

[p] (N. Y. 1886) A witness subpœnaed by duces tecum may be relieved by the court from producing unnecessary books.—Pond v. Solomon, 2 City Ct. R. 300.

[q] (N. C. 1826) Where a deed produced under subpœna duces tecum was left after the trial among the papers in the office, it was subject to the control of the party producing it.—Carter v. Graves, 12 N. C. 74.

[r] (S. C. 1841) A witness attending under a subpœna duces tecum is not required to testify, but merely to bring into court a paper which the party needs.—Sherman v. Barrett, 1 McMul. 147.

[s] (Tex. 1896) Where a subpœna duces tecum, requiring a defendant to produce account books to be used on hearing of plaintiff's affidavit controverting an answer by a garnishee, was issued, and defendant appeared, but refused to produce the books, it was error to rule that the witness could not be required to produce the books to be used as evidence against himself.—Cullers v. Birge (Civ. App.) 34 S. W. 986.

[t] (Va. 1816) An attachment will not be granted against the clerk of the executive council for disobeying a subpœna duces tecum commanding him to bring into court a paper submitted to the council for the purpose of enabling it to perform its executive functions, and filed among its papers. The clerk ought not to take such paper from the files, without the order of the council.—Morris v. Creel, 2 Va. Cas. 49.

§ 26. Vacation of writ.

[a] (N. Y. 1892) An action against a company and others to recover for the illegal use of patent processes having been dismissed as to the company, leaving only the question of the amount of profits for which the other defendants were liable to be determined, the court erred in refusing to vacate a subpœna duces tecum against the company, the only object of which was to discover its secret processes.—Averill v. Barber, 63 Hun, 630, 18 N. Y. Supp. 80.

§ 27. Operation and effect.

[a] (Pa. 1837) Where a party notified to produce books or papers on the trial is sworn and states that the same are not in his possession, he cannot be examined generally as to the merits of the case, since the case does not resemble in this respect that of a bill of discovery.—Wood v. Connell, 2 Whart. 542.

3. ATTACHMENT TO COMPEL ATTENDANCE AND HABEAS CORPUS AD TESTIFICANDUM.

AUTHORITY TO ISSUE ATTACHMENT AND GROUNDS THEREFOR, § 28.
NECESSITY AND SUFFICIENCY OF SUBPŒNA AND SERVICE THEREOF, § 29.
APPLICATION AND ISSUANCE, § 30.
FORM AND REQUISITES, § 31.
SERVICE AND RETURN, § 32.
HABEAS CORPUS AD TESTIFICANDUM, § 33.

Attachment for contempt, see post, § 38.
Payment or tender of fees and expenses, see ante, §§ 15, 16.
Place where attendance may be required, see ante, § 9.

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I. Attendance, Production of Documents, and Compensation. (B) Process and Proceedings [50 Am. Dig. to Compel Attendance and Production of Documents. 3. Attachment to Compel Attendance.

Privileges and exemptions, see ante, § 8.

Compensation of sheriffs and constables for serving attachment, see "Sheriffs and Constables," vol. 43, cc. 3382-3384, § 67.

Suing out attachment for witness not subpœnaed as contempt of court, see "Contempt," vol. 10, c. 2397, § 23 [b].

§ 28. Authority to issue attachment and grounds therefor.

Authority to compel attendance in general, see ante, § 1.

[a] (U. S. 1807) The circuit court for the District of Columbia will grant a rule on a witness residing in Baltimore, to show cause why he should not be attached for not attending according to summons.—Hodgson v. Butts, Fed. Cas. No. 6,563 [1 Cranch, C. C. 447].

[b] (U. S. 1851) Although Act March 2, 1793 (1 Stat. 333, c. 22) allows subpœnas ad testificandum to run from the federal circuit courts into districts not their own, yet where the witness who has been thus subpœnaed shows no disposition to treat the process of the court with contempt, the issuing of an attachment is always matter of discretion with the court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the court will not compel his attendance; but will either postpone the cause or have his deposition taken.—Ex parte Beebees, Fed. Cas. No. 1,220 [2 Wall. Jr. 127].

[c] (Fla. 1880) Defendant, in a criminal case, who has caused his witnesses to be duly subpœnaed to appear at the trial, is entitled, on their nonappearance, to an attachment to compel their attendance; it is error to force him to trial before such attachments have issued.—Green v. State, 17 Fla. 669.

[d] (La. 1879) Where accused has, in proper time, ordered subpœnas to issue, he cannot be compelled to apply for attachments, swear to the facts he intends to prove by his witnesses, or go to trial without them, until an earnest and vain effort has been made to bring them into court.—State v. Boitreaux, 31 La. Ann. 188.

[e] (La. 1889) An attachment for witnesses, to substantiate the grounds of a motion for new trial on an indictment for murder, will not be granted where the testimony would be cumulative only of that heard on the trial, and due diligence was not used to secure the attendance of the witnesses for the trial.—State v. Johnson, 41 La. Ann. 574, 7 South. 670.

[f] (La. 1889) On an indictment for murder, an attachment cannot be required against an absent witness when it appears that he is not in the state, and was not served, and there is no showing that the accused was ignorant of his absence, that his testimony is material, or that his attendance can be secured for an early trial.—State v. Johnson, 41 La. Ann. 574, 7 South. 670.

[g] (La. 1889) On an indictment for murder, where counsel for defendant knows that one of his witnesses cannot be found, his statement, in answer to inquiries put by the court, that another witness is the only one against whom an attachment is desired, is a waiver of attachment against the first witness.—State v. Johnson, 41 La. Ann. 574, 7 South. 670.

[h] (La. 1891) It is proper to refuse to issue attachments for witnesses in a criminal case where it appears that one of them is in a dying condition, and the other is far gone in pregnancy, and cannot attend.—State v. McCarthy, 43 La. Ann. 541, 9 South. 493.

[i] (Mass. 1831) Where a witness, under recognizance, fraudulently avoided with a view to prevent the trial of a capital cause at the first term, the court will issue an attachment against him, returnable at the next term, and continue the indictment.—Commonwealth v. Carter, 28 Mass. (11 Pick.) 277.

[j] (Mass. 1853) A justice of the peace has no authority to issue a warrant for the arrest of a witness who failed to attend before him, when duly summoned on behalf of the commonwealth in a criminal prosecution, if the case in which he was to testify has been finally determined and ended.—In re Clarke, 66 Mass. (12 Cush.) 320.

[k] (Mo. 1880) When the fact that a witness has recognized to appear is not duly shown by the record, and not otherwise made known to the court when an application is made for an attachment against such witness, the refusal to order an attachment will not be a ground for reversing the judgment.—State v. Hopper, 71 Mo. 425.

[l] (N. H. 1874) The court will order a capias to issue against a witness to answer for his default where the witness who has been properly served with a subpœna sent out under the indorsement of the attorney general or the county solicitor fails to attend according to its command; the facts of such service being properly returned to the court.—State v. Tibbetts, 54 N. H. 240.

[m] (N. J. 1818) A witness who disobeys a subpœna is liable to attachment.—State v. Trumbull, 4 N. J. Law (1 Southard) 139.

[n] (N. Y. 1800) Where a witness positively refuses to obey a subpœna, an attachment will be granted in the first instance.—Andrews v. Andrews, 2 Johns. Cas. 109, Coleman, Cas. 120.

[o] (N. Y. 1824) The court may by attachment compel the production of a public document which is in the hands of a private individual.—People v. Vail, 2 Cow. 623.

[p] (N. Y. 1827) The circuit court may grant an attachment against a witness to bring him forward to testify, after he has disobeyed a subpœna.—People v. Vermilyea, 7 Cow. 108.

[q] (N. Y. 1848) Since a witness can only be brought into court on compulsory process to be punished for contempt in refusing to appear and testify, a surrogate has no jurisdiction to issue an attachment for a witness disobeying a subpœna, to compel him to be brought into court to testify.—Perry v. Mitchell, 5 Denio, 537.

[r] (N. Y. 1867) Where a witness appears in response to a subpœna duces tecum, but neglects to produce, plaintiff may be allowed to withdraw a juror and proceed by attachment, and the question whether the witness is bound to obey and produce the papers will be considered when he is sworn or when brought up on the attachment.—In re O'Toole's Estate, 1 Tuck. Sur. 39.

[s] (Pa. 1788) Where it appeared that witnesses against whom an attachment had issued for disobedience to a subpœna had been so much indisposed as to be incapable of attending, they were discharged, and the costs of the attachment directed to abide the event of the suit.—Butcher v. Coats, 1 Dall. 340, 1 L. Ed. 166.

[t] (Pa. 1881) A witness subpœnaed to appear before an examiner refused to appear, although reasonable time was allowed. *Held* that a rule for an attachment would be made absolute.—Bowen v. Thornton, 9 Wkly. Notes Cas. 575.

§ 29. Necessity and sufficiency of subpœna and service thereof.

[a] (U. S. 1795) An attachment will not be granted against a witness unless a subpœna

has been previously issued and actually served; and all the documents upon which it is awarded must be filed with the court.—United States v. Caldwell, Fed. Cas. No. 14,708 [2 Dall. 333, 1 L. Ed. 404].

[b] (U. S. 1853) When no preliminary evidence has been given before the commissioner, prior to his issue of the subpœna, showing the case to be one in which a de bene esse examination can be lawfully had, the federal circuit court will not grant a writ of attachment against the witness.—Ex parte Peck, Fed. Cas. No. 10,885 [3 Blatchf. 113].

[c] (La. 1873) It is a rule of court, long since established, that, unless personal service has been made on a witness, no attachment to compel his attendance will be granted.—State v. Allemand, 25 La. Ann. 525.

[d] (Minn. 1858) On the refusal of the court to allow defendant to prove his case on cross-examination of plaintiff's witness, defendant said that he should call the witness at the proper time, and plaintiff said that he had no objection to the witness' remaining. The next day the witness could not be found when defendant called him. It appeared that no fee had been tendered him for the second day, and that defendant had not subpœnaed him. *Held*, that defendant could not have an attachment against the witness.—Beaulieu v. Parsons, 2 Minn. 37 (Gil. 26).

[e] (Minn. 1858) To entitle a party to an attachment for an absent witness he must have duly subpœnaed such witness; it is no excuse that the witness had been subpœnaed by the other side, and examined.—Beaulieu v. Parsons, 2 Minn. 37 (Gil. 26).

[f] (N. J. 1818) An attachment will not be ordered against a witness, unless the subpœna be strictly served, and the witness designed to contemn the authority of the court.—State v. Trumbull, 4 N. J. Law (1 Southard) 139.

[g] (N. Y. 1852) Where a witness fully explains to the party the reasons why he could not attend a trial on a notice of three or four hours, and offered to attend the next day, if the party moves for an attachment, he will be charged with costs thereon.—Chalmers v. Melville, 1 E. D. Smith, 502.

[h] (Ohio, 1860) Under Code, § 322, authorizing an attachment for a witness who fails to attend after subpœna has been "lawfully ordered" and served on him, attachment will not issue for a witness on whom service was had outside of the county where he resides, and it is immaterial that the witness may have accepted a witness fee.—Anonymous, 2 Ohio Dec. 407.

[i] (Pa. 1793) A witness may, by his own act, dispense with the legal form of serving a subpœna, and may, under such service, be subjected to an attachment.—Feree v. Strome, 1 Yeates, 303.

[j] (Tex. 1895) A refusal to grant an attachment for a witness is proper, where the evidence to be given is cumulative, and no process had been issued for the witness or reason given why it had not been so issued.—Cline v. State, 34 Tex. Cr. R. 415, 31 S. W. 175.

§ 30. Application and issuance.

[a] (Cal. 1886) There is no abuse of discretion by a court in refusing to grant an attachment for witnesses, if it is not shown by any sworn statement what was intended to be proved by such witnesses; especially where they are out of the county in which the trial was had, and no attachment was asked to enforce their appearance until after one side of the case had been closed, and numerous witnesses had been examined on the other side.—People v. Marseiler, 70 Cal. 98, 11 Pac. 503.

[b] (Ill. 1896) The refusal of the court to order an attachment for a witness, under the circumstances on which it was asked, is not a sufficient reason for reversing the judgment.—Huffer v. Viskovsky, 62 Ill. App. 94.

[c] (La. 1826) A witness may be attached without an affidavit of the materiality of his testimony.—Southward v. Bowie, 5 Mart. (N. S.) 151.

[d] (N. Y. 1859) After the announcement of the counsel on each side that the testimony is closed, it is in the discretion of the presiding judge to issue an attachment to compel the attendance of an absent witness.—Stephens v. People, 19 N. Y. 549, affirming (1859) 4 Parker, Cr. R. 396.

[e] (Pa. 1791) Where the attendance of a witness can be obtained in time for the trial, an attachment may be issued at nisi prius; but where the action has been postponed for the term, application must be made to the court in bank.—Knight's Lessee v. Pechen, 1 Yeates, 18.

[f] (Tex. 1896) In a criminal case, defendant's application for an attachment for a witness should not be denied merely because the application does not recite the facts expected to be proved by the witness.—Moore v. State (Cr. App.) 38 S. W. 980.

§ 31. Form and requisites.

[a] (U. S. 1858) Where a witness living in another state and district fails to obey a subpœna, and an attachment is issued for him, such attachment should be directed to the marshal of the court issuing the same, and not to the marshal of the district where the witness may be found.—United States v. Potter, Fed. Cas. No. 16,075.

§ 32. Service and return.

[a] (La. 1879) A return of an attachment for a witness in a criminal case, that she "could not be found," is insufficient; the officer should state what inquiry and search he made, especially if in another parish.—State v. Boitreaux, 31 La. Ann. 188.

§ 33. Habeas corpus ad testificandum.

Compelling attendance of convicts in general, see ante, § 7.

[a] (Ga. 1884) Where application for process to compel the attendance of a witness in a criminal case who was confined in the penitentiary was made to the court, it was not essential that money to defray his expenses should have been tendered.—Roberts v. State, 72 Ga. 673.

[b] (Nev. 1876) The only design of the law requiring an affidavit to be made of certain facts, before the court shall make an order to have a party in jail produced in court, to testify at the instance of the adverse party, was to prevent improper and unnecessary interference with the custody of prisoners. If the order for the prisoner's attendance in court was improvidently granted, it is no concern of the prisoner; being before the court he is bound to answer any question that he would have been required to answer if the process for bringing him there had been strictly pursued.—Maxwell v. Rives, 11 Nev. 213.

[c] (N. Y. 1810) When served with a habeas corpus ad testificandum, a sheriff is bound to bring up a person in his custody on execution, to testify in a civil suit, on being tendered the expenses for bringing up and returning the prisoner.—Noble v. Smith, 5 Johns. 357.

[d] (N. Y. 1844) In the case of a habeas corpus ad testificandum, the judge or commissioner issuing the writ has no power to authorize the sheriff to suffer the prisoner to go at large pending the proceedings.—People v. Stone, 10 Paige, 606.

[e] (N. Y. 1895) The supreme court has inherent power to issue a writ of habeas corpus ad testificandum.—People v. Sebring, 14 Misc. Rep. 31, 35 N. Y. Supp. 237.

[f] (N. Y. 1895) An indictment found on the testimony of persons convicted of felony, who were brought from the penitentiary on a habeas corpus ad testificandum, notwithstanding the provision of Code Civ. Proc. § 2011, that the writ shall not issue to bring up such persons, will not be set aside on that ground, since the fact that such writ was wrongfully issued could not be objected to by defendant, but only by the warden of the penitentiary.—People v. Sebring, 14 Misc. Rep. 31, 35 N. Y. Supp. 237.

[g] (N. Y. 1895) An indictment found on the testimony of persons convicted of felony, who were brought from the penitentiary on a habeas corpus ad testificandum, notwithstanding the provision of Code Civ. Proc. § 2011, that the writ shall not issue to bring up such persons, will not be set aside on that ground, since a convict is a competent witness (Code Civ. Proc. § 832; Pen. Code, § 714).—People v. Sebring, 14 Misc. Rep. 31, 35 N. Y. Supp. 237.

[h] (N. C. 1872) Acts 1868–69, c. 116, § 37, forbidding the use of the writ habeas corpus ad testificandum for witnesses under sentence for a felony, in favor of parties in any suit, applies only to parties strictly so-called, and not to a case where the state is plaintiff.—State v. Adair, 68 N. C. 68.

[i] (N. C. 1875) Where one convicted of murder and sentenced to be executed is a material witness for the state in a criminal case to be inquired into by the grand jury, the solicitor for the state is entitled to a writ of habeas corpus to bring him into court.—Ex parte Harris, 73 N. C. 65.

[j] (Pa. 1870) Where, on the trial of an issue in a divorce case, respondent, the husband, had been served with a habeas corpus ad testificandum directing him to produce the two daughters of the parties, who were at a school near Boston, and he made return that the children had been sent to school more than six months before, that libelant, the mother, had visited them there, and had free access to them, *held*, that the writ of habeas corpus ad testificandum having been improvidently issued, it could not be enforced; the witnesses not having been sent away by the father to avoid service of a subpœna, and being, at the time of the application, and for several months before, in another state, could not be brought in under this writ without their consent.—Koecker v. Koecker, 7 Phila. 364.

[k] (Vt. 1836) A writ of habeas corpus ad testificandum, returned into court, and lodged on the files, may be shown by copy attested by the clerk.—Mattocks v. Bellamy, 8 Vt. 463.

4. SECURITY FOR APPEARANCE AND TAKING INTO CUSTODY, COMMITMENT, OR DETENTION OF WITNESSES.

BOND, RECOGNIZANCE, OR OTHER SECURITY FOR APPEARANCE, § 34.
—— FORM AND REQUISITES OF BOND AND ENFORCEMENT THEREOF, § 35.
TAKING INTO CUSTODY, COMMITMENT, AND DETENTION OF WITNESSES, § 36.

§ 34. Bond, recognizance, or other security for appearance.

[a] (U. S. 1807) Where a witness appears in court at the term mentioned in his recognizance, and the same is not respited, he is not bound to attend at the following term to which the cause is continued.—United States v. Butler, Fed. Cas. No. 14,698.

[b] (U. S. 1860) Where, upon the arrest of a person as a witness in a criminal case for the United States under Act Aug. 8, 1846, § 7, great hardship will be imposed upon him when imprisoned, for want of bail, he will be discharged by the federal court on its own recognizance.—United States v. Lloyd, Fed. Cas. No. 15,614 [4 Blatchf. 427].

[c] (U. S. 1869) It is the duty of the United States district attorney, in criminal prosecutions by the government, where he has any doubt whether witnesses will attend, to have them properly recognized.—United States v. Durling, Fed. Cas. No. 15,010 [4 Biss. 509].

[d] (Ala. 1892) Under Cr. Code, § 4294, providing that a justice of the peace may compel a witness for the prosecution in a criminal case to enter into bond for his appearance, with sufficient sureties, but such sureties must not be required when the witness does not reside in the state, the justice has not power to compel a bond with sureties where the witness resides in Georgia, and such a bond, while binding on the principal, would be invalid as to the sureties.—State v. Calhoun, 99 Ala. 279, 13 South. 425.

[e] (Cal. 1882) The power to require undertakings from witnesses in criminal cases is limited, under Code, to those who have been examined as witnesses before the committing magistrate.—Ex parte Shaw, 61 Cal. 58.

[f] (Ind. 1895) A justice of the peace cannot require one subpœnaed as a witness on a prosecution for a crime other than a felony to enter into a recognizance for his appearance on the day of trial stated in the subpœna, there being no statutory authority therefor.—Clayborn v. Tompkins, 141 Ind. 19, 40 N. E. 121.

[g] (Iowa, 1890) Under Code 1873, § 4385, which provides that on change of venue in criminal cases the judge may require witnesses for the state to enter into recognizance for their appearance, the judge is not authorized to require the witness to furnish bond with sureties, and in default thereof to be kept in custody.—Comfort v. Kittle, 81 Iowa, 179, 46 N. W. 988.

[h] (Iowa, 1890) Code 1873, § 4385, which provides that, on change of venue in criminal cases, the accused shall give bond for his appearance, and the court or judge may require witnesses for the state to enter into "cognizance" for their appearance, should be construed as though the word "recognizance" had been used.—Comfort v. Kittle, 81 Iowa, 179, 46 N. W. 988.

[i] (Iowa, 1890) Under Code 1873, § 4385, which provides that on change of venue in criminal cases the judge may require witnesses for the state to enter into recognizance for their appearance, the order requiring such recognizance may be made at chambers without notice to the witness.—Comfort v. Kittle, 81 Iowa, 179, 46 N. W. 988.

[j] (Kan. 1873) On the continuance of a criminal case in the district court, the witnesses may be required to give personal recognizances for their appearance at the next term, but cannot be compelled to give recognizances with sureties; nor does the fact that such recognizance has been signed by a surety bind him.—State v. Lane, 11 Kan. 458.

[k] (Kan. 1895) Under Gen. St. 1889, c. 82, § 61, one who makes complaint for the arrest of another for a felony may be required to enter into a recognizance for his appearance as a witness against the person so charged, and on his refusal to do so may be held in custody.—In re Petrie, 1 Kan. App. 184, 40 Pac. 118.

[l] (Ky. 1829) In criminal cases, the court may compel a witness to enter into a recogni-

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sance to appear at a future day, but cannot require any surety of him.—Bickley v. Commonwealth, 25 Ky. (2 J. J. Marsh.) 572.

[m] (Ky. 1886) A bond was executed for the appearance of a witness "at the time and place mentioned within." At the next term of court the witness appeared and was told by the attorney for the commonwealth, without any notice to return at a future term, that he could go. *Held*, that the terms of the bond were complied with and the sureties released.—Com. v. Stephens, 8 Ky. Law Rep. 61.

[n] (Miss. 1886) The circuit court, as a court of oyer and terminer, has the power to require a witness, who has been subpœnaed to testify for the state before the grand jury, to enter into a recognizance to appear either at a present or future term.—Gwynn v. State, 64 Miss. 324, 1 South. 237.

[o] (N. J. 1824) Witnesses in behalf of the prisoner may be compelled to recognize for their appearance at the trial.—State v. Zellers, 7 N. J. Law (2 Halst.) 220.

[p] (N. J. 1880) Under Revision, p. 266, § 2, relating to recognizances of witnesses, magistrates have power, in criminal cases, to require witnesses examined by them to give recognizances, with sureties, for their appearance at the trial, and to commit them to the county jail in default thereof.—State v. Walsh, 3 N. J. Law J. 119.

[q] (N. Y. 1824) A witness from a foreign state, attending before arbitrators, is privileged from arrest; and, if arrested, will be discharged absolutely, and without filing common bail.—Sanford v. Chase, 3 Cow. 381.

[r] (Ohio, 1848) Swan's St. pp. 538, 539, authorizing a magistrate to require a witness in a criminal case to enter into a recognizance for his appearance, does not authorize the magistrate to exact recognizance with security, his own recognizance being sufficient.—Latshaw's Case, 1 Ohio Dec. 90.

§ 35. —— Form and requisites of bond and enforcement thereof.

[a] (Mass. 1815) An action of debt will lie on a recognizance running to the commonwealth.—Commonwealth v. Green, 12 Mass. 1.

[b] (N. Y. 1844) A recognizance for the appearance of a witness to testify on an indictment in a court of sessions must acknowledge an indebtedness to the people, and mention the offense charged, or no action can be had thereon.—People v. Rundle, 6 Hill, 506.

[c] (N. Y. 1849) A recognizance by the prosecutor of a criminal complaint, which by statute is to be conditioned that the prosecutor shall appear and testify at the next court having cognizance thereof, is not vitiated by the addition of the words "as well to the grand as the petit jury, and not depart the said court without leave."—People v. Millis, 5 Barb. 511.

[d] (N. C. 1839) The words of the act of 1715, prescribing that the magistrate shall take recognizances from the informer and witnesses to appear at the next court "where the matter is cognizable," and that the recognizances shall be returned into the office of "the court wherein the matter is to be tried," are merely directory as to the time and place of returning the proceedings, so that they may be acted on speedily and efficiently, for the advantage of each side. They mean only that the return shall be made to the next term of the court, in which, according to the recognizance, the party is to appear, so that the party shall not be required to appear at one term, or in one court, and the recognizance be returned to a subsequent term, or to a different court.—State v. Edney, 20 N. C. (3 & 4 Dev. & B.) 513.

[e] (Tex. 1890) Under Code Cr. Proc. art. 314, requiring an examining magistrate to certify to all the proceedings had before him, failure to certify that bail was required for appearance as a witness is fatal to the enforcement of the bail-bond, and parol evidence of the fact is inadmissible to supply the omission.—Foat v. State, 28 Tex. App. 527, 13 S. W. 867.

[f] (Tex. 1890) Under Code Cr. Proc. art. 318, providing that witnesses may be required by the magistrate, "upon the examination of any criminal accusation before him," to give bail for their appearance, etc., a witness' bail-bond not executed till four days after the examination is concluded, and the examining court has adjourned, and where no order requiring the bond had been entered of record by the magistrate, is void.—Foat v. State, 28 Tex. App. 527, 13 S. W. 867.

[g] (Vt. 1835) A recognizance by a justice of the peace, for the appearance of a witness, is not vitiated by containing the condition "and not depart without leave of court." The statute prescribes no particular form.—State Treasurer v. Woodward, 7 Vt. 529.

§ 36. Taking into custody, commitment, and detention of witnesses.

Right to fees during detention, see post, § 61.

[a] (U. S. 1860) A person arrested under Act Aug. 8, 1846 (9 Stat. 73), as a witness on the part of the United States in a criminal case, and unable to give the bond of $5,000 on being imprisoned, filed an affidavit stating that he was not in possession of certain documents, which it was desired that he should produce, and that he was not responsible for their alleged loss; that he was a householder and resident, and had been for the past 13 years, and that his health was feeble, and that the imprisonment was injurious. The government furnished no testimony directly contradicting any of these statements, and did not prove that the petitioner was able to give bail for his appearance. *Held*, that he might be discharged on executing his own recognizance in $1,000 penalty to appear and testify.—United States v. Lloyd, Fed. Cas. No. 15,614 [4 Blatchf. 427].

[b] (U. S. 1882) Where a federal court orders the arrest of a witness charged with having failed to obey a subpœna issued by it, and duly served, and the witness departs into another district before he can be arrested, any judge of the United States, having jurisdiction in the district to which the witness has removed, may order his arrest and removal back to the district in which he is charged with the offense.—In re Ellerbe (C. C.) 13 Fed. 530.

[c] (Cal. 1874) When a witness for the people in a criminal case is required to enter into an undertaking with sureties, to appear and testify, and is committed for failure to comply, and it appears that he is unable to procure sureties, he may be discharged, and his deposition may be forthwith taken on behalf of the people.—People v. Lee, 49 Cal. 37.

[d] (Cal. 1885) Where witnesses shall not be "unreasonably detained" (Const. art. 1, § 6), a witness who is detained for 90 days, and after several continuances, not satisfactorily accounted for, is entitled to discharge on habeas corpus.—Ex parte Dressler, 67 Cal. 257, 7 Pac. 645.

[e] (Iowa, 1878) Only in a case of actual contempt, and when necessary to the administration of justice, can a witness be arrested on a warrant directing his arrest in vacation. Under Code 1873, § 4217, the court may order his discharge by the officers entrusted with the writ, upon bail fixed by the court.—State v. Archer, 48 Iowa, 310.

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[f] (Iowa, 1880) The decision of a magistrate ordering the commitment of a witness, under Code 1873, §§ 4248, 4249, 4251, for refusal to give security for his appearance, must be presumed legally and regularly made, and based on sufficient grounds.—Markwell v. Warren County, 53 Iowa, 422, 5 N. W. 570.

[g] (Mich. 1895) Although a person may, on proper showing, be held in custody as a witness, such detention will not be permitted merely on ex parte affidavits.—In re Lewellyn, 104 Mich. 318, 62 N. W. 554.

[h] (Mich. 1895) Persons detained as witnesses are held "upon civil process," under How. Ann. St. § 8941, providing that persons held on civil process shall not be confined in a room with those arrested on a criminal charge.—In re Lewellyn, 104 Mich. 318, 62 N. W. 554.

[i] (Minn. 1872) Under Laws 1868, c. 71, providing that on affidavit filed by the prosecuting attorney, stating that affiant has good reason to believe that certain persons, material witnesses, will leave the state before the trial, the court may order such persons brought before it, and, if in its judgment the circumstances of the case or the interests of the state warrant it, it may require such person to enter into a recognizance, with or without surety, as it might direct, and for a refusal to comply commit him to jail to await the trial, a witness for the state, who is willing to enter into his own recognizance to appear and testify at the trial, cannot be committed to await the trial, unless he intends to leave the state, and not return or be present at the trial, or otherwise evade his obligation to appear and testify, and, as thus construed, the act is not unconstitutional.—State v. Grace, 18 Minn. 398 (Gil. 359).

[j] (Minn. 1872) Where one accused of felony has been held to answer in the district court, the prosecution is deemed "pending" in such court, within the meaning of Laws 1868, c. 71, providing for the compulsory attendance of witnesses by committing them to jail, or holding them to bail, though the return of the magistrate may not have been filed.—State v. Grace, 18 Minn. 398 (Gil. 359).

[k] (Ohio, 1893) Under Rev. St. §§ 7150–7153, an examining magistrate has power, in the exercise of a sound discretion, to commit to prison a necessary witness against a person accused of crime.—Fawcet v. Linthecum, 7 Ohio Cir. Ct. R. 141.

5. PUNISHMENT OF DISOBEDIENCE TO SUBPŒNA AS CONTEMPT, AND DAMAGES AND PENALTIES FOR FAILURE TO OBEY SUBPŒNA.

EXCUSES FOR FAILURE TO ATTEND, § 37.
PUNISHMENT OF DISOBEDIENCE TO SUBPŒNA AS CONTEMPT, § 38.
REFUSAL TO BE SWORN OR TO TESTIFY, § 39.
DISOBEDIENCE OF SUBPŒNA DUCES TECUM, § 40.
DEPARTURE OR ABSENCE DURING TRIAL AND DISCHARGE, § 41.
DAMAGES AND PENALTIES FOR FAILURE TO OBEY SUBPŒNA, § 42.
—— PROCEEDINGS TO ENFORCE, § 43.

Prevention of attendance of witness as criminal contempt, see "Contempt," vol. 10, c. 2379, § 4 [x].

§ 37. Excuses for failure to attend.

Payment or tender of fees and expenses, see ante, §§ 15, 16.

[a] (Ala. 1852) A defaulting witness may excuse himself by showing that, in failing to attend, he was not guilty of either negligence or willful disobedience, and this should be the limit of the power of the courts below in allowing excuses.—Maclin v. Wilson, 21 Ala. 670.

[b] (N. Y. 1836) A witness duly subpœnaed is bound to make extraordinary efforts to attend. Nothing but extreme poverty or sickness of himself or family will excuse him.—People v. Davis, 15 Wend. 602.

[c] (N. Y. 1852) Where a party has delayed the service of a subpœna, so as not to give the witness reasonable time to prepare to attend the trial, his nonattendance will be excused on comparatively slight grounds, although the shortness of the notice is not per se an excuse.—Chalmers v. Melville, 1 E. D. Smith, 502.

[d] (N. Y. 1853) That a witness deems his testimony immaterial does not excuse nonattendance.—Bonesteel v. Lynde, 8 How. Prac. 226; Id. 352.

[e] (N. Y. 1874) In a proceeding to punish a witness for contempt for neglecting to attend in obedience to a subpœna, it is a sufficient answer that he knows nothing material to the issue.—Morgan v. Morgan, 16 Abb. Prac. (N. S.) 291.

[f] (N. C. 1842) The inability of a witness to attend court must be decided in reference to the modes of traveling which are in use in the community. If there are modes not impracticable, and it does not appear but that they were in the power of the party summoned, his nonattendance cannot be attributed to inability.—Eller v. Roberts, 25 N. C. 11.

[g] (Pa. 1788) Witnesses who failed to obey a subpœna because they were so ill as to be unable to do so are not in contempt.—Butcher v. Coats, 1 Dall. 340, 1 L. Ed. 166.

[h] (Pa. 1827) The absence of a witness is not excused by the difficulty of bringing her to the courthouse on account of lameness, provided her general health is good.—Pipher v. Lodge, 16 Serg. & R. 214.

[i] (Tenn. 1858) The extreme illness of witness' wife, "so that his attention to her was absolutely necessary to her comfort and safety," is not an excuse for failure to attend.—Slaughter v. Birdwell, 38 Tenn. (1 Head) 341.

[j] (Tenn. 1858) Under Acts 1794, c. 1, § 29, the only "incapacity" which will excuse a witness duly summoned from its penalties for nonattendance is a physical incapacity.—Slaughter v. Birdwell, 38 Tenn. (1 Head) 341.

[k] (Tenn. 1874) Serious illness of a witness' wife is a sufficient cause for his failure to attend court, within Code, § 3822.—Foster v. McDonald, 59 Tenn. (12 Heisk.) 619.

§ 38. Punishment of disobedience to subpœna as contempt.

Place where attendance may be required, see ante, § 9.

Constitutional guaranty against deprivation of liberty as applied to imprisonment of witnesses for refusal to appear or testify, see "Constitutional Law," vol. 10, cc. 2161, 2162, § 744.

Duty of witness observing Saturday as Sabbath, see "Sunday," vol. 45, c. 165, § 85 [a].

Punishment of bankrupt or witnesses for failure to appear or answer interrogatories on examination in bankruptcy, see "Bankruptcy," vol. 6, cc. 461, 462, § 405.

[a] If a witness merely disobeys a subpœna, the court will not in the first place grant an attachment for contempt, but the practice is to move for a rule to show cause.
—(N. Y. 1805) Jackson v. Mann, 2 Caines, 92; (Va. 1814) Morris v. Creel, 1 Va. Cas. 333.

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[b] (U. S. 1860) A defendant, made liable by the state statute to examination as a witness for plaintiff, is liable to be attached for contempt in not obeying a subpœna issued by the federal circuit court and served on him, commanding him to attend and be examined on the trial of a civil suit at common law, pending in such court.—Fowler v. Hecker, Fed. Cas. No. 5,001 [4 Blatchf. 425].

[c] (Ala. 1838) A defendant, who neglects to answer on service of a subpœna upon him, places himself in contempt of the process of court.—Mussina v. Bartlett, 8 Port. 277.

[d] (Ala. 1848) A witness summoned before a grand jury to give evidence of crime, who declines to answer, may be proceeded against by indictment, but cannot be fined for contempt.—State v. Blocker, 14 Ala. 450.

[e] (Ill. 1850) If a witness refuses to appear before the master or to answer, the court, on information thereof, will punish him for contempt.—Brockman v. Aulger, 12 Ill. (2 Peck) 277.

[f] (Ind. 1877) An attachment for contempt of court may be issued against a witness, based solely on the sheriff's return on a subpœna for such witness, showing the latter to have willfully refused to permit such subpœna to be served on him, and his refusal, with knowledge of its nature, to obey the same.—Wilson v. State, 57 Ind. 71.

[g] (Iowa, 1870) A witness is not entitled to release from commitment on habeas corpus, because the affidavit desired by the party at whose instance the subpœna was issued would not be legally admissible in the proceeding, pending in another forum, for which it is sought or in which it is desired to be used. Of this the witness or person subpœnaed has no right to judge.—Robb v. McDonald, 29 Iowa, 330, 4 Am. Rep. 211.

[h] (Iowa, 1883) A person subpœnaed to make affidavit before a justice of the peace, as permitted by Code 1873, §§ 3692, 3693, who refuses obedience, may be committed for contempt, although the affidavit may be useless as evidence in the case in which it is desired, and he cannot be released on habeas corpus.—State v. Seaton, 61 Iowa, 563, 16 N. W. 736.

[i] (Mich. 1862) Discontinuance of a suit obliges the discharge of one summoned as a witness therein and committed for contempt of court for refusal to answer.—In re Hall, 10 Mich. 210.

[j] (N. Y. 1857) A defendant was summoned to appear before a county judge for examination on behalf of plaintiffs, under Code, § 391, and on the day appointed made default in attendance without any sufficient excuse, and the examination was continued to a later day by stipulation between the attorneys for both parties. On the day appointed by the stipulation defendant did not appear. *Held*, that defendant would not be held in contempt, as it did not appear that plaintiffs appeared at that time, nor that there was any reason given why they did not, and the inference was that plaintiffs had abandoned the proceedings.—Gardiner v. Peterson, 14 How. Prac. 513.

[k] (N. Y. 1885) It is not an indictable criminal contempt to disobey the subpœna of the district attorney issued in a criminal case. Such disobedience is not embraced in subdivision 3, § 10, 2 Rev. St., which specifies "willful disobedience of any process or order lawfully issued or made by it," (a court of record.)—Sherwin v. People, 100 N. Y. 351, 3 N. E. 465.

[l] (N. Y. 1887) The refusal of a witness to attend court, when summoned, is contempt, and punishable under Code Civ. Proc. § 2284, though no actual loss is caused thereby.—People v. Brown, 46 Hun, 320.

[m] (Ohio, 1834) The object of an attachment against a witness for contempt is to punish him, not to redress the party injured.—State v. Nixon, Wright, 763.

[n] (Ohio, 1878) In a proceeding in aid of execution, before a referee, under Code, § 459, a witness was subpœnaed by the clerk of the court of common pleas to appear before the referee to testify; but no order had been made by the court for the examination of witnesses other than the judgment debtor, and the witness refused to appear in obedience to the subpœna. *Held*, that the subpœna issued by the clerk was not an order of the court, and the witness was not bound to obey the same, and therefore was not liable to be attached as for contempt.—Harman v. Waller, 1 Cleve. Law Rep. 26, 4 Ohio Dec. 97.

[o] (S. C. 1837) The termination of a cause before an attachment for a contempt is moved for against a witness does not destroy the power of the court to punish him.—Johnson v. Wideman, Dud. 70.

[p] (Va. 1834) A circuit superior court ordered a subpœna for witnesses to attend the grand jury, then in session, and they intentionally concealed themselves from the sheriff to prevent the process from being served, and so prevented it from being served, until the grand jury was discharged. *Held*, on the construction of St. 1830–31, c. 11, § 25, that this was not a contempt punishable by the court in a summary manner.—Commonwealth v. Deskin, 4 Leigh, 685.

§ 39. Refusal to be sworn or to testify.

Refusal of expert to testify without additional compensation as contempt, see post, § 66.

[a] (U. S. 1886) Witnesses before an examiner will be compelled to answer, when it seems probable the testimony may be relevant; but care will be exercised to avoid unnecessary and improper inquiry into private affairs.—Robinson v. Philadelphia & R. R. Co. (C. C.) 28 Fed. 340.

[b] (U. S. 1891) On an examination before a special examiner a witness will be compelled, by proceedings in contempt, to answer questions that seem to be material to the issue.—Johnson Steel Street Rail Co. v. North Branch Steel Co. (C. C.) 48 Fed. 196.

[c] (U. S. 1892) In the case of the refusal to testify of a witness subpœnaed on the trial of an interference, the remedy is by petition for an attachment for contempt, and not for an order to compel the witness to answer the questions put to him.—Brungger v. Smith (C. C.) 49 Fed. 124.

[d] (Ga. 1887) Upon a prosecution for libel, under Code, § 4522, the court may fine and imprison the publisher of the newspaper containing the libel, who refuses to give up the real name of the author of the publication, or to testify at all, although he may have been indicted for the same offense.—Pledger v. State, 77 Ga. 242, 3 S. E. 320.

[e] (Mich. 1860) A magistrate having jurisdiction, under Comp. Laws, c. 194, to examine and commit for trial, or hold to bail, persons charged with crimes not cognizable before a justice of the peace, has no power to commit a witness for refusing to testify on such examination. He has no powers except such as are expressly conferred by this chapter.—In re Farnham, 8 Mich. 89.

[f] (Mo. 1879) Where a witness pertinaciously refuses to answer a lawful question, to compel obedience the court may order his imprisonment until he does answer, and need not limit his imprisonment to a given number of days; and this, whether such contumacious refusal to answer be before the court or the grand jury.—Ex parte Renshaw, 6 Mo. App. 474.

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[g] (N. Y. 1838) A defendant may refuse to answer an illegal or improper question, on an examination under an order of reference; but, if he refuses to answer a proper question, he may be punished by the court for a contempt in refusing to answer.—Gihon v. Albert, 7 Paige, 278.

[h] (N. Y. 1853) Where complaint is made that an offense has been committed, the magistrate may compel the attendance of witnesses; and if any witness, on being brought before the magistrate, refuses to be sworn and to testify, he may be adjudged guilty of a criminal contempt, and punished by imprisonment.—People v. Hicks, 15 Barb. 153.

[i] (N. Y. 1857) The power of a justice of the peace to commit a witness, under 2 Rev. St. p. 274, § 279, for refusing to be sworn as provided in that section, is conditional, being dependent upon the fact that the party at whose instance the witness attends shall make oath that the testimony of the witness is so far material that without it he cannot safely proceed in the trial of the cause. The power of the justice to commit does not vest until the party makes such oath. Hence this provision is not applicable to the case of the refusal on the part of a person arrested on a charge of intoxication, under Laws 1857, c. 628, to be sworn as to the cause of his intoxication.—People v. Webster, 14 How. Prac. 242.

[j] (N. Y. 1857) Justices of the peace in this state have no power to commit persons refusing to be sworn as witnesses, in examinations before them on complaints in criminal causes. People v. Webster, 3 Parker, Cr. R. 503.

[k] (N. Y. 1861) Where a witness is committed for refusing to testify, it is not necessary that the commitment should show affirmatively that he was not entitled to the privilege claimed by him, though the commitment state that he claimed the privilege.—People v. Kelly, 12 Abb. Prac. 150.

[l] (N. Y. 1889) Under Code Civ. Proc. §§ 856, 857, authorizing the judge, on proof by affidavit that a witness refuses to answer a legal question, to commit him to jail by warrant, specifying the cause of commitment, etc., the fact that notice of the application was given, and an order to show cause granted, does not require a decision evidenced by an order in writing, as the statute does not require notice or rule to show cause, and such procedure is a mere nullity.—In re McAdam, 54 Hun, 637, 7 N. Y. Supp. 454, affirming judgment 5 N. Y. Supp. 387.

[m] (S. C. 1818) A witness persevering in silence, when questioned, may be committed for contempt, and confined until he does answer.—Lott v. Burrel, 2 Mill, Const. 167.

[n] (Tenn. 1884) If a witness appear under a subpœna issued by order of the attorney general during the term of court to testify as to gaming and refuse to answer, he is not guilty of contempt, since the attorney general has no authority to order such subpœna issued.—Warner v. State, 81 Tenn. (13 Lea) 52.

[o] (Vt. 1874) On a proceeding under Gen. St. c. 94, § 10, for the punishment of intoxication, it is error to require defendant to disclose the place where and the person of whom he procured the liquor, and to commit him for failure to make the disclosure, as this is a proceeding under section 33, in which there is no prosecution of the intoxicated person.—In re Pierce, 46 Vt. 374.

[p] (Wis. 1889) Rev. St. §§ 2515, 2517, give the municipal judge of Dane county all the power and jurisdiction of a justice of the peace in criminal matters, and confer on him exclusive jurisdiction of all criminal cases in the city of Madison. Section 4053 provides that subpœnas may issue by any justice of the peace, municipal judge, or police justice, requiring the attendance of witnesses within the territory in which such officer has jurisdiction, in any action, matter, or proceeding pending or to be examined into before any court, magistrate, or officer. Sections 4763, 4776, provide that, on complaint being made to such magistrate that a crime has been committed, he shall examine on oath the complainant, and any witnesses produced by him, and reduce the same to writing; and, in case any person summoned fail or refuse to appear, or any witness appearing shall refuse to be sworn, he shall be liable to the same penalties, and shall be proceeded against as provided in case of jurors and witnesses in justices' courts in civil cases. *Held* that, in examining whether a crime has been committed, the municipal judge may also examine as to who committed it, and for that purpose he has discretionary power to issue subpœnas for such witnesses as he deems necessary; and, where one subpœnaed refuses to be sworn or testify, such municipal judge may punish him for contempt.—State v. Keyes, 75 Wis. 288, 44 N. W. 13.

§ 40. Disobedience of subpœna duces tecum.

Compliance with writ in general, see ante, § 25.
Sufficiency of writ, see ante, § 22.

[a] (La. 1873) The consequence of not producing books and papers in obedience to a subpœna duces tecum is not imprisonment for contempt, but the party who has obtained the subpœna has the right to ask that the facts which he states in his affidavit for the subpœna be taken as proved.—Columbia Fire Co. v. Purcell, 25 La. Ann. 283.

[b] (Mo. 1879) The manager of a local telegraph office will be committed for contempt where he refuses to obey a subpœna duces tecum, issued by the court at the instance of the grand jury, commanding him to produce before the grand jury all telegrams or copies of telegrams in his office which passed between certain persons named during the last six months.—Ex parte Brown, 7 Mo. App. 484, affirmed (1880) 72 Mo. 83, 37 Am. Rep. 426.

[c] (N. Y. 1861) The refusal of a witness to produce papers acknowledged to be in his possession, for the reason that it would be a breach of his privilege as attorney, constitutes contempt.—In re Mitchell, 12 Abb. Prac. 249.

[d] (N. Y. 1864) On application for an order for the issue of an attachment against a witness for contempt of court during a hearing before a referee, it appeared that the witness was directed, while under examination, to produce certain books not then in court, and which he declared under oath that he could not then produce. No prior notice to produce the books had been given to the witness. *Held*, that the application must be refused.—Heerdt v. Wetmore, 25 N. Y. Super. Ct. (2 Rob.) 697.

[e] (N. Y. 1874) In a proceeding to punish a witness for contempt for neglecting to attend, in obedience to a subpœna duces tecum, it is a sufficient answer that he has not any document, such as he is called upon to produce, material and necessary as evidence tending to prove the case of the party requiring his attendance.—Morgan v. Morgan, 16 Abb. Prac. (N. S.) 291.

[f] (N. Y. 1888) The mere assertion of officers of a corporation that the corporation's books are not in their possession is not sufficient to purge them of contempt in disobeying an order of court for the production of the books at an examination before trial, where it has been shown that the books were lately in their possession, and they have failed in any manner to account for their disappearance.—Fenlon v. Dempsey, 21 Abb. N. C. 291.

[g] (N. Y. 1893) The court may punish for contempt one who fails to produce books pursuant to the subpœna duces tecum.—Holly Mfg. Co. v. Venner, 74 Hun, 458, 26 N. Y. Supp. 581, judgment affirmed (1894) 143 N. Y. 639, 37 N. E. 648.

[h] (Tex. 1896) A defendant to whom a subpœna duces tecum has been issued, requiring him to produce his account books to be used as evidence for plaintiff, who appears, but refuses to produce the books, is guilty of contempt.—Cullers v. Birge (Civ. App.) 34 S. W. 986.

§ 41. Departure or absence during trial and discharge.

Payment or tender of fees, see ante, § 16.
Sufficiency of subpœna, see ante, § 12 [e].

[a] (N. Y. 1887) A witness subpœnaed to attend forthwith, who went promptly, and, when he arrived, found that the court had adjourned, on which he returned to his home, should not have been punished for contempt.—People v. Potter, 6 N. Y. St. Rep. 753.

[b] (Ohio, 1834) If a party gives his witness leave of absence, and he departs, he is not in contempt, and, if attached, will be discharged at the cost of the party.—State v. Nixon, Wright, 763.

[c] (Pa. 1887) Where witnesses were in attendance at court, and it was found that the case would not be reached before the following week, they were permitted by the court to go home before Saturday, to return the following Monday; but in such a case special permission from the court is necessary, and should be entered of record.—Commonwealth v. Smith, 4 Pa. Co. Ct. R. 321.

[d] (Tenn. 1839) A nonsuit, though set aside at the same term at which it is taken, operates as a discharge of the witnesses in attendance.—Cochran v. Brown, 20 Tenn. (1 Humph.) 329.

§ 42. Damages and penalties for failure to obey subpœna.

[a] (Ala. 1852) The statute imposing a forfeiture on a defaulting witness does not give the party summoning the witness any right to this sum; but it is imposed as a punishment on the delinquent.—Maclin v. Wilson, 21 Ala. 670.

[b] (Ala. 1858) To justify a judgment against a defaulting witness, who was summoned to give evidence before the grand jury, the record must affirmatively show a substantial compliance with the statute. Code, § 3492.—Durden v. State, 32 Ala. 579.

[c] (Iowa, 1859) Where a witness is a party to a suit in which his attendance is required, no technical objection to the regularity or sufficiency of the subpœna should be suffered to prevail, in a suit to recover damages for failing to obey the same.—McCall v. Butterworth, 8 Iowa (8 Clarke) 329.

[d] (Iowa, 1859) In an action for damages for failing to obey a subpœna, it is not indispensably necessary that the return of the officer should show that a copy of the subpœna was delivered to the witness.—McCall v. Butterworth, 8 Iowa (8 Clarke) 329.

[e] (Mich. 1845) It is no answer to an action for damages occasioned by defendant's nonattendance as a witness, that the court from which the subpœna issued, refused, on motion, to impose a fine on defendant for contempt in disobeying the supbœna, but accepted his excuse.—Prentiss v. Webster, 2 Doug. 5.

[f] (Mo. 1852) A witness, subpœnaed, his fees having been tendered to him, who fails to attend on the trial to which he is summoned, is liable for the damages occasioned by his nonappearance, though the suit wherein he was summoned has not been determined.—Connett v. Hamilton, 16 Mo. 442.

[g] (N. Y. 1834) An action on the case will not lie against a witness for nonattendance in court; it appearing that plaintiff voluntarily submitted to a nonsuit, and that the witness appeared at the place of trial a short time after the nonsuit was entered, and it appearing, also, that plaintiff could have proved in another way all the facts essential to his recovery.—West v. Tuttle, 11 Wend. 639.

[h] (N. Y. 1846) A witness is not liable to the penalty fixed by the statute for not attending when subpœnaed, unless his evidence is material.—Courtney v. Baker, 3 Denio, 27.

[i] (N. Y. 1847) An action may be maintained against a defaulting witness for the penalty and the damages sustained by plaintiff, though a jury was not sworn in the cause in which the witness was subpœnaed.—Hurd v. Swan, 4 Denio, 75.

[j] (N. Y. 1847) To enable plaintiff to recover the costs of circuit against a defaulting witness, it must appear that the failure to try the cause was on account of his absence.—Hurd v. Swan, 4 Denio, 75.

[k] (N. Y. 1882) In order to recover the statutory penalty for the nonattendance of a witness, it must be shown that he was a material witness, and that damages resulted from his nonattendance.—Carrington v. Hutson, 28 Hun, 371.

[l] (N. C. 1809) A witness for the state, who has judgment nisi entered against him on his recognizance, may apply for a remission of the forfeiture, if he do it before a sci. fa. is issued against him.—State v. Herndon, 5 N. C. 269.

[m] (Tenn. 1833) It is a good defense for a witness, against whom a forfeiture has been taken for nonattendance, that he was discharged by the party who subpœnaed him, or told to attend if it was convenient, and, if not, that he should not be called out; but the witness cannot discharge himself on his own affidavit.—Duke v. Given, 12 Tenn. (4 Yerg.) 478.

[n] (Tenn. 1835) A witness who fails to attend on subpœna by the grand jury is not liable to a forfeiture, since he should be summoned by the court.—State v. Butler, 16 Tenn. (8 Yerg.) 83.

[o] (Tenn. 1836) It is not necessary that the witness should have been summoned in the county in which he resided, to incur the forfeiture for nonattendance. A legal summons executed on him personally, or left at his place of residence, is sufficient.—Smith v. Barger, 17 Tenn. (9 Yerg.) 322.

[p] (Tenn. 1883) The forfeiture given by statute may be taken against a witness regularly summoned and failing to appear, although it does not appear affirmatively that his default was willful.—State v. Thomas, 79 Tenn. (11 Lea) 113.

[q] (Vt. 1838) A witness who has had his travel fee and one day's attendance tendered, and who attended one day and then left the court, is not liable for the penalty under the statute, if the subpœna was served by an indifferent person, who was not named in the subpœna.—Mattocks v. Wheaton, 10 Vt. 493.

§ 43. —— Proceedings to enforce.

Justice court's jurisdiction, see "Justices of the Peace," vol. 31, c. 989, § 134.

[a] (Ala. 1836) The fact that no return appears on a scire facias issued against a defaulting witness is sufficient ground for reversing a judgment rendered thereon.—Catoe v. Harrison, 3 Port. 219.

[b] (Ala. 1844) On scire facias against a witness for a failure to obey a subpœna, the witness may excuse himself on his own oath.—Livingston v. Lucas, 6 Ala. 147.

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[c] (Ala. 1852) A scire facias against a defaulting witness should set out the subpœna, either verbatim or substantially, and aver that it was served. It should also contain an averment showing at what day and term the witness was bound to appear, or it is fatally defective.—Emanuel v. Ketchum, 21 Ala. 257.

[d] (Ala. 1852) In scire facias against a defaulting witness, against whom a judgment nisi has been rendered, the writ, when no declaration is filed, should show by positive averment that a subpœna had been issued and served, and then set out in substance the judgment nisi; in short, every material fact to entitle plaintiff to judgment.—Spence v. Simmons, 21 Ala. 563.

[e] (Ala. 1866) A demurrer which does not state any specific objection to a scire facias against a defaulting witness should be overruled.—Pomeroy v. State, 40 Ala. 63.

[f] (Iowa, 1859) In an action for damages for failure to appear as witness in obedience to a subpœna, the return of service upon the subpœna not being conclusive, plaintiff may show by evidence aliunde that the writ was duly and legally served.—McCall v. Butterworth, 8 Iowa (8 Clarke) 329.

[g] (Mich. 1845) In an action for damages occasioned by defendant's nonattendance as a witness in obedience to a subpœna, plaintiff is entitled to recover any damages immediately consequential upon such nonattendance; e. g., that occasioned by the postponement of the trial.—Prentiss v. Webster, 2 Doug. 5.

[h] (Miss. 1886) Where a judgment nisi has been rendered "for a failure to appear to testify before the grand jury," etc., and a sci. fa. is issued to show cause why a judgment should not be entered for a failure to appear "to answer to the state of Mississippi on a charge preferred against him," etc., there is a fatal variance, which necessitates the amendment of the writ. In these cases writs of sci. fa. should be amended to accord with the judgment nisi.—Gwynn v. State, 64 Miss. 324, 1 South. 237.

[i] (N. Y. 1828) In an action for the penalty imposed by 1 Rev. Laws, p. 524, for nonattendance of witness, the declaration must aver that the fees were paid or tendered to the witness.—McKeon v. Lane, 1 Hall, 319.

[j] (N. Y. 1836) Under 2 Rev. St. p. 400, authorizing the recovery of damages and also a penalty against witnesses for nonattendance when duly subpœnaed, and giving, by section 43, the "proper action" for the injury complained of, a count in case and a count in debt might be joined in the same declaration.—Smith v. Merwin, 15 Wend. 184.

[k] (N. Y. 1846) A witness not being liable to the penalty fixed by statute for not attending when subpœnaed, unless his evidence is material, the admission of the party suing for the penalty that the witness knew nothing about the matter in controversy is admissible in a suit for such penalty.—Courtney v. Baker, 3 Denio, 27.

[l] (Tenn. 1836) In a scire facias, issued to enforce the penalty for the nonattendance of a witness, it is not necessary to set out the subpœna verbatim.—Smith v. Barger, 17 Tenn. (9 Yerg.) 322.

[m] (Tenn. 1842) A scire facias, to have execution for the penalty of a subpœna, must show by direct averment of the time of the service of the subpœna and of the time of the trial, that the defendant was bound to attend at that time.—State v. Lacy, 22 Tenn. (3 Humph.) 225.

[n] (Tenn. 1850) A judgment nisi against a witness for a failure to attend in accordance with a subpœna must show that the subpœna was executed five days before the court to which it was returnable, or it will be void.—Dickenson v. Kincaid, 30 Tenn. (11 Humph.) 72.

[o] (Tenn. 1852) The penalty given by the statute to be recovered against witnesses who have been summoned at the instance of the accused in a criminal prosecution, and who fail to attend, can only be recovered in the name of and for the use of the state.—Nelson v. Ewell, 32 Tenn. (2 Swan) 271.

[p] (Tenn. 1852) The liability incurred by a witness in default is several in its nature. The remedy to enforce it is against him alone, and it cannot be united with a proceeding against other witnesses in like default.—Nelson v. Ewell, 32 Tenn. (2 Swan) 271.

[q] (Tenn. 1854) A scire facias on a judgment nisi against a witness for nonattendance on a subpœna must state distinctly the legal grounds of his liability, and must leave nothing to implication or inference which the law requires, to render him liable.—Knott v. Smith, 34 Tenn. (2 Sneed) 244.

[r] (Tenn. 1854) Under Acts 1794, c. 1, § 33, a witness summoned in a criminal transaction, failing to appear, forfeits the sum of $250 to the state. *Held*, that a judgment rendered against a defaulting witness for the sum of $125 is void.—State v. Dill, 34 Tenn. (2 Sneed) 414.

[s] (Tenn. 1855) Scire facias against a witness to recover a forfeiture for nonappearance under Acts 1794, c. 1, § 29, must be tested of the term at which the judgment nisi was entered; the witness being required to show cause "at the next term after his failure."—Kincaid v. Rogers, 35 Tenn. (3 Sneed) 1.

[t] (Tenn. 1855) An accidental failure of service of process, properly tested, will not, however, defeat the remedy.—Kincaid v. Rogers, 35 Tenn. (3 Sneed) 1.

[u] (Tenn. 1874) Where the clerk of a chancery court failed to issue a scire facias during the term at which a judgment nisi against a witness had been rendered, an alias scire facias may properly be issued at the next term, requiring defendant to show cause why the judgment nisi should not be made absolute.—Upton v. Girdner, 67 Tenn. (8 Baxt.) 183.

[v] (Tenn. 1895) A scire facias cannot issue against a defaulting witness to appear and show cause why a judgment should not be rendered against him where there is no judgment nisi on which to base the scire facias.—Rogers v. Goins, 95 Tenn. (11 Pickle) 361, 32 S. W. 197.

(C) COMPENSATION.

1. RIGHT TO COMPENSATION, §§ 44-55.
2. NATURE OF SERVICES AND AMOUNT OF COMPENSATION, §§ 56-69.
3. PERSONS LIABLE, PAYMENT, AND RECOVERY, §§ 70-76.

Payment or tender as condition precedent to attendance, see ante, §§ 15, 16.

—— *to production of document, see* ante, § 24.

At coroner's inquest, see "Coroners," vol. 11, cc. 2393, 2394, § 26.

Consideration for promise to pay witnesses for attending court, see "Contracts," vol. 11, c. 249, § 274.

Constitutional guaranty against deprivation of property as applied to statutes prohibiting speculation in witness fees, see "Constitutional Law," vol. 10, c. 2244, § 841 [y].

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Discretion of trial court as to allowance, see "Appeal and Error," vol. 2, c. 1211, § 583 [p]; vol. 3, cc. 1744, 1745, § 3885.
Failure to make compensation ground for continuance, see "Continuance," vol. 10, c. 2739, § 85.
Fees as costs in criminal cases, see "Costs," vol. 13, cc. 1082–1086, §§ 1177–1184.
—— *of garnishees as witnesses, see* "Garnishment," vol. 24, cc. 2156, 2157, § 245.
In admiralty, see "Admiralty," vol. 1, c. 1938, § 842.
In bankruptcy proceedings, see "Bankruptcy," vol. 6, c. 879, § 899.
Ownership of fees and mileage of witness taxed as costs, see "Costs," vol. 13, c. 852, § 832.
Recovery as costs of witness fees, see "Costs," vol. 13, cc. 675–700, §§ 715–743.
Sufficiency of consideration for promise to pay excessive witness fees, see "Contracts," vol. 11, c. 226, § 252 [u].

1. RIGHT TO COMPENSATION.

IN GENERAL, § 44.
RESIDENCE OF WITNESS, § 45.
NECESSITY AND SUFFICIENCY OF SUBPŒNA, § 46.
ATTENDANCE AT COURT, § 47.
FAILURE OR INABILITY TO TESTIFY, § 48.
EFFECT OF CONTINUANCE OR POSTPONEMENT, § 49.
PERSONS ENTITLED, § 50.
—— PUBLIC OFFICERS, § 51.
—— ATTORNEYS AT LAW, § 52.
—— PARTIES, § 53.
—— OFFICERS, AGENTS, OR MEMBERS OF CORPORATION, § 54.
LIMITATION OF NUMBER OF WITNESSES, § 55.

§ 44. In general.

[a] (U. S. 1886) Witnesses do not lose their right to mileage and per diem by not insisting on prepayment; and the party summoning them, being bound to pay such mileage and per diem, may tax them in his costs.—Young v. Merchants' Ins. Co. (C. C.) 29 Fed. 273.

[b] (Iowa, 1853) Under Code 1873, § 2544, allowing compensation to a witness for attending a trial before a justice of the peace, a witness is entitled to his fees from the county for his attendance in criminal cases on a preliminary examination before a justice of the peace.—Johnson County v. Porter, 4 G. Greene, 79.

[c] (Kan. 1878) In the absence of express statutory provision therefor, a witness for the prosecution is not entitled to fees, unless there is a conviction.—Shawnee County v. Ballinger, 20 Kan. 590.

[d] (Ky. 1830) A witness who attends and deposes, in obedience to a subpœna which he has acknowledged by a written indorsement, is entitled to pay for his attendance.—Brown v. Moore, 26 Ky. (3 J. J. Marsh.) 306, 20 Am. Dec. 142.

[e] (Mo. 1894) A witness who accepts service of a subpœna is entitled to fees for attendance.—McHoney v. Kerwin, 56 Mo. App. 459.

[f] (N. Y. 1808) Poor witnesses appearing for the people on subpœna are equally entitled to pay as if they had agreed on recognizance.—People v. Duell, 3 Johns. 449.

[g] (N. Y. 1887) A third person, who is required to attend and be examined in supplementary proceedings as to property in his possession belonging to the judgment debtor, is not entitled to witness fees.—Heckman v. Bach, 20 Abb. N. C. 401.

[h] (N. C. 1801) A witness is entitled to have his attendance dues taxed in execution, though a previous execution has omitted them.—Anonymous, 3 N. C. 138.

[i] (N. C. 1857) Witnesses summoned by one suing in forma pauperis are entitled to their costs. The officers of the court only are included in the order authorized by Rev. Code, c. 31, § 43.—Morris v. Rippy, 49 N. C. 533.

[j] (N. C. 1876) Where the names of witnesses are indorsed on a bill which was prepared and submitted to the grand jury, such witnesses may be summoned and allowed compensation for attending.—Lewis v. Wake, 74 N. C. 194.

[k] (N. C. 1876) Witnesses cannot be paid for appearing before the grand jury on a general inquiry, since there is no authority for such summonses.—Lewis v. Wake, 74 N. C. 194.

[l] (Pa. 1887) Where a witness is neither subpœnaed nor examined, but attends on request, the court may, if satisfied that the party who procured his attendance did it in good faith, expecting to require his testimony, make an allowance for payment.—Commonwealth v. Smith, 4 Pa. Co. Ct. R. 321.

[m] (Pa. 1890) Act May 19, 1889 (P. L. 129), providing that, in all road cases, "it shall be lawful for the court hearing such proceedings to make such order about the payment of the necessary costs incurred as to the court shall appear right and just," simply authorizes the court to direct by whom the costs shall be paid, and does not empower it to order payment of witness fees, which have never been considered taxable in road cases.—In re Lebanon & Dyberry Road (Quart. Sess.) 8 Pa. Co. Ct. R. 461.

[n] (Pa. 1895) Under Act May 19, 1887, a county is liable for the payment of costs to a witness who appeared before the grand jury and was subpœnaed at the trial though the indictment was quashed, and a new indictment was subsequently found, upon which a trial was had; said witness testifying therein, and the prisoner being convicted.—Richards v. Clearfield County (Com. Pl.) 16 Pa. Co. Ct. R. 227.

[o] (S. C. 1895) Fees and mileage are allowed witnesses, irrespective of whether the action is one at law or in equity.—Coleman v. Curtis, 43 S. C. 1, 20 S. E. 744.

§ 45. Residence of witness.

Right to mileage, see post, §§ 67–69.
—— *for travel outside state or district, see* post, § 68.

[a] (U. S. 1886) All parts of the state of South Carolina are within the jurisdiction of the United States circuit court for the Eastern district of South Carolina; and per diem and mileage will be allowed witnesses attending at a trial in that court who come from the Western district of that state, no matter what the distance.—Young v. Merchants' Ins. Co. (C. C.) 29 Fed. 273.

[b] (Ala. 1893) Though Code, § 2801, provides that the evidence of a witness may be taken by deposition where he resides more than 100 miles from the place of trial, if such a witness attends the trial when subpœnaed he is entitled to his mileage and per diem fees.—Alabama Midland Ry. Co. v. Rushing, 103 Ala. 542, 15 South. 853.

[c] (Ill. 1881) A witness, summoned from another county to testify in a habeas corpus proceeding growing out of an arrest for crime, is entitled to fees, in accordance with Rev. St. c. 65, § 8.—Angell v. Union County, 8 Ill. App. Bradw.) 244.

[d] (N. Y. 1824) A witness attending from a foreign state is within 2 Rev. Laws, p. 29, en-

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titling witnesses attending from a foreign county to 50 cents a day.—Nichols v. Doty, 8 Cow. 352.

[e] (Or. 1886) Act 1885, providing that "in all criminal actions and proceedings witnesses residing within two miles of the place of trial, or the place where they are required to appear and testify, shall not be entitled to receive either witness fees or mileage," is not in conflict with Const. art. 1, § 18, providing that the "particular services" of any man shall not be demanded without just compensation.—Daly v. Multnomah County, 14 Or. 20, 12 Pac. 11.

[f] (Tex. 1881) A witness, who had been subpœnaed in a cause, removed from the county in which the suit was pending. His deposition was taken. He afterwards returned to the county and attended the trial. *Held*, that he was entitled to witness fees.—Allbright v. Corley, 54 Tex. 372.

§ 46. Necessity and sufficiency of subpœna.

[a] (U. S. 1804) A witness may be allowed his fees, although not regularly summoned.—United States v. Williams, Fed. Cas. No. 16,709 [1 Cranch, C. C. 178].

[b] (U. S. 1805) Witnesses who attended in response to a summons, though served by a private person, are entitled to their fees.—Power v. Semmes, Fed. Cas. No. 11,360 [1 Cranch, C. C. 247].

[c] (U. S.) Witnesses may become entitled to fees as having attended a federal court "pursuant to law," though they have done so voluntarily, without being subpœnaed.—(1888) The Vernon (D. C.) 36 Fed. 113; (1889) Eastman v. Sherry (C. C.) 37 Fed. 844; (1893) Pinson v. Atchison, T. & S. F. R. Co. (C. C.) 54 Fed. 464.

[d] (U. S. 1893) Where a witness in a federal court, who lives in another state more than 100 miles away, and therefore cannot be served with subpœna, voluntarily attends in good faith on the request of a party who deemed his testimony material, such witness is entitled to the usual fees and to mileage for 100 miles.—Burrow v. Kansas City, Ft. S. & M. R. Co. (C. C.) 54 Fed. 278.

[e] (Ga. 1895) A nonresident witness who appeared pursuant to a subpœna issued in a criminal case which was not signed by the clerk of the superior court and the solicitor general of the circuit, as required by Code, § 3845, was not entitled to compensation or mileage.—Harris v. Early County, 96 Ga. 186, 22 S. E. 704.

[f] (Mo. 1894) It is error to tax fees of a witness in the absence of evidence that he attended the trial in pursuance of service of a subpœna.—McHoney v. Kerwin, 56 Mo. App. 459.

[g] (N. Y. 1859) Witnesses who come on request, without subpœna, are entitled to the allowance for traveling expenses, and also to the per diem allowance for the days during which the case is actually on the day calendar, and the court actually in session, and the witnesses in attendance.—Vence v. Speir, 18 How. Prac. 168.

[h] (N. C. 1824) A witness, who attends court without a subpœna to him, is not entitled to prove his attendance so as to charge the losing party.—Thompson v. Hodges, 10 N. C. 318.

[i] (Pa.) A witness who attends and is examined without the service of a subpœna is entitled to his pay and mileage.—(1803) De Benneville v. De Benneville, 1 Bin. 46; (1874) Lagrosse v. Curran, 10 Phila. 140; (1884) Herr v. Keener, 1 Lanc. Law Rev. 337; (1887) Commonwealth v. Smith, 4 Pa. Co. Ct. R. 321.

[j] (Pa. 1874) Witnesses attending without subpœna, and not called to testify, are entitled to their costs, where a subpœna had been taken out, but they waived its service, and where there was no allegation that their testimony was not needed.—Lagrosse v. Curran, 10 Phila. 140.

[k] (S. C. 1804) Witnesses called and sworn at the trial, if it be not done fraudulently and collusively, are entitled to their costs, though not subpœnaed.—Price v. McGee, 1 Brev. 455.

[l] (S. C. 1839) A witness attending upon a subpœna ticket alone, without writ, is entitled to his fees from the party cast in the suit.—Johnson v. Wideman, 1 Cheves, 26.

[m] (Tex. 1886) A witness attending court in obedience to a void subpœna is not entitled to compensation.—Sapp v. King, 66 Tex. 570, 1 S. W. 466.

§ 47. Attendance at court.

Amount of compensation, see post, § 59.
Right to fees in several causes, see post, § 64.

[a] (U. S. 1803) A witness recognized and attending the court on the part of defendant, if sworn and sent before the grand jury on the part of the United States, is entitled to be paid by the United States for his attendance on the trial.—Ex parte Johnson, Fed. Cas. No. 7,367 [1 Wash. C. C. 47].

[b] (U. S. 1851) When a person is summoned as a juror, and at the same term is subpœnaed by the United States as a witness, and attends in obedience to each process, and, according to the practice of the court, makes affidavit of such attendance, he is entitled to compensation for each service.—Edwards v. Bond, Fed. Cas. No. 4,294 [5 McLean, 300].

[c] (U. S. 1886) A defendant in attendance upon court under indictment, under recognizance, who is also under recognizance as witness for the United States in another case, is entitled to his mileage and witness fees for attendance in the latter case.—In re Addis (D. C.) 28 Fed. 794.

[d] (U. S. 1887) Plaintiff was a witness in a case under recognizance and also at the same time a grand juror. He was paid his per diem as such juror. *Held*, that he was only entitled to the per diem of a witness from the time he was discharged as grand juror.—Ex parte Turner (D. C.) 32 Fed. 372.

[e] (Me. 1852) One is not authorized to certify to his attendance as a witness, unless he come into the courthouse and be in actual attendance there.—Kennedy v. Wright, 34 Me. 351.

[f] (Pa. 1878) A witness in attendance at court, under arrest on a judgment which was afterwards withdrawn, will not be allowed witness fees in the case in which he testified.—Commonwealth v. Lovett, 2 Pa. Co. Ct. R. 875.

[g] (Pa. 1886) A witness in a case in court where he is at the same time a party to a suit in a different case is presumably there in his own interest, and is not entitled to witness fees.—Beatty v. Lehigh Valley R. Co., 4 Lanc. Law Rev. 1.

[h] (Pa. 1887) Where the rules of court do not require the attendance of defendants or their witnesses on the first day of the term, but only the attendance of grand jurors and witnesses for the commonwealth, one attending at such time as a witness for the commonwealth, though bound over by recognizance to the sessions as defendant in another case, is entitled to witness fees for that day and single mileage.—Commonwealth v. Smith, 4 Pa. Co. Ct. R. 321.

[i] (Pa. 1894) Where a witness attends court as plaintiff, and also as witness in another suit, and stays one day after the trial of his suit to testify in such other suit, he is entitled to witness' fees for one day and mileage for return-

ing home.—Fritz v. Fritz (Com. Pl.) 2 Lack. Leg. N. 187.

[j] (Pa. 1894) Where a witness is attending court in a case in which he is defendant, he is not entitled to witness' fees and mileage when called to testify in the other case for which he was subpœnaed, and which was tried before his case.—Fritz v. Fritz (Com. Pl.) 2 Lack. Leg. N. 186.

§ 48. Failure or inability to testify.

Persons liable for compensation, see post, § 70 [b].

Recovery as costs of witness fees affected by incompetency of witness, see "Costs," vol. 13, cc. 683, 684, § 723.

[a] Witnesses who are subpœnaed in a cause are entitled to their fees, whether sworn or not.—(Ill. 1841) Leigh v. Hodges, 4 Ill. (3 Scam.) 15;

(Pa. 1803) De Benneville v. De Benneville, 1 Bin. 46; (1887) Commonwealth v. Smith, 4 Pa. Co. Ct. R. 321.

[b] (U. S. 1886) Witnesses subpœnaed to testify to a particular point will be allowed mileage and per diem up to the admission of their testimony, although the other party admits at the trial the point to be proved by such witnesses; and, a second trial being had, and no stipulation or entry made on record that the point would be admitted at such second trial, such witnesses will be allowed per diem and mileage for attendance at that trial also.—Young v. Merchants' Ins. Co. (C. C.) 29 Fed. 273.

[c] (N. H. 1860) A witness who is summoned to attend court, and paid for his travel and one day's attendance, or who is summoned and attends without being paid, if he remain in attendance in good faith until the cause is tried or otherwise disposed of, without notice that his attendance is no longer required, is entitled to his fees for such attendance from the party summoning him, and, if they be not paid, may maintain an action to recover them.—Gunnison v. Gunnison, 41 N. H. 121, 77 Am. Dec. 764.

[d] (Pa. 1887) Fees cannot be taxed for witnesses rejected as incompetent, though subpœnaed in good faith.—Eakin v. Fulmer, 4 Pa. Co. Ct. R. 319.

[e] (Pa. 1888) A witness is entitled to fees for every day he was in attendance, though he was not examined.—In re Goodman's Estate, 6 Pa. Co. Ct. R. 254.

[f] (Pa. 1890) No fees should be allowed for witnesses subpœnaed by defendant to testify as to his character for truth and veracity, where no attack of that sort was made, and there was no reasonable ground for believing it would be made.—First Nat. Bank v. Broadhead (Com. Pl.) 8 Pa. Co. Ct. R. 536.

[g] (Pa. 1894) A witness who was too drunk to answer questions on cross-examination is not entitled to witness' fees or mileage.—Fritz v. Fritz (Com. Pl.) 2 Lack. Leg. N. 187.

[h] (Tenn. 1846) A witness is entitled to his witness fees, if he is examined, even though he proves to be an incompetent witness. His incompetency may be waived, or his interest released, and it does not follow that he was not examined, because he appears of record to have been incompetent.—Gray v. Alexander, 26 Tenn. (7 Humph.) 16.

§ 49. Effect of continuance or postponement.

On amount of compensation, see post, § 62.

[a] (U. S. 1886) Where a cause was on the docket, and could be tried at a term of court at which it was not tried, and, before learning that the trial would not take place, a party summoned witnesses whom he was not able to notify that the trial would not be had, such witnesses, attending court, are entitled to their mileage and per diem.—Young v. Merchants' Ins. Co. (C. C.) 29 Fed. 273.

[b] (U. S. 1889) A witness for the United States, under subpœna, attended court. The case was continued, and the witnesses were verbally instructed to attend at the next term. In the meantime he removed his residence into another state, but without further summons attended court, and was used as a witness. *Held*, that he was entitled to his per diem and mileage from his place of residence.—In re Williams (D. C.) 37 Fed. 325.

[c] (Ga. 1855) Under Judiciary Act 1799, § 21, if a witness is not present in court when his case is postponed or continued, and so remains in ignorance of such postponement or continuance, it is by his own fault, and he cannot charge for any subsequent attendance.—Robison v. Banks, 17 Ga. 211.

[d] (Ill. 1889) A witness who attends court is entitled to his fees, though he was not examined by reason of the continuance of the cause to another term.—Fish v. Farwell, 33 Ill. App. 242.

[e] (N. Y. 1842) A witness living at a distance, who was delayed by accident from reaching the circuit on the first day, but arrived the second, before the court was open and the cause reached on the calendar, is entitled to his fees, though by consent the cause had been adjourned for the circuit on the first day.—Anonymous, 3 Hill, 457.

[f] (N. Y. 1849) A witness was not subpœnaed until the night of the first day of the circuit, for the reason that he could not be found. He went to court the next morning, but arrived an hour after the cause had been postponed. *Held* that, since the witness arrived in time to have been sworn if the cause had been tried, and there was no laches on the part of the witness or the party, the witness was entitled to his fees.—Clarks v. Staring, 4 How. Prac. 243.

[g] (N. Y. 1857) A witness residing out of the state and attending the circuit court, which was twice adjourned before the cause in which his testimony was given was tried, is entitled to only one traveling fee from the state line and fees for attendance only on the days at which the court was adjourned and at which he actually attended; and a witness residing in the county is entitled to like fees for attendance and traveling fees for going from his residence to the place where the court was held and returning three times.—Moulton v. Townsend, 16 How. Prac. 306.

[h] (Pa. 1895) Where, in obedience to a subpœna, a witness traveled to the nearest station, and, being met there by a telegram informing him that the case was continued, returned home, he is not entitled to witness fees or mileage.—Shutt v. Canon (Com. Pl.) 17 Pa. Co. Ct. R. 463, 5 Pa. Dist. R. 167, 26 Pittsb. Leg. J. (N. S.) 337.

§ 50. Persons entitled.

Right of bankrupt and wife to witness fees on examination in bankruptcy, see "Bankruptcy," vol. 6, c. 462, § 407.

[a] (Pa. 1881) In the trial of an issue devisavit vel non, witnesses who are devisees or legatees named in the will, and therefore interested, are entitled to witness fees if they are not parties to the record.—Lightner v. Houser, 2 Lanc. Law Rev. 103.

[b] (Pa. 1886) Where there has been an absolute assignment of a chose in action, and ac-

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tion is brought thereon by the assignee, there is no presumption that the assignor is in court to protect his own interests; and, if he is subpœnaed as a witness and gives testimony, he is entitled to his witness fees.—Beatty v. Lehigh Valley R. Co., 4 Lanc. Law Rev. 1.

[c] (Pa. 1891) A wife who testifies as a material witness in a suit on behalf of her husband is entitled to witness fees.—Bell v. Dawes (Com. Pl.) 9 Pa. Co. Ct. R. 636.

[d] (Pa. 1892) Where the husband survives, the right of action for the death of the wife by the wrongful act of another is in him alone, and the children cannot be made parties; and hence, where they are called and examined as witnesses, they are entitled to the usual fees and mileage.—Kauffman v. Manor Tp. (Com. Pl.) 11 Pa. Co. Ct. R. 304.

[e] (Pa. 1893) A husband who testifies on behalf of his wife, having been regularly summoned, is entitled to fees.—Curry v. Philips (Com. Pl.) 14 Pa. Co. Ct. R. 479.

[f] (S. C. 1881) In an action by a third person against a sheriff to recover cotton seized under an agricultural lien, the lienee is entitled to recover fees as a witness against plaintiff, who failed in the action.—Winsmith v. Dewberry, 14 S. C. 554.

§ 51. —— Public officers.

[a] (U. S. 1887) A deputy marshal is an officer of the court, but, unless he be actually engaged in waiting on the court, he is entitled to per diem and mileage if he be summoned as a witness for the government.—Ex parte Burdell (D. C.) 32 Fed. 681.

[b] (U. S. 1887) A deputy clerk is an officer of court, and is not entitled to per diem and mileage when used as a witness for the government in a case tried in the court in which he is officiating.—Ex parte Burdell (D. C.) 32 Fed. 681.

[c] (U. S. 1887) The clerks employed by the marshal in his office, keeping his accounts, are not officers of court, and are entitled to fees and mileage, if used as witnesses for the government.—Ex parte Burdell (D. C.) 32 Fed. 681.

[d] (U. S. 1892) A person employed by a postmaster who receives a fixed salary, without any allowance for clerk hire, is not a "clerk or officer of the United States," within the meaning of Rev. St. § 850, declaring that such persons shall receive only their necessary expenses when summoned as witnesses in behalf of the government.—In re Waller (D. C.) 49 Fed. 271.

[e] (U. S. 1888) Rev. St. § 850, provides that a clerk sent away from his place of business as a witness for the government shall be paid his necessary expenses, but no "mileage or other compensation in addition to his salary." *Held*, that a marshal's clerk receiving a salary, subpœnaed as a witness for the government, is entitled to his necessary expenses, but not to mileage or additional compensation.—Duval v. United States, 23 Ct. Cl. 102.

[f] (Pa. 1814) A justice of the peace, who attends as a witness for the state, is entitled to costs for attending, except for one day, when he is bound to attend for the purpose of returning recognizances; and it is not necessary that he should have been summoned.—Commonwealth v. Philadelphia County Com'rs, 6 Bin. 397.

[g] (Pa. 1876) Magistrates and constables, subpœnaed as witnesses in felony cases, are entitled to receive from the county their daily pay as witnesses, except for one day during each court, when they are bound to attend to return their recognizances; but, if they make their return 10 days before the commencement of the session of court, under Act May 8, 1854, this rule does not apply.—Kirkendall v. Luzerne County, 33 Leg. Int. 313.

[h] (Pa. 1894) The county auditor is entitled to full fees and mileage when called as a witness in a criminal case.—Commonwealth v. McArdle (Quart. Sess.) 3 Pa. Dist. R. 258.

§ 52. —— Attorneys at law.

[a] (Mass. 1833) An attorney at law, attending court on professional business and also pursuant to a subpœna, is only entitled to a day's pay for attendance on the day on which he testifies; but he is entitled to pay for any time he is detained as a witness, waiting to testify, after having finished his professional business.—Parks v. Brewer, 31 Mass. (14 Pick.) 192.

[b] (N. Y. 1828) An attorney or counselor is not entitled to fees as a witness.—Crummer v. Huff, 1 Wend. 24.

[c] (N. Y. 1863) The attorney of record, who testifies as a witness, is entitled to a witness fee for the day on which he was sworn and testified.—Taaks v. Schmidt, 25 How. Pr. (N. Y.) 340.

[d] (Pa.) An attorney is not entitled to witness fees for attendance in a court where he actually practices.—(1836) McWilliams v. Hopkins, 1 Whart. 276; (1885) Bank v. Wirebach, 2 Lanc. Law Rev. 274.

[e] (Pa. 1872) A. went to Reading at April term, 1871, as counsel for defendants. Owing to the absence of two material witnesses, he withdrew from the case, and became a witness, another counsel being retained in his place. He also attended as a witness at August term, 1871. *Held*, on motion to retax costs, that A. could recover witness fees only for August term, 1871, but for the first term was entitled to compensation from defendants as counsel.—Marsdorf v. Lacey, 2 Woodw. Dec. 81.

[f] (Pa. 1886) A member of the bar is not entitled to witness fees, as his business calls him to be present in court, and he therefore suffers no loss of time or inconvenience.—Beatty v. Lehigh Valley R. Co., 4 Lanc. Law Rev. 1.

[g] (Wis. 1879) Attorneys at law who are in attendance as witnesses at the trial of a cause are entitled to witness fees, unless it is shown that they are also counsel in the cause.—Abbott v. Johnson, 47 Wis. 239, 2 N. W. 332.

§ 53. —— Parties.

Recovery as costs of fees to parties or persons interested as witnesses, see "Costs," vol. 13, cc. 684–686, §§ 724, 725.

[a] (U. S. 1891) A party is not entitled to either witness fees or mileage when his presence has not been required by the opposite party.—Street v. The Progresso (D. C.) 48 Fed. 239.

[b] (U. S. 1896) A party called and examined as a witness on his own behalf is not entitled to fees for travel and attendance.—Roundtree v. Rembert (C. C.) 71 Fed. 255.

[c] (Cal. 1887) A party not subpœnaed by his adversary, who appears and testifies in his own behalf, is not entitled to fees and mileage.—Beal v. Stevens, 72 Cal. 451, 14 Pac. 186.

[d] (Ind. 1882) Where, in a proceeding to lay out a highway, some of the remonstrants are used as witnesses by another remonstrant, they are entitled to witness fees.—Reader v. Smith, 88 Ind. 440.

[e] (Minn. 1869) A defendant is not entitled to fees for attendance as a witness in a cause except where he attends solely as a witness for his codefendants.—Barry v. McGrade, 14 Minn. 286 (Gil. 214).

[f] (N. H. 1850) A defendant, required by order of court to answer interrogatories relative

to a negotiable note disclosed by a trustee, is entitled to fees as a witness.—Hurd v. Fogg, 22 N. H. (2 Fost.) 98.

[g] (N. H. 1860) Rev. St. c. 189, providing for the appointment of auditors in certain cases, prescribes their duties, and declares that they may hear the parties and make report. Sections 6, 7, provide that if any party neglect or refuse to appear before the auditor, or to render an account, or to produce such books and papers, and to answer on oath such interrogatories, relating to the matter in controversy, as may be pertinent and material, the auditor shall certify the same to the court, and that the court shall thereupon render judgment against such party as upon nonsuit or default, and, if necessary, cause the damages to be assessed by a jury. *Held*, that neither party is entitled to fees as a witness before an auditor, whether testifying in his own favor or for his adversary.—Whitney v. Pierce, 40 N. H. 114.

[h] (N. H. 1860) Under Pamph. Laws, cc. 1952, 2090, making parties to suits witnesses, a party who testifies or gives his deposition to be used in his own favor on trial is not entitled to fees as a witness; but, when such party compels his adversary to testify or give a deposition to be used on such trial, he shall pay him the same as any other witness.—George v. Starrett, 40 N. H. 135.

[i] (N. Y. 1836) Plaintiff cannot be allowed for his own attendance as a witness, though his testimony should be admissible.—Christy v. Christy, 6 Paige, 170.

[j] (N. Y. 1856) Where defendant was examined as a witness on his own behalf, in answer to the testimony of the assignor on the demand in suit, defendant was entitled to fees as a witness, to be taxed as costs.—Querissle v. Hilliard, 3 Abb. Prac. 31.

[k] (N. Y. 1858) A party who testified in his own behalf, as permitted by Code, § 399, is not entitled to fees under Laws 1840, c. 386, § 8, providing for fees to witnesses, as a witness, within the meaning of the act, is one who attends only in obedience to a subpœna.—Cornell v. Potter, 15 How. Prac. 278.

[l] (N. Y. 1865) A party who attends the trial of his cause solely as a witness, and is sworn and examined as such, is entitled to witness fees.—Van Dusen v. Bissell, 29 How. Prac. 481.

[m] (N. C. 1876) A party who is compelled to attend court to be examined in behalf of the adverse party is entitled to witness fees.—Penny v. Brink, 75 N. C. 68.

[n] (Pa. 1878) A plaintiff, although suing in a representative capacity, is not entitled to witness fees and mileage for himself.—Rhoades v. Bank, 12 Phila. 391.

[o] (Pa. 1884) The superintendent of a Sunday school organization, and plaintiff of record, attending the trial as agent of the Sunday school to conduct the suit, authorized as such by the school, is not entitled to witness fees.—Climenson v. Green, 2 Chest. Co. Rep. 206.

[p] (Pa. 1887) In an action in the name of husband and wife, in right of the wife, the husband is not entitled to witness fees, though he attended as a witness only.—Sewards v. Elliott, 3 Pa. Co. Ct. R. 72.

[q] (Pa. 1887) A bona fide assignor of a claim sued in his name is entitled to witness fees.—Tagg v. Bowman, 3 Pa. Co. Ct. R. 300.

[r] (Pa. 1887) A party, suing as administrator, cannot tax costs for his own attendance as a witness.—Eakin v. Fulmer, 4 Pa. Co. Ct. R. 319.

[s] (Pa. 1895) Where a member of a firm for whom a receiver is appointed testifies in an action by the receiver, he is not entitled to witness fees, and the action is in reality an action by the firm.—Leonard v. Smith (Com. Pl.) 1 Lack. Leg. N. 40; Id., 4 Pa. Dist. R. 249.

[t] (Pa. 1896) Petitioners for an inquisition in lunacy are parties to the proceedings, and are not entitled to witness fees and mileage.—In re Hogg (Com. Pl.) 17 Pa. Co. Ct. R. 509.

[u] (Tenn. 1871) A party to a suit in his own right is not entitled to compensation for attending as a witness.—Grub v. Simpson, 53 Tenn. (6 Heisk.) 92.

[v] (Tex. 1872) Under Act May 19, 1871 (Gen. Laws, p. 108), providing that a party litigant may testify in his own behalf in all cases except actions against executors, administrators, or guardians, or may be called to the witness stand by the opposite party, a party thus becoming or made a witness is not entitled to witness fees.—Gause v. Edminston, 35 Tex. 69.

§ 54. —— Officers, agents, or members of corporation.

[a] (U. S. 1885) Where the witnesses who appear before the master for the purpose of furnishing an account are officers of a defendant corporation in an infringement suit, which has been ordered to render such account, they are not entitled to mileage and per diem fees.—American Diamond Drill Co. v. Sullivan Machine Co. (C. C.) 32 Fed. 552.

[b] (Pa.) The president, secretary, and members of a school board, in a case in which their board is a party, and in which they are summoned as witnesses, are entitled to witness fees.—(1877) Evans v. School Board, 9 Lanc. Bar, 102; (1884) First Nat. Bank of Mt. Joy v. Greider, 5 Lanc. Bar, No. 1, p. 1.

[c] (Pa. 1884) A president of a corporation, subpœnaed as a witness, is entitled to witness fees and mileage, although he assisted in conducting the suit.—Salmon Creek Lumber & Mining Co. v. Dusenberry, 2 Chest. Co. Rep. 205.

[d] (Pa. 1885) Officers and members of a corporation, who are material witnesses and in attendance in obedience to a subpœna, on the trial of a cause in which the corporation is a party, are entitled to witness fees and mileage.—Wilson v. Mutual Fire Ins. Co., 1 Pa. Co. Ct. R. 11.

[e] (Pa. 1885) Officers and members of a corporation, in attendance on the trial of a cause to which the corporation is a party, are entitled to witness fees.—Johnson v. A. & N. P. R. Co., 1 Pa. Co. Ct. R. 10.

[f] (Pa. 1887) A party who sued as agent of another is not entitled to witness fees.—Fisher v. Selden, 4 Pa. Co. Ct. R. 392.

[g] (Pa. 1888) The president of a corporation plaintiff is entitled to witness fees, where he attends court in the capacity of a witness alone, and not to conduct the suit.—Skinner Engine Co. v. Webb, 5 Pa. Co. Ct. R. 480.

[h] (Pa. 1888) A former agent of a corporation, who attends court as a witness and assists counsel in the management of a trial, where the corporation is plaintiff, is entitled to witness fees, where the agency no longer exists between him and the corporation.—Skinner Engine Co. v. Webb, 5 Pa. Co. Ct. R. 480.

§ 55. Limitation of number of witnesses.

[a] (U. S. 1886) Under Gen. St. S. C. § 2192, mileage and per diem will be allowed for but three witnesses to each issue raised in the action in which they are subpœnaed.—Young v. Merchants' Ins. Co. (C. C.) 29 Fed. 273.

[b] (Tex. 1894) Rev. Civ. St. art. 1423, which provides that the fees of more than two wit-

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nesses to any fact shall not be allowed in any cause, does not apply to criminal cases.—Tracy v. State (Cr. App.) 24 S. W. 897.

2. NATURE OF SERVICES AND AMOUNT OF COMPENSATION.

IN GENERAL, § 56.
STATUTORY PROVISIONS, § 57.
SUBPŒNA DUCES TECUM, § 58.
ATTENDANCE IN GENERAL, § 59.
TIME SPENT IN TRAVELING TO AND FROM PLACE OF TRIAL, § 60.
DURING DETENTION OF WITNESS, § 61.
EFFECT OF CONTINUANCE OR POSTPONEMENT, § 62.
ATTENDANCE OVER SUNDAY, § 63.
WITNESSES SUMMONED OR TESTIFYING IN SEVERAL CAUSES, § 64.
ADDITIONAL COMPENSATION TO EXPERTS, § 65.
—— REFUSAL TO TESTIFY AS CONTEMPT, § 66.
MILEAGE AND EXPENSES, § 67.
—— TRAVEL OUTSIDE STATE OR DISTRICT, § 68.
—— EFFECT OF CONTINUANCE OR POSTPONEMENT, § 69.

§ 56. In general.

[a] (Ga. 1880) In absence of special statutory provision therefor, witnesses are not allowed $2 per day for attending a commitment trial, though this be allowed for attending on the superior court.—Floyd County Com'rs v. Black, 65 Ga. 384.

[b] (Ill. 1889) A person who, under subpœna, attends court as a witness, cannot recover more than the fees prescribed by law for witnesses, though the party who procured the attendance of such witness agreed to pay him a greater sum.—Walker v. Cook, 33 Ill. App. 561.

[c] (La. 1812) A witness is not entitled to daily compensation for time lost by missing a passage to a port, where he does not reside.—In re Shaddock, 2 Mart. (O. S.) 207.

[d] (Minn. 1878) In the absence of a special agreement for a different sum, a person attending as a witness at the request of a party, and without a subpœna is only entitled to recover for his services and expenses the statutory compensation allowed in such cases.—Holbrook v. Cooley, 25 Minn. 275.

[e] (N. H. 1850) By Rev. St. c. 472, § 12, the fees of witnesses, in all cases except when they attend the superior court or court of common pleas, are those only which are taxable for attendance before a justice of the peace.—Mathes v. Bennett, 21 N. H. (1 Fost.) 204.

[f] (N. J. 1883) Without a special agreement for extra compensation, a witness is not entitled to more than the statutory fees.—Fonda v. Bolton, 6 N. J. Law J. 240.

[g] (N. C. 1808) A witness summoned by each party is entitled to compensation from each.—Pearce v. Person, 5 N. C. 188.

[h] (Or. 1886) Civ. Code, § 785, providing that witnesses subpœnaed out of the county where the court is sitting are entitled to double fees, has no reference to criminal cases.—Sargent v. Umatilla County, 13 Or. 442, 11 Pac. 225.

[i] (Pa. 1878) Witnesses who attend before a committing magistrate, and afterwards on the same day attend in court on the same case, will not be allowed witness fees for the attendance before the magistrate.—Commonwealth v. Lovett, 2 Pa. Co. Ct. R. 375.

[j] (Pa. 1880) The equity fee bill under Act May 4, 1864 (Purd. Dig. p. 601, pl. 70), directs that the fees of witnesses shall be the same as before arbitrators, and accordingly daily pay of witnesses was reduced from $1 to 62½ cents.—Quay v. Quay, 1 Chest. Co. Rep. 489.

[k] (Pa. 1881) Under Act April 16, 1849, providing that witnesses attending before any commissioner in lunacy inquisitions shall be allowed the same fees and mileage as if attending as witnesses in court, the pay of such witnesses changes with any changes in the pay of witnesses attending at court.—Commonwealth v. Reese, 1 Chest. Co. Rep. 176.

[l] (Pa. 1881) The pay of witnesses before commissioners is regulated by that allowed witnesses in court, and as Act April 21, 1856, provided that the pay of witnesses in Chester county attending court shall be $1 per day, except when they reside in Westchester, where it should be as theretofore, and as said witnesses resided in the county, their pay was $1 per day.—Commonwealth v. Reese, 1 Chest. Co. Rep. 176.

[m] (Pa. 1885) Where depositions are taken in pursuance of a rule of court, the witnesses are constructively in attendance at court, and their fees are the same as those allowed witnesses for attendance at court.—Cox v. Skeen, 2 Chest. Co. Rep. 387.

[n] (Pa. 1885) A witness testifying at an arbitration, and subsequently on the same day his deposition being taken in the same cause between the parties under rule of court, cannot be allowed more than one day's pay.—Ulrich v. Getz, 2 Lanc. Law Rev. 137.

[o] (S. C. 1824) A witness served with a subpœna ticket, no writ of subpœna having issued, is entitled to 2s. 4d. only for each day's attendance at court.—Bratton v. Clendenin, Harp. 454.

§ 57. Statutory provisions.

[a] (Ark. 1850) The provision of the Revised Statutes, providing that witnesses attending at the same time, in several cases, where their fees are to be paid by the county, shall receive fees in one case only, was repealed by the act of 1843.—Pulaski County v. Downer, 10 Ark. (5 Eng.) 588.

[b] (Pa. 1889) Act Pa. Feb. 23, 1889, does not alter or repeal Act March 11, 1873, under which the fees of witnesses in the courts of record of Philadelphia county are fixed at $1.50 per diem.—De Haven v. Morath, 7 Pa. Co. Ct. R. 388.

[c] (Pa. 1890) Act Feb. 23, 1889 (P. L. 8), by its express terms only affects fees of witnesses in counties regulated by Act Feb. 22, 1821, and does not affect various local statutes fixing the compensation of witnesses.—McDonald v. Alliance Coal Min. Co. (Com. Pl.) 8 Pa. Co. Ct. R. 460.

[d] (Pa. 1895) Act Feb. 22, 1821, entitled "An act to amend and alter the fee bill" (7 Smith's Laws, 367), by section 13 fixed the fees of witnesses residing more than one mile from the county seat at 62 cents per day, and those residing within a mile of such county seat at 50 cents. Act 1856 (P. L. 485) changed the rate for Chester county for witnesses residing outside the county seat only. Act Feb. 23, 1889, "to amend thirteenth section of an act entitled 'An act to amend and alter the fee bill,'" provides that "the fees to be received by witnesses shall be as follows, viz.: Each day's attendance at court, $1." *Held*, that witnesses residing in West Chester are entitled to $1 per day for attendance at court.—Bradley v. Vernon, 166 Pa. 603, 31 Atl. 330.

[e] (Utah, 1888) Act March 8, 1888, declaring that from January 1, 1888, until January 1, 1890, witnesses for the territory, in criminal cases, shall be paid certain fees, is prospective, and will not cover services rendered in the month preceding its passage.—People v. Clayton, 5 Utah, 598, 18 Pac. 628.

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§ 58. Subpœna duces tecum.

[a] (N. Y. 1879) Acts 1840, c. 386, allowing but 50 cents a day to witnesses of whatever class, a witness subpœnaed under a subpœna duces tecum cannot be allowed $1.25.—In re Corwin, 6 Abb. N. C. 437.

§ 59. Attendance in general.

Right to compensation, see ante, § 47.

[a] (U. S. 1844) A witness is entitled to his fees during the whole time of his actual attendance during the trial of the case, although the examination on both sides be closed.—Whipple v. Cumberland Cotton Mfg. Co., Fed. Cas. No. 17,515 [3 Story, 84].

[b] (U. S. 1875) A witness is entitled to fees only for the days of actual attendance, and not for the days on which he was ready to attend.—In re Crane, Fed. Cas. No. 3,352.

[c] (U. S. 1892) Witnesses are not entitled to the per diem fee of $1.50 for time occupied previous to trial in conference with counsel or proctor.—Pringle v. The Michigan (C. C.) 52 Fed. 509.

[d] (La. 1812) An inhabitant of another state, detained as a witness, is entitled to a compensation for each day he is so detained, though not actually in attendance on court.—McFall's Case, 2 Mart. (O. S.) 170.

[e] (Minn. 1858) Costs for unnecessary attendance cannot be allowed, but attendance may be necessary on days other than those on which the trial actually takes place.—Andrews v. Cressy, 2 Minn. 67 (Gil. 55).

[f] (N. Y. 1843) Where a cause was on the day calendar, and was there one day only, the city witnesses were entitled to one day's fees.—Ehle v. Bingham, 4 Hill, 595.

[g] (N. Y. 1867) The fees of a witness are not limited to fees for attendance on days during which the cause was on the day calendar, when he lives at a distance.—Wheeler v. Ruckman, 5 Rob. 702.

[h] (Or. 1866) A witness' claim can only be for the number of days he was in actual attendance.—Crawford v. Abraham, 2 Or. 163.

[i] (Pa. 1885) Where defendant and his witnesses waited in court from Monday morning until 2 o'clock Friday afternoon for the case to be called, on termination of the action in his favor, he was entitled to have five days' witness fees taxed in the costs.—Dwight v. Peoples, 1 Pa. Co. Ct. R. 141.

§ 60. Time spent in traveling to and from place of trial.

[a] (U. S. 1892) Witnesses are not entitled to the per diem fee of $1.50, in addition to their mileage, for time spent in coming to and returning from the place of trial.—Pringle v. The Michigan (C. C.) 52 Fed. 509.

[b] (N. Y. 1824) The fee to a witness from a foreign state is to be computed from the time he left home.—Nichols v. Doty, 3 Cow. 352.

[c] (N. Y. 1831) If the whole travel of a witness in going and returning is over 15 miles, and under 30, one day is allowed for travel; if over 15 miles each way, the witness is allowed one day to come and one to return, independently of the time he is detained for examination; if the distance traveled is less than 15 miles both ways, no further allowance can be made, unless it appears that the witness was required to attend so early, or was detained so late, that he could not come or return within the usual hours of traveling on the day of his examination.—Rogers v. Rogers, 2 Paige, 458.

[d] (N. Y. 1834) A witness is entitled to reasonable time for travel, availing himself of the usual modes of conveyance. He cannot be required to travel on Sunday, nor can he limit his travel to 30 miles per day.—Wilkie v. Chadwick, 13 Wend. 49.

[e] (N. Y. 1838) A witness is entitled to an allowance for one day in coming to, and one day in returning from, the place of trial, although he resides only eight miles distant.—Lamb v. Coe, 19 Wend. 127.

[f] (Pa. 1878) Under Act April 23, 1864 (P. L. 575), providing that, in addition to the usual mileage, the fees of witnesses attending court shall be one dollar per diem, witnesses are entitled to such per diem allowance only while in actual attendance. The time expended to reach the county seat is covered by the mileage allowance.—Miller v. Shoop, 1 Lanc. Law Rev. 377.

[g] (Pa. 1884) Under Act April 23, 1864, making a per diem allowance to each witness "attending" court, the time a witness spent in traveling to reach the place where the court was held was not included.—Miller v. Shoop, 1 Lanc. Law Rev. 377.

[h] (Pa. 1893) Under Act Feb. 22, 1821, § 13, providing that a witness shall be allowed fees for "each day's attendance at court," a witness cannot be allowed fees for time spent in traveling to and from the place of trial.—Venetian Blind Co. v. Nesbit (Com. Pl.) 13 Pa. Co. Ct. R. 330.

[i] (S. C. 1855) Under the act of 1791, allowing witnesses a certain sum per day for "attending" court, a witness residing out of the district is entitled to his per diem fee for travel in going to and returning from court.—Speigner v. Cooner, 9 Rich. Law, 120.

§ 61. During detention of witness.

[a] (U. S. 1802) A witness, who for want of surety to appear and testify, has been imprisoned, is entitled to the daily compensation for the time of imprisonment.—Higginson's Case. Fed. Cas. No. 6,471 [1 Cranch, C. C. 73].

[b] (Iowa, 1880) A witness who is confined in the county jail by order of a justice of the peace, for failure to give security for his appearance to testify for the state in a criminal trial, cannot recover from the county his per diem as a witness for the time of his confinement.—Markwell v. Warren County, 53 Iowa, 422, 5 N. W. 570.

[c] (Md. 1896) One who is committed to custody by an examining magistrate in a criminal proceeding for failure to give security for his appearance as a witness for the prosecution, if such failure is not due to contumacy, or to his bad character, but solely to inability through no fault on his part, will be considered as in attendance on the court, and entitled to his per diem as a witness, for the term of his detention.—Hall v. Somerset County, 82 Md. 618, 34 Atl. 771, 51 Am. St. Rep. 484, 32 L. R. A. 449.

[d] (Mich. 1893) A witness committed in default of bail to appear in a criminal court is in attendance on the court, within the meaning of the statute providing for the payment of witness fees, and is entitled to fees during the time of commitment.—Robinson v. Chambers, 94 Mich. 471, 54 N. W. 176, 20 L. R. A. 57; Id., 94 Mich. 473, 54 N. W. 176.

[e] (N. J. 1882) A witness who is committed into the custody of the jail during vacation, because he cannot give security for his appearance at the proper time, is not "a witness attending court," within Revision, p. 408, which gives a fee per diem "for every witness attending court."—State v. Walsh, 44 N. J. Law (15 Vroom) 470.

[f] (Ohio, 1842) Where a witness is committed because he could not obtain security for his appearance as required by the magistrate, he is entitled to the same fees per diem as if in actual attendance at court under recognizance.—Latshaw's Case, 1 Ohio Dec. 96.

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[g] (Or. 1889) An information was filed against C. accusing him of mayhem, at a certain county in the state, and M., the party injured, was a witness before the examining magistrate, who required him to give an undertaking, in the sum of $500, for his appearance as a witness at the trial of C. upon any indictment which might be found against the latter by the grand jury. M. being unacquainted in the community where the alleged offense was charged to have been committed, failed to give such undertaking, and was held by the magistrate as such witness for 17 days. *Held*, that M. had no right of action against such county for his loss of time; that there was no contract on the part of the county to pay therefor; and that the county had no authority to enter into any such contract, for the reason that the legislature had not granted it power to do so.—Morin v. Multnomah County, 18 Or. 163, 22 Pac. 490.

[h] (Or. 1889) Nor did the county neglect or violate any duty it owed M., he having been held as a witness by order of the examining magistrate under an authority vested in him by law, which the county had no right whatever to control.—Morin v. Multnomah County, 18 Or. 163, 22 Pac. 490.

[i] (Or. 1889) If the compulsory services performed by M. in attending and giving testimony at the trial against C., were particular services, within the meaning of the clause in the constitution of Oregon which provides as follows: "Nor shall the particular services of any man be demanded without just compensation"—M. could not claim compensation therefor as against the county; the duty of providing for the observance of said clause of the constitution not devolving upon counties, but upon the legislature.—Morin v. Multnomah County, 18 Or. 163, 22 Pac. 490.

[j] (Or. 1889) Such services were not "particular services," within the meaning of the constitution, but they belonged to that class of general services which every man is bound to render for the general as well as his own individual good.—Morin v. Multnomah County, 18 Or. 163, 22 Pac. 490.

[k] (Pa. 1889) Under Act Feb. 22, 1821 (7 Smith & R. Laws, 377; 1 Purd. Dig. 746), providing that witnesses shall be entitled to fees for each day's "attendance at court," a witness cannot recover for the time he was confined to the county jail, in default of bail, to appear as a witness in a prosecution by the state.—Howard v. Beaver County, 6 Pa. Co. Ct. R. 397, 23 Wkly. Notes Cas. 574.

[l] (Pa. 1895) A witness in a felony case, committed for default of bail to appear and testify, cannot recover witness fees for the time of his imprisonment.—Sluchko v. County of Luzerne (Com. Pl.) 7 Kulp, 526, 16 Pa. Co. Ct. R. 221, 4 Pa. Dist. R. 418.

[m] (Wis. 1895) Mandamus will not lie to compel the clerk of the circuit court to issue the certificate provided for by Rev. St. § 4060, requiring such clerk, on proof by affidavit of the attendance of a witness on a criminal trial in the circuit court, to give the witness a certificate of the compensation to which he is entitled from the county, where relator, in default of a recognizance for her appearance as a witness, was confined in jail during the time for which compensation was claimed, and the case was never brought to trial, and relator never appeared in court as a witness.—State v. Greene, 91 Wis. 500, 65 N. W. 181.

§ 62. Effect of continuance or postponement.

On right to compensation, see ante, § 49.
—— *to mileage, see* post, § 69.

[a] (U. S. 1808) If a cause in the circuit court for the District of Columbia be postponed for two or three days, witnesses attending from Baltimore will be allowed pay for those days.—Hance v. McCormick, Fed. Cas. No. 6,009 [1 Cranch, C. C. 522].

[b] (U. S. 1844) A witness is entitled to fees during the time of his actual attendance, though the trial is suspended on account of the illness of counsel.—Whipple v. Cumberland Cotton Mfg. Co., Fed. Cas. No. 17,515 [3 Story, 84].

[c] (U. S. 1846) If a case is suspended for a few days, and postponed by agreement of parties, and not by order of the court, except to carry the agreement into effect, the witnesses' continued attendance till discharged will be allowed.—Hathaway v. Roach, Fed. Cas. No. 6,218 [2 Woodb. & M. 63].

[d] (Ala. 1846) Merely laying aside the civil and taking up the criminal docket does not discharge a witness in a case on the former. The witness cannot know how long it may occupy the court, or that the civil docket will not be called again before it is disposed of. If a suitor in such case would be relieved from the costs of his witnesses, he must at least excuse them from attending.—Marsh v. Branch Bank at Mobile, 10 Ala. 57.

[e] (N. Y. 1831) Where a cause is called, and the trial put off by defendant, and he subsequently obtains a verdict, he is not entitled to more than one day's fees to witnesses.—Titus v. Bullen, 6 Wend. 562.

§ 63. Attendance over Sunday.

[a] (U. S. 1850) Witnesses from a distance are entitled to fees for attendance on Sunday, when they are detained over that day.—Schott v. Benson, Fed. Cas. No. 12,479 [1 Blatchf. 564].

[b] (N. Y. 1863) A witness residing at a distance from the court is entitled to fees for attending on Sunday, as well as on secular days; and whether he uses the money in expenses at the place of holding the court, or in going to and from his residence, is not material.—Muscott v. Runge, 27 How. Prac. 85.

§ 64. Witnesses summoned or testifying in several causes.

[a] (U. S. 1857) A witness, summoned in several suits brought by the same plaintiff against different defendants, is entitled to his attendance and mileage in each case.—Parker v. Bigler, Fed. Cas. No. 10,726 [1 Fish. Pat. Cas. 285].

[b] (U. S. 1885) Where witnesses are paid in one or more cases, and not in others, the evidence is strong that they are never to be paid, especially where the lapse of time is great between the rendering of the service and the taxation.—Wooster v. Handy (C. C.) 23 Fed. 49.

[c] (U. S. 1885) In the absence of any rule of court, or special order, or stipulation of parties, a witness is entitled, under Rev. St. § 848, to his fee for each day's attendance in court in each suit in which he attends.—Wooster v. Handy (C. C.) 23 Fed. 49.

[d] (U. S. 1886) Witnesses will not be deprived of their per diem and mileage by the fact that they were in attendance on the court in another cause between different parties, and received per diem and mileage therefor.—Young v. Merchants' Ins. Co. (C. C.) 29 Fed. 273.

[e] (U. S. 1887) If a witness be subpœnaed in two cases, the parties being different, to attend therein before the court, and testify orally, or before any officer pursuant to law, to give his deposition, and does so attend, he is entitled to the witness fees prescribed by Rev. St. § 848, for his travel and attendance in each case. The fact that he actually testifies but once on the trial of the cases together by consent, or that his testimony is but once written out in the

deposition, to be used by agreement in both cases, makes no difference; nor is there a distinction between witness fees for attendance "in court" and those "before any officer pursuant to law."—Archer v. Hartford Fire Ins. Co. (C. C.) 31 Fed. 660.

[f] (U. S. 1888) Where two libels were filed against a vessel for two losses occasioned by the same disaster, but the causes were never consolidated, double mileage and attendance should be allowed, though the witnesses were sworn but once, and their testimony was read in both cases.—The Vernon (D. C.) 36 Fed. 113.

[g] (Ala. 1827) A witness summoned, at the instance of one who is a party in several suits pending at the same time in the same court, to attend and give evidence in such suits, is entitled to fees in each case.—Findley v. Wyser, 1 Stew. 23.

[h] (Ark. 1883) A witness in a civil case is entitled to fees for each case in which he testifies.—Springfield & M. R. Co. v. Lambert, 42 Ark. 121.

[i] (Ga. 1855) A witness is entitled to charge full fees for every case in which he may have been summoned.—Robison v. Banks, 17 Ga. 211.

[j] (Ill. 1892) Rev. St. c. 52, § 47, which allows a witness one dollar for each day's attendance and five cents a mile for necessary travel, does not restrict a witness who is subpœnaed in a number of cases to one dollar for each day he attends and one mileage fee, but he is entitled to a per diem and a mileage fee in each case.—O'Kane v. People, 46 Ill. App. 225.

[k] (Iowa, 1874) A witness subpœnaed and attending court on the same day in several different cases is entitled only to fees for attendance and mileage for the day of his attendance, and the number of cases in which he may give testimony will not increase his compensation.—Hardin v. Polk County, 39 Iowa, 661.

[l, m] (Mass. 1854) Where several actions for the obstruction, at successive periods of time, of the wheels of one mill by the backwater of another, are referred by rule of court to arbitration, the travel and attendance of witnesses, who are summoned, attend, and are paid in all the actions, may be taxed in each.—Day v. Berkshire Woolen Co., 67 Mass. (1 Gray) 420.

[n] (N. Y.) A witness who actually attends in two cases, although between the same parties, is entitled to fees in both.—(1859) Hicks v. Brennan, 10 Abb. Prac. 304; (1860) Vence v. Speir, 18 How. Prac. 168.

[o] (N. C. 1896) Where eight actions against the same defendant had been consolidated into one, an entry of "judgment against both parties, plaintiffs and defendants, for their costs in each case," entitles witnesses to prove but one attendance and in one action.—Morristown Mills Co. v. Lytle, 118 N. C. 837, 24 S. E. 530.

[p] (Or. 1866) In two or more cases between the same parties at the same term, a witness will be allowed but single mileage and attendance. The attendance in each successive case will reach back only to the final disposition of the preceding cause.—Crawford v. Abraham, 2 Or. 165.

[q] (Pa. 1831) Where witnesses in two connected cases, tried at the same court, elect to tax their fees in one of them, and defendant in that case dies before the costs are paid, they cannot afterwards have their fees taxed in the other case, being entitled to fees in one case only.—Commonwealth v. Cozens, 1 Ashm. 265.

[r] (Pa. 1846) Where a controversy arises out of one and the same transaction between several and different plaintiffs, but the same defendant, who alone is liable for costs, a witness, who is subpœnaed in the several suits by the respective plaintiffs, is entitled to single pay for each day's attendance, and no more, without regard to the number of suits in which he is called to testify.—Batdorff's Adm'rs v. Eckert, 3 Pa. (3 Barr) 267.

[s] (Pa. 1860) When the same witnesses attend the trial of four different cases tried at the same place, they are not entitled to separate bills in each case. They can demand but one compensation for each necessary attendance.—Law v. Cobb, 1 Luz. Leg. Obs. 3; Card v. Cobb, Id.

[t] (Pa. 1869) Witnesses in criminal prosecutions are entitled to mileage and daily pay, as if attending in one case, although subpœnaed by the commonwealth in several cases, notwithstanding the repeal by the act of 1860 of section 15, Act Sept. 23, 1791, providing that, where several indictments are brought against defendant at same sessions, the county shall pay the costs of one only.—Commonwealth v. Curren, 2 Chest. Co. Rep. 393.

[u] (Pa. 1872) Where testimony was taken in two cases together, the witnesses were entitled to one fee only.—In re McCullough, 12 Phila. 576.

[v] (Pa. 1878) Where two causes against the same defendant were heard by the arbitrators on the same day and at the same place, and the witnesses were summoned in each to appear at the same time and place, and were sworn and examined but once, they were entitled to but one fee.—Evans v. Hart, 10 Lanc. Bar, 77.

[w] (Pa. 1885) Witnesses are only entitled to mileage and daily pay as if attending in one case, when subpœnaed and called by the commonwealth in a number of cases.—Commonwealth v. Curren, 2 Chest. Co. Rep. 393.

[ww] (Pa. 1885) The daily pay allowed by the fee bill for the attendance of witnesses at court is intended as a compensation, and when they have received that they are entitled to no more; and this, without regard to the number of suits in which they are called to testify.—Cody v. Clelam, 1 Pa. Co. Ct. R. 8.

[x] (Pa. 1886) A person who is subpœnaed in several cases is allowed compensation only in one.—Beatty v. Lehigh Valley R. Co., 4 Lanc. Law Rev. 1.

[xx] (Pa. 1895) A witness in criminal cases is entitled to only one day's pay, without regard to the number of cases in which he testifies.—Keller v. Clinton County (Com. Pl.) 4 Pa. Dist. R. 216.

[y] (Tenn. 1829) Under Acts 1815, c. 59, providing that a witness duly notified may prove his attendance in each suit he was legally summoned to attend, a witness is permitted to prove his per diem pay in all suits in which he is subpœnaed.—Hopkins v. Waterhouse, 10 Tenn. (2 Yerg.) 323.

[yy] (Tenn. 1885) Code, § 6235, declares that "no witness can prove attendance at any one term of the court in more than two criminal cases." *Held*, that no exception can be grafted on the statute, although terms have lengthened, and a witness has testified in cases tried at different times during the term.—State v. O'Haver, 83 Tenn. (15 Lea) 46.

[z] (Tex. 1852) A witness who is subpœnaed in several suits, pending at the same time and place, at the instance of the same person, is entitled under the statute to compensation in each case.—Flores v. Thorn, 8 Tex. 377.

[zz] (Vt. 1838) If a person attend as a witness in more than one cause at the same time, he is entitled to full pay in each cause, unless the causes are between the same parties, and

he is only subpœnaed in one cause, in which case he is only entitled to pay in one cause.—House v. Barber, 10 Vt. 158.

§ 65. Additional compensation to experts.

[a] (Ark. 1894) An expert who testifies for the state in a criminal case cannot demand compensation in addition to the usual fees allowed witnesses, provided he is not compelled to make any preliminary examination or preparation, and is not compelled to attend and listen to the testimony.—Flinn v. Prairie County, 60 Ark. 204, 29 S. W. 459, 46 Am. St. Rep. 168, 27 L. R. A. 669.

[b] (Ark. 1895) A physician is not entitled to any more than the regular witness fees for his expert testimony in respect to a post mortem examination.—Clark County v. Kerstan, 60 Ark. 508, 30 S. W. 1046.

[c] (Colo. 1893) An expert witness, who testifies for the people in a criminal case in obedience to a subpœna, without making in advance any demand for special compensation, is entitled to recover only the statutory witness fees.—Board Com'rs Larimer County v. Lee, 3 Colo. App. 177, 32 Pac. 841.

[d] (Colo. 1893) Where there has been no application to the county board to make a special contract with such witness, and it is not affirmatively shown that the refusal to pay him extra compensation would result in a miscarriage of justice, the court trying the case has no power to order payment of extra fees to the witness.—Board Com'rs Larimer County v. Lee, 3 Colo. App. 177, 32 Pac. 841.

[e] (D. C. 1893) Under the Rock Creek Park statute, providing, in the condemnation proceedings, that the marshal shall summon any witness desired by any party, and that the expenses of service of summons and their attendance fees shall be paid by the United States as costs, expert witnesses summoned at the request of a landowner, and testifying as regards gold deposits on the land, should be allowed reasonable fees in addition to their per diem as a common witness, to be paid by the United States.—United States v. Cooper, 21 D. C. 491.

[f] (D. C. 1893) Practical miners, testifying as to deposits of gold, are expert witnesses, so as to be entitled to reasonable fees in addition to their per diem.—United States v. Cooper, 21 D. C. 491.

[g] (Ind. 1852) A physician is not entitled to compensation, beyond that of an ordinary witness, for traveling to and giving evidence at a coroner's inquest in obedience to a subpœna; but the expenditure of labor and skill by the physician in a post mortem examination will create a claim to additional compensation.—Gaston v. Marion County, 3 Ind. 497.

[h] (Iowa, 1875) Physicians or other professional men, who may have been summoned as witnesses, are not entitled to extra compensation under Code 1873, § 3814, unless called to testify as experts, and give an opinion based on their special study and experience.—Snyder v. Iowa City, 40 Iowa, 646.

[i] (La. 1888) An expert appointed by one to make researches deemed necessary for his defense must be paid by him.—Harrison v. City of New Orleans, 40 La. Ann. 509, 4 South. 133.

[j] (Mass. 1870) Under Gen. St. 1860, c. 115, § 17, authorizing courts to allow a sum for services and expenses incident thereto in counties, and Laws 1860, c. 191, providing for the allowance of certain specified costs, and that no other costs shall be allowed in criminal proceedings, "except such as the court may deem reasonable for services not therein specifically provided for," the court may allow a reasonable compensation to an expert witness summoned by a prisoner, if the attorney general consents.—In re Clark, 104 Mass. 537.

[k] (Mass. 1896) Where an agreement is made by one to go into court at a future day and testify as an expert as to a matter which he had examined as a civil engineer, he is entitled to recover the reasonable compensation (in addition to the statutory fees) promised him therefor, though he is afterwards summoned and paid the regular statutory fees, and does not then claim extra compensation, or give notice that he will make such claim, and, though testifying, and advising counsel as to questions to be asked him and other witnesses, he is not asked any question as an expert.—Barrus v. Phaneuf, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619.

[l] (Mass. 1896) An agreement by one to go into court at a future day and testify as an expert in regard to a matter which he had examined as a civil engineer is sufficient consideration for a promise to pay a reasonable compensation in addition to the statutory fees.—Barrus v. Phaneuf, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619.

[m] (Minn. 1883) Gen. St. 1878, c. 70, § 8, providing for the allowance of fees or compensation to a witness summoned or sworn and examined "as an expert in any profession or calling," does not apply to cases where a witness skilled in some profession or calling, is called on to testify as to facts within his personal knowledge, although he may have acquired his knowledge of the facts while in the ordinary practice of his profession, and although his professional skill may have enabled him to observe such facts more intelligently and to narrate them more correctly.—Le Mere v. McHale, 30 Minn. 410, 15 N. W. 682.

[n] (Minn. 1887) The provision of the statute (Gen. St. 1878, c. 70, § 8) which authorizes a judge to allow to an expert witness "such fees or compensation as may be just and reasonable," has reference to an allowance to be made after the witness has been summoned and dismissed without being sworn or examined, or after he has been sworn and examined, and not before.—State v. Teipner, 36 Minn. 535, 32 N. W. 678.

[o] (Minn. 1887) A physician and surgeon upon the stand as a witness cannot properly refuse to answer a question upon the ground that his answer will be expert evidence, and that he has not been summoned or paid as an expert witness.—State v. Teipner, 36 Minn. 535, 32 N. W. 678.

[p] (N. Y. 1823) A surveyor, attending as a witness, is entitled to no more compensation than another witness, except in causes where there has been a view.—Lyon v. Wilkes, 1 Cow. 591.

[q] (N. Y. 1872) A witness meets the requirements of a subpœna if he appears in court when required to testify, and gives proper impromptu answers to such questions as are then put to him. He cannot be required, by virtue of the subpœna, to examine the case, to use his skill and knowledge to form an opinion, nor to attend, hear, and consider the testimony given, so as to be qualified to give a deliberate opinion on a question of science arising on such testimony; hence, a professional witness, called as an expert, may be paid for his time, services, and expenses, and the question what amount is paid cannot, in the absence of anything to show bad faith, affect the regularity of the trial, though it may, perhaps, affect his credit with the jury. It is not improper for the district attorney to procure the attendance of skilled witnesses in appropriate cases, for a special compensation; nor will the fact that an expert attended and testified at his instance, under agreement for compensation, which was unknown to the defense until after witness' testimony was closed,

be an irregularity affecting the verdict.—People v. Montgomery, 13 Abb. Prac. N. S. 207.

[r] (N. C. 1872) Under Acts 1870-71, c. 139, § 133, giving the court power to allow compensation to a witness summoned as an expert, such a witness is entitled to a reasonable fee, in addition to the usual fee for attendance.—State v. Dollar, 66 N. C. 626.

[s] (Pa. 1889) At a coroner's inquest a physician, who had been duly sworn as a witness, was asked to state his opinion of the effect of the medicines administered to the deceased, and to describe her conditions and symptoms when he first saw her. *Held*, that he was bound to answer both questions without payment of a professional fee.—Commonwealth v. Higgins, 5 Kulp, 269.

§ 66. —— Refusal to testify as contempt.

[a] The refusal of a physician to testify as to his professional opinion, without the compensation of a professional fee, is not a contempt of court.

—(Ind. 1877) Buchman v. State, 59 Ind. 1, 26 Am. Rep. 75; Dills v. State, Id. 15;

(N. Y. 1871) People v. Montgomery, 13 Abb. Prac. (N. S.) 207.

[b] (U. S. 1881) A physician cannot lawfully be compelled, even in criminal cases, to testify as an expert to matters of medical science, against his objection, unless first compensated by reasonable fee, as for a professional opinion; and a refusal to so testify is not punishable as a contempt.—United States v. Howe, Fed. Cas. No. 15,404a.

[c] (Ala. 1875) A physician, like any other person, may be called to testify as an expert in a judicial investigation, whether it be of a civil or criminal nature, without being paid for his testimony as for a professional opinion, and, on refusal to testify, is punishable as for a contempt.—Ex parte Dement, 53 Ala. 389, 25 Am. Rep. 611.

[d] (Ill. 1884) A physician, who, without objection, has testified as to the condition of a patient whom he has visited professionally, is not justified in refusing to give an opinion as to the cause of the symptoms discovered, unless he is paid an expert's fee.—Wright v. People, 112 Ill. 540.

[e] (Ohio, 1886) Where a physician who made a post mortem examination was called as a witness in a homicide case, and, after having answered all questions as to facts, refused to testify as to matters of opinion, unless paid an extra compensation as an expert, he is punishable for contempt for refusing to answer, since the statute fixes the fees which witnesses are entitled to receive, regardless of their calling or profession.—State v. Darby, 9 Ohio Dec. 725, 17 Wkly. Law Bul. 62.

[f] (Tex. 1879) A physician may be compelled to testify as to the result of a post-mortem examination made by him, over objection that his knowledge was attained by professional skill, and that, not having been paid therefor, he could not be compelled to testify thereto; for, though a medical expert cannot be compelled to make a post mortem examination, unless he is paid, such examination, having already been made, cannot be withheld on that ground.—Summers v. State, 5 Tex. App. 385, 32 Am. Rep. 573.

§ 67. Mileage and expenses.

Per diem fees for time spent in traveling to and from place of trial, see ante, § 60.

[a] (U. S. 1862) If a witness, whose residence is not at the place of holding court, is summoned at the place of trial, he is allowed mileage for returning to his home, but not for coming to the court.—Woodruff v. Barney, Fed. Cas. No. 17,986 [1 Bond, 528; 2 Fish. Pat. Cas. 244].

[b] (U. S. 1871) A witness, subpœnaed at the place of trial on the day on which he is required to attend, is not entitled to travel fees to and from his place of residence; and, if not so subpœnaed, he is entitled to such travel fee.—The Sunnyside, Fed. Cas. No. 13,619 [5 Ben. 162].

[c] (U. S. 1889) Rev. St. § 848, allows a witness mileage to and from his residence. Section 876 provides that a subpœna may run into another district as to witnesses living not more than 100 miles from the place of trial. Section 863 authorizes depositions by witnesses living more than that distance. *Held*, that witnesses voluntarily attending a court more than 100 miles distant from their residences can only recover mileage for 100 miles.—Eastman v. Sherry (C. C.) 37 Fed. 844.

[d] (U. S. 1889) In the taxation of costs in the federal courts the clerk has no authority to allow mileage for witnesses living at a distance greater than 100 miles, unless the court shall, for good cause shown, otherwise direct.—Smith v. Chicago & N. W. Ry. Co. (C. C.) 38 Fed. 321.

[e] (Iowa, 1887) A county is not liable for the mileage of a witness subpœnaed to attend a preliminary examination of a person accused of crime, where the subpœna was issued and served before the complaint was lodged with the magistrate, and before the accused was arrested.—Warnstaff v. Louisa County, 35 N. W. 604.

[f] (Iowa, 1890) Code 1873, § 3814, provides that in criminal cases, where defendant is adjudged not guilty, mileage fees of witnesses shall be paid by the county. McClain's Code, § 5095, provides that in no criminal case shall witnesses for the defense be subpœnaed at the expense of the county, except upon order of the court before whom the case is pending, and then only upon a satisfactory showing that the witnesses are necessary for the defense. *Held*, that where a witness in a criminal case attends without being subpœnaed, at the request of defendant's counsel, he is not entitled to mileage, though he may have been included in the order granting defendant authority to subpœna witnesses, that not being an order or request of the court to such witness to attend.—State v. Willis, 79 Iowa, 326, 44 N. W. 699.

[g] (Iowa, 1895) Code 1873, § 3673, providing that witnesses living more than 70 miles from the place of holding court cannot be compelled to attend, does not prohibit the granting of full mileage to a witness attending from a greater distance.—Briggs v. M. Rumely Co., 96 Iowa, 202, 64 N. W. 784.

[h] (La. 1812) An inhabitant of another state, detained as a witness, is not entitled to mileage.—McFall's Case, 2 Mart. (O. S.) 170.

[i] (Mass. 1887) Where three cases were heard together before a master, and the same attorneys were employed in each case, and the witnesses were all summoned in but one case, *held*, that they were not entitled to more than one travel, because the officer who served the subpœnas upon them requested them to attend for all the cases, and they did so attend and testify.—Barber v. Parsons, 145 Mass. 203, 13 N. E. 491.

[j] (Mo. 1893) Attendance by a witness who has accepted service of a subpœna is attendance "under subpœna," within Rev. St. 1889, § 5003, so as to entitle him to mileage.—Wilson v. St. Louis, K. & N. W. Ry. Co., 53 Mo. App. 342; Mt. Olivet Cemetery Ass'n v. Dalton, Id. 345.

[k] (N. J. 1890) Under Revision, p. 408, fixing the fees of a witness from a foreign coun-

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try, he is entitled to mileage on his first attendance in court, and also for going home and returning, if such conduct is reasonable, which it is within the discretion of the trial court to determine.—Henry v. Walton, 52 N. J. Law (23 Vroom) 370, 19 Atl. 791.

[l] (N. Y. 1831) A witness, who resides in the place where the court is held, is not entitled to travel fees.—Jackson v. Hoagland, 1 Wend. 69.

[m] (N. Y. 1831) A foreign witness, subpœnaed at the place of trial, is not entitled to travel fees.—Niagara Bank v. Austin, 6 Wend. 548.

[n] (N. Y. 1849) Where a witness is subpœnaed at his temporary residence or place of business, and attends court pursuant to the writ, he is entitled to his traveling fees from his temporary residence, instead of from his permanent residence.—Clarks v. Staring, 4 How. Prac. 243.

[o] (N. Y. 1852) A foreign witness, who is subpœnaed at the place of the trial, is not entitled to travel fees.—Dowling v. Bush, 6 How. Prac. 410.

[p] (N. Y. 1857) A witness is entitled to traveling fees, to be computed from the place of his residence, though he was subpœnaed at a point nearer the place where the court is held.—Pike v. Nash, 16 How. Prac. 53.

[q] (N. Y. 1863) The attorney of record, who testifies as a witness, is not entitled to mileage.—Taaks v. Schmidt, 25 How. Prac. 340.

[r] (N. Y. 1886) Where one comes from a distant city to the city of his residence to testify, to entitle him to his traveling fees, it must appear that he came for the sole purpose of testifying, and that he actually returned to the city from whence he came.—Sargent v. Warren, 41 Hun, 103.

[s] (N. C. 1888) Where a witness is not summoned, but gives his evidence voluntarily, he cannot recover mileage, as, if he was a nonresident, his deposition could have been taken, and if a resident, he is not entitled to prove his attendance, if not summoned.—Stern v. Herren, 101 N. C. 516, 8 S. E. 221.

[t] (Or. 1866) A witness' claim for disbursements made in a cause must be only for the number of miles actually traveled.—Crawford v. Abraham, 2 Or. 163.

[u] (Pa. 1878) Under Act April 23, 1864 (P. L. 575), providing that, in addition to the usual mileage, the fees of witnesses shall be one dollar per diem, money expended to reach the county seat is covered by the mileage.—Miller v. Shoop, 1 Lanc. Law Rev. 377.

[v] (Pa. 1893) The mileage of a witness should be taxed by the shortest and most direct route from his home to the place of trial.—Venetian Blind Co. v. Nesbit (Com. Pl.) 13 Pa. Co. Ct. R. 330.

[w] (Pa. 1894) Under Act May 19, 1887 (P. L. 134), providing that mileage allowed witnesses shall be computed by the "route usually traveled," mileage may be allowed for a longer route by rail, selected in preference to a route by stage, shorter in actual distance, but longer in time, the former route being the usual route.—Commonwealth v. Heiges (Quart. Sess.) 4 Pa. Dist. R. 184.

[x] (Tex. 1895) A witness is entitled to mileage fees from and to his residence only.—Marks v. Fields (Civ. App.) 29 S. W. 664.

[y] (Wash. 1888) A provision in an act of congress that mileage shall not be allowed witnesses for a greater distance than 100 miles applies only to witnesses who come from without the territorial limits of a court's jurisdiction.—United States v. Small, 3 Wash. T. 478, 17 Pac. 739.

§ 68. —— Travel outside state or district.

[a] The travel of witnesses who come from another state is to be taxed from the line of the state to the place of trial, coming and returning.

—(N. J. 1832) Williamson v. Johnson, 13 N. J. Law (1 J. S. Green) 156;

(N. Y. 1809) Howland v. Leonox, 4 Johns. 311.

[b] The travel of a witness coming from another state is to be taxed only from the line of the state in the ordinary route from his place of residence to the place of holding the court.

—(Mass. 1832) Melvin v. Whiting, 30 Mass. (13 Pick.) 184; (1840) White v. Judd, 42 Mass. (1 Metc.) 293;

(Pa. 1838) Leeds v. Loud, 2 Miles, 189.

[c] Neither party nor witness can be allowed mileage beyond the line of the state.

—(Me. 1867) Inhabitants of Kingfield v. Pullen, 54 Me. 398;

(Or. 1866) Crawford v. Abraham, 2 Or. 163.

[d] (U. S. 1862) By a liberal construction of the statute, return travel by a witness is allowed, even beyond the limits of the district for which court was held.—Woodruff v. Barney, Fed. Cas. No. 17,986 [1 Bond, 528; 2 Fish. Pat. Cas. 244].

[e] (U. S. 1886) In federal courts, the traveling fees of a witness residing out of the district can only be taxed to the extent of 100 miles.—Buffalo Ins. Co. v. Providence & S. S. S. Co. (C. C.) 29 Fed. 237.

[f] (U. S. 1888) Witness fees in the federal courts are taxable for travel not exceeding 100 miles, unless the distance be wholly within the district, though the witness attend the trial voluntarily, at the request of one of the parties.—The Syracuse (C. C.) 36 Fed. 830.

[g] (U. S. 1889) A witness for the United States, voluntarily attending court on the verbal instructions of the district attorney, is entitled to mileage, notwithstanding that his residence is out of the district, and more than 100 miles from the place of holding court.—In re Williams (D. C.) 37 Fed. 325.

[h] (U. S. 1889) Witnesses residing in the district, who attend court in obedience to a subpœna, are entitled to mileage fees for the whole distance necessarily traveled in going to and returning from the place where the court is held, though it exceeds 100 miles.—Sims v. Schult (C. C.) 40 Fed. 143.

[i] (U. S. 1890) Witness fees in civil cases are not to be taxed for travel over any greater distance than a subpœna would run, and hence, where a witness resident in one district attends to have his deposition taken in another, he is not entitled to fees for travel before he reached the latter district.—Wooster v. Hill (C. C.) 44 Fed. 819.

[j] (U. S. 1891) In admiralty causes in the Eastern district of Pennsylvania, mileage will not be allowed to witnesses brought from beyond the district, except as to 100 miles of the distance.—Street v. The Progresso (D. C.) 48 Fed. 239.

[k] (U. S. 1893) Where the witnesses come from without the state at a greater distance than 100 miles, they are entitled to claim for mileage for the distance of 100 miles, and no more, and also their per diems.—Pinson v. Atchison, T. & S. F. R. Co. (C. C.) 54 Fed. 464.

[l] (Ga. 1868) A person who resided in St. Louis, Mo., being in the courtroom, was subpœnaed in a criminal case in behalf of the state. He attended court until it adjourned,

and was permitted to go home on his promise to return in obedience to the subpœna. He did return, and gave his testimony in the case. *Held*, that he was entitled to mileage from his home; there being nothing in the statute expressly restricting mileage to travel performed within the limits of the state.—Dutcher v. Justices Inferior Court of Fulton County, 38 Ga. 214.

[m] (Ill. 1889) A witness in a civil case is not entitled to mileage for travel outside the state.—Fish v. Farwell, 33 Ill. App. 242.

[n] (Iowa, 1883) A witness subpœnaed from out the state to testify for the state in a criminal case, where defendant is found not guilty, may recover from the county mileage outside the state at the same rate as within.—Westfall v. Madison County, 62 Iowa, 427, 17 N. W. 614.

[o] (Kan. 1881) Where a witness, after he had entered into a recognizance to appear at a criminal trial, moved away from Kansas into Massachusetts, and then attended the trial, he could, under Comp. Laws 1879, p. 445, § 15, recover mileage fees only for the distance traveled in Kansas.—Lyon County v. Chase, 24 Kan. 774.

[p] (Mo. 1843) A witness residing in another state, who has been compelled, in Missouri, to recognize for his appearance in the latter state, is entitled to mileage from his place of residence.—Hutchins v. State, 8 Mo. 288.

[q] (Mo. 1895) Rev. St. 1889, § 5003, requires a witness to be examined on oath as to the number of days of attendance under subpœna or recognizance, and the number of miles traveled. *Held*, that a resident of another state under recognizance is entitled to mileage from the place of his residence, and not from the state line.—State ex rel. Keck v. Seibert, 130 Mo. 202, 32 S. W. 670.

[r] (N. H. 1860) If a witness, after being summoned and paid, removes to another state, but nevertheless attends the trial in good faith, he is entitled to his fees for such attendance and for the additional travel from the other state.—Gunnison v. Gunnison, 41 N. H. 121, 77 Am. Dec. 764.

[s] (N. Y. 1835) An administratrix, who filed a bill of foreclosure as such, will be allowed a reasonable compensation for expenses incurred by her in coming from without the limits of the state to be examined as a witness in the cause.—Elliott v. Lewis, 3 Edw. Ch. 40.

[t] (N. C. 1814) When one who has entered into a recognizance as a witness in behalf of the state removes from the state, he is entitled to travel fees to and from his actual residence.—State v. Stewart, 4 N. C. 138, 1 Car. Law Repos. 524.

[u] (S. C. 1855) Witnesses residing out of the district are entitled to $1 for every 30 miles traveled by them in going to and returning from court in addition to their pay for actual attendance.—Speigner v. Cooner, 9 Rich. Law, 120.

[v] (Vt. 1858) Costs may be taxed for the actual travel of witnesses from the place of their residence to the place of trial, whether they reside in a foreign jurisdiction or not.—Town of Albany v. Town of Derby, 30 Vt. 718.

§ 69. —— Effect of continuance or postponement.

[a] (U. S. 1846) If a case is suspended for a few days by agreement of parties the witnesses are not entitled to another travel unless included in the agreement.—Hathaway v. Roach, Fed. Cas. No. 6,213 [2 Woodb. & M. 63].

[b] (Kan. 1883) Witnesses were subpœnaed for the 21st, and after they reached court the trial was postponed to the 26th, and the witnesses told to appear then. *Held*, that they were entitled to mileage for their return on the 26th.—Union Pac. Ry. Co. v. Harris, 29 Kan. 275.

[c] (Pa. 1880) Double mileage cannot be allowed to witnesses who attend a trial, even where, after waiting a week for trial, they returned home from Saturday to Monday, and then had to travel to a different place where the court adjourned for trial.—Sweet v. Pennock, 1 Chest. Co. Rep. 16.

[d] (Pa. 1881) Where witnesses were subpœnaed for one week, at the end of which the case was continued until the following Monday, when they were resubpœnaed for the following week, they were entitled to but single mileage.—Todd v. Painter, 1 Chest. Co. Rep. 176.

[e] (Pa. 1885) Witnesses are entitled to only single mileage.—Lyon v. Marshall, 1 Pa. Co. Ct. R. 90.

[f] (Pa. 1887) Where a cause is called on the first day of trial and set down for subsequent day, witnesses present on the first day who go to their homes and return on the day fixed for trial are not entitled to double mileage.—Eakin v. Fulmer, 4 Pa. Co. Ct. R. 319.

[g] (Pa. 1895) Where a case was called on Monday, but postponed till Wednesday, witnesses who went home on Monday and returned on Wednesday are entitled to mileage.—Harman v. Shank (Com. Pl.) 3 Pa. Dist. R. 813.

3. PERSONS LIABLE, PAYMENT, AND RECOVERY.

PERSONS LIABLE IN GENERAL, § 70.
LIABILITY OF STATE OR COUNTY, § 71.
STATEMENT, ACCOUNT, AFFIDAVIT, AND CERTIFICATE, § 72.
PAYMENT, § 73.
RECOVERY BACK OF FEES PAID, § 74.
FORFEITURES AND PENALTIES FOR CLAIMING EXCESSIVE FEES, § 75.
ACTIONS AND OTHER REMEDIES, § 76.

§ 70. Persons liable in general.

Liability of surety on bond for costs for compensation of witnesses, see "Costs," vol. 13, c. 517, § 555 [c].

Persons calling witness, liable for witness fees, see "Costs," vol. 13, c. 396, § 386.

[a] (Ga. 1849) A witness subpœnaed in a criminal prosecution in behalf of a defendant, who is acquitted on the trial, cannot charge and collect by execution of such defendant, for his attendance and mileage out of the county in which he resides.—Howell v. Blackwell, 7 Ga. 443.

[b] (Ga. 1859) When a witness is rejected as incompetent, he can recover his fees only of the party who subpœnaed him.—Crozier v. Berry, 27 Ga. 346.

[c] (Kan. 1887) Where a defendant is tried for a felony, and acquitted, a witness who appeared at the trial on his behalf, in obedience to a subpœna, may recover compensation of the defendant in an action brought against him for services performed at his request.—Bennett v. Kroth, 37 Kan. 235, 15 Pac. 221, 1 Am. St. Rep. 248.

[d] (Minn. 1875) Under Gen. St. 1866, c. 70, § 7, which fixes the fees of witnesses "for attending in any justice's court," and section 41, which authorizes the county attorney to summon witnesses "without paying or tendering fees in advance," witnesses for the state in a criminal case are entitled to their fees, and it is proper to tax them in the costs against defendant, where costs are allowable.—State v. Bliss, 21 Minn. 458.

[e] (N. C. 1832) A party who produces a witness before the master must bear the expenses.—Taylor v. Cawthorne, 17 N. C. 221.

[f] (S. C. 1822) A witness subpœnaed by a defendant, who prevails, cannot recover of plaintiff the costs of his attendance.—Clement v. Bagley, 2 McCord, 244.

§ 71. Liability of state or county.

Right of accused to compulsory process, see ante, §§ 2–4.

[a] (Fla. 1871) A witness summoned to testify in behalf of the state before the grand jury or before the circuit court receives his compensation from the state and not from the county.—State v. Edwards, 13 Fla. 573.

[b] (Iowa, 1882) Where a prosecution is dismissed before trial a witness called for the prosecution may sue the county and recover his legal fees for attending before the justice, although both the complaining witness and defendant may be solvent.—Cassidy v. Palo Alto County, 58 Iowa, 125, 12 N. W. 231.

[c] (Iowa, 1888) Laws 18th Gen. Assem. c. 207, repealing Code 1873, § 3818, provides that "in no criminal case shall witnesses for the defense be subpœnaed at the expense of the county except upon an order of the court or judge before whom the case is pending; then only upon a satisfactory showing that the witnesses are material and necessary for the defense; and the board of supervisors shall in no case audit or allow any claims for witness fees for the defendaint in criminal cases, except upon order or judgment of the court or judge thereof, and such order may be made at the time of trial or other disposition of the case, and upon such showing as the court may require." *Held*, that it is sufficient if the witnesses were ordered to be subpœnaed by the court, on a satisfactory showing that their testimony would be material to the defense.—Wheelock v. Madison County, 75 Iowa, 147, 39 N. W. 243.

[d] (Iowa, 1889) Under Code 1873, § 4233, requiring the magistrate, in preliminary examinations, to issue subpœnas for witnesses desired either by the state or defendant, the magistrate has no jurisdiction over defendant until arrest, and cannot bind the county for the mileage and attendance fees of witnesses subpœnaed before such arrest.—Warnstaff v. Louisa County, 76 Iowa, 585, 41 N. W. 195.

[e] (Md. 1896) Under Code, art. 24, § 7, requiring county commissioners to pay the costs of a defendant who may be discharged or acquitted or fined not exceeding 15 cents, the commissioners must pay all witnesses before justices summoned on behalf of the state, and all summoned on behalf of defendant where defendant has been discharged, or fined only 15 cents, or acquitted; but cannot pay fees due to the prisoner's witnesses where he is convicted.—Schamel v. Washington County, 83 Md. 128, 34 Atl. 839.

[f] (Neb. 1883) The county cannot be required to pay the costs of defendant's witnesses on a prosecution for felony, under either Const. art. 1, § 11, which gives to defendant the right "to have process to compel the attendance of witnesses in his behalf," or under Comp. St. p. 746, § 541a, providing "that the fees of all the witnesses in criminal cases in the district court shall be paid by the county wherein the indictment is found;" such provision having reference only to cases where a change of venue has been had, and being intended to determine which county should pay such fees as either would be liable for in such cases.—Hewerkle v. Gage County, 14 Neb. 18, 14 N. W. 549.

[g] (N. H. 1845) One recognized to appear as a witness in a public prosecution is entitled to receive from the county his fees for travel and attendance.—Ex parte Mitchell, 17 N. H. 501.

[h] (N. C. 1877) A witness in a criminal case has no claim on the county for his fees until the question of the county's liability for costs is passed on by the court.—Young v. Buncombe County, 76 N. C. 316.

[i] (N. C. 1889) Where an indictment is quashed, defendant's necessary witness fees cannot be taxed against the county as Code, § 747, authorizes the court to tax defendant's witnesses against the county only when he "shall be acquitted, a nolle prosequi entered, or judgment arrested."—State v. Massey, 104 N. C. 877, 10 S. E. 608.

[j] (N. C. 1889) Const. art. 1, § 11, which provides that a defendant in a criminal case shall not be compelled to pay necessary witness fees unless found guilty, does not, in the absence of legislative enactment, require the public to pay defendant's necessary witnesses on his acquittal, but merely deprives them of their common-law right to look to defendant for payment.—State v. Massey, 104 N. C. 877, 10 S. E. 608.

[k] (Pa. 1882) Although the constitution gives to a defendant the right to have compulsory process for obtaining witnesses in his behalf, it does not provide that such witnesses' costs and expenses shall be paid by the county, and as there is no act of assembly imposing such liability, the county is not compellable to pay the same.—Commonwealth v. Kilcourse, 1 Del. Co. R. 189.

[l] (Tenn. 1879) Under Code, § 5392, the compensation of witnesses summoned before a grand jury, where no indictment is found, must be paid by the county in which they were summoned, and not by the state.—State v. Treadway, 71 Tenn. (3 Lea) 55.

[m] (Utah, 1889) It is apparent from the act (Sess. Laws 1888, p. 184) providing for the payment of jurors, witnesses, etc., and creating and defining the duties of court commissioners, and another passed on the same day, that the legislature, having provided for payment of all outstanding obligations for witness fees up to January 1, 1888, intended to provide for the payment of all certificates for which the territory was liable after that date, and commit their payment to the court commissioners therein named; but that services rendered after that date and before the passage of these acts should be paid according to the law then in force.—People v. Pyper, 6 Utah, 160, 21 Pac. 722.

§ 72. Statement, account, affidavit, and certificate.

Affidavit as to witness fees in statement of costs, see "Costs," vol. 13, cc. 720–722, § 776.

Fees of clerk of state courts for certificates of attendance, see "Clerks of Courts," vol. 10, cc. 109, 110, § 56.

—— *of United States court for certificates of attendance, see* "Clerks of Courts," vol. 10, cc. 135, 136, § 80.

[a] (U. S. 1875) The clerk's certificate is only prima facie evidence of the number of days that a witness attended before the register in bankruptcy. The memoranda or entries made by the register may be used to prove the proceedings.—In re Crane, Fed. Cas. No. 3,352.

[b] (U. S. 1888) An order of a circuit court of the United States, allowing mileage to a witness, is a sufficient voucher for the marshal of the court on the auditing of his accounts, but is not conclusive on the government, in a suit between it and the witness to recover such mileage.—Duval v. United States, 23 Ct. Cl. 102.

[c] (Ala. 1880) A witness' certificate signed by the clerk of the court is prima facie evidence in an action for his fees.—Burns v. Howard, 68 Ala. 352.

[d] (Ala. 1895) Code, § 4349, provides that the foreman of the grand jury shall give each witness a certificate stating the time, the number of miles traveled, and the amount due him. Section 4887 provides that the fees of witnesses before the grand jury must be paid by the county in the manner specified in section 4889, which provides that the clerk shall issue a certificate to each witness for the state, stating therein the amount of compensation to which he is entitled, and the facts which, under section 4887, make it a good claim against the county, which certificate is payable by the treasurers out of any fines or forfeitures in the county treasury. *Held*, that the certificate of the clerk prescribed by section 4889 is the only authentication of claims for such fees which the treasurer can pay.—Alston v. Yerby, 108 Ala. 480. 18 South. 559, following Herr v. Seymour (1884) 76 Ala. 270.

[e] (Ga. 1855) Certified subpœna accounts are prima facie evidence of the number of days for which payment is due to a witness.—Robison v. Banks, 17 Ga. 211.

[f] (Ill. 1889) Under Rev. St. c. 25, § 16, subd. 5, which provides that the clerk of the court shall keep "a fee-book in which shall be distinctly set down any item under the proper title of the cause and heads, the costs of each suit, including clerk's, sheriff's, and witness' fees, stating the name of each witness having claimed his attendance during the term, with the number of days he attended at each term," a witness who attends at several terms may wait until the term at which judgment is rendered, and then file his affidavit showing the number of days he attended at each term.—Fish v. Farwell, 33 Ill. App. 242.

[g] (Me.) A witness' certificate to travel and attendance, where proved to have been made falsely, will be presumed to have been made corruptly; but this presumption may be rebutted by evidence.—(1834) Chesley v. Brown, 11 Me. (2 Fairf.) 143; (1852) Kennedy v. Wright, 34 Me. 351.

[h] (Mich. 1880) Witness fees will not be allowed to parties unless a special affidavit is made showing that such parties attended as witnesses, and traveled, as charged, for that purpose, and not to assist as parties in the conduct of the case.—Dickinson v. Seaver, 44 Mich. 624, 7 N. W. 182.

[i] (Mich. 1885) How. Ann. St. § 9016, provides that mileage shall be allowed to witnesses, to be estimated from the residence of the witness, if within the state, or, if without the state from the boundary line, to the place of attendance; and that (section 9002) an affidavit for mileage shall state the distance the witnesses respectively traveled. *Held*, that an affidavit to tax mileage fees should state the place of residence of the witnesses.—Jeffery v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7.

[j] (Mont. 1891) Under Comp. St. div. 5, § 1081, relative to the payment of witness fees, providing that, on application of a witness, the clerk of court shall fill out an affidavit giving the number of miles traveled by him, which shall be sworn to by the witness, and a certificate corresponding thereto shall be signed by the clerk, provided that, if the county commissioners have established a table of distances, the certificate of mileage shall not exceed the distance established by the table, where there is a regular stage line, and the distance by rail is further, in the absence of any table furnished by the county commissioners the clerk is not bound to give a certificate for the number of miles by rail, though the witness traveled that way, and though he made affidavit that the distance was necessarily traveled, and though the stage route was inconvenient and unpleasant.—State v. Ramsey, 11 Mont. 245, 28 Pac. 258.

[k] (N. Y. 1810) No fees for attendance and travel of witnesses can be taxed without proof by affidavit of their actual attendance and travel.—Jackson v. Scott, 6 Johns. 330.

[l] (N. Y. 1837) In the affidavit of the attendance of witnesses, it is not necessary, in the first instance, to state their materiality, and the affidavit need not be made by the party or his attorney.—Willink v. Reckle, 19 Wend. 82.

[m] (N. Y. 1843) The affidavit of the travel and attendance of witnesses should give the name, residence, distance traveled, and time occupied of each witness.—Ehle v. Bingham, 4 Hill, 595.

[n] (N. C. 1824) Witnesses should swear to their attendance at each term, and the ticket should state the number of days' attendance at each term.—Thompson v. Hodges, 10 N. C. 318.

[o] (S. C. 1890) Gen. St. § 622, subd. 2, requires each county to pay witness fees in state cases, for actual attendance on the circuit court as provided by law; and section 2197 provides that no fees shall be allowed to any witness bound over or summoned to testify, unless the judge who tried the cause in which the witness was summoned shall certify that he was material. *Held*, that the certificate of a circuit judge, which fails to state that the witness was material, is insufficient.—Hellams v. Greenville County, 32 S. C. 441, 11 S. E. 211.

[p] (S. C. 1894) Gen. St. § 2197, provides that no fees or other compensation shall be allowed to any witness bound over or summoned to testify in the court of general sessions unless the circuit judge who tried the case shall certify that such witness was material. *Held*, that a certificate that a witness "was regularly bound over as a material witness," signed by the clerk of the circuit court, and marked "Approved" by the circuit judge, is not a compliance with the statute.—Eustace v. Greenville County, 42 S. C. 190, 20 S. E. 88.

[q] (Tex.) In a suit by a witness against the party who summoned him, to recover his fees, the clerk's certificate is prima facie evidence of plaintiff's right.—(1852) Flores v. Thorn, 8 Tex. 377; (1857) Crawford v. Crain, 19 Tex. 145.

[r] (Utah, 1889) Comp. Laws 1888, § 5447, providing that witness fees shall not be taxed "unless the witness appear before the clerk within two days after the trial, and claim his fees," does not apply as against a party who has paid his witnesses their fees in advance, and made the affidavit of costs and disbursements required by section 3695.—Grant v. Union Pac. Ry. Co., 6 Utah, 270, 21 Pac. 996.

§ 73. Payment.

Additional compensation to experts, see ante, §§ 65, 66.

[a] (U. S. 1886) Rev. St. § 823 [U. S. Comp. St. 1901, p. 632], regulating witnesses' fees, does not prohibit the attorney general from procuring the attendance of witnesses living beyond the process of the court by paying their traveling expenses out of the miscellaneous expense fund under his control.—Douglass v. United States, 21 Ct. Cl. 462.

[b] (U. S. 1889) A marshal, being without funds, gave certificates to witnesses. The assignee of these certificates presented them to the treasury department for payment. *Held*, that the provision of Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], prohibiting assignments of claims against the United States, did not preclude the treasury department from making payment to such assignee.—Lopez v. United States, 24 Ct. Cl. 84.

[c] (Minn. 1894) A witness in court cannot be compelled to testify until his per diem wit-

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ness fees are paid him.—Kipp v. Dawson, 59 Minn. 82, 60 N. W. 845.

[d] (N. Y. 1847) A witness attending court is not obliged to be sworn until his fees as such witness have been paid.—Hurd v. Swan, 4 Denio, 75.

[e] (Pa. 1877) The Armstrong county act of 1834 (P. L. 685), providing that the witness fees must be paid them unless they have given a written order for their payment to some other person, was merely declaratory of the then existing law.—McCain v. Jerrell, 24 Pittsb. Leg. J. (O. S.) 185.

§ 74. Recovery back of fees paid.

[a] (N. Y. 1851) The sum paid to a witness, on serving a subpœna, for one day's attendance and for mileage, cannot be recovered back by the party paying it, unless the witness has failed, without a reasonable excuse, to attend the court in obedience to the subpœna. If the cause is settled or put off, the witness is not bound to refund, although he is excused from attending.—Ford v. Monroe, 6 How. Prac. 204.

[b] (N. Y. 1852) Where a witness who has been subpœnaed departs from the court without leave before the trial, the fees paid him to secure his attendance may be recovered back.—Dowling v. Bush, 6 How. Prac. 410.

§ 75. Forfeitures and penalties for claiming excessive fees.

[a] (Ga. 1894) Code, § 3843, providing that a witness who claims more than is due him forfeits all his fees, and shall pay to the injured party four times the amount so claimed, has no application to an execution issued by the clerk for excessive witness fees; the issuance by the clerk of the execution for such fees not being a "claim by the witness" for them, within such section.—State v. Everett, 93 Ga. 575, 20 S. E. 78.

§ 76. Actions and other remedies.

Appealability of orders relating to fees of witnesses, see "Appeal and Error," vol. 2, c. 1389, § 833.

Claim for fees as "liability created by statute" within meaning of limitation acts, see "Limitation of Actions," vol. 33, cc. 324, 325, § 154.

Limitations applicable to action, see "Limitation of Actions," vol. 33, c. 325, § 154 [h, i].

Splitting causes of action, see "Action," vol. 1, c. 1434, § 621.

[a] (U. S. 1891) The claim of a witness for the United States for fees earned by attendance on a federal court is a claim against the marshal, and not against the government, and therefore not within the prohibition against assignments contained in Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], and an action will lie by the assignee of witness' certificates on the bond of a marshal who has received the money to pay them in his official capacity, but has failed to do so.—Bollin v. Blythe (C. C.) 46 Fed. 181.

[b] (Ala. 1827) A witness may transfer his certificate for fees, and the holder can sustain an action in the name of the witness for his own use.—Findley v. Wyser, 1 Stew. 23.

[c] (Ala. 1840) A witness' right of action to recover his fees accrues immediately on his obtaining the proper certificate from the clerk, and he is not obliged to await the result of an execution against the unsuccessful party.—Hill v. White, 1 Ala. 576.

[d] (Ala. 1846) In a suit on an assigned witness' certificate, it is competent for defendant, notwithstanding the certificate, to show that the witness agreed, before the services were rendered, to attend gratuitously.—Carville v. Reynolds, 9 Ala. 969.

[e] (Ala. 1851) A witness for the state in a prosecution against a party cannot bring suit on his certificate of attendance against defendant after his conviction.—Nicolas v. Trickey, 19 Ala. 92.

[f] (Del. 1893) In an application for payment by the state of fees of witnesses for the defense in criminal cases, the affidavits of indigence must be read in open court.—In re Indigent Witnesses, 2 Hardesty, 181.

[g] (Ga. 1894) Where the clerk of court issues an execution for the costs due witnesses, and defendant meets it with an affidavit of illegality, on the ground that the witnesses claimed more fees than they are entitled to, the court should hear evidence by the witnesses and try the issue.—State v. Everett, 93 Ga. 575, 20 S. E. 73.

[h] (Ill. 1894) A witness cannot appeal from an order retaxing his fees, as he is not a party to the judgment.—Boyd v. Humphries, 53 Ill. App. 422.

[i] (Kan. 1889) In an action to recover for services as a witness, where the defense was that the services were a mere gratuity, with the understanding at the time of performance that they were not to be paid for, and there was evidence tending to establish such a defense, it is error for the court to refuse to instruct the jury as to the principle that no recovery can be had for services gratuitously performed.—Stadel v. Stadel, 40 Kan. 646, 20 Pac. 475.

[j] (Ky. 1835) A distress issued on a claim of a witness for his attendance may be levied on property fraudulently conveyed by defendant in the distress.—Worland v. Outten, 33 Ky. (3 Dana) 477.

[k] (Ky. 1835) The claim of a witness for his attendance is a debt on the party by whom he was summoned, and may be satisfied by distress.—Worland v. Outten, 33 Ky. (3 Dana) 477.

[l] (Md. 1896) The remedy of a witness for a refusal of the county commissioners to pay his fees is not in assumpsit, but by mandamus.—Hall v. Somerset County, 82 Md. 618, 34 Atl. 771, 51 Am. St. Rep. 484, 32 L. R. A. 449.

[m] (Miss. 1892) Code, § 1595, providing that a party recovering costs in an action may have the amount of his witnesses' fees taxed, for which execution might issue, has no application to witnesses of the unsuccessful party, who are not entitled to have execution issued against such party to enforce collection of their fees, but they have simply a valid claim for the amount, on which they may bring suit as any other creditor by simple contract.—Hall v. Moore, 70 Miss. 75, 11 South. 655.

[n] (Mo. 1892) The right of a witness to have his fees taxed in a case must be exercised through the agency of a party to the suit.—State ex rel. Houser v. Oliver, 50 Mo. App. 217.

[o] (Mont. 1888) Under Cr. Proc. Act § 423, providing that witnesses in criminal cases shall make out, under oath, a bill of their fees, and file it with the clerk, a complaint for the recovery of fees failing to show compliance with this section is defective.—First Nat. Bank of Billings v. Custer County, 7 Mont. 464, 17 Pac. 551.

[p] (N. H. 1850) Where defendant's fees as a witness under order of court to testify to the facts relating to a negotiable note disclosed by a trustee had not been paid, he is entitled to judgment and execution therefor as for costs.—Hurd v. Fogg, 22 N. H. (2 Fost.) 98.

[q] (N. C. 1801) Witnesses cannot bring an action at common law for their services; they must proceed on the statute.—Standley v. Hodges, 1 N. C. 500.

[r] (N. C. 1802) Before the act of 1790, a witness could not pursue the common-law remedy against the party who summoned him, until recourse was first had against the party cast, according to the directions of the act of 1783.—Stanly v. Hodges, 1 N. C. 203.

[s] (N. C. 1881) A witness is not at liberty, after final judgment, to withdraw, his "witness ticket," and sue upon it. His fees for attendance should be taxed and collected with the other costs against the party adjudged to pay the same, if he be solvent, and if not, then the prevailing party who summoned and required his testimony is responsible therefor.—Belden v. Snead, 84 N. C. 243.

[t] (Or. 1870) A statute that requires a witness in a criminal case to claim his fees at the same term at which the witness attended does not deprive the witness of a constitutional right; it only points out the remedy the witness is to pursue.—Lannahan v. Multnomah County, 3 Or. 187.

[u] (Pa. 1841) On an indictment for forcible entry, and an acquittal of the defendants without any finding of the jury on the subject of costs, an action will not lie, by a witness, in behalf of the commonwealth, to recover his costs of the prosecutor who subpœnaed him.—Strein v. Zeigler, 1 Watts & S. 259.

[uu] (Pa. 1843) A witness may maintain an action for his fees against the party who subpœnaed him and lost the cause, without having the bill of costs taxed, and making demand before suit brought.—Utt v. Long, 6 Watts & S. 174.

[v] (Tenn. 1827) A witness may sue the party who summoned him, for the attendance money allowed by law, although he lives in the same county where the suit is pending, and the cause is not finally determined.—Wetherspoon v. Killough, Mart & Y. 38.

[vv] (Tenn. 1827) Where two joint plaintiffs subpœna a witness, he may sue either or both for the attendance money.—Wetherspoon v. Killough, Mart & Y. 38.

[w] (Tex. 1876) The certificate given by the clerk, on the oath of a witness, showing the amount due such witness for attendance in a cause, while not an adjudication, is prima facie evidence of the correctness of the claim, on which he may sue the party who summoned him without waiting for the termination of the suit.—Houston & G. N. R. Co. v. Jones, 46 Tex. 133.

[ww] (Tex. 1879) In the absence of statute a witness may claim his costs, and the same may be taxed in the bill of costs, at any time before the issue of execution, but not afterwards. Hardy v. De Leon, 7 Tex. 466.

[x] (Tex. 1880) A witness who sued for his fees for attendance should show the subpœna, or account for its absence, and he should show the time at which he attended.—Harris v. Coleman, 8 Tex. 278.

[xx] (Tex. 1880) Under the act of 1836 the fees of witnesses abode the event of the suit, and were recoverable from the party cast only in the mode provided by that act. Under the act of 1846 witnesses have a claim directly against the party summoning them, for their fees; and, as soon as the service is rendered, they may maintain an action for the same.—Flores v. Thorn, 8 Tex. 377.

[y] (Tex. 1880) Where a witness sues for his fees, the subpœna which was served on him is competent evidence to prove that he was subpœnaed.—Flores v. Thorn, 8 Tex. 377,

[yy] (Tex. 1890) No action can be sustained to recover witness fees from one against whom judgment for the fees had been entered in the cause in which they accrued, unless it is alleged and proved that the judgment became dormant.—Ballard v. Murphy (Tex. App.) 15 S. W. 42.

[z] (Vt. 1894) In assumpsit by a witness to recover his fees of the winning party, the clerk's taxation of costs, which included the attendance of plaintiff as a witness, was admissible to show his attendance, though neither defendant nor his counsel were present at the taxation.—Hamilton v. Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

[zz] (Wash. 1896) The court's approval of a cost bill in a criminal case, with fees of witnesses stricken out, amounts to a disapproval of such witness fees; and thereupon the right of action of the witnesses against the county for the fees accrues.—State v. Graves, 13 Wash. 485, 43 Pac. 376.

II. COMPETENCY.

(A) CAPACITY AND QUALIFICATIONS IN GENERAL, §§ 77-206.
(B) PARTIES AND PERSONS INTERESTED IN EVENT, §§ 207-549.
(C) TESTIMONY OF PARTIES OR PERSONS INTERESTED FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT, §§ 550-731.
(D) CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS, §§ 732-787.

Incompetency as ground for refusing compensation, see ante, § 48 [d, h].

Admissibility of declarations of persons incompetent to testify, see "Criminal Law," vol. 14, c. 1612, § 939; c. 1633, § 969.

As to testamentary capacity of testator, see "Wills," vol. 49, cc. 134–137, § 116.

Authority of to waive exceptions to competency of witness, see "Attorney and Client," vol. 5, c. 1622, § 173 [h].

Constitutional guaranty of equal protection of laws as applied to statutes determining competency of witnesses, see "Constitutional Law," vol. 10, c. 2137, § 720.

Declarations of incompetent witnesses as evidence, see "Evidence," vol. 20, c. 1485, § 1054.

Delegation to judiciary of power to compel incompetent witness to testify, see "Constitutional Law," vol. 10, c. 1375, § 103 [u].

Impairment of obligation of contract by statutes relating to competency of witnesses, see "Constitutional Law," vol. 10, cc. 1946, 1947, § 520.

—— *of vested right to remedy by statutes relating to competency of witnesses, see* "Constitutional Law," vol. 10, cc. 1608, 1609, § 262.

In justice court, see "Justices of the Peace," vol. 31, cc. 1305–1307, § 347.

In proceedings for discharge of bankrupt, see "Bankruptcy," vol. 6, c. 720, § 724.

In prosecution for adultery, see "Adultery," vol. 1, c. 2008, § 22.

Liability of attorney for negligence in permitting incompetent witness to testify, see "Attorney and Client," vol. 5, c. 1680, § 224 [xx].

Motion to strike out evidence for incompetency of witnesses, see "Trial," vol. 46, cc. 994, 995, §§ 230, 231; c. 1013, § 243.

New trial, incompetency as ground for, see "Criminal Law," vol. 15, cc. 43, 44, §§ 2206 [k], 2207 [g]; cc. 146–148, §§ 2310-2312; "New Trial," vol. 37, c. 880, § 63; cc. 1130–1133, § 208.

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Of administrator to prove notice of his appointment, see "Executors and Administrators," vol. 22, c. 1251, § 810 [b].
Of arbitrators to testify in relation to their award, see "Arbitration and Award," vol. 4, cc. 470–473, § 519.
Of attesting witnesses to testify in probate proceedings, see "Wills," vol. 49, cc. 763–770, §§ 679–684.
Of experts, see "Criminal Law," vol. 14, cc. 1755–1764, §§ 1064–1070; "Evidence," vol. 20, cc. 3407–3455, §§ 2343–2363.
Of mother as witness in bastardy proceedings, see "Bastards," vol. 6, cc. 1927–1931, §§ 149–152.
Of parties or holders to testify in action on negotiable instrument, see "Bills and Notes," vol. 7, cc. 2458–2467, §§ 1771–1775.
Of person making dying declarations offered in evidence in prosecution for homicide, see "Homicide," vol. 26, cc. 705–708, §§ 445–447.
Of subscribing witness to will, see "Wills," vol. 49, cc. 343–356, §§ 284–298.
Of surveyors and their assistants in boundary proceedings, see "Boundaries," vol. 8, cc. 655–660, §§ 157–159.
Of witnesses as affecting finding of grand jury, see "Indictment and Information," vol. 27, cc. 310–313, § 54.
—— *as to proceedings before grand juries, see* "Grand Jury," vol. 24, cc. 2774, 2775, § 87.
—— *before grand jury as ground for quashing indictment, see* "Indictment and Information," vol. 27, cc. 799–801, § 483.
—— *not examined before grand jury, see* "Criminal Law," vol. 14, cc. 2190, 2191, § 1433.
—— *not indorsed on indictment or information to testify on prosecution, see* "Criminal Law," vol. 14, cc. 2179–2182, §§ 1416, 1417.
—— *not on list furnished to defendant, see* "Criminal Law," vol. 14, c. 2187, § 1428.
—— *to prove appraisement in action to recover duties paid, see* "Customs Duties," vol. 15, cc. 1552–1555, § 249.
Presence of accused during examination of witness as to his competency, see "Criminal Law," vol. 14, c. 2220, § 1472.
Recognition of proceedings as waiver of objections to witness making deposition, see "Depositions," vol. 16, cc. 1336, 1337, § 335.
Review, discretion of trial court, see "Appeal and Error," vol. 3, cc. 1682–1684, § 3852; "Criminal Law," vol. 15, cc. 832, 833, § 3062.
—— *harmless error in permitting incompetent witness to testify, see* "Criminal Law," vol. 15, c. 934, § 3138 [k].
Review, necessity of exceptions, see "Appeal and Error," vol. 2, c. 1907, § 1506; "Criminal Law," vol. 15, cc. 449, 450, § 2663.
—— *of objections in proceedings in orphans' court, see* "Appeal and Error," vol. 2, c. 1560, § 1023 [c].
—— *of objections in trial court, see* "Appeal and Error," vol. 2, c. 1558, § 1018 [ff]; c. 1566, § 1031 [a]; "Criminal Law," vol. 15, c. 428, § 2640.
Review, objections to competency of witness part of bill of exceptions on appeal in criminal prosecutions, see "Criminal Law," vol. 15, c. 582, § 2817.
—— *of findings, see* "Appeal and Error," vol. 3, cc. 1140, 1141, § 3322.
—— *of rulings as to competency of witness in criminal prosecution, dependent on setting forth objection in record, see* "Criminal Law," vol. 15, cc. 690, 691, § 2937.
—— *presumptions on appeal, see* "Appeal and Error," vol. 3, cc. 1515, 1516, § 3745; "Criminal Law," vol. 15, c. 790, § 3030.
State laws as rules of decision in federal courts as to competency of witness in criminal case, see "Courts," vol. 13, cc. 2768, 2769, § 984.
Time and necessity of objection to competency of witness making deposition, see "Depositions," vol. 16, c. 1290, § 304; cc. 1293, 1294, § 307.
To contradict certificate of acknowledgment, see "Acknowledgment," vol. 1, c. 1041, § 300; cc. 1075, 1076, § 347.
To testify on trial of cause anew on appeals from justices of the peace, see "Justices of the Peace," vol. 31, cc. 1806–1809, § 698.

(A) CAPACITY AND QUALIFICATIONS IN GENERAL.

1. IN GENERAL, §§ 77-79.
2. KNOWLEDGE OR MEANS OF KNOWLEDGE OF FACTS, §§ 80-87.
3. RACE OR COLOR, §§ 88-95.
4. DEGREE OF MENTAL CAPACITY, §§ 96-101.
5. RELIGIOUS BELIEF AND OBLIGATION OF OATH, §§ 102-107.
6. CHARACTER AND CONDUCT, §§ 108-118.
7. RELATIONSHIP TO PARTY IN GENERAL, §§ 119-123.
8. HUSBAND AND WIFE, §§ 124-132.
9. JUDGES, JURORS, AND JUDICIAL OFFICERS, §§ 133-138.
10. OBJECTIONS TO COMPETENCY AND DETERMINATION THEREOF AND EFFECT OF INCOMPETENCY, §§ 139-206.

1. IN GENERAL.

IN GENERAL, § 77.
WHAT LAW GOVERNS, § 78.
STATUTORY PROVISIONS, § 79.

§ 77. In general.

[a] (Ala. 1881) The inability of a witness to read or write does not affect his competency to testify as to the signature of a deed by a certain person as witness, his incapacity affecting only the weight of his testimony.—Allred v. Elliott, 71 Ala. 224.

[b] (La.) The general rule is that all persons not expressly disqualified may testify in civil and criminal cases.—(1822) Bernard v. Vignaud, 10 Mart. (O. S.) 482; (1850) State v. Levy, 5 La. Ann. 64.

[c] (La. 1848) A decision in a civil suit, declaring a witness not entitled to credit, cannot disqualify him, though it may greatly affect his credibility.—Farr v. Gyles, 3 La. Ann. 669.

[d] (La. 1879) Women are competent witnesses to prove the handwriting of a testator, though they are not competent as subscribing witnesses to a will.—Succession of Roth, 31 La. Ann. 315.

[e] (Wis. 1874) Taylor's St. p. 711, § 14, providing that no person "practicing physic and surgery" shall "testify in a professional capacity as a physician and surgeon in any case, unless such person shall have received a diploma," applies only to testimony as experts, and not to a statement by a witness that he set plaintiff's leg, and that "both bones were broken three

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fingers wide above the ankle."—Montgomery v. Town of Scott, 34 Wis. 338.

§ 78. What law governs.

[a] (La. 1841) The rule in relation to the competency of witnesses is to be governed by the lex fori with some exceptions in favor of the local law.—Buckner v. Watt, 19 La. 211.

§ 79. Statutory provisions.

Effect of incompetency of witness as disqualifying adverse party, see post, § 206.
Infamy or conviction of crime, see post, § 110.
Removal of incompetency of husband and wife, see post, § 137.
—— *of infamous persons, see* post, § 115.
—— *of negroes, see* post, § 93.

[a] (Ga. 1853) Act 1850, authorizing attorneys to testify, does not apply to cases instituted before it was passed, as it is prospective.—Hammond v. Myrick, 14 Ga. 77.

[b] (La. 1822) The former rules as to the competency of witnesses were repealed by Territorial Act 1805, No. 26.—Bernard v. Vignaud, 10 Mart. (O. S.) 482.

[c] (La. 1841) Act March 25, 1828, providing that all the rules of proceeding which existed before the promulgation of the Code of Practice, except those relating to juries and witnesses and with respect to the competency of the latter, are repealed, did not repeal the law then existing, respecting the competency of witnesses.—Waters v. Petrovic, 19 La. 584.

2. KNOWLEDGE OR MEANS OF KNOWLEDGE OF FACTS.

IN GENERAL, § 80.
SOURCE OF KNOWLEDGE, § 81.
RECOLLECTION OF WITNESS, § 82.
KNOWLEDGE OR LANGUAGE, § 83.
CHARACTER OR REPUTATION OF PARTY, § 84.
CONVERSATIONS, ADMISSIONS, DECLARATIONS, AND CONFESSIONS, § 85.
SURVEYS, § 86.
CUSTOMS AND USAGES, § 87.

Credibility of witnesses, see post, §§ 1076, 1077.
Evidence, see post, § 196.
Impeachment of knowledge or recollection of witness, see post, § 1103.
As ground for motion to strike out evidence, see "Trial," vol. 46, c. 995, § 231.

§ 80. In general.

[a] (U. S. 1839) On a prosecution for stealing letters from the mail, bank notes alleged to be inclosed in a letter so stolen need not be proved by a person who has seen the president and cashier write; but any one who deals in such notes as cashier of a bank, etc., may prove their genuineness.—United States v. Keen, Fed. Cas. No. 15,510 [1 McLean, 429].

[b] (Ala. 1848) Where usury is proved by a witness, the party to the usurious contract is not competent to testify to an independent fact, showing its connection with the note in controversy, when he knows nothing of the offense itself.—Jackson v. Jones, 13 Ala. 121.

[c] (Ala. 1848) Where the question was whether a certain warehouse was fireproof, a witness who stated that he did not know what a fireproof building was may be allowed to state what was considered such in the place where he resided, and in what respect the one in question differed therefrom.—Hatchett v. Gibson, 13 Ala. 587.

[d, e] (Ga. 1881) In an action by an engineer, against a railroad company, for injuries, the negligence of the plaintiff being put in issue, the conductor having authority over such engineer is a competent witness as to the latter's duties.—Augusta & S. R. Co. v. Dorsey, 68 Ga. 228.

[f] (Ill. 1874) In an action of assumpsit to recover damages for the breach of a parol contract to furnish wood to defendant, the testimony of plaintiff's bookkeeper was admissible to show the amount of wood purchased and the price paid therefor, although he did not make the purchases, where he had knowledge of such purchase and kept the books, one of which was produced at the trial.—Long v. Conklin, 75 Ill. 32.

[g] (Ill. 1887) In an action to recover the price of corn, where the purchaser pleads that the corn did not answer to contract, if the purchaser did not himself sell the corn in the market for which he claimed it was bought, or did not know of his own knowledge how much it was sold for there, he is an incompetent witness to show what it brought there when sold.—Carpenter v. First Nat. Bank of Joliet, 119 Ill. 352, 10 N. E. 18.

[h] (Ind. 1893) On the question of the damages to land by the burning of the soil, the county auditor is not competent to testify as to the assessor's return of appraisement for taxation of the injured land.—Chicago & E. R. Co. v. Smith, 6 Ind. App. 262, 33 N. E. 241.

[i] (Ind. 1894) One who had been the grantee's partner for a year before the conveyance could testify as to his familiarity with his partner's claim against the grantor, and what occurred between the grantor and grantee when witness figured up the indebtedness and the deed was made.—Fleming v. Yost, 137 Ind. 95, 36 N. E. 705.

[j] (Iowa, 1877) In an action on an account, a witness may testify to the receipt of orders for merchandise from defendant, where the receipt of such orders were within his personal knowledge, though the only knowledge of the witness as to the details of the transaction was based on plaintiff's account book.—Davis Sewing Mach. Co. v. McGinnis, 45 Iowa, 538.

[k] (Iowa, 1888) One who has been in the habit of passing over a crossing every day, and sometimes five or six times a day, is competent to state that she knew the signal to stop or go on, and that the flagman stationed at the crossing gave the signal to go on.—Buchanan v. Chicago, M. & St. P. R. Co., 75 Iowa, 393, 39 N. W. 663.

[l] (Kan. 1886) It is not competent to prove the condition of a long account between a bank and one of its customers by the oral testimony of the cashier of the bank, where it is not shown that the cashier is the bookkeeper, or that the books are kept under his supervision, or that he has any knowledge of such books.—Mann v. Second Nat. Bank of Springfield, 34 Kan. 746, 10 Pac. 150.

[m] (Kan. 1886) Where a person has lived several months on a farm near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one.—Missouri Pac. Ry. Co. v. Stevens, 35 Kan. 662, 12 Pac. 25.

[n] (La. 1889) The refusal of a trial judge to permit a witness to answer a question, the purport of which was whether wounds received by an accused had been inflicted in any particular way, will not be interfered with, where the witness had previously stated that he did not know how the wounds had been inflicted, and that he was not an expert.—State v. Claire, 41 La. Ann. 1067, 6 South. 806.

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[o] (Md. 1801) The register of a land office is competent to testify as to the loss of records in his office and as to certain practices which prevailed therein previous to the Revolution. —Hall's Lessee v. Gough, 1 Har. & J. 119.

[p] (Mass. 1891) On an indictment charging a conspiracy between defendants to obtain goods under color of a contract between one Kennedy and a corporation, in which Kennedy should assume to be one Brown, who was pretended to be a wealthy person, the testimony of persons residing in the place where it was pretended that Brown lived and owned real estate, that no such person as Brown was known there, was competent, although no one witness testified that he knew everybody living there.—Commonwealth v. Meserve, 154 Mass. 64, 27 N. E. 997.

[q] (Mass. 1896) Witnesses may testify as to the mental capacity of one injured by defendant's machinery, though they were not acquainted with him till after the accident.—Laplante v. Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294.

[r] (Mich. 1878) The fact that the injury to plaintiff on which he based his claim for malpractice against a surgeon was caused by his own imprudence in laying off his splints and going on crutches cannot be proved by the statements of a witness having no personal knowledge thereof.—Hitchcock v. Burgett, 38 Mich. 501.

[s] (Mich. 1888) In an action for the consideration of a contract to saw lumber for a specified price per thousand "as evidenced by a measurement of the same when shipped," testimony as to the method of measurement at the place of shipment, by a witness who showed no knowledge qualifying him to correct or explain such measurement, was properly excluded.—Eastman v. Cleaver, 72 Mich. 167, 40 N. W. 238.

[t] (Mich. 1891) Where plaintiff agreed to cut and deliver lumber for defendants at a certain dock, the settlement therefor to be made on the lumber tally on the lumber as shipped, a witness who kept tally on a scaleboard of the number of logs delivered, and on the board becoming full transferred to a book kept for the purpose sometimes the number of feet in each log and sometimes the number of logs and total number of feet, was competent, using the book as a memorandum, to testify to the number of feet of lumber which he scaled.—Welch v. Palmer, 85 Mich. 310, 48 N. W. 552.

[tt] (Minn. 1869) A county treasurer is a competent witness as to payment to him of a liability to the county since he is the authorized receiver and custodian of the county funds. —Shelly v. Lash, 14 Minn. 498 (Gil. 373).

[u] (Mo. 1886) A person who was present at an auction sale is competent to prove what occurred at the sale, although the auctioneer is not produced or his absence accounted for. —Austin v. Boyd, 23 Mo. App. 317.

[uu] (N. C. 1881) One who saw an instrument signed by the maker, who is absent from the state, and by the subscribing witness, who is dead, is a competent witness to testify to its execution.—Miller v. Hahn, 84 N. C. 226.

[v] (N. C. 1890) A witness is competent to testify to a fact of the truth of which he says that he feels "reasonably certain."—People v. Teague, 106 N. C. 576, 11 S. E. 665.

[vv] (Ohio, 1847) Under Act Jan. 30, 1822, relating to the sale of land for taxes, and providing that the clerk of the court shall make out a list of the judgments rendered against delinquents and deliver the same, together with an order of sale, to the county auditor, who shall then proceed to sell said lands, the auditor is a competent witness to prove that such list was delivered to him by the clerk.—Thevenin v. Slocum, 16 Ohio, 519.

[w] (Pa. 1819) On the trial of an indictment for uttering a forged bank note, it is not necessary to prove the forgery by the testimony of the president and cashier whose signatures are alleged to have been forged. A witness who has become acquainted with their handwriting in the course of official correspondence may testify, especially where he states that from his knowledge of the notes of the bank, the paper, type, and whole appearance the note was forged.—Commonwealth v. Smith, 6 Serg. & R. 568.

[ww] (Pa. 1890) The persons before whom a cause of action was settled by the parties, and who assisted in making it, are competent to testify to the terms of the settlement, and what was included in it.—Schubkagel v. Dierstein, 131 Pa. 46, 18 Atl. 1059, 25 Wkly. Notes Cas. 185.

[x] (S. C. 1885) Testimony of attorneys charged with a case is competent to establish the existence and contents of a lost judgment record.—Reynolds v. Rees, 23 S. C. 438.

[xx] (Tex. 1887) The commissioner of the general land office having knowledge of the manner in which the records of that office are kept, is a competent witness to explain what was the understood official meaning of certain entries in that office relating to a county certificate, and surveys under it.—Shinn v. Hicks, 68 Tex. 277, 4 S. W. 486.

[y] (Tex. 1894) It is error to allow a witness to testify that a break in a coupler could have been seen from the outside, when the witness saw the coupler for the first time after the accident, when the cars had been derailed and the coupler detached.—Galveston, H. & S. A. Ry. Co. v. Sweeney, 6 Tex. Civ. App. 173, 24 S. W. 947.

[yy] (Tex. 1895) A failure of a locomotive to give the statutory signals at a crossing may be shown in an action for injuries by a person lawfully on the track, at a point near enough to the crossing to have heard the signals.—Galveston, H. & S. A. Ry. Co. v. Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

[z] (Tex. 1895) The competency of a witness to testify as to her being the surviving wife of a deceased person is not affected by the fact that another suit is pending to establish that relation.—Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56.

[zz] (Tex. 1895) A person who went on the last of three trains, which were a day apart, all carrying cattle, cannot testify that none of them were watered, it not appearing that he had any opportunity to know about the other trains.—Gulf, C. & S. F. Ry. Co. v. White (Civ. App.) 32 S. W. 322.

§ 81. Source of knowledge.

[a] (Ga. 1879) Where a witness states that he knows a thing testified to from the best of evidence, the source of his knowledge may be inquired into and the testimony excluded if found to be based on hearsay evidence.—Smith v. State, 63 Ga. 168.

[b] (Ill. 1875) The testimony of a postmaster, on direct examination, that a certain person bought a money order on a specified date, payable to certain parties, is inadmissible where he states on cross-examination that he knows the facts only from the money order record.—Protection Life Insurance Co. v. Foote, 79 Ill. 361.

[c] (Mich. 1891) In an action for the price of logs, it appeared that M. & R. scaled the logs; that M. took the measurements at one end, and called them out to R., together with any defects

apparent to him, and that R. relying upon the correctness of his statements, took the measurements at the other end. M. did not testify at the trial. *Held*, that R.'s testimony as to the scaling was incompetent, for his measurements depended solely on the accuracy of M.'s, as to which there was no evidence.—Sovereign v. Mosher, 86 Mich. 36, 48 N. W. 611.

[d] (Mo. 1893) It is not competent to prove the duties of a brakeman by the testimony of one who has only been round trains a few times, when the brakemen had been attending to their business, and who testified that he had no other knowledge of their duties than what he had observed, and what he had been told by railroad men that they were supposed to be.—Farber v. Missouri Pac. Ry. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350.

[e] (N. H. 1866) A witness who has not seen a carriage start may be allowed to testify, merely from hearing, as to the place from which it started.—State v. Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

[f] (Ohio, 1875) The market price of an article may be proved by the testimony of witnesses whose knowledge is derived from persons or sources from which it may be acquired.—Mowry v. Cheeler, 5 Am. Law Rec. 587.

[g] (Pa. 1891) A witness cannot testify to facts based on measurements made by another, from whom alone he has derived his knowledge.—Holmes v. Chartiers Oil Co., 138 Pa. 546, 21 Atl. 231, 21 Am. St. Rep. 919, 27 Wkly. Notes Cas. 156.

[h] (S. C. 1895) One cannot testify as to an indebtedness set out in a contract which alone gave him any knowledge of it.—Gibbes v. McCraw, 45 S. C. 184, 22 S. E. 790.

[i] (Tex. 1892) In an action for the value of cotton lost in transitu, a witness for plaintiff testified that, at the time of the loss of the cotton in question, he was the manager of plaintiff's agent M., located at P., Tex.; that he knew the cotton was destroyed by fire at G., of his own knowledge, as far as it was possible for him to know it without actually seeing it burn. *Held*, that the evidence was properly admitted, it not appearing therefrom that witness was not at G. the day of the fire, and that, while he did not see the fire, his statement may have been based on information derived from a source that would bind defendant.—Missouri Pac. Ry. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

[j] (Tex. 1895) Testimony of the general manager of a railroad while it was in the hands of a receiver as to what the company's books show as to the extent of the betterments of the road during the receivership is admissible to show the extent of such betterments, where he stated that his information was derived from the books and from the general disposition of the funds which passed under his control as such general manager.—Texas & P. Ry. Co. v. Warner (Civ. App.) 29 S. W. 503.

§ 82. Recollection of witness.

[a] (Iowa, 1864) Evidence of a conversation had with a deceased person, whose executor is the adverse party, is admissible, although the witness cannot recollect the entire conversation.—Nash v. Gibson, 16 Iowa, 305.

[b] (Kan. 1896) A witness who has not kept the books or the pay rolls, and who has no recollection of the facts independently of them, cannot state the contents of such books or pay rolls.—Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598.

[c] (La. 1860) Although a witness does not recollect the whole conversation of a party, he may nevertheless be allowed to testify to what he does recollect.—Garrett v. Crooks, 15 La. Ann. 483.

[d] (La. 1895) The admissions of defendant will not be excluded merely because the witness testifying thereto cannot recollect all that was said.—State v. Vallery, 47 La. Ann. 182, 16 South. 745, 49 Am. St. Rep. 363.

[e] (Me. 1864) If a witness can give the substance of a conversation in relation to the matter in issue, his testimony is not to be excluded because he cannot give all the conversation which took place at the same time in relation to other matters.—Pope v. Machias Water Power & Mill Co., 52 Me. 535.

[f] (Mass. 1843) Where a witness is offered to prove the testimony of deceased, a witness given on a former trial of the same cause, he cannot be permitted to testify if he states that he can only give the substance of such testimony but not the language of the deceased witness.—Warren v. Nichols, 47 Mass. (6 Metc.) 261.

[g] (Miss. 1888) A statement, voluntarily made by defendant, relative to the circumstances of the homicide, to a newspaper reporter, is admissible when the latter testifies that he took the statement down accurately, and read it to defendant, who agreed to its correctness, though the witness does not remember, independently of the article, what defendant said.—Jackson v. State, 66 Miss. 89, 5 South. 690, 14 Am. St. Rep. 542.

[h] (N. J. 1843) A witness is competent to prove the evidence given by a witness, since deceased, on a former trial of a cause, if he testifies that he has a distinct recollection, independent of his notes, of the deceased having been sworn as a witness, of what he was produced to prove, and of the substance of what he then stated, although, for the language used by him, he must rely on his notes taken at the time, and which he believes to be correct.—Sloan v. Somers, 20 N. J. Law (Spencer) 66.

[i] (N. Y. 1888) A creditor who is charged with having entered into a fraudulent combination with his debtor to defraud other creditors, in a certain conversation, is not incompetent to testify whether such combination was formed because he cannot give the details of the conversation.—Continental Nat. Bank v. Koehler, 49 Hun, 607, 1 N. Y. Supp. 870.

[j] (Ohio, 1856) It is essential to the competency of a witness called to give evidence of another witness on a former trial in a criminal case, but since deceased, that he heard the deceased person testify on the former trial, and that he has such accurate recollection of the matter stated that he will, on his oath, assume, and undertake to narrate in substance, the matter sworn to by the deceased person, in all its material parts, or that part thereof which he may be called on to prove.—Summons v. State, 5 Ohio St. 325.

[k] (Tex. 1884) A witness is not rendered incompetent to testify to his best recollection of a certain conversation by the fact that he is not certain as to what was stated or has doubts about the correctness of his memory.—Simpson v. Brotherton, 62 Tex. 170.

§ 83. Knowledge of language.

Mode of testifying, see post, §§ 811, 812.

[a] (Cal. 1874) A conversation between a person indicted for murder and his victim, while alive, held partly in Chinese and partly in English, may be proved, that part of it held in English by persons present who understood English only, and that part of it held in Chinese by persons present who understood Chinese, provided both the accused and his victim understood both languages.—People v. Ah Wee, 48 Cal. 236, distinguishing Same v. Gelabert (1870) 39 Cal. 663.

[b] (Neb. 1893) A witness who was called by the parties to a verbal contract to witness it

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may testify as to its existence, though at the time the parties spoke some German, which he did not understand, it not appearing that any part of the contract was made in that language.—Roberson v. Reiter, 38 Neb. 198, 56 N. W. 877.

[c] (Tex. 1876) The deposition of a witness translating a Spanish document showed that he had once filled the post of Spanish translator in the general land office, and wrote and spoke the Spanish language. *Held*, that it was no objection to his deposition that it had not first been shown that he was "a Spanish scholar and competent to translate the Spanish language into English."—Blythe v. Houston, 46 Tex. 65.

§ 84. Character or reputation of party.

[a] (Ala. 1853) To render a witness competent to testify to the general character of the accused, it is not necessary that he should know what a majority of his neighbors said or thought of him, nor that he should have heard some one say what a majority of them said or thought of him; the only test of his competency is whether he knows the general character of the accused among his neighbors, or those acquainted with him.—Dave v. State, 22 Ala. 23.

[b] (Ala. 1854) To authorize a witness to testify to the general character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient.—Elam v. State, 25 Ala. 53.

[c] (Ala. 1859) Eight or ten years' acquaintance enables a witness to speak to the character of a party, though they live 20 miles apart.—Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422.

[d] (Ala. 1879) On a trial for selling liquor to a person of known intemperate habits all persons having sufficient knowledge of said person's general character are competent to testify as to whether he was or was not generally known as a person of intemperate habits.—Tatum v. State, 63 Ala. 147.

[e] (Ala. 1891) Defendant's reputation cannot be shown by witnesses whose only knowledge has been acquired after commission of the crime.—Griffith v. State, 90 Ala. 583, 8 South. 812.

[f] (Cal. 1886) Until it is shown that a witness has lived in the same county with or knows defendant's general reputation in the county, it is not proper to question him in regard thereto.—People v. Rodrigo, 69 Cal. 601, 11 Pac. 481.

[g] (Ill. 1894) It is not necessary that a witness who testified as to the reputation of another for carefulness, prudence, and skill in a certain occupation should be experienced in such occupation.—Western Stone Co. v. Whalen, 51 Ill. App. 512, judgment affirmed (1894) 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244.

[h] (La. 1896) The peaceable character of defendant cannot be established by witnesses who have not resided in his neighborhood for 7 and 11 years.—State v. Fontenot, 48 La. Ann. 305, 19 South. 111.

[i] (Tex. 1896) On a prosecution for threatening the life of another, it was error to allow a witness, who had stated that he did not know defendant's general reputation in the county in which he lived for carrying out his threats, to testify that defendant was a dangerous man.—Woods v. State, 37 Tex. Cr. R. 459, 36 S. W. 96.

[j] (Vt. 1883) It was in the court's discretion to allow defendant to prove the financial reputation of the insolvent, though not residing in the same town, if frequently there on business.—Larkin v. Batchelder, 56 Vt. 416.

§ 85. Conversations, admissions, declarations, and confessions.

[a] That a witness did not hear all of a conversation about which he is called to testify is no ground of objection to his stating so much of it as he did hear.

—(Ga. 1872) Westmoreland v. State, 45 Ga. 225;

(Iowa, 1855) Mays v. Deaver, 1 Iowa (1 Clarke) 216;

(S. C. 1856) State v. Gossett, 9 Rich. Law, 428;

(Va. 1888) Sutton v. Commonwealth, 85 Va. 128, 7 S. E. 323.

[b] (Ala. 1890) A witness who hears the terms of a contract discussed in the presence of the parties a few minutes after they are agreed on, and before the persons present have dispersed, is competent to prove the contract, although he did not actually hear it made.—Perryman v. Wolffe, 93 Ala. 290, 9 South. 148.

[c] (Ga. 1879) A witness in a murder trial who was in the gunsmith's shop at the time the accused bought a pistol testified as to his understanding of a statement made by the accused at the time, but admitted that he did not hear the words distinctly. *Held*, that it was competent for him to testify as to the substance of the statement as he understood it, and that such testimony was not inadmissible as being a mere inference, his doubt as to whether he heard it correctly detracting only from the force and value of his evidence.—Cox v. State, 64 Ga. 374, 37 Am. Rep. 76.

[d] (Ga. 1890) A jailer overheard the accused say, while alone in his cell, "Lord, have mercy on me for what I have done. The only thing I regret is killing my father." The jailer could not say he heard all the accused said—he might have said something before he got there. *Held*, that the statement was admissible.—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

[e] (Ky. 1887) Testimony as to conversations which took place in an adjoining room where the witness could not see who were talking nor recognize their voices is admissible where the witness states that defendant and others who were talking passed through the room where he was, and this latter testimony sufficiently connects the defendant with the conversation.—Short v. Commonwealth, 4 S. W. 810.

[f] (La. 1877) The admissions, confessions, or declarations of a person accused of crime cannot be received in evidence against him, unless the witness who testifies to them is able to state at least the substance of them; and a remark made by the accused from the jail window to a boy outside is inadmissible in evidence where the witness did not hear the preceding or subsequent portion of the conversation in the course of which the remark was made.—State v. Hughes, 29 La. Ann. 514.

[g] (La. 1885) A confession of guilt by an accused is not rendered inadmissible by the fact that the witness does not know the name of the confessor, where on defendant and another being shown to him he at once pointed out defendant as the one who confessed.—State v. King, 37 La. Ann. 662.

[h] (Mass. 1872) On the trial of two persons for adultery with each other, a witness may testify that he overheard one of them in speaking to the other, admit the adultery, although he did not overhear the rest of their conversation.—Commonwealth v. Pitsinger, 110 Mass. 101.

[i] (N. Y. 1887) A witness is not competent to testify to a conversation in which a confession was made, if he did not understand the whole of it.—People v. Miniscl, 12 N. Y. St. Rep. 719.

[j] (N. C. 1876) The testimony of a witness who states that he heard the bargain made be-

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tween the parties is competent to prove what the bargain was, although he did not hear the whole of the conversation in the course of which it was made.—Davis v. Smith, 75 N. C. 115.

[k] (N. C.) A witness may give the substance of declarations made by a party to an action in the course of a conversation, altogether he did not hear the entire conversation, if the portion heard embraced a distinct fact, pertinent to the issue.—(1883) State v. Pratt, 88 N. C. 639; (1886) Same v. Carson, 95 N. C. 593.

[l] (Pa. 1874) On a trial for murder the testimony of a witness, who was a prisoner confined in jail with the accused, was admissible to prove a conversation between the witness and the accused in which the latter confessed his guilt, although such conversation was carried on through a soil pipe in the jail, and the witness had no other means of recognizing the accused than his voice.—Brown v. Commonwealth, 76 Pa. (26 P. F. Smith) 319.

[m] (S. C. 1832) The rule that all the declarations and admissions by the accused must be taken together does not exclude evidence of a conversation overheard between him and another, though the witness did not hear it all.—State v. Covington, 2 Bailey, 569.

[n] (S. C. 1891) After accused made a confession, the person to whom it was made brought another to accused, and told the latter to repeat the confession in order that the third person might reduce it to writing, which was done. *Held*, that such third person was competent to prove that the confession was voluntary.—State v. Howard, 35 S. C. 197, 14 S. E. 481.

[o] (Tex. 1896) On a trial for an assault with intent to murder, where it was shown in proof of the identity of accused that he conversed with prosecutor both before and after the shot, evidence that witnesses could recognize him by his voice was admissible.—Givens v. State, 35 Tex. Cr. R. 563, 34 S. W. 626.

§ 86. Surveys.

Of surveyors and their assistants in boundary proceedings, see "Boundaries," vol. 8, cc. 655–660, §§ 157–159.

[a] (U. S. 1831) A party may prove his possession of land by any competent witness, whether he were present at the resurvey or not; but he is not competent to testify as to the lines, objects, and boundaries laid down on the resurvey, unless he was present.—Greenleaf's Lessee v. Birth, 30 U. S. (5 Pet.) 132, 8 L. Ed. 72.

[b] (U. S. 1813) The surveyors of the county, who officially know that certain lands are covered with prior surveys, are competent witnesses to prove the same.—Jones v. Bache, Fed. Cas. No. 7,454 [3 Wash. C. C. 199].

[c] (Ark. 1860) The testimony of a county surveyor is admissible, in a proceeding by a widow to recover dower assigned to her, to show what land was included in the assignment of dower, between the points stated by the report of the commissioners of assignment.—Farr v. Farr, 21 Ark. 573.

[d] (Ky. 1809) In an action to recover land the surveyor is a competent witness for either party.—Bowling v. Helm, 4 Ky. (1 Bibb) 88.

[e] (Md. 1790) In an action on the case for overflowing land, the surveyor who located the land and made the plats in the cause may give evidence of the place where the water overflowed, though he was not sworn as a witness on the survey.—King v. Tarlton, 2 Har. & McH. 473.

[f] (Md. 1827) A person cannot establish his claim to land by the testimony of witnesses as to the location of the plots returned upon the survey, where such witnesses were neither examined upon nor attended the survey.—Wall v. Forbes, 1 Har. & G. 441.

[g] (Md. 1828) A witness who declined to give evidence of a particular boundary, although in the execution of the warrant of resurvey he was at the place where the boundary stood, and was called on by plaintiff to testify in relation to it, may yet, at the trial, be called on to testify thereto, though not sworn at the survey.—Stoddert's Lessee v. Manning, 2 Har. & G. 147.

[h] (Md. 1828) A witness who was not on the resurvey, and did not show to the surveyor a certain division line, is not competent to give evidence in relation to such line.—Stoddert's Lessee v. Manning, 2 Har. & G. 147.

[i] (Md. 1867) Acts 1852, c. 177, which modifies the old rule that no one not sworn on a survey should be competent to testify in court as to the location of lines or objects on the certificate of such survey, by providing that witnesses may be examined who were not sworn on the survey, does not render one not on the survey a competent witness.—Morrison v. Hammond's Lessee, 27 Md. 604.

§ 87. Customs and usages.

[a] (Iowa, 1876) Where a witness called to testify respecting a custom of trade, showed that his knowledge of it was not later than a year before the time of giving his testimony, he was incompetent.—Hale v. Gibbs, 43 Iowa, 380.

[b] (Kan. 1885) A person who knows the usage between commission merchants may testify thereto, though he be not himself a commission merchant.—Gregg v. Garverick, 33 Kan. 190, 5 Pac. 751.

[c] (Mass. 1890) Testimony as to the usages of trade existing at the time of the transactions is properly excluded when it appears that the witness offered was a member of the board of trade for 23 years prior to 1882, but that the transactions in suit were conducted under its rules adopted in 1883.—Farnum v. Pitcher, 151 Mass. 470, 24 N. E. 590.

[d] (Miss. 1859) That a custom may be admissible to explain a contract it must be proved by witnesses who have had actual experience in the matter, and not by those who can merely give a speculative opinion as to the existence of the custom.—Shackelford v. New Orleans, J. & G. N. R. Co., 37 Miss. 202.

[e] (Mo. 1886) The fact that an Indian agent is not a lawyer does not render him incompetent to testify as to the existence, nature, and universality of customs affecting the property rights of Indian women.—Wear v. Sanger, 91 Mo. 348, 2 S. W. 307.

[f] (Mo. 1886) Evidence of the meaning of the term "merchantable measurement" in a lumber contract may be properly given by lumber dealers as well as lumber manufacturers, since such term does not involve a custom, but merely the meaning of a technical term as applied to the measurement of lumber.—Gaunt v. Pries, 21 Mo. App. 540.

[g] (N. Y. 1856) The customary dealing of banks may be proved by persons who deal with them, though not employed in any bank.—Griffin v. Rice, 1 Hilt. 184.

[h] (N. Y. 1893) A person is not competent to testify as to an alleged custom of trade, unless he is either engaged in such trade, or it is shown that he knows what the custom is.—Kugelman v. Levy (Com. Pl.) 4 Misc. Rep. 519, 24 N. Y. Supp. 559.

[i] (Or. 1892) A person who has purchased and shipped potatoes from a certain island, and can testify to a custom in shipping potatoes therefrom, from his own experience and his observation of the practice of others for three years, as well as one who has lived on the

island for 10 years, raising and selling potatoes during that time, is competent to testify to such custom.—Holmes v. Whitaker, 23 Or. 319, 31 Pac. 705.

[j] (R. I. 1859) Where a policy insured "808 bundles rods" and exempted the company from liability for partial loss on bar iron, persons connected with the iron trade, whether manufacturers, retail dealers, or workers in iron, as well as insurers of iron or merchants effecting insurance on it, are competent to testify that by a usage in the iron trade the words "bundles rods" meant bar iron, but a usage to treat "bundles of rods" as bar iron under a proviso of a policy exempting insurer for a partial loss thereon can be proved only by the testimony of insurers, insurance brokers, and merchants accustomed to settle losses on insurance contracts on such subjects.—Evans v. Commercial Mut. Ins. Co., 6 R. I. 47.

[k] (Tex. 1895) A person testifying that he had often ordered a "car load" of meat, from a certain city, but always specified the number of pounds to be shipped, is not qualified thereby to testify as to the existence of a custom in such city in regard to the number of pounds in a car load.—Woldert v. Arledge, 11 Tex. Civ. App. 484, 33 S. W. 372.

3. RACE OR COLOR.

COMPETENCY OF NEGROES IN GENERAL, § 88.
DEGREE OF COLOR, § 89.
NATURE OF TESTIMONY, § 90.
COMPETENCY FOR OR AGAINST FREEDMEN OR FREE NEGROES, § 91.
COMPETENCY OF FREEDMEN OR FREE NEGROES, § 92.
STATUTORY REMOVAL OF DISQUALIFICATION, § 93.
INDIANS, § 94.
CHINESE, § 95.

Credibility of witness, see post, § 1118.

§ 88. Competency of negroes in general.

Evidence, see post, § 197.

[a] (U. S. 1802) Under the law of Virginia, a slave cannot be a witness if a free white man be a party.—Thomas v. Jamesson, Fed. Cas. No. 13,900 [1 Cranch, C. C. 91].

[b] (U. S. 1827) A colored man is not a competent witness in Alexandria, D. C., against a colored man indicted jointly with white men for a riot.—United States v. Birch, Fed. Cas. No. 14,596 [3 Cranch, C. C. 180].

[c] (U. S. 1837) Slaves are competent witnesses in criminal prosecutions, in Alexandria, D. C., against negroes or mulattoes.—United States v. Farrell, Fed. Cas. No. 15,074 [5 Cranch, C. C. 311].

[d] (U. S. 1840) A Malayan, baptized and educated in the Christian religion, is not a Christian white person, within the Maryland laws, and the testimony of negroes and mulattoes is admissible against him.—United States v. Dow, Fed. Cas. No. 14,990 [Taney, 34].

[e] (Cal. 1860) Section 14 of the act concerning crimes and punishments creates an exception to the general rule of section 13 of said act; and in a criminal suit against a white man, no black person or mulatto, although the injured party, can give evidence.—People v. Howard, 17 Cal. 63.

[ee] (Cal. 1860) The "injured party," within the meaning of section 13 of the act concerning crimes and misdemeanors, is the immediate and direct sufferer from the offense committed.—People v. Howard, 17 Cal. 63.

[f] (Del. 1841) Negro testimony is admissible in a case between negroes, or against a negro.—Elliott v. Morgan, 3 Har. 316.

[g] (Del. 1841) In an indictment against a white man for kidnapping, the negro kidnapped is allowed to testify, though there were white persons present participating in the crime.—State v. Whitaker, 3 Har. 549; Same v. Griffin, Id. 560.

[h] (Del. 1842) Though white persons were present at the commission of an alleged crime, if they were not in a situation or position to see the act, and did not in fact observe all that happened at the time when the crime charged is alleged to have been committed, the person on whom the crime was committed, though a negro, is a competent witness to prove it.—State v. Cooper, 3 Har. 571.

[i] (Del. 1859) A negro is a competent witness for a white person in a suit against a negro, though the witness would not be competent to testify for defendant.—Burton v. Roe, 2 Houst. 49.

[j] (Del. 1867) A negro, on whom an assault and battery has been committed by a white man, is a competent witness in the trial of the latter for the offense, although another white man was present at the time the act was committed.—State v. Rash, Houst. Cr. Cas. 271.

[k] (Ga. 1852) Against a free white person, negro testimony is inadmissible. It is competent, however, to state that certain acts were done, in consequence of information received from a negro.—Grady v. State, 11 Ga. 253.

[l] (Ind. 1857) A negro is a competent witness in behalf of another negro on trial under an indictment.—Woodward v. State, 6 Ind. 492.

[m] (Ind. 1857) On the trial of an information against a colored man, he offered two witnesses, whom the court refused to admit, unless defendant would admit that they were negroes, and that he himself was a mulatto. *Held*, that the witnesses should have been admitted or rejected according to the rules of law.—Weaver v. State, 8 Ind. 410.

[n] (Iowa, 1856) Since the provisions of Code 1851, § 2388, forbidding a negro to testify in any case where a white person is a party, were not for the exclusive benefit of the white person, a waiver by such white person by offering a negro as a witness does not render the negro competent to testify.—Motts v. Usher, 2 Iowa (2 Clarke) 82.

[o] (Ky. 1828) Slaves are competent witnesses only for or against negroes or mulattoes.—Tumey v. Knox, 23 Ky. (7 T. B. Mon.) 88.

[p] (Ky. 1848) Negroes or mulattoes are not competent witnesses, in suits between negroes and white persons, though called by the white person to testify in his behalf against the negro.—Page v. Carter, 47 Ky. (8 B. Mon.) 192.

[q] (Mo. 1836) Under the statute providing that negroes shall not be witnesses in cases where all the parties are not negroes, in an action for freedom against a negro, it is no objection to the admission of the testimony of a negro that defendant vouches a white man for warranty of title.—Meechum v. Judy, 4 Mo. 361, affirmed Eidenmiller v. Kump (1875) 61 Mo. 342.

[r] (N. C. 1821) A slave tried for a capital crime may be convicted on the testimony of a slave, though uncorroborated by pregnant circumstances.—State v. Ben, 8 N. C. 434.

[s] (Ohio, 1831) A negro is not admissible as a witness, against a quadroon, on trial for a criminal offense.—Gray v. State, 4 Ohio (4 Ham.) 353.

[t] (Ohio, 1846) A black or mulatto person is not a competent witness where a white person is a party.—Jordan v. Smith, 14 Ohio, 199.

[u] (Tenn. 1838) No person disqualified as a witness by reason of his being a free man of color or slave, under Act 1794, c. 1, § 32, can be a

witness, in a state prosecution, for a defendant who belongs to one of the disqualified classes. —Jones v. State, 19 Tenn. (1 Meigs) 120.

§ 89. Degree of color.

[a] (U. S. 1836) A mulatto, born of a white woman, is a competent witness against a Christian white person.—United States v. Crandell, Fed. Cas. No. 14,885 [4 Cranch, C. C. 683].

[b] (Ala. 1857) The son of a mulatto is incapable, by statute, of being a witness against a white man.—Smyth v. Oliver, 31 Ala. 39.

[c] (Ala. 1859) A person whose great-grandmother was the daughter of a mulatto by a negress is not a competent witness for or against a white (Code, § 2276), although his father, maternal grandfather, and great-grandfather were whites.—Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422.

[d] (Ala. 1859) A person whose maternal grandmother was the daughter of two mulattoes, each of whom had a full-blooded black for one parent, cannot testify against a white under Code, § 2276.—Heath v. State, 34 Ala. 250.

[e] (Ind. 1862) In a suit wherein one party is white and the other colored the white party cannot introduce a colored witness who has one-eighth or more of negro blood, against the other. —Graham v. Crockett, 18 Ind. 119.

[f] (Va. 1847) Persons having less than one-fourth of negro blood in their veins are competent witnesses on the trial of a white man.—Dean v. Commonwealth, 4 Grat. 541.

§ 90. Nature of testimony.

[a] (Del. 1846) A colored person is competent to prove his book of original entries, to make it evidence in a suit, though against a white person.—Webb v. Pindergrass' Adm'x, 4 Har. 439.

[b] (Del. 1858) A colored witness is competent to testify to a confession made to him by a white man as regards a homicide committed in the absence of any witness.—State v. Downham, Houst. Cr. Cas. 45.

[c] (Ga. 1851) On a trial against a free white citizen, the state may give in evidence the confessions of a negro, even when extorted by the pain of punishment, provided they are proven by a white person, not as independent testimony, but as an inducement and in illustration of what was said and done by defendant, who was present.—Berry v. State, 10 Ga. 511.

[d] (Miss. 1857) On an indictment for the murder of a slave by a slave, the principal witness for the prosecution, also a slave, and all of one master, was charged by his master with a knowledge of the matter, which he denied. Afterwards the master tied him and struck him one blow, and informed his slaves that he would find out who did the killing, and that whoever did it should be hung. The witness thereupon stated that he saw the accused commit the homicide, and that the accused threatened to kill him, if he ever divulged it; and he also gave his master at the same time a minute account of the transaction. Four months afterwards, his testimony at the trial was substantially the same. His testimony was corroborated, in several important particulars, by other witnesses, but was in conflict with some others as to the time of day when certain material facts transpired. *Held*, that he was a competent witness. —Ned v. State, 33 Miss. 364.

[e] (Mo. 1841) Although a negro cannot testify against a white person, a conversation between the prisoner and a negro, if otherwise unobjectionable, may be proved by a white person, but not by the negro.—Hawkins v. State, 7 Mo. 190.

[f] (N. J. 1826) Where a witness is incompetent because he is a slave, his declarations, even to show his condition, cannot be legally received as evidence.—Fox v. Lambson, 8 N. J. Law (3 Halst.) 275.

[g] (N. C. 1828) On the trial of a white man as an accessory, the principal being a negro, the testimony of negroes is admissible on the question of the principal's guilt, but not to prove the incitement by the accessory.—State v. Chitten, 13 N. C. 49.

[h] (N. C. 1841) On the trial of an issue devisavit vel non, where the will was propounded by two legatees, one of whom was a colored woman, and the other a white woman, and the caveators are colored persons, the caveators may prove by other colored persons the declarations of the colored woman, one of the parties propounding, in relation to the subject-matter of the issue, since they come within the exception of 1 Rev. St. c. 31, § 81, disabling colored people within certain degrees from being witnesses except against each other.—Ragland v. Huntingdon, 23 N. C. 561.

[i] (Va. 1836) A person who is in custody and applies for a habeas corpus may show, by his own affidavit, probable cause to believe that he is detained in custody without lawful authority, and though, upon the return of the writ, it appears that the applicant is a person of color, and claimed as a slave, still the affidavit does not cease to be proper. The person of color is not admitted to give evidence against a white person, but his affidavit is received merely as a foundation for further proceedings.—De Lacy v. Antoine, 7 Leigh, 438.

§ 91. Competency for or against freedmen or free negroes.

[a] (U. S. 1802) A slave may be a witness on a prosecution against a free mulatto in Alexandria county, D. C.—United States v. Bell, Fed. Cas. No. 14,564 [1 Cranch, C. C. 94].

[b] (U. S. 1803) A slave is not a competent witness for a free mulatto in a public prosecution.—United States v. Swann, Fed. Cas. No. 16,425 [1 Cranch, C. C. 148].

[c] (U. S. 1806) Under the law of Maryland a slave is a competent witness for a free black man on a criminal prosecution.—United States v. Shorter, Fed. Cas. No. 16,284 [1 Cranch, C. C. 371].

[d] (U. S. 1806) Under the law of Maryland slaves are competent witnesses for free negroes indicted for assault and battery.—United States v. Terry, Fed. Cas. No. 16,454 [1 Cranch, C. C. 318].

[e] (U. S. 1808) A slave is not a competent witness against a freeborn mulatto not subject to any term of servitude by law.—United States v. Hill, Fed. Cas. No. 15,365 [1 Cranch, C. C. 521].

[f] (U. S. 1829) In Washington county, D. C., a slave is not a competent witness against a free mulatto not in a state of "servitude by law."—United States v. Gray, Fed. Cas. No. 15,252 [3 Cranch, C. C. 681].

[g] (Mo. 1851) On the trial of an indictment against a free woman of color for leasing a house to be kept as a bawdy house, a slave who cohabits with her as her husband is a competent witness for her.—Coleman v. State, 14 Mo. 157.

[h] (N. C. 1794) A slave is not a competent witness against a free negro.—Cox v. Dove, 1 N. C. 72.

§ 92. Competency of freedmen or free negroes.

[a] (U. S. 1803) Manumitted slaves are good witnesses for or against a free mulatto in Washington county, D. C.—United States v. Barton, Fed. Cas. No. 14,533 [1 Cranch, C. C. 132].

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[b] (U. S. 1805) Under the law of Maryland a free negro is a competent witness against a free white man.—United States v. Fisher, Fed. Cas. No. 15,101 [1 Cranch, C. C. 244].

[c] (U. S. 1806) A free black man, born of a white woman, is a competent witness against a white man.—Minchin v. Docker, Fed. Cas. No. 9,628 [1 Cranch, C. C. 370].

[d] (U. S. 1808) Under Acts Md. 1717, c. 13, freeborn negroes, not subject to any term of servitude by law, are competent witnesses in all cases. Color alone is no objection to a witness.—United States v. Mullany, Fed. Cas. No. 15,832 [1 Cranch, C. C. 517].

[e] (U. S. 1810) A freeborn negro is a competent witness in a case of freedom.—Queen v. Hepburn, Fed. Cas. No. 11,503 [2 Cranch, C. C. 3], affirmed (1819) 11 U. S. (7 Cranch) 290, 3 L. Ed. 348.

[f] (U. S. 1813) Under the law of Maryland a slave is not a competent witness against a free black person, in a capital case; but free blacks, unless they are in a state of servitude by law, are competent witnesses against free blacks.—United States v. Butler, Fed. Cas. No. 14,699 [2 Cranch, C. C. 75].

[g] (U. S. 1813) A freeborn mulatto is a competent witness against a white person.—United States v. Douglass, Fed. Cas. No. 14,988 [2 Cranch, C. C. 94].

[h] (U. S. 1814) A colored person who has obtained his freedom by being removed from Virginia to Maryland contrary to Acts Md. 1796, c. 67, is not a competent witness against a white person.—United States v. Minifie, Fed. Cas. No. 15,782 [2 Cranch, C. C. 109].

[i] (U. S. 1821) A free colored man who has resided in the District of Columbia eight years, and publicly acted as a freeman, and so generally reputed to be, is a competent witness for the United States against a free colored person. —United States v. Neale, Fed. Cas. No. 15,859 [2 Cranch, C. C. 241].

[j] (U. S. 1835) A free negro or mulatto born of a free colored woman is not a competent witness against a free negro or mulatto born of a white woman.—United States v. Beddo, Fed. Cas. No. 14,556 [4 Cranch, C. C. 664].

[k] (U. S. 1835) Under the law of Maryland a mulatto born of a white woman, and not in a state of servitude by law, is a competent witness for a white man.—United States v. Davis, Fed. Cas. No. 14,925 [4 Cranch, C. C. 606].

[l] (U. S. 1840) Under the statutes of Maryland negroes and mulattoes, free or slave, are not competent witnesses in any case wherein a Christian white person is concerned; but they are competent witnesses against all other persons.—United States v. Dow, Fed. Cas. No. 14,990 [Taney, 34].

[m] (Ala. 1835) In suits between a white man and a free person of color, or of mixed blood within the third degree, where the amount in controversy is under $20, and the former is sworn, the latter has also the right to use his own oath.—Ivey v. Hardy, 2 Port. 548.

[n] (Del. 1841) A convict slave is a free man for the purpose of giving evidence as well as of punishment.—State v. Griffin, 3 Har. 559.

[o] (Del. 1854) After a decree of freedom, and pending an appeal, the slave is not a competent witness.—State v. Turner, 5 Har. 501.

[p] (Md. 1810) A free black person is an incompetent witness in a case where the parties were free white Christians.—Rusk v. Sowerwine, 3 Har. & J. 97.

[q] (N. Y. 1806) A free black man is a competent witness to prove facts which may have happened while he was a slave.—Gurnee v. Dessies, 1 Johns. 508.

[r] (N. Y. 1813) Although the manumission of a slave by an infant, with the consent of his guardian, is voidable, yet such manumission renders the slave in the meantime a competent witness for his former master, the infant's power of revoking the gift on coming of age being an objection to his credit only.—Rogers' Ex'rs v. Berry, 10 Johns. 132.

[s] (N. C. 1868) A freedwoman is a competent witness against a freedman, who, though passing as her husband in slavery, has never married her since emancipation.—State v. Taylor, 61 N. C. 508.

[t] (S. C. 1807) A free person of color, born of a free white woman, ex parte materna, is a competent witness.—State v. McDowell, 2 Brev. 145.

[u] (S. C.) A free person of color is incompetent as a witness, in any action involving the rights of white persons. — (1821) White v. Helmes, 1 McCord, 430; (1831) Groning v. Devena, 2 Bailey, 192.

[v] (Va. 1835) In an action by a white man against a free negro, a free negro is not a competent witness for plaintiff.—1 Rev. Code, c. 111, § 5.—Winn v. Jones. 6 Leigh, 74.

§ 93. Statutory removal of disqualification.

[a] (Ark. 1869) The civil rights bill (Act Cong. April 9, 1866), permitting a colored man to testify against a white man, is not unconstitutional on the ground that it invades the rights of the several states to prescribe who shall be competent witnesses in their courts.—Kelley v. State, 25 Ark. 392.

[b] (Ark. 1869) Under the civil rights bill (Act Cong. April 9, 1866), a colored man can testify against a white man notwithstanding Gould's Dig. c. 181, § 25.—Kelley v. State, 25 Ark. 392.

[c] (Del. 1867) The provision of Act Cong. April 9, 1866, that all persons within the jurisdiction of the United States shall have the right in every state to give evidence to the same extent as white persons, is unconstitutional in so far as it assumes to compel, regulate, or control the admission of evidence in the state of Delaware.—State v. Rash, Houst. Cr. Cas. 271.

[d] (Ga. 1866) The color of a witness is no longer an objection to his competency in the courts of this state.—Clarke v. State, 35 Ga. 75.

[e] (Ky. 1867) The laws of this state in reference to the competency of negroes as witnesses are not affected by the civil rights bill.—Bowlin v. Commonwealth, 65 Ky. (2 Bush) 5, 92 Am. Dec. 468.

[f] (N. C. 1869) Rev. Code, c. 107, § 71, which makes persons of color incapable of being witnesses, except against each other, was repealed by the constitution, allowing them to vote and hold office.—State v. Underwood, 63 N. C. 98.

§ 94. Indians.

Obligation of oath, see post, § 104 [h].

[a] (Ala. 1836) It is no objection to the admissibility of a will in evidence, in an action between an Indian and a white man, that the will was proved on the testimony of an Indian alone; it appearing that all parties entitled to object to the probate of the will were Indians.—Carroll v. Pathkiller, 3 Port. 279.

[b] (Cal. 1860) Section 14 of the act concerning crimes and punishments creates an exception to the general rule of section 13 of said act; and in a criminal suit against a white man, an Indian, although the injured party, cannot give evidence.—People v. Howard, 17 Cal. 63.

[c] (Dak. 1867) An Indian may testify as a witness, under Laws 1862, p. 99, § 308, mak-

ing competent "every human being" who understands the nature of an oath, and 13 Stat. 361, 533, and 12 Stat. 588, providing that in the federal courts no witness shall be excluded on account of color, and that, in other respects, the competency of witnesses shall be determined by the law of the state in which the court is held.—Bruguier v. United States, 1 Dak. 5, 46 N. W. 502.

[d] (Miss. 1844) An Indian is a competent witness in a suit between white men, and is under no other restrictions than a white person.—Harris v. Newman, 11 Miss. (3 Smedes & M.) 565; Coleman v. Tish-ho-mah, 12 Miss. (4 Smedes & M.) 40.

§ 95. Chinese.

Religious belief, see post, § 102 [qq].

[a] (Cal. 1854) Section 394 of the act concerning civil cases provides, "No Indian or negro shall be allowed to testify as a witness in any action or proceeding in which a white person is a party." Section 14 of the act regulating criminal proceedings, provides, "No black or mulatto person, or Indian, shall be allowed to give evidence in favor of, or against, a white man." *Held*, that the words "white," "negro," "mulatto," "Indian," and "black person," must be taken in their generic sense, and exclude all persons other than white from testifying against whites; and hence a Chinaman is incompetent to testify.—People v. Hall, 4 Cal. 399.

[b] (Cal. 1859) A Chinaman is an "Indian" within Code, § 394, excluding "Indians" as witnesses.—Speer v. See Yup Co., 13 Cal. 73.

[c] (Cal. 1865) The words "white person," in the act which provides that "no Indian, or person having one-half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor of or against a white person," refer to the defendant only in a criminal action; and a Chinaman, who is on trial for crime, may introduce Chinese witnesses in his behalf.—People v. Awa, 27 Cal. 638.

[d] (Cal. 1869) The testimony of a Chinaman, born in China, was inadmissible against a negro born within the United States in the trial of an indictment against the negro, section 14 of the act of 1863 providing that "no Chinese shall be permitted to give evidence for or against any white person," and the civil rights bill of April 9, 1866, giving "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," the right to "full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."—People v. Washington, 36 Cal. 658.

[e] (Ga. 1883) A Chinaman, whose capacity to understand the nature of an oath and to testify are made clear on being tested, may be sworn, under Code, § 3852 et seq., in like manner as other witnesses.—Green v. State, 71 Ga. 487.

4. DEGREE OF MENTAL CAPACITY.

IN GENERAL, § 96.
AGE AND MATURITY OF MIND, § 97.
—— DISCRETION OF COURT, § 98.
UNSOUNDNESS OF MIND, § 99.
INTOXICATION AND USE OF DRUGS, § 100.
PERSONS DEAF AND DUMB, § 101.

Evidence, see post, § 196.
Impeachment of capacity of witness, see post, §§ 1101, 1102.

§ 96. In general.

[a] (Mass. 1858) The testimony of a witness who declares himself unable to answer questions put to him on cross-examination, on the ground that his memory at times fails him in consequence of mental injury resulting from a sunstroke, and such is his present condition, is not to be stricken out by the presiding judge, but may be submitted to the jury.—Lewis v. Eagle Ins. Co., 76 Mass. (10 Gray) 508.

[b] (Minn. 1881) Gen. St. 1878, c. 73, § 7, provides that "all persons except as hereinafter provided, having the power and faculty to perceive and to make known their perceptions to others, may be witnesses." Section 9 provides that persons "who are of unsound mind or intoxicated at the time of their production for examination" shall not be competent as witnesses. *Held*, persons intoxicated and of unsound mind are not wholly disqualified, but are competent if they have such an understanding as enables them to retain in memory the events of which they have been witnesses, and understanding sufficient to appreciate the obligation of an oath.—Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164.

[c] (Tenn. 1871) Testimony of a person 80 years of age is insufficient on an issue in chancery as to the fairness of a conveyance, his memory being too impaired to recollect whether he made alleged payments, amounting to $1,300, in 1861, 1862, 1863, 1864, or 1865, or whether he got any of the money from the grantor, his son-in-law.—McCutchen v. Pigue, 4 Heisk. 565.

§ 97. Age and maturity of mind.

Credibility of witnesses, see post, § 1075.
Deaf and dumb child, see post, § 101 [c].
Determination of competency, see post, § 202.
Nature and obligation of oath, see post, §§ 105–107.

[a] (Ala. 1841) An infant under the age of seven years may be sworn as a witness in a criminal case, if he has sufficient knowledge of the nature and consequences of an oath.—State v. Morea, 2 Ala. 275.

[b] (Ala. 1874) A female child, eight years of age, upon whom an alleged criminal assault was made, is a competent witness for the prosecution, notwithstanding her tender years.—Wade v. State, 50 Ala. 164.

[c] (Ala. 1883) The fact that a female child of seven years of age was held incompetent to testify on a prosecution for attempt to have carnal intercourse with her does not affect her competency on a new trial, when she is above eight years old.—Kelly v. State, 75 Ala. 21, 51 Am. Rep. 422.

[d] (Ark. 1867) There is no precise age within which children are absolutely excluded as witnesses. If they are of sufficient natural intelligence, and comprehend the nature and effect of an oath, their testimony should be admitted.—Flanagin v. State, 25 Ark. 92; Warner v. Same, Id. 447.

[e] (Cal. 1858) If over 14, prima facie, a child is competent to testify; otherwise if under 14.—People v. Bernal, 10 Cal. 66.

[f] (Ga. 1878) A child seven years of age, who understands the nature of an oath, is a competent witness, though not punishable for perjury, under Code, § 4295.—Johnson v. State, 61 Ga. 35.

[g] (Ga. 1887) A boy of 10 years of age is a competent witness if he understands the nature of an oath, and of this the court is to be the judge.—Moore v. State, 79 Ga. 498, 5 S. E. 51.

[h] (Ill. 1893) Where a child of 13 years, when called as a witness, states that she knows it would not be right to tell a lie, and the judge thereupon instructs her as to the consequences of testifying falsely, the child is a competent witness; the question of her knowledge going rather to her credibility than to her competency.—McAmore v. Wiley, 49 Ill. App. 615.

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[i] (Iowa, 1889) Where a witness, a boy 12 years of age, possesses the ordinary intelligence of boys of that age, and his answers through an interpreter to questions relative to his understanding of the obligations of an oath are satisfactory to the court, the admission of his testimony cannot be alleged as error.—State v. Severson, 78 Iowa, 653, 43 N. W. 533.

[j] (Ky. 1890) In a suit for divorce the son of plaintiff by a former marriage was a competent witness for her, though he was only 11 years old.—Green v. Green, 11 Ky. Law Rep. 763.

[k] (Me. 1842) A child of any age, capable of distinguishing between good and evil, may be examined on oath; and the credit due to his statements is to be submitted to the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion.—State v. Whittier, 21 Me. (8 Shep.) 341, 38 Am. Dec. 272.

[l] (Mass. 1813) A child under nine years of age may be sworn as a witness.—Commonwealth v. Hutchenson, 10 Mass. 225.

[m] (Mich. 1862) In a criminal trial a child seven years of age may testify; but his credibility is a matter for the jury to consider.—Washburn v. People, 10 Mich. 372.

[n] (Mich. 1880) In a suit for divorce for alleged adultery, it is improper to call children of the parties, of a tender age, to testify to facts tending to show a want of chastity in defendant.—Crowner v. Crowner, 44 Mich. 180, 6 N. W. 198, 38 Am. Rep. 245.

[o] (Mich. 1880) Testimony of a child, a few months over six years old, identifying defendant as one engaged in a robbery, is properly admitted; the judge being satisfied that the child is sufficiently conscious of the duty of speaking the truth, and the jury being properly cautioned in acting on the same.—McGuire v. People, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265.

[p] (Mo. 1874) Wag. St. p. 1374, § 8, excluding as a witness "a child under 10 years of age who appears incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly," does not exclude, in a trial for murder, a child of nine years who, after a little delay, was able to give intelligible answers, although at first, from the novelty of the surroundings, she was prevented therefrom by nervous agitation.—State v. Scanlan, 58 Mo. 204.

[q] (Mo. 1884) A child who is capable of receiving correct impressions of facts and of relating them truly is a competent witness.—Cadmus v. St. Louis Bridge & Tunnel Co., 15 Mo. App. 86.

[r] (Mo. 1891) The common-law rule that a child under 14 years of age is prima facie incapable of testifying is modified by Rev. St. 1889, § 8925, providing that a child of 10 years is incompetent to testify, unless the court satisfies itself that it is capable of receiving just impressions of the facts concerning which it is called to testify.—Brashears v. Western Union Tel. Co., 45 Mo. App. 433.

[s] (Neb. 1891) A child nine years of age is a competent witness if he understands the nature and obligations of an oath.—Davis v. State, 31 Neb. 247, 47 N. W. 854.

[t] (N. J. 1819) A witness over 14 years of age will not be interrogated respecting his capacity, unless some reason creating suspicion be shown.—Den v. Vancleve, 5 N. J. Law (2 Southard) 589.

[u] (N. Y. 1889) A witness only seven or eight years old, who understands that she will be punished if she tells an untruth, is competent.—Agnew v. Brooklyn City R. Co. (City Ct. Brook.) 5 N. Y. Supp. 756, judgment affirmed, 117 N. Y. 651, 22 N. E. 1132.

[v] (Tex. 1877) The question of the competency of a child is not decided by any precise age, but by apparent capacity.—Brown v. State, 2 Tex. App. 115.

[w] (Tex. 1889) An objection to the boy's testimony, "because of ignorance," is properly overruled, when such testimony is as clear and intelligent as that of most witnesses of mature years and ordinary education, and is strongly corroborated.—Hawkins v. State, 27 Tex. App. 273, 11 S. W. 409.

§ 98. —— Discretion of court.

[a] (Cal. 1858) No precise age is fixed under which a child is incompetent; it depends on the discretion of the court, in view of all the circumstances.—People v. Bernal, 10 Cal. 66.

[b] (Ga. 1873) Where the court examines a child to test its competency as a witness, and pronounces it incompetent, it must be a very flagrant case of error to authorize an appellate court to reverse the judgment.—Peterson v. State, 47 Ga. 524.

[c] (La. 1867) The law has fixed no qualification of age as to the competency to testify in criminal matters. The competency of a witness as to age depends on his intelligence, judgment, capacity, and understanding, all of which must be left to the discretion of the judge and the jury.—State v. Denis, 19 La. Ann. 119.

[d] (La. 1876) Under the age of 14 a child will not be presumed to have a sufficient understanding to be a witness, and inquiry is made by the judge to ascertain his capacity to be sworn, and his admission or ejection must depend on the sound discretion of the judge. The law fixes no precise age when the witness shall be excluded. In the present case, a ruling allowing a child only 6 years old, who appeared capable, on examination by the judge, was sustained.—State v. Richie, 28 La. Ann. 327, 26 Am. Rep. 100.

[e] (Md. 1895) In an action for divorce, it is within the discretion of the court to allow children of the parties, of tender years, to testify.—Freeny v. Freeny, 80 Md. 406, 31 Atl. 304.

[f] (Mo. 1882) The finding of the trial court, after personal inspection and oral examination, that a child under 10 years of age is competent to testify, will not be reviewed on appeal.—State v. Jefferson, 77 Mo. 136.

[g] (Mo. 1890) Under Rev. St. 1889, § 8925, declaring as "incompetent to testify" "a child under ten years of age who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," a child under ten is presumptively incompetent, but the issue of competency is one for the court, whose ruling thereon will not be reversed unless it affirmatively appear that there has been an abuse of discretion.—Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

[h] (Mo. 1891) Where a witness, nine years old, had never been in the courthouse before, did not know when he was born nor the nature of an oath, but did know that people were sworn in order to make them tell the truth, and said that he himself would tell the truth, and his testimony indicated intelligence, the question of his capacity as a witness is for the judge.—State v. Doyle, 107 Mo. 36, 17 S. W. 751.

[i] (Mo. 1896) Rev. St. 1889, § 8925, makes a child under 10 years of age who appears incapable of receiving just impressions of the facts, or of relating them truly, incompetent to testify. *Held*, that it is within the discretion of the court to allow a child under 10 years of age to testify.—State v. Nelson, 132 Mo. 184, 33 S. W. 809.

[j] (N. J. 1810) If a witness is under the age of 14, his capacity is a proper subject for the

determination of the justice; and where, in fact, the witness was upwards of 14, but it did not so appear at the trial, the court will refuse to reverse on account of the rejection of the witness.—Van Pelt v. Van Pelt, 3 N. J. Law (2 Penning.) 657.

[k] (N. J. 1812) It is discretionary with the court to admit a person under 14 years of age as a witness.—Anonymous, 3 N. J. Law (2 Penning.) 930.

[l] (N. M. 1895) A child 10 years old, of natural intelligence, and who understands the nature of an oath, may, in the discretion of the court, be a witness in a criminal case.—Territory v. De Gutman, 8 N. M. 92, 42 Pac. 68.

[m] (N. Y. 1895) It is discretionary with the court to permit a child under the age of 12 years to testify in a criminal case.—People v. Smith, 86 Hun, 485, 33 N. Y. Supp. 989.

[n] (Or. 1881) It is for the trial court to decide the competency of a child as a witness, and its decision is not reviewable unless clear abuse of discretion be shown.—State v. Jackson, 9 Or. 457.

[o] (Tex. 1889) Code Cr. Proc. art. 730, subd. 2, provides that "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath," are incompetent to testify in criminal cases. *Held*, that an objection that a boy 11 years of age was incompetent to testify "because of youth" was in the discretion of the trial court, and its action thereon, after examining the boy to determine his competency, would not be revised on appeal, unless abuse of such discretion was shown, under Willson, Cr. St. § 2435.—Hawkins v. State, 27 Tex. App. 273, 11 S. W. 409.

[p] (Wis. 1894) The competency of a five year old child to testify is within the discretion of the trial court.—State v. Juneau, 88 Wis. 180, 59 N. W. 580, 24 L. R. A. 857, 43 Am. St. Rep. 877.

§ 99. Unsoundness of mind.

[a] (U. S. 1882) One who, though a lunatic, is able to apprehend the obligation of an oath, and give a correct account of matters he has seen or heard, is admissible as a witness.—District of Columbia v. Arms, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618.

[b] (Ala. 1853) It is no objection to the competency of a witness that he is subject to fits of mental derangement, if he is sane at the time he is offered.—Campbell v. State, 23 Ala. 44.

[c] (Ala. 1892) Although one alleging that he is of unsound mind, and suing by his next friend, under Code, § 2580, admits his mental incapacity, yet it is a question for the court to determine whether or not he is competent to testify.—Worthington v. Mencer, 96 Ala. 310, 11 South. 72, 17 L. R. A. 407.

[d] (Ala. 1893) A witness should not be excluded on the ground of mental incapacity, if he has sufficient capacity to understand an oath, and to narrate the transaction in what appears to be an intelligent, rational manner, but the question as to his credibility should be left to the jury.—Walker v. State, 97 Ala. 85, 12 South. 83.

[e] (Cal. 1893) The discharge of a person from an insane asylum by the resident physician and secretary, though the certificate does not state that she is restored to reason, is prima facie evidence that she is so restored, or that she was improperly committed, and is therefore a competent witness, these being the only grounds for her discharge under the statute.—Clements v. McGinn, 33 Pac. 920.

[f] (Cal. 1893) Under Code Civ. Proc. § 1880, declaring that persons "who are of unsound mind at the time of their production for examination" cannot be witnesses, the fact that a person has been committed to an asylum as insane does not render her an incompetent witness, but the question of competency is for the court, and her testimony is properly received, in the absence of anything to show her of unsound mind.—Clements v. McGinn, 33 Pac. 920.

[g] (Del. 1841) Insanity of a witness is good ground for his rejection.—Armstrong's Lessees v. Timmons, 3 Har. 342.

[h] (Ill. 1895) The fact that a witness has been judicially declared to be of feeble mind, and not capable of transacting business, does not render his testimony inadmissible, where the nature and extent of his mental impairment are not shown, and the testimony of other witnesses shows that, at the time of his testifying, he had an intelligent appreciation of his responsibility as a witness, and a fair recollection and understanding of the matters about which he testified.—Tucker v. Shaw, 158 Ill. 326, 41 N. E. 914.

[i] (Ind. 1893) In an action for assault and battery, plaintiff is not rendered incompetent to testify by an allegation in his complaint that the injuries received have impaired his mind, and by the reception of evidence in support of such allegation.—Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483.

[j] (Kan. 1878) One who has been adjudged restored to sanity may testify as to facts that occurred while he was under guardianship as insane.—Sarbach v. Jones, 20 Kan. 497.

[k] (Minn. 1881) An allegation in a complaint that plaintiff had theretofore been adjudged insane, and had been confined for two years in a lunatic asylum, whence she was afterwards discharged, is not such an admission of plaintiff's insanity at the time of the trial as will disqualify her as a witness.—Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164.

[l] (N. Y. 1813) Idiots, lunatics, and madmen are not competent witnesses.—Livingston v. Kiersted, 10 Johns. 362.

[m] (N. Y. 1870) An inquisition of lunacy found against one is prima facie evidence of his incompetency as a witness, and unless it be overcome by evidence of his sanity, he should not be permitted to testify, even as against one not a party to the proceedings in lunacy.—Hoyt v. Adee, 3 Lans. 173.

[n] (N. Y. 1876) In an action against the custodians of a lunatic for tort to his person, he is a competent witness, but defendants may show acts on his part of a contributory character tending to set in motion the causes of the injuries complained of, although intention cannot be imputed to him.—People v. New York Hospital, 3 Abb. N. C. 229.

[o] (N. Y. 1876) An insane person may be competent to testify to facts not relating to himself according as the court is satisfied with the degree of his understanding; and a person who has been insane and is apparently recovered may testify to facts occurring during the period of this insanity, provided that in both mentioned cases the facts testified to are objectively demonstrable, and constitute a basis from which to begin such testimony.—People v. New York Hospital, 3 Abb. N. C. 229.

[p] (Tex. 1891) Under Code Cr. Proc. art. 730, subds. 1, 2, providing that persons who are insane when they are offered as witnesses, or who were insane when the events happened of which they are called to testify, are incompetent as witnesses, an insane woman cannot testify as to rape alleged to have been commit-

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ted on her.—Lopez v. State, 30 Tex. App. 487, 17 S. W. 1058, 28 Am. Rep. 935.

[q] (Va. 1874) The fact that a witness is a lunatic is not sufficient per se to exclude him; he must be at the time of his examination so affected by his malady as to deprive him of the understanding necessary to enable him to retain in memory the events of which he has been a witness, and to give him a knowledge of right and wrong.—Coleman v. Commonwealth, 25 Grat. 865, 18 Am. Rep. 711.

[r] (Va. 1874) All persons examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses and gives them a knowledge of right and wrong; and therefore idiots and lunatics, while under the influence of their malady, not possessing this share of understanding, should be excluded.—Coleman v. Commonwealth, 25 Grat. 865, 18 Am. Rep. 711.

§ 100. Intoxication and use of drugs.

Credibility of witness, see post, § 1117.
Impeachment of witness, see post, § 1102.

[a] (N. Y. 1819) A witness who is in a state of intoxication is incompetent to be sworn or to testify.—Hartford v. Palmer, 16 Johns. 143.

[b] (N. Y. 1819) Where a witness is objected to on the ground that he is intoxicated, it is within the discretion of the court to decide whether he is in such condition that he ought to be admitted to testify.—Hartford v. Palmer, 16 Johns. 143.

[c] (Pa. 1824) It is no objection to a witness' competency that he has been found a habitual drunkard, under Act February 25, 1819.—Gebhart v. Shindle, 15 Serg. & R. 235.

[d] (Pa. 1845) Whether a witness is incompetent by reason of intoxication, is a matter within the sound discretion of the court.—Gould v. Crawford, 2 Pa. (2 Barr) 89.

[e] (Wash. 1895) One who uses opium is a competent witness, but, his evidence being unreliable, the jury should be carefully cautioned as to the credence to be given it.—State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

§ 101. Persons deaf and dumb.

Mode of testifying, see post, § 809.
Obligation of oath, see post, § 104 [c].

[a] (Ind. 1840) A deaf and dumb person, who can be communicated with by signs, is a competent witness, if he has sufficient discretion.—Snyder v. Nations, 5 Blackf. 295.

[b] (Mo. 1893) A person deaf and dumb from birth is not presumed to be an idiot.—State v. Howard, 118 Mo. 127, 24 S. W. 41.

[c] (N. M. 1884) A nine year old deaf and dumb child, who has never been educated in an institute for deaf mutes, who cannot be made to understand anything of the nature of an oath, and who can do nothing more than give an account of what he saw, without affording any means of examination or cross-examination, is not a competent witness.—Territory v. Duran, 3 N. M. (Gild.) 189, 3 Pac. 53.

[d] (S. C. 1893) It was not error to admit the testimony of a deaf and dumb person without expert testimony as to his competency, where persons who had employed him testified that he was very intelligent, and that they had no trouble in communicating with him by signs.—State v. Weldon, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126.

[e] (Vt. 1882) A dumb plaintiff may be a witness in his own behalf, although he cannot be cross-examined with facility.—Quinn v. Halbert, 55 Vt. 224.

5. RELIGIOUS BELIEF AND OBLIGATION OF OATH.

RELIGIOUS BELIEF IN GENERAL, § 102.
CONSTITUTIONAL PROVISIONS, § 103.
NATURE AND OBLIGATION OF OATH IN GENERAL, § 104.
CHILDREN, § 105.
—— SUFFICIENCY, § 106.
—— INSTRUCTIONS BY COURT OR OTHERS, § 107.

Credibility of witness, see post, § 1119.
Evidence, see post, § 198.

§ 102. Religious belief in general.

[a] (U. S. 1827) Persons who do not believe in the existence of a God, or in a future state of existence, are not competent witnesses.—Wakefield v. Ross, Fed. Cas. No. 17,050 [5 Mason, 16].

[b] (U. S. 1834) A man who does not believe in the existence of a God, other than Nature, nor in a future state of existence, is not a competent witness.—United States v. Lee, Fed. Cas. No. 15,586 [4 Cranch, C. C. 446].

[c] (U. S. 1836) When a witness is objected to on the ground of his disbelief of a God, and of a future state of rewards and punishments, and he declares that he believes in a future state of existence, and of a Supreme Being who will punish him, either in this world or the next, for his evil deeds, and it appears in evidence that he has so declared before the trial, and that he sent his children to the Sunday school, and his wife and children regularly to church, the court will permit him to be examined as a witness, leaving his credibility to the jury.—United States v. White, Fed. Cas. No. 16,675 [5 Cranch, C. C. 38].

[d] (U. S. 1839) The testimony of an atheist is not admissible in evidence.—Anonymous, Fed. Cas. No. 446.

[e] (U. S. 1843) A witness must believe in the existence of a God, and in rewards and punishments. If, according to his faith, these rewards and punishments are inflicted in this life, he is competent, and this fact may go to his credibility.—United States v. Kennedy, Fed. Cas. No. 15,524 [3 McLean, 175].

[f] (Ala. 1841) It is not an objection to a witness that he does not believe in "future" rewards and punishments, if he believes in the existence of a God, and that he will punish falsehood and perjury in this world.—Blocker v. Burness, 2 Ala. 354.

[g] (Cal. 1861) Under Prac. Act, § 392, the competency of a witness is not affected by his religious sentiments or convictions.—Fuller v. Fuller, 17 Cal. 605.

[h] (Conn. 1796) Evidence may be admitted to prove a witness to be an atheist.—Beardsly v. Foot, 2 Root, 399.

[hh] (Conn. 1828) A person who disbelieves in any punishment in a future state is not a competent witness.—Atwood v. Welton, 7 Conn. 66.

[i] (Del. 1835) A person, to be sworn as a witness, must believe in a God and a future state of rewards and punishments.—Perry's Adm'r v. Stewart, 2 Har. 37.

[ii] (Ga. 1871) Code, § 3797, which provides that religious belief shall go only to the credit of a witness, does not justify asking a witness if he believes in Christ as the Savior.—Donkle v. Kohn, 44 Ga. 266.

[jj] (Ill. 1820) All persons who believe in God and a future state, though they disbelieve in a punishment hereafter for crimes committed here, are competent witnesses.—Noble v. People, 1 Ill. (Breese) 54.

[jj] (Ill. 1856) A person who has no religious belief, nor belief in a Supreme Being, and who,

though recognizing his amenability to human law in case he testify falsely, yet does not feel accountable morally here or hereafter, cannot be admitted as a witness.—Central Military Tract R. Co. v. Rockafellow, 17 Ill. (7 Peck) 541.

[k] (Me. 1840) After declarations of a person tending to show that he does not believe in a Supreme Being have been admitted, an honest change of opinion after the making of such declarations may be shown, in order that the witness may qualify under St. 1833, c. 58, making a belief in the Supreme Being a prerequisite to the admission of a witness to testify.—Smith v. Coffin, 18 Me. (6 Shep.) 157.

[kk] (Me. 1840) After declarations of a witness tending to show his disbelief in the existence of a Supreme Being, which belief is made a prerequisite to the admission of a witness to testify (St. 1833, c. 58), have been admitted in evidence, the person offered as witness cannot be permitted to testify to his belief in a Supreme Being in order to qualify as a witness. —Smith v. Coffin, 18 Me. (6 Shep.) 157.

[l] (Me. 1841) St. 1833, c. 58, contemplates that a belief in a Supreme Being is a prerequisite to the admission of a witness to testify; but, after his admission, no inquiry should be allowed as to his religious opinions.—Smith v. Coffin, 18 Me. (6 Shep.) 157.

[ll] (Mass.) The disbelief of a future state of existence goes only to the credibility of a witness.—(1818) Hunscom v. Hunscom, 15 Mass. 184; (1834) Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 163.

[m] (Mass. 1829) A person believing in the being of a God, and in his attributes as a righteous avenger of wickedness, and in the existence of a future state, is competent to be sworn as a witness. — Commonwealth v. Bachelder, Thacher, Cr. Cas. 191.

[mm] (Mass. 1835) Upon objection to a witness for defect of religious faith, he stated at first that he believed in a God, and afterwards that he did not consider an oath more binding upon his conscience than a simple promise, that he attached no religious obligation or sanctity to an oath, and that he had no idea of a God who knows the secrets of all hearts, and who rewards and punishes men according to their conduct. *Held*, that such witness was incompetent.—Commonwealth v. Barnard, Thacher, Cr. Cas. 431.

[n] (Mass. 1848) One who does not believe in the existence of God is not a competent witness. —Thurston v. Whitney, 56 Mass. (2 Cush.) 104.

[nn] (Mass. 1860) The rule of the common law that a witness cannot be examined as to his religious belief, either on the voir dire or on cross-examination, is unaffected by Gen. St. c. 131, § 12, the purpose of which was to render persons who were disbelievers in any religion competent witnesses, and to cause their disbelief to be proved only to affect their credibility. —Commonwealth v. Burke, 82 Mass. (16 Gray) 33.

[o] (Mich. 1858) By Comp. Laws, § 4336, it is provided that no person shall be deemed incompetent as a witness in any court on account of his opinions on the subject of religion, nor shall any witness be questioned in relation to his opinions thereon before or after he is sworn. *Held*, that under this statute it is incompetent to question a witness in reference to his belief in the existence of a God.—People v. Jenness, 5 Mich. 305.

[oo] (Mo. 1882) An atheist is a competent witness.—Londener v. Lichtenheim, 11 Mo. App. 385.

[p] (N. H. 1828) A person who is proved to have openly and repeatedly avowed that he had no belief in the existence of a God cannot be admitted to testify in a court of justice.—Norton v. Ladd, 4 N. H. 444.

[pp] (N. H. 1879) One is competent to testify who believes in the existence of God, and that divine punishment, here or hereafter, will follow perjury.—Free v. Buckingham, 59 N. H. 219.

[q] (N. J. 1889) A person's belief as to the punishment of perjury by the Deity is to be classed among his religious principles, and hence the fact that a party in a suit does not believe that God will punish perjury does not render such party incompetent as a witness, when offered in his own behalf.—State v. Powers, 51 N. J. Law (22 Vroom) 432, 17 Atl. 969.

[qq] (N. M. 1884) Where a witness, a Chinaman, says that he believes in the Chinese religion, and takes an oath which would bind his conscience to tell the truth, he is, in the matter of religious belief, a competent witness.— Territory v. Yee Shun, 3 N. M. (Gild.) 100, 2 Pac. 84.

[r] (N. Y. 1820) On an issue as to whether a person offered as a witness had such religious belief as would entitle him to testify, where it appeared that he had within three months before the trial repeatedly and deliberately declared his unbelief, he cannot, on objection being made, be admitted to deny the declarations or to state his recantation of them.—Jackson v. Gridley, 18 Johns. 98.

[rr] (N. Y. 1820) A person who does not believe in the existence of a God or in a future state of rewards and punishments cannot be a witness in a court of justice under any circumstance.—Jackson v. Gridley, 18 Johns. 98.

[s] (N. Y. 1820) On an issue as to the religious belief of a person offered as a witness, where it was shown that he had within three months before the trial repeatedly and deliberately declared his unbelief, he may be restored to competency on giving satisfactory evidence of a change of mind some time before the trial, so as to repel the presumption arising from his former declarations.—Jackson v. Gridley, 18 Johns. 98.

[ss] (N. Y. 1820) An adult of sound mind, when called as a witness, cannot be questioned as to his religious creed.—Jackson v. Gridley, 18 Johns. 98.

[t] (N. Y. 1823) The proper test of a witness' competency, when objected to on the ground of his religious belief, is "whether he believes in the existence of a God, who will punish him if he swears falsely."—Butts v. Swartwood, 2 Cow. 431.

[tt] (N. Y. 1837) A disbeliever in the existence of a Supreme Being who will punish false swearing is not a competent witness.—People v. McGarren, 17 Wend. 460.

[u] (N. Y. 1859) The credibility of a witness is not affected by his belief in spiritualism.— Blaisdell v. Raymond, 9 Abb. Prac. 178.

[uu] (N. C. 1856) One who believes in the existence of a Supreme Being, who will punish men in this world for every sin committed, though he does not believe that punishment will be inflicted in the world to come, is a competent witness.—Shaw v. Moore, 49 N. C. 25.

[v] (Ohio, 1840) A person who believes in the existence of God, and that an oath is binding on the conscience, is competent to testify, though he does not believe in a future state of rewards and punishments.—Brock v. Milligan, 10 Ohio, 121.

[vv] (Pa. 1841) The rule excluding witnesses embraces those who believe future punishments not to be eternal.—Cubbison v. McCreary, 2 Watts & S. 262.

[w] (Pa. 1841) The true test of the competency of a witness on the ground of his religious

principles is whether he believes in the existence of a God, who will punish him if he swear falsely.—Cubbison v. McCreary, 2 Watts & S. 262.

[ww] (Pa. 1856) A belief in a future state of rewards and punishments, or a belief in the inspired character of the Bible, are not essential to the competency of a witness. It is enough if he believes in a God, who will punish false swearing.—Blair v. Seaver, 26 Pa. (2 Casey) 274.

[x] (Pa. 1867) To be competent as a witness, one must have a conscience alive to the conviction of accountability to a higher power than human law. Solely his regard for the good of society, or his fear of punishment, is not sufficient.—Commonwealth v. Winnemore, 2 Brewst. 378.

[xx] (Pa. 1886) Act May 21, 1885, permitting defendants in criminal cases to testify, removes every form of incompetence, as well that arising from defect of religious belief as from interest or otherwise.—Commonwealth v. Kauffman, 1 Pa. Co. Ct. R. 410.

[y] (Tenn. 1852) He is a competent witness who states that he does not believe in a state of future rewards and punishments after death, and that the only punishment inflicted for wrongs in this life is the pangs of conscience; but he believes in the existence of God, and believes the Bible.—Bennett v. State, 31 Tenn. (1 Swan) 411.

[yy] (Vt. 1841) A person who disbelieves in the existence of a God is not a competent witness.—Arnold v. Arnold's Estate, 13 Vt. 363; Scott v. Hooper, 14 Vt. 535.

[z] (Vt. 1842) If the objection to the competency of a witness who believed that there is no God has been removed by a change of views, he should be examined.—Scott v. Hooper, 14 Vt. 535.

[zz] (Va. 1846) No person is incapacitated from being a witness on account of his religious belief.—Perry v. Commonwealth, 3 Grat. 632.

§ 103. Constitutional provisions.

[a] (Ill. 1890) Under Const. art. 2, § 3, which provides that "no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations," the absence of belief in his accountability to the Deity does not disqualify a citizen from testifying in a court of justice.—Hronek v. People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837.

[b] (Ill. 1890) Under Const. 1870, art. 2, § 3, providing that "no person shall be denied any civil or political rights, privilege, or capacity on account of his religious opinions," the matter of a person's religious belief or unbelief does not affect his competency as a witness.—Ewing v. Bailey, 36 Ill. App. 191.

[c] (Ky. 1882) The exclusion of a witness in a criminal case on account of his disbelief in God and a future state of rewards and punishments is unconstitutional.—Bush v. Commonwealth, 80 Ky. 244.

[d] (Mass. 1848) A rejection of a witness as incompetent by reason of his want of religious belief is not a violation of the second article of the bill of rights.—Thurston v. Whitney, 56 Mass. (2 Cush.) 104.

[e] (N. J. 1889) The statutory right of a party to testify in his own behalf is a civil right within the meaning of Const. art. 1, providing that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles."—State v. Powers, 51 N. J. Law (22 Vroom) 432, 17 Atl. 969.

§ 104. Nature and obligation of oath in general.

[a] (Cal. 1861) A foreigner, a witness, did not at first understand the meaning of the word "obligation" as applied to an oath. *Held* that, after he was made to understand it by an explanation, no objection to his competency could be made on this ground.—Fuller v. Fuller, 17 Cal. 605.

[b] (Conn. 1809) A person who does not believe in the obligation of an oath and in a future state of rewards and punishments, or any accountability for his conduct after death, is not a competent witness to prove the execution of a will, and his opinions may be proved from his own declarations out of court; nor, in such a case, can the witness be allowed to deny or explain in court the declarations imputed to him.—Curtiss v. Strong, 4 Day, 51, 4 Am. Dec. 179.

[c] (Ind. 1840) A deaf and dumb person may be a competent witness, if he understands that perjury is punished by law, though he has no conception of the religious obligation of an oath.—Snyder v. Nations, 5 Blackf. 295.

[d] (Iowa, 1867) Section 4, art. 1, of the constitution, which allows parties to use as a witness any person not disqualified by interest, assumes that the person shall possess enough of understanding to appreciate the nature and feel the obligation of an oath.—Kilburn v. Mullen, 22 Iowa, 498.

[e] (La. 1893) Where a witness states that she does not know the consequences if she should testify falsely, and the judge certifies that she exhibits as much intelligence as an ordinary person of her class, her statement does not show that she is ignorant of the nature of an oath, and she is competent.—State v. Langford, 45 La. Ann. 1177, 14 South, 181, 40 Am. St. Rep. 277.

[f] (Mass. 1861) No exception lies to the decision of a judge of the superior court on the question whether a witness has sufficient knowledge of right and wrong, and of the nature and obligation of an oath, to qualify him to testify, if no erroneous view is taken of any legal principle.—Commonwealth v. Mullins, 84 Mass. (2 Allen) 295.

[g] (Minn. 1876) Where a witness understands that he is brought into court to tell the truth, that it is wrong to tell a lie, and that he will be punished if he does tell a lie, he has sufficient understanding of the obligation of an oath to be competent.—State v. Levy, 23 Minn. 104, 23 Am. Rep. 678.

[h] (Neb. 1880) On a trial for murder an Indian was called as a witness for the prosecution, and, in answer to many questions, put through an interpreter, by the attorneys for the accused, intended to test his capacity to understand the obligation of an oath, answered, in substance, to all that he meant to tell the truth, but failed to answer the questions propounded. *Held* that, as it did not appear that he had "capacity to understand the obligation of an oath" (Code Civ. Proc. § 328), his testimony was inadmissible.—Priest v. State, 10 Neb. 393, 6 N. W. 468.

[i] (Tex. 1858) A state's witness having disqualified herself on her voir dire with regard to her knowledge of the nature and obligation of an oath, the state was permitted to take her to a private office, and instruct her thereupon. She was thereupon returned into court, and replying that she then understood the test, was held competent as a witness. *Held*, that the proceeding was erroneous.—Taylor v. State, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656.

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§ 105. Children.

Competency in general, see ante, §§ 97, 98.

[a] (D. C. 1894) A child of sufficient intelligence to have a just appreciation of the difference between right and wrong, and a proper consciousness of the punishment for false swearing, is competent to testify.—Williams v. United States, 3 App. D. C. 335.

[b] (Ga. 1885) A child six years old, on whom a rape is alleged to have been committed, is not a competent witness, where it does not appear from her preliminary examination that she understands the obligation of an oath and the punishment imposed for its violation, or that she has any conception of future punishment for wrongs done in this life.—Johnson v. State, 76 Ga. 76.

[c] (Ind. 1882) Rev. St. 1881, § 1798, provides that all persons who are competent to testify in civil actions are competent witnesses in criminal cases. Sections 496, 497, provide that all persons shall be competent witnesses in a civil case, except children under 10 years of age, unless it appears that they understand the nature and obligation of an oath. *Held*, that in a criminal case a child over 10 years of age is a competent witness, though he does not understand the nature and obligation of an oath.—Holmes v. State, 88 Ind. 145.

[d] (Iowa, 1867) A bill of exceptions recited that a witness introduced by defendant was objected to by plaintiff, "and, being questioned by the court, she stated that she would be nine years old next fall." The trial was in May. Objection of plaintiff sustained, for the reason that the witness did not understand the nature of an oath, to which defendant excepted. *Held*, that the presumption from her age of her capacity to understand the obligation of an oath would not be very strong.—Kilburn v. Mullen, 22 Iowa, 498.

[e] (Ky. 1894) An infant under 12 is a competent witness if, in the opinion of the court, she has sufficient intelligence to truthfully narrate the facts to which her attention is directed, though she may be totally ignorant of God and of the evil of testifying falsely.—White v. Commonwealth, 96 Ky. 180, 28 S. W. 340.

[f] (Mich. 1887) It is necessary to the admissibility of the testimony of a child under seven that the court should be satisfied, by an examination of the child, that he is capable of appreciating the obligation of his oath, and to admit the testimony of such a child without an examination which will satisfy the court upon this point is reversible error.—Hughes v. Detroit, G. H. & M. Ry. Co., 65 Mich. 10, 31 N. W. 603.

[g] (Mo. 1884) That a child otherwise competent has never received religious instruction does not disqualify him as a witness.—Cadmus v. St. Louis Bridge & Tunnel Co., 15 Mo. App. 86.

[h] (N. Y. 1839) Where a witness called to testify is of tender years, the opposite party may require that he shall be examined as to his understanding of the nature and obligation of an oath.—People v. McNair, 21 Wend. 608.

[i] (N. Y. 1890) Where a child of tender years, called as a witness, is unable to comprehend the nature of an oath, there is no error in refusing, even in a criminal case, to receive his unsworn statement for what it is worth.—People v. Frindel, 58 Hun, 482, 12 N. Y. Supp. 498.

[j] (Pa. 1867) A child, believing that falsehood will be punished in a future state, may be sworn as a witness, though ignorant of the meaning of an oath.—Commonwealth v. Ellenger, 1 Brewst. 352.

[k] (Pa. 1869) A child eight years old, who testified that she went to Sunday school and that, if she did not tell the truth, she would be punished hereafter, might be sworn as a witness, though she did not know what the Bible was, nor understand the nature of an oath.—Commonwealth v. Carey, 2 Brewst. 404.

[l] (S. D. 1895) Whether a boy 11 years old is able to discriminate between right and wrong, and knows the nature of an oath, so as to render him competent as a witness, are questions for the trial court.—State v. Reddington, 7 S. D. 368, 64 N. W. 170.

[m] (Tex. 1873) A child of 10 years, who, upon examination on voir dire, said "that she did not know what God and the laws of the country would do to her if she swore falsely, but that she would tell the truth," is not thereby disqualified from testifying.—Davidson v. State, 39 Tex. 129.

[n] (Tex. 1882) A child nine year old, whose examination shows an utter want of anything like a knowledge of the nature or character and consequences of an oath, is not a competent witness.—Williams v. State, 12 Tex. App. 127.

[o] (Va. 1883) Where the court has decided on a prior trial that a child understands the nature of an oath, and therefore is competent, he cannot be examined before the jury on a subsequent trial as to his competency.—Oliver v. Commonwealth, 77 Va. 590.

[p] (Va. 1889) A conviction will not be set aside on the ground that the prosecutrix, who was 12 years of age, could not understand the nature of an oath, where she was very critically examined by the court, and the jury were instructed that they were judges of her credibility.—Smith v. Commonwealth, 85 Va. 924, 9 S. E. 148.

[q] (W. Va. 1893) An infant of such tender years and mind as to be legally irresponsible for her conduct, and to have no conception of the legal or moral obligation of an oath, nor of the pains and penalties for false swearing, is not a competent witness.—State v. Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605.

§ 106. —— Sufficiency.

[a] (U. S. 1895) On a trial for murder, a boy nearly five and a half years old, being offered as a witness, stated on his voir dire that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him; that he was going to tell the truth; that his mother had told him that morning to "tell no lie." To the question what would be done with him in court if he told a lie, he replied that they would put him in jail, and to a question as to what the clerk said to him when he held up his hand, he answered: "Don't you tell no story." *Held* competent.—Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244.

[b] (Ala. 1879) A child aged nine years, who, when examined, said that she did not know what the Bible was, that she had been to church but once, that she had heard of God, but did not know who he was, and that, if she swore to a lie, she would be put in jail, but did not know whether she would be punished in any other way, is an incompetent witness.—Carter v. State, 63 Ala. 52, 35 Am. Rep. 4.

[c] (Ala. 1882) A child 11 years old, who said she had never heard of God, heaven, or hell, and did not know that she would be punished if she swore falsely otherwise than by being put in jail, should not be allowed to testify.—Beason v. State, 72 Ala. 191.

[d] (Ala. 1889) A child 7½ years of age is a competent witness, where it appears, on her examination by the judge, that she has an intelligent comprehension of the belief that falsehood is not only morally wrong, but will be severely punished in the future.—McGuff v. State, 88 Ala. 147, 7 South. 35, 16 Am. St. Rep. 25.

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[e] (Ala. 1889) A boy 14 years of age, who states on his examination that he knows it is wrong to lie, but did not know that he would be punished if he swore to a lie, is not a competent witness.—McKelton v. State, 88 Ala. 181, 7 South. 38.

[f] (Ala. 1894) A child under 10 years of age, when examined by the court to test her competency, stated that if she swore falsely, or did wrong, she would go to hell, but if she did right, and told the truth, she would go to heaven. *Held*, that the answers were sufficient to show that the witness was competent, though no questions were asked touching her belief in a Supreme Being.—Grimes v. State, 105 Ala. 86, 17 South. 184.

[g] (Ala. 1895) A child 10 years old, who, when asked what would become of her when she died if she swore falsely, replied, "I will go to hell," and made the same reply when asked what would be done with her here, was competent to testify.—Williams v. State, 109 Ala. 64, 19 South. 530.

[h] (Ill. 1873) A child nine years of age, who testified on her voir dire that she "understood the nature of an oath, and that if she did not swear the truth she would get into hell fire," is competent according to the most rigid rule.—Draper v. Draper, 68 Ill. 17.

[i] (Ind. 1858) A person under 10 years of age (that being the statute period of presumption) who does not know how perjury will be punished, but believes it will be, who knows that it is not right to swear a lie, and says she would tell the truth if sworn, and always, if mother wanted her to, and that her mother had told her to in this case, may be presumed to have been competent; the court below having admitted her.—Blackwell v. State, 11 Ind. 196.

[j] (Minn. 1876) A child produced as a witness, who understands that he is brought to court to tell the truth, that it is wrongful to tell a lie, and that he will be punished if he tells a lie, has sufficient understanding of the obligation of an oath to be competent.—State v. Levy, 23 Minn. 104, 23 Am. Rep. 678.

[k] (Mont. 1895) In a criminal case a boy 15 years old, who states that the oath taken required him to tell what was so, and that what was so was the truth, and what was not so was falsehood, and if he did not tell the truth he would be punished, is a competent witness.—State v. Cadotte, 17 Mont. 315, 42 Pac. 857.

[l] (N. Y. 1890) A lad of 11 years, who testified that he believed in heaven, the home of God, and hell, the home of the Devil; that at death the good would go to the former, and the bad to the latter; that it was bad to lie, both in and out of court; for the former his parents would whip him, and for the latter he would be sent to prison—was competent to testify.—Jones v. Brooklyn, B. & W. E. R. Co. (City Ct. Brook.) 3 N. Y. Supp. 253, judgment affirmed 121 N. Y. 683, 24 N. E. 1098.

[m] (N. Y. 1894) A witness 10 years old, who states that he had been taught that it was wrong to tell a lie, and that a witness who testified falsely was subject to punishment, shows sufficient ability to comprehend the nature and effect of an oath.—People v. Linzey, 79 Hun, 23, 29 N. Y. Supp. 560.

[n] (S. C. 1886) A boy of 12 could repeat the Lord's prayer, and had heard it said that bad men caught those who lied, cursed, etc. He had never heard of God, the devil, heaven, hell, or the Bible, and had no idea of what became of the good or the bad after death. *Held*, that he was not a competent witness.—State v. Belton, 24 S. C. 185, 58 Am. Rep. 245.

[o] (Tenn. 1871) The answer of an illiterate child, 13 years old, that she would go to the bad world if she told a lie, showed her competent as a witness.—Vincent v. State, 3 Heisk. 120.

[p] (Tenn. 1871) The belief of a child of tender years, but good intelligence, that "the bad man would get him" if he swore to a lie, showed a sufficient sense of the obligation of an oath to render him competent as a witness.—Logston v. State, 3 Heisk. 414.

[q] (Tex. 1877) Where a witness 10 years of age stated on her voir dire that she attended Sunday school and knew it was wrong to tell a lie, and the opposing counsel did not further test her understanding, it was not reversible error to permit her to testify over an objection to her competency.—Johnson v. State, 1 Tex. App. 609.

[r] (Tex. 1877) Where a boy seven years of age, offered as a witness, stated that if he told a lie the devil would get him and he would go to Huntsville, meaning the penitentiary, and it appeared that the boy was implicated in the crime for which the defendant was on trial, and the court instructed the jury that they might take into consideration the age, experience, and all other matters in their judgment likely to affect the truth and correctness of the witness' testimony, and that they could not convict on the uncorroborated testimony of the boy, whether or not he was an accomplice, no abuse of discretion was shown in permitting him to testify.—Mason v. State, 2 Tex. App. 192.

[s] (Tex. 1894) A child 10 years old, who on her voir dire answered that she would go to jail if she told a lie, and to hell when she died, shows sufficient comprehension of the nature of an oath to be permitted to testify.—Comer v. State (Cr. App.) 20 S. W. 547.

[t] (Tex. 1894) It is not an abuse of discretion for a trial judge to permit a boy 12 years old to testify in a criminal cause, when it appears that the boy, on his voir dire, stated that "it was wrong to tell a lie, and that, if he told a lie, he would be punished."—Parker v. State, 33 Tex. Cr. R. 111, 21 S. W. 604, 25 S. W. 967.

[u] (Tex. 1895) A boy 13 years of age, who understands the difference between truth and falsehood, comprehends the orthodox idea of future reward and punishment, and knows that it is wrong to swear to or tell a lie, is a competent witness.—Partin v. State (Cr. App.) 30 S. W. 1067.

[v] (Tex. 1896) A boy 10 years of age, having an idea of future rewards and punishments, should also be shown to know the penalties of perjury, in order to render him a competent witness.—Murphy v. State, 36 Tex. Cr. R. 24, 35 S. W. 174.

§ 107. —— Instructions by court or others.

[a] (Mass. 1886) In the trial of a criminal case, where a witness, a girl of 13, has been called, and withdrawn because apparently ignorant of the nature of an oath, and afterwards the judge examines the witness, finds her competent to be sworn, and permits her to testify, defendant cannot object on the ground that she has been instructed by a Christian minister as to the nature of an oath since the last adjournment of the court.—Commonwealth v. Lynes, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709.

[b] (N. H. 1876) When a child offered as a witness appears not informed as to the nature of an oath, the judge may instruct him, and then, being satisfied that he understands, may receive his testimony.—Day v. Day, 56 N. H. 316.

[c] (N. Y. 1818) An infant of intelligence, who does not understand the nature of an oath, will be instructed by the court, and will there-

upon be permitted to testify.—In re Stone, 3 City H. Rec. 2.

[d] (Pa. 1870) A child of eight may be allowed to be instructed by the crier and to be sworn, although she had stated that she did not know how to read, or what the Bible was; she having replied that she must tell the truth when on the stand, and if not she would "go to the big fires of hell."—Commonwealth v. Carey, 2 Brewst. 404.

[e] (Tex. 1859) A child seven years old, called as a witness, said that she did not know what was done when she held up her hand, and that she did not know what would be done with her if she told a story. *Held*, judging from this, and from the manner in which she gave her testimony afterwards, and notwithstanding the trial judge attempted to instruct her as to the nature of an oath, that she was incompetent.—Holst v. State, 23 Tex. App. 1, 3 S. W. 757, 59 Am. Rep. 770.

6. CHARACTER AND CONDUCT.

IN GENERAL, § 108.
INFAMY OR CONVICTION OF CRIME IN GENERAL, § 109.
STATUTORY PROVISIONS, § 110.
NATURE OF OFFENSE, § 111.
CHARACTER OF PROCEEDINGS AGAINST WITNESS, § 112.
PROCEEDINGS IN OTHER JURISDICTIONS, § 113.
PROCEEDINGS IN WHICH EVIDENCE IS INADMISSIBLE AND NATURE OF EVIDENCE, § 114.
STATUTORY REMOVAL OF DISQUALIFICATION, § 115.
EFFECT OF PARDON, § 116.
—— CONDITIONAL PARDON, § 117.
EFFECT OF SERVING OUT TERM, § 118.

Credibility and impeachment of witness, see post, §§ 1111–1176.

§ 108. In general.

[a] (U. S. 1827) Seamen are deemed in law credible, as well as competent, witnesses, and their testimony is to be weighed like other witnesses.—United States v. Freeman, Fed. Cas. No. 15,162 [4 Mason, 505].

[b] (Ark. 1892) The fact that a principal was induced to testify by an offer of leniency of punishment does not affect his competency, but only his credibility.—Vaughan v. State, 57 Ark. 1, 20 S. W. 588.

[c] (Ind. 1859) Where a witness is offered by defendant generally, and testifies that she had had conversations with defendant in regard to the testimony, and that one witness had informed her of what another had testified to, it was error to entirely exclude that witness.—Horne v. Williams, 12 Ind. 324.

[d] (Ky. 1827) The character of a witness, and not his conduct, decides his competency.—Allen v. Young, 22 Ky. (6 T. B. Mon.) 136, 17 Am. Dec. 130.

[e] (Ky. 1895) In an action by an administrator to set aside a mortgage there was a judgment for plaintiff. On appeal the judgment was reversed, with directions to settle the mortgagee's account. *Held*, that the fact that the mortgagee testified on the trial of the action does not preclude him from testifying before the commissioner to whom the matter of his account was referred.—Lebus v. Whalen, 30 S. W. 22.

[f] (La. 1811) A party's concubine is a competent witness, the objection affecting her credit only.—Meunier v. Couet, 2 Mart. (O. S.) 56.

[g] (Mo. 1848) The questions of the competency and credibility of witnesses are distinct and independent questions, and the fraudulent conduct of a witness, which might affect his credibility, does not destroy his competency.—Rose v. Bates, 12 Mo. 30.

[h] (Mont. 1895) The fact that respondent in disbarment proceedings was enabled to defraud his client by reason of a corrupt scheme entered into by them to defraud the county, does not prevent the client from testifying as to such scheme.—State v. Cadwell, 16 Mont. 119, 40 Pac. 176.

[i] (N. J. 1861) Since the passage of the act of 1859 (Nix. Dig. p. 928), failure to answer interrogatories within the time required by law does not disqualify the party as a witness in his own behalf.—Voorhees v. Jones, 29 N. J. Law (5 Dutch.) 270.

[j] (N. J. 1864) It is no objection to the competency of a codefendant to testify that he has not answered the bill, but has suffered a decree pro confesso against him, and although complainant may, at his discretion, require him to answer, yet, if he does not, he cannot thereby deprive his codefendant of his testimony, or disqualify himself as a witness in the cause.—Giveans v. McMurtry, 16 N. J. Eq. (1 C. E. Green) 468.

[k] (S. C. 1895) The fact that a witness, in attesting a deed, has declared that it was signed, sealed, and delivered in his presence, will not preclude him from testifying, in an action on the deed, to facts which will show nondelivery.—Johnson v. Johnson, 44 S. C. 364, 22 S. E. 419.

[l] (Tex. 1895) In a proceeding by a ward to set aside a sale of his property by his guardian under order of court, the guardian is competent to testify that no consideration was paid him by the purchaser, though in his report as guardian he had stated under oath that he had received the purchase money.—Hampton v. Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423.

§ 109. Infamy or conviction of crime in general.

Compelling attendance of convicts, see ante, § 7.
Credibility of witness, see post, §§ 1126–1128, 1132.
Evidence, see post, § 199.

[a] (U. S. 1811) Where incompetency depends on an infamous punishment, and the same is not inflicted where it might have been, the witness is not rendered incompetent.—United States v. Brockius, Fed. Cas. No. 14,652 [3 Wash. C. C. 99].

[b] (U. S. 1880) Conviction of an infamous crime does not affect the competency of a witness.—United States v. Biebusch (C. C.) 1 Fed. 213, 1 McCrary, 42.

[c] (Ga. 1869) Infamy does not render a witness incompetent.—Frain v. State, 40 Ga. 529.

[d] (Ill. 1861) One who confesses himself guilty of a felony, and accuses others of the same crime in order to shield himself from punishment, is an approver, and as such is an incompetent witness; but a confession of other felonies will not make the party confessing an approver.—Myers v. People, 26 Ill. (16 Peck) 173; Gray v. People, Id. 344.

[e] (La. 1861) In civil matters, under Civ. Code, art. 2260, those whom the law deems infamous are not competent witnesses.—State v. Benoit, 16 La. Ann. 273.

[f] (Mass. 1817) Evidence of the testimony of a witness in a former trial, who has since been convicted of an infamous crime, is inadmissible.—Le Baron v. Crombie, 14 Mass. 234.

[g] (N. Y. 1827) Where an accomplice is charged with any other felony than that in relation to which the prosecutor moves for his ad-

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mission as a witness, this fact of itself is sufficient ground for rejecting him.—People v. Whipple, 9 Cow. 707.

[h] (N. Y. 1869) Under the statutes declaring any person "sentenced upon conviction for felony" incompetent to testify (2 Rev. St. p. 701, § 23), and defining felony as "an offense for which the offender, on conviction, shall be liable by law to be punished by death or imprisonment in state prison" (Id. p. 702, § 38), one who has been convicted of and sentenced for the crime of burglary in the third degree is incompetent as a witness, although, being at the time of conviction and sentence under 16 years of age, he is, under exceptions of later statutes in behalf of juvenile offenders, sentenced to the house of refuge, instead of to state prison.—People v. Park, 41 N. Y. 21, affirming Park v. People, 1 Lans. 263.

[i] (Ohio, 1869) The admission of a witness that on a former examination touching the same subject-matter he committed perjury, provided he has not been legally convicted of the perjury, only affects his credit, not his competency.—Brown v. State, 18 Ohio St. 496.

[j] (S. C. 1821) A conviction of perjury or felony of a husband will not render his wife incompetent.—State v. Anthony, 1 McCord, 285.

§ 110. Statutory provisions.

Statutory removal of incompetency, see post, § 115.

[a] (Ala. 1878) The statutes have not changed the common-law rule that a person duly convicted of burglary or grand larceny is rendered infamous; and such a person is not a competent witness.—Taylor v. State, 62 Ala. 164.

[b] (Ala. 1882) Code, §§ 4613, 4614, authorizing the taking of depositions of persons confined in the penitentiary, do not enlarge the competency of such persons as witnesses.—Planters' & Merchants' Ins. Co. v. Tunstall, 72 Ala. 142.

[c] (Ind. 1851) Rev. St. 1843 apply only to subsequent convictions of the crime of forgery.—Johnson v. State, 2 Ind. (2 Cart.) 652.

[d] (Ky. 1886) 2 Rev. St. c. 107, § 5, provided that no person convicted of a felony anywhere in the United States should be competent as a witness, unless he had been pardoned. Gen. St. c. 29, art. 8, § 8, provides that persons convicted of perjury or false swearing, or subornation of perjury, shall be disqualified as a witness. *Held*, that the former statute was repealed by the General Statutes, and that a person convicted of grand larceny is not thereby disqualified as a witness.—Commonwealth v. McGuire, 84 Ky. 57.

[e] (Mo. 1886) A person who was disqualified from testifying by Gen. St. 1865, c. 20, § 66, which provided that "a person convicted" of one of certain offenses should be incompetent "to be sworn as a witness," was not made competent by reason of the omission of the words, "to be sworn as a witness," from the statute in the Revision of 1879, the latter statute having no implied retroactive effect.—State v. Sutherland (Sup.) 1 S. W. 753.

§ 111. Nature of offense.

[a] A witness is not rendered incompetent by a conviction of petit larceny.

—(Ind. 1851) Pruitt v. Miller, 3 Ind. 16;
(Mass. 1764) Rex v. Pourksdorff, Quincy, 104;
(N. Y. 1843) Carpenter v. Nixon, 5 Hill, 260; (1860) People v. Shay, 18 How. Prac. 538, affirmed Shay v. People (1860) 22 N. Y. 317; (1860) Shay v. People, 4 Parker, Cr. R. 353;
(Va. 1885) Barbour v. Commonwealth, 80 Va. 287.

CONTRA, see
(Ala. 1881) Sylvester v. State, 71 Ala. 17; (1882) Burns v. Campbell, Id. 271;
(N. H. 1855) Lyford v. Farrar, 31 N. H. (11 Fost.) 314;
(S. C. 1881) State v. James, 15 S. C. 233.

[b] The offense of being a common prostitute is not an infamous crime, rendering the witness incompetent.

—(Conn. 1856) State v. Randolph, 24 Conn. 363; (1877) State v. Shields, 45 Conn. 256;
(Ga. 1858) Smithwick v. Evans, 24 Ga. 461;
(Pa. 1885) Seibert's Estate, 1 Pa. Co. Ct. R. 229, 17 Wkly. Notes Cas. 271.

[c] It is the nature of the crime, not the punishment, which determines whether a convict is a competent witness.

—(N. Y. 1827) People v. Whipple, 9 Cow. 707;
(Pa. 1871) Schuylkill County v. Copley, 67 Pa. (17 P. F. Smith) 386, 5 Am. Rep. 441.

[d] (U. S. 1811) In Pennsylvania a person convicted of an assault and battery with intent to murder, and sentenced to fine and imprisonment, is a competent witness.—United States v. Brockius, Fed. Cas. No. 14,652 [3 Wash. C. C. 99].

[e] (U. S. 1812) A witness is incompetent to testify in a proceeding in court who has been convicted of a conspiracy to defraud the creditors of an insolvent debtor.—United States v. Porter, Fed. Cas. No. 16,072 [2 Cranch, C. C. 60].

[f] (Ala. 1876) The common-law rule that a person convicted of arson is thereby rendered incompetent to testify as a witness does not extend to a conviction under Rev. Code, § 3699, for the offense of "arson in the third degree."—Harrison v. State, 55 Ala. 239.

[g] (Ala. 1877) Only a conviction by a state tribunal renders the convict incompetent to testify on the ground of infamy, not a conviction before a mayor for violation of a municipal ordinance against stealing.—Cheatham v. State, 59 Ala. 40.

[h] (Ala. 1882) A conviction of the statutory offense of embezzlement does not render a witness infamous, unless the particular act would have been larceny at common law.—Planters' & Merchants' Ins. Co. v. Tunstall, 72 Ala. 142.

[i] (Ala. 1883) A conviction under Code 1876, § 4239, of the offense of placing an obstruction on a railroad track, does not render a witness incompetent.—Clifton v. State, 73 Ala. 473.

[j] (Conn. 1793) A person who has been convicted of theft cannot testify.—State v. Gardner, 1 Root, 485.

[k] (Conn. 1810) A conviction of treason, felony, or any species of the crimen falsi renders the convict incompetent to testify.—Sheldon v. Ackley, 4 Day, 458.

[l] (Del. 1859) On the trial of an indictment for rape, an accomplice is not competent as a witness for the accused where that accomplice has been already convicted.—State v. Turner, Houst. Cr. Cas. 76.

[m] (Fla. 1891) McClel. Dig. p. 901, § 7 (Laws March 10, 1845), which declares that no person shall be incompetent as a witness by reason of conviction for a criminal offense, except for certain designated crimes, among which is arson, does not render incompetent one convicted under Laws 1868, c. 1637, § 4, of the crime of house-burning; an offense which would not have been arson at common law, because the building burned was neither a dwelling house nor an outhouse or barn within the

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curtilage.—Williams v. Dickenson, 28 Fla. 90, 9 South. 847.

[n] (Ind. 1851) By the statute in force previously to 1843, a person who was convicted of the crime of forgery was not rendered infamous.—Johnson v. State, 2 Ind. (2 Cart.) 652.

[o] (Ky. 1875) One made infamous by conviction for dealing faro is not thereby rendered incompetent to testify as a witness.—Holloway v. Commonwealth, 74 Ky. (11 Bush) 344.

[p] (Ky. 1890) Gen. St. c. 29, art. 8, relates to the crimes of "Perjury and False Swearing." Sections 3 to 7 inclusive, relate to specific kinds of false swearing. Section 8 provides that "if any person be convicted of either of the offenses described in the five preceding sections" he shall ever afterwards be disqualified from being a witness in any case. No other provisions are contained in the statutes disqualifying witnesses. *Held*, that one convicted of manslaughter is not disqualified.—Commonwealth v. Minor, 89 Ky. 555, 13 S. W. 5.

[pp] (Ky. 1894) A conviction for an infamous crime, other than perjury, false swearing, or subornation of perjury, does not disqualify a witness.—Combs v. Commonwealth, 25 S. W. 590.

[q] (Me. 1836) In a libel for divorce, the particeps criminis, if unmarried, is a competent witness for libelant, since the offense is not adultery.—Moulton v. Moulton, 13 Me. (1 Shep.) 110.

[qq] (Md. 1789) Fine, imprisonment, or transportation, for an offense not infamous, does not render a witness incompetent on the ground of infamy.—Clarke's Lessee v. Hall, 2 Har. & McH. 378.

[r] (Mass. 1844) A person convicted of the offense of receiving stolen goods, knowing them to have been stolen, is not a competent witness.—Commonwealth v. Rogers, 48 Mass. (7 Metc.) 500, 41 Am. Dec. 458.

[rr] (Mass. 1846) A conviction of the offense of obtaining goods by false pretenses does not render the party an incompetent witness.—Utley v. Merrick, 52 Mass. (11 Metc.) 302.

[s] (Mass. 1851) A conviction of the offense of maliciously obstructing the passage of cars on a railroad does not render the convict an incompetent witness.—Commonwealth v. Dame, 62 Mass. (8 Cush.) 384.

[ss] (Miss. 1848) Under the statute, which provides that no conviction for any offense except perjury and subornation of perjury shall disqualify a witness to testify, but that it shall go to his credibility only, a person "condemned to be hung" for murder is a competent witness.—Keithler v. State, 18 Miss. (10 Smedes & M.) 192.

[t] (Mo. 1851) Conviction of keeping a bawdy house goes to the credibility only, and not to the competency, of a witness.—Deer v. State, 14 Mo. 348.

[tt] (N. H. 1859) Conviction for adultery does not render a person incompetent to testify as a witness.—Little v. Gibson, 39 N. H. 505.

[ttt] (N. J. 1810) Conviction under the timber act of New Jersey does not disqualify a person to testify in an action against a person for cutting timber on the same land at the same time.—Holler v. Fiirth, 3 N. J. Law (2 Penning.) 723.

[u] (N. Y. 1860) 2 Rev. St. p. 701, declares that no sentence on a conviction for any offense other than a felony shall render a person incompetent to testify. Section 702 declares that the term "felony" means an offense for which the offender shall be liable to be punished by death or by imprisonment in the state's prison. Section 690 defines petit larceny, and declares the punishment shall be imprisonment in a county jail not exceeding six months or by fine. *Held*, that being sentenced on a conviction for petit larceny did not disqualify as a witness.—People v. Shay, 10 Abb. Prac. 413, affirmed Shay v. People, 22 N. Y. 317.

[uu] (N. Y. 1869) Under 2 Rev. St. p. 701, § 23, providing that no person sentenced on a conviction for felony shall be competent to testify, and section 30, declaring that the term "felony" shall be construed to mean an offense for which the offender shall be liable to be punished by death or imprisonment in a state prison, a prisoner under 16 years of age, convicted of burglary in the third degree, is liable to imprisonment in a state prison, and is incompetent as a witness, though he has been sentenced to the house of refuge.—Park v. People, 1 Lans. 263, affirmed People v. Park, 41 N. Y. 21.

[v] (N. C. 1869) A prisoner under a sentence of death for a felony is a competent witness.—State v. Harston, 63 N. C. 294.

[vv] (N. C. 1875) The fact that one has been convicted of murder and is under sentence of death does not render him incompetent as a witness.—Ex parte Harris, 73 N. C. 65.

[w] (Ohio, 1854) A person, convicted of forgery and sentenced therefor to hard labor in the house of refuge, so long as his sentence is not reversed or annulled, is not a competent witness.—Poage v. State, 3 Ohio St. 229.

[ww] (Pa. 1831) A conviction without an attainder does not destroy the competency of a witness.—Skinner v. Perot, 1 Ashm. 57.

[x] (Pa. 1845) A receiver of stolen goods, who by the law is made guilty of a misdemeanor, is not, by reason of the conviction, incapacitated as a witness.—Commonwealth v. Murphy, 3 Clark, 290, 5 Pa. Law J. 217.

[y] (Pa. 1859) A witness, convicted of a conspiracy to cheat and defraud creditors, is not thereby disqualified.—Bickel's Ex'rs v. Fasig's Adm'r, 33 Pa. (9 Casey) 463.

[yy] (Pa. 1871) One who has been convicted and is undergoing his sentence for embezzlement as a public officer is a competent witness, notwithstanding the punishment is of the same kind as that inflicted for infamous offenses.—Schuylkill County v. Copeley, 67 Pa. (17 P. F. Smith) 386, 5 Am. Rep. 441.

[z] (Pa. 1871) Infamous crimes are treason, felony, and every species of the crimen falsi, such as forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice. This is clearly the limitation of the term "infamous crimes," as understood in Pennsylvania. There are many offenses, involving both falsehood and fraud, which are punished as infamous crimes are usually punished, and yet are not infamous crimes, and will not exclude the offenders as witnesses.—Schuylkill County v. Copeley, 67 Pa. (17 P. F. Smith) 386, 5 Am. Rep. 441.

[zz] (Tex. 1877) A conviction for a felony disqualifies the party as a witness, unless he has been pardoned. A conviction for a misdemeanor does not, though the misdemeanor be theft of property worth less than $20.—Welsh v. State, 3 Tex. App. 114.

§ 112. Character of proceedings against witness.

[a] A person is not rendered incompetent by conviction of crime, but only by judgment on the conviction.

—(Ill. 1869) Faunce v. People, 51 Ill. 311;
(Ind. 1853) Dawley v. State, 4 Ind. 128;
(La. 1843) Laborde v. Consolidated Ass'n of Planters, 4 Rob. 190, 39 Am. Dec. 517;
(N. C. 1847) State v. Valentine, 29 N. C. 225.

CONTRA, see
(Del. 1854) State v. Anderson, 5 Har. 493.

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[b] (U. S. 1840) A defendant convicted of an infamous offense, if not sentenced, is a competent witness.—United States v. Dickinson, Fed. Cas. No. 14,958 [2 McLean, 325].

[c] (U. S. 1894) A mere plea of guilty by a conspirator does not render him incompetent to testify against his confederates.—United States v. Wilson (D. C.) 60 Fed. 890.

[d] (Ala. 1882) The mere finding of a true bill against a person does not disqualify him as a witness.—Powell v. State, 72 Ala. 194.

[e] (Ga. 1858) A slave who has been convicted, but not sentenced, as principal, is a competent witness against an accessory.—Thornton v. State, 25 Ga. 301.

[f] (Mass. 1844) A conviction of larceny before a justice of the peace, in a case within his jurisdiction, and a performance of the sentence, render the convict an incompetent witness, although the complaint on which the justice proceeded was so defective that judgment might have been arrested or reversed on error.—Commonwealth v. Keith, 49 Mass. (8 Metc.) 531.

[g] (Mo. 1878) The fact that the sentence of a person who had been convicted of obtaining money under false pretenses has been suspended by an appeal and order of supersedeas does not render him a competent witness.—Ritter v. Democratic Press Co., 68 Mo. 458.

[h] (N. Y. 1877) Under 2 Rev. St. p. 681, § 1, disqualifying as a witness any person who "shall, upon conviction, be adjudged guilty of perjury," a person is not rendered incompetent until sentence has been pronounced upon him.—Blaufus v. People, 69 N. Y. 107, 25 Am. Rep. 148.

[i] (Tex. 1881) The deposition of a party, taken after his indictment for forgery, but before his conviction, is inadmissible in evidence.—Webster v. Mann, 56 Tex. 119, 42 Am. Rep. 688.

[j] (Tex.) Under Code Cr. Proc. art. 730, subd. 5, providing that persons convicted of felony shall be incompetent as witnesses, and Pen. Code, art. 27, providing that a person is a convict after final condemnation, one convicted of a felony, but not sentenced, is a competent witness.—(1888) Arcia v. State, 26 Tex. App. 193, 9 S. W. 685; (1894) Hurley v. State, 35 Tex. Cr. R. 282, 33 S. W. 354; (1896) Evans v. State, 35 Tex. Cr. R. 485, 34 S. W. 285.

[k] (Tex. 1888) Under the statutes, the offense of willfully driving stock from its accustomed range, with intent to defraud, is a felony; and where a defendant is found guilty, and fined for such offense, and takes no appeal, he is a convicted felon, and incompetent, although no formal sentence has been passed on him.—Woods v. State, 26 Tex. App. 490, 10 S. W. 108.

[l] (Tex. 1893) Under Pen. Code, art. 27, providing that "an accused person is termed a convict after final condemnation by the highest court of resort which, by law, has jurisdiction of his case, and to which he has thought proper to appeal," one against whom judgment of conviction for a felony has been entered, but against whom sentence has not been pronounced, or, if sentence has been pronounced, has an appeal pending in the appellate court, is not a convict, so as to disqualify him as a witness.—Jones v. State, 32 Tex. Cr. R. 135, 22 S. W. 404.

[m] (Tex. 1896) Where notice of appeal has been given by the person convicted of a felony, and entered on the short minutes of the court by the judge, and such person testifies that he desires to prosecute the appeal, the conviction does not render him incompetent as a witness.—Robinson v. State, 36 Tex. Cr. R. 104, 35 S. W. 651.

[n] (Va. 1890) Though a witness on a trial for arson was charged as an accomplice in the indictment, and has been found guilty by the jury, he is a competent witness for the state where he has not yet been sentenced.—Brown v. Commonwealth, 86 Va. 935, 11 S. E. 799.

§ 113. Proceedings in other jurisdictions.

[a] (U. S. 1892) At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another, such conviction and sentence can have no effect by way of penalty or of personal disability or qualification beyond the limits of the state in which the judgment is rendered. A conviction in North Carolina will not make the convict incompetent to testify in Texas.—Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, reversing United States v. Logan (C. C. 1891) 45 Fed. 872.

[b] (U. S. 1891) Persons convicted and punished for an infamous offense in the state courts are competent witnesses in the United States courts, their credibility being a question for the jury.—United States v. Logan (C. C.) 45 Fed. 872.

[c] (U. S. 1892) On a criminal trial in the federal courts of Pennsylvania, a person who has been convicted and sentenced in the courts of that state for murder is incompetent to testify except when his disability has been removed by a pardon.—United States v. Hall (D. C.) 53 Fed. 352.

[d] (Ala. 1853) A conviction for libel in another state does not disqualify a witness in Alabama.—Campbell v. State, 23 Ala. 44.

[e] (Mass. 1822) A conviction of an infamous crime in a foreign country or another state does not render the subject of such conviction an incompetent witness in the courts of this state.—Commonwealth v. Green, 17 Mass. 515.

[f] (Nev. 1880) A witness is incompetent to testify in a criminal trial who has been convicted of an infamous crime in another state.—State v. Foley, 15 Nev. 64, 37 Am. Rep. 458.

[g] (N. H. 1838) A conviction of a crime in another state is not admissible in evidence for the purpose of impeaching the credit of a witness.—Chase v. Blodgett, 10 N. H. 22.

[h] (N. H. 1838) But a conviction in another state of a crime which by the laws of such state disqualifies the party from being heard as a witness, and which, if committed in New Hampshire, would have operated as a disqualification, is sufficient to exclude him from testifying there, in the same manner as if it had been committed, and the conviction had taken place, in their jurisdiction.—Chase v. Blodgett, 10 N. H. 22.

[i] (N. Y. 1877) A statute that no person convicted of felony shall be competent to testify does not extend to convictions in other states, but only to persons who have been convicted in a court of the state where such law exists.—National Trust Co. v. Roberts, 42 N. Y. Super. Ct. (10 Jones & S.) 100, affirmed Same v. Gleason (1879) 77 N. Y. 400, 33 Am. Rep. 632.

[j] (N. Y. 1878) 2 Rev. St. p. 701, § 23, disabling as a witness a person sentenced upon a conviction for felony, refers only to a conviction in New York.—Sims v. Sims, 75 N. Y. 466, reversing (1877) 12 Hun, 231.

[k] (N. Y. 1878) Const. U. S. art. 4, § 1, requiring full faith and credit to be given by each state to the records of other states, does not make a person, incompetent as a witness in another state because of having been convicted of crime there, incompetent as a witness in this state.—Sims v. Sims, 75 N. Y. 466, reversing (1877) 12 Hun, 231.

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[l] (N. Y. 1879) The rule that one's conviction of a felony in another state does not render him incompetent as a witness is not affected by the fact that his term of sentence has not expired.—National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632.

[m] (N. C. 1824) A witness who has been convicted of forgery in another state is incompetent in the courts of this state.—State v. Candler, 10 N. C. 393.

[n] (Tex. 1887) Under Bill of Rights, section 10, and Code Cr. Proc. art. 416, a judgment which on its face appears to have been rendered on information is invalid, and therefore where such a judgment rendered in the courts of another state is offered for the purpose of disqualifying a witness, it is not admissible until it has been shown that by the laws of the state where rendered it was valid.—Pitner v. State, 23 Tex. App. 366, 5 S. W. 210.

[o] (Tex. 1887) A judgment, showing the conviction of the witness for forgery in Kansas, is admissible in evidence for the purpose of proving the disqualification of the witness, although it does not, on its face, show that forgery is a felony in Kansas, but its introduction must be followed up by proof that forgery is a felony in Kansas, notwithstanding the fact that it is such in Texas under Pen. Code, arts. 442 and 443.—Pitner v. State, 23 Tex. App. 366, 5 S. W. 210.

[p] (Tex. 1887) Under Code Cr. Proc. § 730, which disqualifies as witnesses "all persons who have been or may be convicted of felony in this state, or in any other jurisdiction," a witness is disqualified where he has been convicted of a felony, although such conviction was not had within the territorial limits of the state.—Pitner v. State, 23 Tex. App. 366, 5 S. W. 210.

[q] (Va. 1849) The record of a conviction of petit larceny in another state will not render the person convicted incompetent to testify.—Uhl v. Commonwealth, 6 Grat. 706.

§ 114. Proceedings in which evidence is inadmissible and nature of evidence.

[a] (Ark. 1884) The disqualification of one convicted of a crime to testify applies to civil cases only; the Criminal Code being silent on the subject.—Werner v. State, 44 Ark. 122.

[b] (Ky. 1890) Civ. Code, § 606, subd. 8, providing that no prisoner in the penitentiary of the state or any other country shall testify, does not apply to the procedure in criminal actions, but is limited to civil causes.—Commonwealth v. Minor, 89 Ky. 555, 13 S. W. 5.

[c] (N. Y. 1863) The disqualification of a witness who has been convicted of felony, unless pardoned, extends to all cases where the declaration is to be used in a judicial proceeding for the purpose of establishing or proving some fact; and it applies to both written and oral evidence.—People v. Robertson, 26 How. Prac. 90.

[d] (Tex. 1881) A letter written by a penitentiary convict, and acknowledged by him after his conviction, cannot be used as a standard of comparison in evidence, since the fact of conviction disqualifies the writer from acknowledging the letter for the purposes of evidence.—Long v. State, 10 Tex. App. 186.

§ 115. Statutory removal of disqualification.

[a] (U. S. 1884) Cr. Proc. Act Utah, 1878, provides that "the rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this act." Civ. Prac. Act, § 374, provides that "all persons, without exception, otherwise than as specified in this chapter, may be witnesses in any act or proceeding. Facts which, by the common law, would cause the exclusion of witnesses, may still be shown for the purpose of affecting their credibility." Section 378, which was repealed by Act March 9, 1882, provided that "persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses." *Held*, that by such repeal convicted felons were made competent witnesses in criminal as well as civil cases.—Hopt v. People of Territory of Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262.

[b] (U. S. 1890) Act March 16, 1878, c. 37, 20 Stat. 30 [U. S. Comp. St. 1901, p. 660], which provides that a defendant charged with crime shall, at his own request, but not otherwise, be a competent witness, does not render competent a defendant who, by previous conviction of an infamous crime, has lost the privilege of testifying.—United States v. Hollis (D. C.) 43 Fed. 248.

[c] (Ark. 1887) Mansf. Dig. § 2859, declaring persons convicted of larceny, and other enumerated crimes, incompetent to testify, unless by consent of the parties, does not apply to criminal trials. The disqualification is removed in such cases by Act March 24, 1885, enabling accused persons to testify at their own request. It is reversible error, therefore, to exclude the testimony of accused persons on the ground of infamy.—Ransom v. State, 49 Ark. 176, 4 S. W. 658.

[d] (Ga. 1888) One convicted of perjury is a competent witness; the disqualification laid down in Code, § 4466, having been removed by the evidence act (Code, § 3854).—Brunswick & W. R. Co. v. Clem, 80 Ga. 534, 7 S. E. 84.

[e] (Ind. 1856) All objections to the competency of a witness by reason of crime were removed by the practice act of 1852.—Muir v. Gibson, 8 Ind. 187.

[f] (Ind. 1873) Since the adoption of Code, § 243, persons who have been convicted of treason, murder, rape, arson, burglary, robbery, manstealing, forgery, or perjury are not for that reason incompetent to testify in civil suits; but such conviction may be shown to affect their credibility.—Glenn v. Clore, 42 Ind. 60.

[g] (La. 1861) The act of 1855 permits convicts to testify for and against each other.—State v. Benoit, 16 La. Ann. 273.

[h] (La.) Under Acts 1886, No. 29, providing that a competent witness in all criminal matters shall be a person of proper understanding, conviction of an infamous crime is no longer a disqualification of a witness in criminal cases.—(1889) State v. Mack, 41 La. Ann. 1079, 6 South. 808; (1890) Same v. McManus, 42 La. Ann. 1194, 8 South. 305.

[i] (Me. 1863) The deposition of a person, taken while he is under sentence of death, having been convicted of murder, is made legal testimony by chapter 53 of the Laws of 1861, which provides that "no person shall be incompetent to testify in consequence of having been convicted of any criminal offense."—Woodman v. Churchill, 51 Me. 112.

[j] (Mass. 1854) Under St. 1852, c. 312, § 60, convicts in the state prison, brought into court by writ of habeas corpus, are competent witnesses.—Newhall v. Jenkins, 68 Mass. (2 Gray) 562.

[k] (Miss. 1848) Under the statute which provides that no "conviction" for any offense, except perjury and subornation of perjury, shall disqualify a witness to testify, but shall only go to his credibility, a person convicted of murder, as principal, and sentenced to be hung, may testify against his accessory.—Keithler v. State, 18 Miss. (10 Smedes & M.) 192.

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[l] (N. Y. 1871) Under Laws 1869, c. 678, a prisoner is a competent witness on his own behalf, even though he has been sentenced on a conviction for felony, and has not been pardoned.—Delamater v. People, 5 Lans. 332.

[m] (N. Y. 1874) Laws 1847, c. 460, § 150, authorizing a convict to be sworn and making him "a competent witness against any fellow-prisoner for any offense actually committed while in prison," permits a convict to testify to any facts material to the issue on the trial of any such offense. He is not restricted to the particular acts constituting the crime.—Donohue v. People, 56 N. Y. 208.

[n] (N. Y.) Under Code Civ. Proc. § 832, declaring that a person "convicted of crime or misdemeanor is notwithstanding a competent witness in a civil or criminal action," a person convicted and sentenced is competent, as well as one convicted only.—(1881) Sacia v. Decker, 1 Civ. Proc. R. 47; (1883) People v. McGloin, 91 N. Y. 241, 12 Abb. N. C. 172, 1 N. Y. Cr. R. 154, 16 Wkly. Dig. 255, affirming (1882) 28 Hun, 150, 1 N. Y. Cr. R. 105.

[o] (N. Y. 1881) Code, § 832, making those convicted of crimes competent witnesses, was applicable, before the passage of Laws 1879, c. 542, to civil cases only, and the testimony of one so testifying should be struck out on motion.—Perry v. People, 86 N. Y. 353, 62 How. Prac. 148.

[p, q] (N. Y. 1888) Under Pen. Code, § 714, providing that no conviction for crime disqualifies a witness, one who confesses that he has previously committed perjury in regard to the same things about which he testifies is not incompetent.—People v. O'Neil, 109 N. Y. 251, 16 N. E. 68, affirming 48 Hun, 36.

[r] (Tenn. 1888) Acts 1887, c. 79, § 1, provides that in a criminal trial defendant may testify. Defendant was on trial for murder. *Held*, that an objection to his testimony, on the ground of previous conviction of larceny and judgment of infamy, was improperly sustained.—Morgan v. State, 86 Tenn. (2 Pickle) 472, 7 S. W. 456.

[s] (Tex.) A defendant who has been convicted of a felony is not incompetent to testify as a witness in his own behalf, under Code Cr. Proc. art. 730, subd. 5, which declares incompetent as witnesses "all persons who have been convicted of a felony, unless the convict has been pardoned," as Laws 1889, p. 37, declares that "any defendant in a criminal action shall be entitled to testify in his own behalf therein."—(1889) Williams v. State, 28 Tex. App. 301, 12 S. W. 1103; (1890) Shannon v. State, 28 Tex. App. 474, 13 S. W. 599.

[t] (Va. 1845) On the trial of a convict from the penitentiary for a felony committed there, a convict confined there for felony is made by statute a competent witness for the prosecution.—Johnson v. Commonwealth, 2 Grat. 581.

[u] (Wis. 1882) Rev. St. § 4073, providing that a person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, applies to all convicts, including those still in prison.—Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

§ 116. Effect of pardon.

[a] A pardon restores the competency as a witness of a person convicted of crime.

—(U. S. 1824) United States v. Rutherford, Fed. Cas. No. 16,210 [2 Cranch, C. C. 528];

(Ark. 1884) Werner v. State, 44 Ark. 122;

(S. C. 1882) State v. Dodson, 16 S. C. 453.

CONTRA, see

(U. S. 1876) Wallamet R. T. Co. v. Oregon S. N. Co., Fed. Cas. No. 17,106.

[b] (U. S. 1892) The granting of a full and unconditional pardon by the president of the United States to a person convicted of a felony restores his competency as a witness, and this result is not affected by a recital in the pardon that it was granted for the reason, among others, that his testimony was desired by the government, in a cause then pending in a court of the United States.—Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077, reversing United States v. Boyd (C. C. 1890) 45 Fed. 851.

[c] (Ala. 1868) The pardon of a person convicted of a crime restores his competency as a witness, although it does not appear that he has been restored by the warrant of pardon to the rights of citizenship or any other rights forfeited by his conviction.—Yarborough v. State, 41 Ala. 405.

[d] (Cal. 1874) A document signed by the governor, in which, under Act March 7, 1868, he, on account of the good conduct of a person confined in the state's prison under sentence for a crime, releases him from imprisonment before the expiration of his term, and restores him to the rights of citizenship, does not remove the disability to testify annexed by law to a conviction for a felony.—Blanc v. Rodgers, 49 Cal. 15.

[e] (Ill. 1860) Where the statute annexes the disability to the conviction, a pardon does not remove it.—Foreman v. Baldwin, 24 Ill. (14 Peck) 298.

[f] (La. 1849). Even if a sentence for felony in another state renders a witness incompetent in Louisiana, such disability, if not annexed to the conviction by express statute, will be removed by a pardon.—Klein v. Dinkgrave, 4 La. Ann. 540.

[g] (Mo. 1886) A mere release and discharge from the penitentiary is not a pardon, restoring competency to testify.—State v. Kirschner, 23 Mo. App. 349.

[h] (N. Y. 1819) Convictions during a certain month for three distinct larcenies, for each of which sentence of a certain period was imposed, render a witness incompetent, notwithstanding a pardon reciting a single conviction for larceny in the same court in the same month, and a sentence for a period of time equal to the three sentences combined, since it could not be justly inferred that the pardon was intended to apply to the whole or either of such convictions.—In re Hutchins, 4 City H. Rec. 119.

[i] (N. Y. 1851) A conviction of perjury disqualifies a person from being a witness, even though pardoned by the governor.—Houghtaling v. Kelderhouse, 1 Parker, Cr. R. 241.

[j] (Pa. 1837) A pardon by the president of the United States of one convicted of passing a counterfeit note and sentenced to three years' imprisonment, liberating the prisoner on payment of costs, restores the prisoner's competency as a witness.—Hoffman v. Coster, 2 Whart. 453.

[k] (Pa. 1857) A pardon, although stating the date of a conviction incorrectly, is sufficient to restore the competency of a witness, if it is possible to show that it was intended to cover, and does cover, the offense of which the record shows the witness to be guilty.—Commonwealth v. Ohio & P. R. Co., 1 Grant, Cas. 329.

[l] (Pa. 1877) The fact that an executive pardon for larceny omitted to direct the restoration of the property or payment of its value does not disable the convict from testifying against persons charged with a murder wherein he was a confessed accomplice.—Hester v. Commonwealth, 85 Pa. 139.

[m] (Pa. 1895) A pardon of one convicted of perjury removes the disability to testify created by Act March 31, 1860 (P. L. 388), providing

that one convicted of that offense "shall be forever disqualified from being a witness in any matter in controversy," and Act May 23, 1887 (P. L. 158), providing that such person shall not be a competent witness for any purpose, though his sentence may have been fully complied with, "unless the judgment of conviction be judicially set aside or reversed."—Diehl v. Rodgers, 169 Pa. 316, 32 Atl. 424, 47 Am. St. Rep. 908, 36 Wkly. Notes Cas. 447.

[n] (S. C. 1846) An instrument in writing, issued by the president under the seal of the United States, directing that one who had been sentenced to the penitentiary for robbing the mail be forthwith released from prison, is a pardon, which annulled the sentence and restored the prisoner to his competency as a witness.—Jones v. Harris, 1 Strob. 160.

[o] (Tenn. 1872) Pardon by the governor is not such a restoration "to full citizenship" under Code, § 1994, as will render the convicted person competent as a witness under section 3812.—Evans v. State, 66 Tenn. (7 Baxt.) 12.

[p] (Tex. 1886) It cannot be objected to the admission of the testimony of one whose competency as a witness has been restored by a pardon that the facts to which he would testify came to his knowledge after conviction and before pardon.—Thornton v. State, 20 Tex. App. 519.

[q] (Tex. 1886) A pardon described the offense as "cow-stealing." The record of conviction showed the "theft of a steer." The term of court was described in the record as the June term, 1878, and in the pardon as the September term, 1878. *Held*, that the pardon should be deemed to remove the disqualification to testify.—Hunnicutt v. State, 20 Tex. App. 632.

[r] (Tex. 1886) A full pardon, granted to a person convicted of a felony, will restore the convict's competency as a witness, though a conditional pardon for the same offense had theretofore been granted to and accepted by the convict.—Martin v. State, 21 Tex. App. 1, 17 S. W. 430.

[s] (Tex. 1886) Where a pardon offered in reply to an objection that a witness is incompetent by reason of a conviction of felony, recites a date of conviction different from that stated in the record of the conviction, and it appears that there could not have been a term of the court in which the conviction was had at the date recited in the pardon, extrinsic evidence is admissible to show that the pardon was intended to, and did in fact, cover the particular offense of which the witness had been convicted.—Martin v. State, 21 Tex. App. 1, 17 S. W. 430.

[t] (Tex. 1886) It cannot be objected to a pardon, offered in reply to an objection that a witness is incompetent by reason of a conviction of felony, that it was granted for the purpose of avoiding a decision of the court of appeals to the effect that a former pardon granted to the witness, being conditional, did not restore his competency, since the reasons for which pardons are granted are no concern of the courts.—Martin v. State, 21 Tex. App. 1, 17 S. W. 430.

[u] (Tex. 1886) A conviction of crime will not be disturbed, as against public policy, because convicted felons were pardoned in order to render them competent to testify against defendant.—Martin v. State, 21 Tex. App. 1, 17 S. W. 430.

[v] (Tex. 1894) A pardon will restore the person's competency as a witness on the trial of an action, the right of which accrued before the pardon was granted.—Missouri, K. & T. Ry. Co. of Texas v. Howell (Civ. App.) 30 S. W. 98.

§ 117. —— Conditional pardon.

[a] (Mass. 1834) A pardon remitting to the convict "the residue of the punishment he was sentenced to endure" does not restore his competency as a witness; aliter, of a full pardon.—Perkins v. Stevens, 41 Mass. (24 Pick.) 277.

[b] (N. Y. 1803) A pardon makes one sentenced to the state prison for forgery competent as a witness, notwithstanding a clause in the pardon declaring that nothing contained therein is intended to relieve the prisoner from the legal disabilities arising from his conviction and sentence, but solely from imprisonment. Such clause is repugnant, and will be treated as surplusage.—People v. Pease, 3 Johns. Cas. 333.

[c] (Tex. 1885) A pardon to which a condition subsequent is annexed will not render a felon competent as a witness.—Carr v. State, 19 Tex. App. 635, 53 Am. Rep. 395.

[d] (Tex. 1887) A pardon, in order to render competent as a witness one who has been convicted of a felony, must be full and unconditional.—Dudley v. State, 24 Tex. App. 163, 5 S. W. 649.

[e] (Tex. 1889) Under Code Cr. Proc. art. 730, providing that all persons who have been pardoned for a felony are competent to testify in criminal actions, a pardon granted "subject to the revocation by the governor of Texas whenever it shall be deemed by said governor that he has violated any of the criminal laws of the state" will not restore the holder to competency as a witness.—McGee v. State, 29 Tex. App. 596, 16 S. W. 422.

§ 118. Effect of serving out term.

[a] (U. S. 1892) A full pardon by the governor of Texas of a person convicted of crime therein, though granted after he has served out his term of imprisonment, takes away all disqualifications as a witness, and restores his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification was removed by the pardon.—Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, reversing United States v. Logan (C. C. 1891) 45 Fed. 872.

[b] (U. S. 1824) A convict who has served out a sentence for felony may be restored by pardon to competency as a witness.—United States v. Jones, Fed. Cas. No. 15,493 [Brunner, Col. Cas. 462].

[c] (U. S. 1835) In the District of Columbia, serving out the term of imprisonment in the penitentiary for felony does not restore the party to his competency as a witness.—United States v. Brown, Fed. Cas. No. 14,661 [4 Cranch, C. C. 607].

[d] (U. S. 1892) Act Pa. March 31, 1860 (Purd. Dig. p. 469, pl. 357), provides that, when any person convicted of a felony, or misdemeanor punishable with imprisonment at labor, has endured his punishment, the punishment so endured shall have the like effect and consequences as a pardon by the governor. *Held*, that this was a legislative pardon, and operated to remove the disability in the same manner as a pardon by the executive, and therefore enabled such persons to testify in criminal trials in the federal courts.—United States v. Hall (D. C.) 53 Fed. 352.

[e] (La. 1861) A pardoned convict can testify in a criminal prosecution, but one who has served out his time of punishment cannot. The endurance of the penalty does not remove the infamy.—State v. Benoit, 16 La. Ann. 273.

[f] (Md. 1805) Where a witness is objected to on the ground of his having been transported to this country to serve several years on a conviction of felony, the party objecting must prove that such witness did not serve out the several years; otherwise, he becomes a competent witness.—Cole's Lessee v. Cole, 1 Har. & J. 572.

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[g] (N. H. 1856) A full pardon, granted after a convict has suffered the entire punishment imposed on him upon his conviction, removes the common-law disability of incompetency as a witness.—State v. Blaisdell, 33 N. H. 388.

[h] (Tex. 1885) A pardon after a prisoner has served his full term in the penitentiary has the same effect as though granted during the term, and restores his competency as a witness.—Hunnicutt v. State, 18 Tex. App. 498, 51 Am. Rep. 330.

[i] (W. Va. 1878) A convict, who has been at liberty after the length of time for which he was sentenced to the penitentiary has elapsed, is presumed to have suffered punishment, and to be restored to competency as a witness under the statute.—State v. Williams, 14 W. Va. 851.

7. RELATIONSHIP TO PARTY IN GENERAL.

IN GENERAL, § 119.
PARENT AND CHILD, § 120.
ATTORNEY AND CLIENT, § 121.
—— NATURE OF TESTIMONY, § 122.
—— CONTINGENT FEES OR OTHER INTEREST, § 123.

Credibility of witness, see post, § 1186.

§ 119. In general.

[a] (Ala. 1827) The relationship of kindred to a party is no objection to the competency of a witness to testify for such party.—High v. Stainback, 1 Stew. 24.

[b] (Ala. 1829) A son-in-law of a testator is incompetent to testify for the executor in an action brought by him, although it does not appear that he is interested.—McKinney's Ex'rs v. McKinney's Adm'rs, 2 Stew. 17.

[c] (Cal. 1860) A witness is not disqualified by the fact that his wife was a daughter of plaintiff.—Mott v. Smith, 16 Cal. 533.

[d] (La.) A father-in-law may be a witness for his son-in-law.—(1822) Bernard v. Vignaud, 10 Mart. (O. S.) 482; (1833) Hamblin v. Hook, 6 La. 73.

[e] (La. 1836) Ascendants, while competent for the wife in an action of separation from bed and board to prove cruel treatment, cannot establish her claims for property.—Taylor v. Felps, 10 La. 114.

[f] (La.) The mother-in-law may testify for the son-in-law, and vice versa. Their connection affects their credibility only.—(1847) Groves v. Steel, 2 La. Ann. 480, 46 Am. Dec. 551; (1849) Rachal v. Rachal, 4 La. Ann. 500.

[g] (La. 1848) A grandfather is an incompetent witness for his grandchild.—Succession of Hargis, 3 La. Ann. 142.

[h] (La. 1851) Where a daughter-in-law sues jointly with her children for property in which she has no distinct interest, her mother-in-law, incompetent for them, is equally so for her.—Hall v. Hill, 6 La. Ann. 745.

[i] (N. J. 1818) By the statute a slave born after 1804 is in the situation of a person bound to service by overseers of the poor, and, on his indictment for murder, the master is a competent witness.—State v. Aaron, 4 N. J. Law (1 Southard) 231, 7 Am. Dec. 592.

§ 120. Parent and child.

[a] (Del. 1860) In a bastardy suit, the father of the mother of the child, who is a minor, is a competent witness for the state.—Smith v. State, Houst. Cr. Cas. 107.

[b] (Fla. 1891) Under Act Feb. 4, 1874, which renders a witness competent, notwithstanding his interest in the event of the action, neither a father nor a mother is disqualified by the parental relation as a witness for or against a son.—Haworth v. Norris, 28 Fla. 763, 10 South. 18.

[c] (Iowa, 1849) A father is a competent witness in behalf of his son in a criminal case.—Cass v. State, 2 G. Greene, 353.

[d] (La.) A father is incompetent for his child, legitimate or illegitimate. Civ. Code, art. 2260. The mere fact of a witness being the ascendant of the party for or against whom he is called disqualifies him. The law makes no distinction as to legitimacy.—(1833) Deslonde v. Le Breret, 5 La. 96; (1842) Leeds v. Caldwell, 1 Rob. 256; (1844) Macarty v. Roach, 7 Rob. 357.

[e] (La. 1839) The father of a party cited in warranty by defendant is incompetent for plaintiff.—Guerin v. Bagneries, 13 La. 14.

[f] (La. 1852) A father cannot interrogate his son as administrator of a succession.—Guier v. Guier, 7 La. Ann. 103.

[g] (La. 1855) In a criminal proceeding, the son is a competent witness for his father, though it is otherwise in a prosecution by the state to recover a civil penalty.—State v. Thompson, 10 La. Ann. 122.

[h] (La. 1860) A natural son is not a competent witness in controversies which relate to the succession of his deceased natural father.—Lazare v. Jacques, 15 La. Ann. 599.

[i] (Me. 1824) In an action by a father for labor and services performed by his son, the latter is a competent witness for plaintiff.—Keen v Sprague, 3 Me. (3 Greenl.) 77.

[j] (Miss. 1849) A daughter is a competent witness in her mother's behalf, during the lifetime of the mother, in a suit between a third person and her mother, the latter claiming the property in controversy, although her testimony might go to show title in her deceased father to the property.—Parker v. McNeill, 20 Miss. (12 Smedes & M.) 355.

[k] (N. H. 1841) In a prosecution under the bastardy act, it is no objection to a witness that he is the father of complainant.—Marston v. Jenness, 12 N. H. 137.

[l] (N. Y. 1811) In trespass against an infant, his father, by whose order the trespass was committed, is a competent witness for defendant.—Alderman v. Tirrell, 8 Johns. 418.

[m] (N. Y. 1829) In a suit to charge an administratrix with assets, her son was competent to testify to the payment of certain of the debts of the intestate by the administratrix in the due course of administration.—Vultee v. Rayner, 2 N. Y. Super. Ct. (2 Hall) 407.

[n] (S. C. 1823) A parent is a competent witness to prove a gift by himself to his child.—Smith v. Littlejohn, 2 McCord, 362.

[o] (Va. 1889) In a suit to set aside a deed to the children of one W., the latter, having no interest in the controversy, is competent to testify on behalf of his children.—Grayson v. George, 85 Va. 908, 9 S. E. 13.

§ 121. Attorney and client.

Communications to or advice by attorney or counsel, see post, §§ 747–767.

Statutory provisions, see ante, § 79.

[a] An attorney is a competent witness for his client.

—(U. S. 1886) French v. Hall, 119 U. S. 152, 7 Sup. Ct. 170, 30 L. Ed. 375;

(Conn. 1790) Smith v. Huntington, 1 Root, 226;

(La. 1814) Menendez v. Larionda's Syndics, 3 Mart. (O. S.) 256; (1833) Sprigg v. Beaman, 6 La. 59;

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(Md. 1850) Beatty v. Davis, 9 Gill, 211;
(N. M. 1871) Beall v. Territory, 1 N. M. 507;
(N. Y. 1848) Little v. McKeon, 3 N. Y. Super. Ct. (1 Sandf.) 607; (1894) Thon v. Rochester Ry. Co., 83 Hun, 443, 30 N. Y. Supp. 620;
(Va. 1875) Rea's Adm'x v. Trotter, 26 Grat. 585.

[b] An attorney in a suit is a competent witness for his client on the trial thereof.
—(Ill. 1865) Morgan v. Roberts, 38 Ill. 65;
(La. 1859) Succession of Grant, 14 La. Ann. 795;
(N. Y. 1848) Robinson v. Dauchy, 3 Barb. 20; Little v. McKeon, 3 N. Y. Super. Ct. (1 Sandf.) 607;
(Pa. 1848) Frear v. Drinker, 8 Pa. (8 Barr) 520;
(S. C. 1819) Reid v. Colcock, 1 Nott & McC. 592, 9 Am. Dec. 729;
(Tex. 1893) Mealer v. State, 32 Tex. Cr. R. 102, 22 S. W. 142.
CONTRA, see
(Ga. 1857) Merchants' Bank of Macon v. Rawls, 21 Ga. 289.

[c] An attorney is a competent witness against his client as to all matters not privileged.
—(Ark. 1866) Milan v. State, 24 Ark. 346;
(Ind. 1891) Lloyd v. Davis, 2 Ind. App. 170, 28 N. E. 232;
(Mo. 1894) State v. Hedgepeth, 125 Mo. 14, 28 S. W. 160.

[d] (Ala. 1848) An attorney, who is to receive a certain fee, is a competent witness for his client.—Morrow v. Parkman, 14 Ala. 769.

[e] (Ala. 1852) On grounds of public policy an attorney at law may be a witness for his client, when he has no other interest in the event of the suit than such as concerns his fees, and they are not contingent in their nature.—Quarles v. Waldron, 20 Ala. 217.

[f] (Del. 1879) An attorney who has never represented his client in a particular litigation may testify in the client's behalf as to a matter learned by him independently of any communication with or information from the client.—Hollis v. Vandergrift, 5 Houst. 521.

[g] (Fla. 1875) It is not a valid objection to the competency of a witness produced on the part of defendant that he had been the attorney of plaintiff.—Buckmaster v. Kelley, 15 Fla. 180.

[h] (Ga. 1853) By the act of 1850 "to regulate the testimony of attorneys at law," an attorney is disqualified as a witness only in the case pending to which his client is a party, and leaves him, as to all other cases, subject to the common-law rule.—Swift v. Perry, 13 Ga. 138.

[i] (Ga. 1854) The statute by which attorneys were prohibited from giving testimony for or against their clients does not include proving service of notices, interrogatories, and such matters which could be proved by the client himself.—Rogers v. Hoskins, 15 Ga. 270.

[j] (Ga. 1855) An attorney is not incompetent to testify to a fact, unless the knowledge of it was acquired by him during the relationship of client and attorney, and by reason of the relationship.—Watkins v. Smith, 17 Ga. 68.

[k] (Ga. 1859) St. 1850, rendering attorneys incompetent in certain cases as witnesses for their clients, does not prevent the attorney general from testifying for the state.—Hines v. State, 26 Ga. 614.

[l] (Ga. 1860) Where an attorney at law acts as an agent for another, and not in his capacity as attorney, his testimony is admissible.—Jones v. Keer, 30 Ga. 93.

[m] (Ga. 1860) In a suit on a foreign judgment, the fact that a witness was an attorney in the suit in which the judgment was obtained does not make him incompetent, when he testifies to no fact that he acquired from his client, or during the existence and by reason of the relation of attorney and client.—Sharman v. Morton, 31 Ga. 34.

[n] (Iowa, 1849) An attorney employed to collect a debt, and who engages another attorney to commence suit on it, is not incompetent to testify for plaintiff.—Walsh v. Murphy, 2 G. Greene, 227.

[o] (Ky. 1860) An attorney is a competent witness in behalf of his client, and also, with the client's consent, against him; but, while the relation subsists, it is a question for the attorney's own mind, and not for the court, whether he shall testify, when thus allowed.—Hall v. Renfro, 60 Ky. (3 Metc.) 51.

[p] (La. 1826) Under Act Jan. 30, 1816, No. 4, § 2, a party cannot call his own counsel as a witness, but he may the counsel of his opponent.—Cox v. Williams, 5 Mart. (N. S.) 139.

[q] (La.) Though, under the laws of Louisiana, an attorney is competent for his client, his position as a witness is one of extreme delicacy for himself and the court; and it is always desirable, for the harmony of the profession, the independence of the bench, and public confidence in the administration of justice, that he should not testify, except in extreme cases when all other means of proof are impossible, and then he should withdraw from the case.—(1847) Succession of Harkins, 2 La. Ann. 923; (1852) Madden v. Farmer, 7 La. Ann. 580; (1855) Boissy v. Lacou, 10 La. Ann. 29.

[r] (Mass. 1848) It is no objection to the competency of a witness called for plaintiff that the witness was the attorney who made the writ, that he was actively engaged in the trial as one of the counsel for plaintiff, and that he opened the cause to the jury.—Potter v. Inhabitants of Ware, 55 Mass. (1 Cush.) 519.

[s] (N. Y. 1848) The practice of attorneys and counselors testifying for their clients is to be disapproved.—Little v. McKeon, 3 N. Y. Super. Ct. (1 Sandf.) 607.

[t] (N. C. 1849) It has been the universal practice to permit an attorney in a cause to give evidence at the instance of his client; but it is a practice not to be encouraged.—Brunswick County v. Woodside, 31 N. C. 496.

[u] (Pa.) An attorney is a competent witness for his client, though it is more proper for him to retire from the case when he finds it necessary that he should be a witness.—(1843) Morrison v. McElfresh, 7 Leg. Int. 194; (1849) Bell v. Bell, 12 Pa. (2 Jones) 235.

[v] (Pa. 1847) All the courts can do is to discountenance the practice of attorneys testifying in behalf of their clients, and, where the evidence is indispensable, to recommend the counsel to withdraw from the cause.—Mishler v. Baumgardner, 1 Am. Law J. (N. S.) 304.

[w] (Pa. 1863) In an action on the sheriff's official bond, for a defective levy, by execution creditors, their attorney is a competent witness in their behalf.—Linton v. Ford, 46 Pa. (10 Wright) 294.

[x] (Pa.) An attorney who has opened his client's case to the jury, and examined the witnesses for his clients, is not thereby rendered incompetent as a witness.—(1872) Follansbe v. Walker, 72 Pa. 228, 13 Am. Rep. 671; (1873) Armstrong v. Walker, 30 Leg. Int. 69.

[y] (Vt. 1846) Defendant, being indebted to plaintiff on a note secured by mortgage, tendered to plaintiff's attorney the amount due and demanded the note, to which the attorney replied that he could not find the note, but of-

fered to give a receipt for it and to discharge the mortgage, which defendant refused. *Held*, that the attorney to whom the tender was made was a competent witness for plaintiff in an action of ejectment founded on the mortgage. —Holton v. Brown, 18 Vt. 224, 46 Am. Dec. 148.

§ 122. —— Nature of testimony.

[a] As between plaintiff and defendant, an attorney is a competent witness to prove his authority to appear in the suit.

—(N. J. 1831) Folly v. Smith, 12 N. J. Law (7 Halst.) 139;

(N. Y. 1818) Caniff v. Myers, 15 Johns. 246; (1823) Gaul v. Groat, 1 Cow. 113; (1823) Tullock v. Cunningham, Id. 256; (1823) Pixley v. Butts, 2 Cow. 421.

[b, c] (Del. 1872) In an action for money had and received, plaintiff's attorney is competent to testify as to a demand by him and defendant's refusal to pay. — Crooks v. Purnell, 4 Houst. 305.

[d] (Ga. 1857) In an action for the recovery of land, defendants in the declaration signed on the back thereof an acknowledgment of the service of the within writ, "and waive the necessity of a copy of it, and service thereof by the sheriff." *Held*, that the attorney for defendant is a competent witness for plaintiff to testify to the intention of the parties in executing such acknowledgment.—Ingram v. Little, 21 Ga. 420.

[e] (Ga. 1881) An attorney cannot testify to invalidate a confession of judgment made by him, but can to explain who were embraced therein.—McBride v. Bryan, 67 Ga. 584.

[f] (Ill. 1861) An attorney in the suit may legally be sworn and testify to a calculation made by him as to the amount due for interest, although the testimony of an indifferent witness would be preferable.—Stratton v. Henderson, 26 Ill. (16 Peck) 68.

[g] (Iowa, 1858) In an action on a note, plaintiff's attorney is a competent witness to prove that the note has been lost since bringing the suit, and that the copy of it annexed to the petition is a true copy thereof.—Abbott v. Striblen, 6 Iowa (6 Clarke) 191.

[h] (Ky. 1851) Where notes had been lodged with one attorney by the holder, and afterwards forwarded by him to another attorney for the holder, and by the latter filed with and made part of an answer in equity, which answer, with the notes, was lost or abstracted from the files, the two attorneys are competent witnesses of the amount and genuineness of the notes, and of the fact that they had been made part of the answer.—Southard v. Cushing's Adm'r, 50 Ky. (11 B. Mon.) 344.

[i] (La. 1825) Counsel, though incompetent witnesses, may make affidavit as to how the proceedings have been conducted.—Caulker v. Banks, 3 Mart. (N. S.) 532.

[j] (La. 1832) A client may prove that his claim has not been paid to his attorney by the attorney himself.—McCrummen v. Stewart, 4 La. 500.

[k] (Md. 1801) As an administrator, by filing as an exhibit in a suit in chancery an account against his intestate in favor of A., thereby acknowledges such account, the attorney of the administrator and A. is competent to prove that the administrator directed such account to be used as an exhibit and insisted on in such suit.—Forbes v. Perrie's Adm'r, 1 Har. & J. 109.

[l] (Miss. 1843) An attorney at law, who assented to an assignment of a judgment belonging to his client, for whom he was under acceptances to be paid out of moneys that he might collect, is a competent witness to prove the circumstances under which his assent to the assignment was given, and to testify generally in reference to it.—Clark v. Kingsland, 9 Miss. (1 Smedes & M.) 248.

[m] (Miss. 1855) The attorney who brought the first suit was a competent witness for plaintiff in the second suit to show that defendant had admitted the mistake in the first judgment, and promised to pay the amount due plaintiff, where it appeared that this witness had given a receipt to plaintiff for one note for collection, and was responsible to that amount, but it did not appear that that was one of the notes sued for in this action, nor that it was not the note on which the former judgment was rendered, and which was paid.—Dunlap v. Edwards, 29 Miss. (7 Cushm.) 41.

[n] (Mo. 1866) In an action for maliciously suing out an attachment, an attorney is a competent witness to prove what was the opinion and advice of another attorney consulting with him, given to the party suing out the attachment.—Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431.

[o] (Mo. 1875) An attorney at law is a competent witness in a criminal case to prove facts necessary to sustain an application for change of venue.—State v. Lack, 58 Mo. 501.

[p] (N. Y. 1818) An attorney who has appeared under a power is competent to prove the execution of the power to himself.—Caniff v. Myers, 15 Johns. 246.

[q] (Ohio, 1828) An attorney who enters an appearance for several joint defendants, on the authority of a part of the number, is a competent witness to that fact for the remaining defendants.—Cox's Adm'rs v. Hill, 3 Ohio (3 Ham.) 411.

[qq] (Ohio, 1828) An attorney who has appeared for a party without authority is a competent witness to prove that fact.—Cox's Adm'rs v. Hill, 3 Ohio (3 Ham.) 411.

[r] (Pa. 1846) An attorney in a case may prove matters which occurred on the trial in open court against his client, as, for instance, what title was in question therein.—Levers v. Van Buskirk, 4 Pa. (4 Barr) 309.

[s] (Pa. 1851) Defendant in a suit had made certain admissions as to the contract on which the suit was founded, before the institution of the suit, to a person who was plaintiff's counsel at the time of such admissions, though not in the suit, which admissions were made at an interview had in consequence of a note from such counsel. *Held*, that such person was a competent witness for plaintiff to prove such admissions, having no interest in the result of such suit.—Edwards v. Goldsmith, 16 Pa. (4 Harris) 43.

[t] (Pa. 1849) Plaintiff's attorney, who has opened the case and examined his witnesses, will not be permitted to impeach the credit of defendant's witness by testifying to a conversation between them since his engagement in the case.—Mishler v. Baumgardner, 4 Clark, 266, 1 Am. Law J. (N. S.) 304.

[u] (Pa. 1892) It is proper to show by the testimony of an attorney, when this can be done without contradicting the record, that the matters at issue on a former trial between the parties were not the same as those on the present trial.—Susquehanna Mut. Fire Ins. Co. v. Mardorf, 152 Pa. 22, 25 Atl. 234, 31 Wkly. Notes Cas. 189.

[v] (S. C. 1849) In an action against the sheriff for official neglect in not arresting a party as in duty bound, plaintiff's attorney is a competent witness for plaintiff to disprove that the sheriff suspended proceedings on the order for bail by his (the attorney's) instructions.—Simonton v. Yongue, 3 Strob. 538.

[w] (Vt. 1845) A judgment recovered by a sheriff on a jail bond, having been paid to his attorneys, was by them with his consent paid to the real party in interest. In an action by the judgment debtor against the sheriff to recover back this payment, after the judgment had been reversed by the supreme court, these attorneys were competent witnesses; they having no interest in the litigation.—Catlin v. Allen, 17 Vt. 158.

§ 123. —— Contingent fees or other interest.

[a] An attorney of record is a competent witness for his client, though his judgment fee depends on his success, and he expects a larger fee if his client succeeds.

—(N. C. 1810) Slocum v. Newby, 5 N. C. 423; (Pa. 1788) Newman v. Bradley, 1 Dall. 240, 1 L. Ed. 118; (1814) Miles v. O'Hara, 1 Serg. & R. 32; (1828) Boulden v. Hebel, 17 Serg. & R. 312.

[b] (Ala. 1848) The attorney for a party is a competent witness for him, unless interested.—McGehee v. Hansell, 13 Ala. 17.

[c] (Conn. 1840) The mere fact that an attorney was retained to appear and defend in a certain suit, and that he did not appear and defend therein, without showing that his client had any available defense, or sustained any damage by his negligence, does not show such an interest in him as will render him an incompetent witness for his client in another suit.—Carrington v. Holabird, 17 Conn. 530.

[d] (Kan. 1889) An attorney may testify in behalf of his client, and the fact that his compensation as an attorney in the action is contingent on the result of the litigation does not render him incompetent. The interest he may have in the action goes to his credibility, but not to his competency.—Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 276.

[e] (La. 1824) An attorney cannot, by renouncing his fee and having his name struck off the record, become a witness for his client.—English v. Latham, 3 Mart. (N. S.) 88.

[f] (La.) An attorney is not disqualified by an interest consisting of his honorarium; so, though he is to receive a percentage on the amount recovered, he is still competent.—(1833) Sprigg v. Beaman, 6 La. 59; (1834) Flower v. O'Conner, 7 La. 198.

[g] (La. 1852) Where prescription was pleaded as a defense to a suit on a note, plaintiff's attorney, in whose hands the note was placed for collection before maturity, cannot testify to an interruption of prescription; the effect of such testimony, if admitted, being to relieve said attorney from liability to his client for negligence, in case the suit was not sustained.—Madden v. Farmer, 7 La. Ann. 580.

[h] (La. 1854) An attorney, who is to receive as his compensation a percentage on the amount recovered, is incompetent from interest.—Hall v. Acklen, 9 La. Ann. 219.

[i] (Me. 1832) A second suit having been brought for the same cause of action, the attorney of record for plaintiff in the first action is competent to testify that he received of defendant the sum sued for, and discharged him of the demand, notwithstanding the attorney also claims the money under an alleged assignment from plaintiff to himself.—McLaine v. Bachelor, 8 Me. (8 Greenl.) 324.

[j] (N. C. 1810) It is no objection to the competency of a witness that he is counsel for plaintiff, and intends, if the debt sued for be recovered, to charge a commission for receiving and remitting the money.—Slocum v. Newby, 5 N. C. 423.

[k] (Pa. 1844) If the act of an attorney of plaintiff be set up as a defense against the claim, the attorney's contingent liability to his client is not sufficient to render him an incompetent witness.—Orphans' Court v. Woodburn, 7 Watts & S. 162.

[l] (Pa. 1849) An attorney is a competent witness for his client, after a contract rendering him interested has been rescinded.—McLaughlin v. Shields, 12 Pa. (2 Jones) 283.

[m] (Pa. 1866) An attorney, who has made himself liable by negligence in regard to collecting a note, is not thereby disqualified from testifying in a suit on the note against an indorser.—Braine v. Spalding, 52 Pa. (2 P. F. Smith) 247.

[n] (S. C. 1857) An attorney, who withdraws from a case and takes no further part therein, on becoming a witness for his client, is not rendered incompetent because no order of substitution or release of his interest in the costs is entered.—Price v. Moses, 10 Rich. Law, 454.

[o] (Tenn. 1859) Where by the admissions of a party a champertous contract was established between him and his attorney, such attorney is not a competent witness to prove the falsity of his client's statements, and that no such contract was entered into.—Dowell v. Dowell, 8 Head, 502.

[p] (Tenn. 1865) An attorney with whom a champertous contract is alleged to have been made for his services in behalf of a plaintiff is a competent witness for plaintiff to disprove the champerty. The fact of the alleged participation in the champertous contract would go to the credit of the attorney as a witness, but would not render him incompetent.—Benton v. Henry, 2 Cold. 83.

[q] (Tex. 1869) An attorney at law, whose fee is dependent on the success of his client, is not a competent witness for his client, when objections to his testimony are raised by the opposite party.—Dailey v. Monday, 32 Tex. 41.

8. HUSBAND AND WIFE.

(a) INCOMPETENCY IN GENERAL, §§ 124-136.
(b) STATUTORY REMOVAL OF DISQUALIFICATION, §§ 137-141.
(c) INTEREST OR JOINDER AS PARTY, §§ 142-152.
(d) AGENCY OF HUSBAND OR WIFE FOR THE OTHER, §§ 153-156.
(e) PARTICULAR ACTIONS, PROSECUTIONS, OR ISSUES IN GENERAL, §§ 157-165.
(f) ACTIONS BETWEEN HUSBAND AND WIFE AND PROSECUTIONS FOR OFFENSES BY HUSBAND OR WIFE AGAINST THE OTHER, §§ 166-176.
(g) EFFECT OF CONSENT, INVALIDITY OF MARRIAGE, OR TERMINATION OF RELATION, §§ 177-183.

Competency of husband or wife of party or other person interested, see post, §§ 415–424.
Credibility as affected by relationship, see post, § 1186.
Effect of conviction of husband on competency of wife, see ante, § 109 [j].
—— of incompetency as disqualifying adverse party, see post, § 206.
Evidence, see post, § 200.
Privileged communications, see post, §§ 734–743.
Right to compensation, see ante, § 50.
Sufficiency of objection, see post, § 194.
Time for objections and waiver thereof, see post, § 192.

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(a) INCOMPETENCY IN GENERAL.

IN GENERAL, § 124.
CONSTITUTIONAL PROVISIONS, § 125.
MARRIAGE PENDING SUIT AND EFFECT OF MARRIAGE FOR PURPOSE OF SUPPRESSING TESTIMONY, § 126.
HUSBAND OR WIFE OF CO-PARTY, § 127.
NATURE OF ACTION OR ISSUE IN GENERAL, § 128.
WIFE OF PARTY SUING OR SUED IN REPRESENTATIVE OR OFFICIAL CAPACITY, § 129.
NATURE OF EVIDENCE IN GENERAL, § 130.
FRAUDULENT ACTS OR CONVEYANCES, § 131.
OFFENSES IN GENERAL, § 132.
CRIMINAL PROSECUTIONS, § 133.
—— TESTIMONY AGAINST OTHER PARTY, § 134.
IMPEACHMENT, CONTRADICTION, AND CORROBORATION, § 135.
COMPELLING HUSBAND OR WIFE TO TESTIFY, § 136.

§ 124. In general.

[a] Husband and wife are incompetent witnesses for or against each other while the marriage relation exists.

—(Ark. 1878) Phipps v. Martin, 33 Ark. 207; (1878) Beecher v. Brookfield, Id. 259; (1879) Watkins v. Turner, 34 Ark. 663;
(Ind. 1859) Woolley v. Turner, 13 Ind. 253;
(La. 1866) Cull v. Herwig, 18 La. Ann. 315;
(N. H. 1867) Blain v. Patterson, 47 N. H. 523;
(N. J. 1862) Bird v. Davis, 14 N. J. Eq. (1 McCart.) 467;
(N. Y. 1816) In re Shaw, 1 City H. Rec. 177; (1823) Stewart v. Stewart, 7 Johns. Ch. 229; (1841) Copops v. Kauffman, 8 Paige, 583; (1851) Hasbrouck v. Vandervoort, 6 N. Y. Super. Ct. (4 Sandf.) 596, affirmed (1853) 9 N. Y. (5 Seld.) 153;
(Pa. 1871) Commonwealth v. Paynter, 8 Phila. 609;
(S. C. 1844) Osborn v. Black, Speers, Eq. 431.

[b] A husband and wife are not competent witnesses, where either is a party to or is interested in the issue.

—(Del. 1858) Burton v. Roe, 2 Houst. 49;
(Ill. 1895) McGrath v. Miller, 61 Ill. App. 497;
(Ind. 1856) Weikel v. Probasco, 7 Ind. 690;
(Ky. 1831) Higdon's Heirs v. Higdon's Devisees, 29 Ky. (6 J. J. Marsh.) 48;
(Mo. 1880) Joice v. Branson, 73 Mo. 28;
(Ohio, 1859) Bird v. Hueston, 10 Ohio St. 418;
(Tex. 1879) Hicks v. Patterson, 1 White & W. Civ. Cas. Ct. App. § 349; (1881) Wilson v. Green, Id. § 98;
(Va. 1882) Shenandoah Val. R. Co. v. Lewis, 76 Va. 833; (1884) Burton v. Mill, 78 Va. 468.

[c] (Fla. 1887) The husband is an incompetent witness in a civil suit against his wife, except in a suit between husband and wife for divorce.—Schnabel v. Betts, 23 Fla. 178, 1 South. 692.

[d] (Ill. 1892) In an action against a man and his wife, the wife is not a competent witness for the defense, after the suit has been dismissed as to her.—Kusch v. Kusch, 143 Ill. 353, 32 N. E. 267.

[e] (Ill. 1893) The fact that a husband is biased in favor of one of the parties to a suit, but has no legal interest therein, does not make his wife an incompetent witness on the trial.—R. J. Gunning Co. v. Cusack, 50 Ill. App. 290.

[f] (Ky. 1832) Where the husband is the beneficial, though not the nominal, plaintiff in a suit, his wife is an incompetent witness.—Pyle v. Maulding, 30 Ky. (7 J. J. Marsh.) 202.

[g] (La. 1856) The rule which in civil matters disqualifies the husband from testifying for or against the wife, and vice versa, is founded on considerations of policy and morality, and is without exception.—Tulley v. Alexander, 11 La. Ann. 628.

[h] (N. Y. 1840) A husband cannot be a witness in favor of his wife, though he has no personal interest in the suit.—Hosack v. Rogers, 8 Paige, 229, affirmed Hosack's Ex'rs v. Same, 25 Wend. 313.

[i] (N. Y. 1851) The rule excluding husband and wife from testifying is founded on reasons of public policy, and not on the interest of the witness.—Hasbrouck v. Vandervoort, 6 N. Y. Super. Ct. (4 Sandf.) 596, affirmed (1853) 9 N. Y. (5 Seld.) 153.

[j] (N. Y. 1862) Husband and wife cannot testify either for or against each other, except where they are parties to the suit.—Rogers v. Rogers, 1 Daly, 194.

[k] (N. Y. 1863) Before the act of 1860, as well as since the amendment of 1862, a husband and wife are not in general admissible as witnesses for or against each other.—Moffat v. Moffat, 23 N. Y. Super. Ct. (10 Bosw.) 468; Same v. Mount, 17 Abb. Prac. 4.

[l] (Pa. 1814) A husband cannot give evidence where his wife would be benefited by his testimony after his death.—Snyder's Lessee v. Snyder, 6 Bin. 483, 6 Am. Dec. 493.

[m] (S. C. 1848) A wife cannot be a witness against the interest of her husband, in a suit to which her husband's trustee is the nominal party, and which the trustee defends on behalf of the husband.—Edwards v. Pitts, 3 Strob. 140.

[n] (Vt. 1863) The wife of a defendant is not a competent witness against a trustee, when the examination would lead her to testify in regard to matters in which her husband is concerned.—Brown v. Burrington, 36 Vt. 40.

[o] (Vt. 1874) If a wife be directly interested in the event of a suit, although she be not a party to the record, her husband is not a competent witness in the cause.—Wheeler v. Wheeler's Estate, 47 Vt. 637.

[p] (Va. 1874) In a controversy between an unmarried woman on the one part, and husbands and wives on the other, in relation to a transaction between them, in which all are interested, as the husbands and wives are incompetent, from their relation to each other, to testify in their own behalf in the case, the unmarried woman is not a competent witness in her own behalf.—Statham v. Ferguson's Adm'r, 25 Grat. 28.

[q] (W. Va. 1881) A husband and wife are not competent witnesses for or against each other, save in an action between themselves.—Watkins v. Wortman, 19 W. Va. 78.

[r] (Wis. 1866) There being no statutory provision to the contrary, a wife, except as allowed at common law, is not a competent witness in an action against her husband to which she is not a party.—Farrell v. Ledwell, 21 Wis. 182.

[s] (Wis. 1883) A husband and wife are not competent witnesses for or against one another, except (1) where both are parties to the action; (2) where one is charged with personal violence upon the other; and (3) where one has acted as the agent of the other, as to matters within the scope of such employment.—Carney v. Gleissner, 58 Wis. 674, 17 N. W. 398.

§ 125. Constitutional provisions.

[a] (Iowa, 1862) Revision 1860, § 3983, disqualifying a wife from testifying in behalf of her husband, is not repugnant to Const. art. 1,

§ 4, providing that any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person not testifying on account of interest who may be cognizant of any fact material; and that parties to suits may be witnesses as provided by law.—Karney v. Paisley, 13 Iowa, 89.

§ 126. Marriage pending suit and effect of marriage for purpose of suppressing testimony.

Invalidity of marriage, see post, § 178.

[a] (Mo. 1874) The marriage of a woman, pending a suit brought by her, does not render her incompetent as a witness.—Charles v. St. Louis & I. M. R. Co., 58 Mo. 458.

[b] (Utah, 1886) A wife is not competent to testify against her husband, although it appears that they entered into the marriage relation for the sole purpose of suppressing testimony.—United States v. White, 4 Utah, 499, 11 Pac. 570.

§ 127. Husband or wife of co-party.

[a] (Idaho, 1891) In an action for conspiracy to defraud against two defendants, though, under Rev. St. § 5958, "a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent," the wife of one of the defendants may be examined as a witness for plaintiff, under instructions by the court that her testimony is only to be considered as against the other defendant than her husband.—Shields v. Ruddy, 2 Idaho, 884, 28 Pac. 405.

[b] (Kan. 1888) Where two defendants are sued jointly, and a joint answer and defense are made by them, the wife of one is not competent to testify to a matter sustaining the joint defense, and which necessarily affects the right of her husband equally with that of his co-defendant.—Arn v. Matthews, 39 Kan. 272, 18 Pac. 65.

[c] (Mass. 1860) At the trial of an action against two defendants for a joint assault and battery, it was in evidence that one singly assaulted plaintiff, and then, at a point over 40 feet distant from that scene, the other singly assaulted him, but that both defendants were present throughout the whole affray. *Held*, that the wife of one defendant was not a competent witness for the other. The common-law rule is not changed by St. 1857, c. 305, § 1, making her competent to testify when she is a party.—Blake v. Lord, 82 Mass. (16 Gray) 387.

[d] (Miss. 1881) The wife of one who was unnecessarily made a codefendant in a suit in equity is not a competent witness for plaintiff.—Leach v. Shelby, 58 Miss. 681.

[e] (N. H. 1865) In an action against several principal defendants, the mere fact that a woman, summoned to answer as trustee, is the wife of one of the defendants, is insufficient to excuse her from answering material questions with reference to her title to real estate attached in the suit.—Claremont Bank v. Clark, 46 N. H. 134.

[f] (Pa. 1895) Where, in an action against a firm for goods sold, one of the members (a married woman) defaults, her husband is a competent witness for plaintiff on the trial of issues raised by the other defendant, since a recovery against the other party sued was in her interest and not against it.—Frack v. Gerber, 167 Pa. 316, 31 Atl. 640, 36 Wkly. Notes Cas. 280.

[g] (Tex. 1855) A., having purchased a slave of B., was sued therefor by C., his daughter. A. alleged a fraudulent combination between B. and C., and prayed that B. should be made a party defendant, which was done by the court below. *Held*, that B. was not a necessary party, and his being made a party did not prevent his wife from being a competent witness.—Hall v. Murphy, 14 Tex. 637.

[h] (Vt. 1892) The wife of a member of a partnership is not competent as a witness in a suit against the partnership.—McEwen v. Shannop, 64 Vt. 583, 25 Atl. 661.

[i] (Wis. 1877) Where two or more defendants must rely on the same defense, so that proof of a good defense as to one establishes a defense as to the other, the wife of one cannot be a witness in behalf of the other, unless the circumstances are such as will permit her to testify directly for her husband. Thus, where the issue was whether a deed of conveyance, under which both defendants claimed as grantees therein, was ever delivered to them by the grantor, the wife of one defendant (not being herself a party) cannot testify as a witness for the other.—Stewart v. Stewart, 41 Wis. 624.

§ 128. Nature of action or issue in general.

Particular actions or issues, see post, §§ 157–165.

[a] (U. S. 1839) Complainant's wife cannot be examined as a witness against defendant in a bill for injunction to restrain defendant from removing plaintiff's slave who had been sold to defendant for a term of years after which he is to be free.—Thomas v. Mackall, Fed. Cas. No. 13,903 [5 Cranch, C. C. 536].

[b] (U. S. 1858) The wife of a party to an interference is incompetent to testify in his behalf.—Nicholas v. Harris, Fed. Cas. No. 10,243 [1 MacArthur, Pat. Cas. 302].

[c] (Ala. 1851) In an action for malicious prosecution against a husband, his wife is not a competent witness for him, and her testimony, given on the preliminary examination, is therefore inadmissible.—Gardner v. Randolph, 18 Ala. 685.

[d] (Ark. 1877) It is error to permit the husband of a plaintiff, in an action for breach of promise of marriage, to testify in behalf of his wife, even as to matters occurring before the marriage.—Collins v. Mack, 31 Ark. 684.

[e] (Cal. 1887) In an action for the recovery of personal property, the admission of the testimony of plaintiff's wife against him, without his consent, is ground for reversal, under Code Civ. Proc. § 1881, which prohibits the examination of a wife for or against the husband without his consent save in specified exceptions.—Fitzgerald v. Livermore, 13 Pac. 167.

[f] (Ga. 1860) In a hearing by arbitrators on the subject-matter of a bill in equity, which was submitted to them, the husband of complainant was allowed to testify against the objection of the wife. *Held*, that the admission of his testimony was not error, especially as he testified to nothing untrue or prejudicial to her interest.—Wade v. Powell, 31 Ga. 1.

[g] (Ill. 1859) The wife of a defendant in execution is not a competent witness on a trial of right of property.—Dexter v. Parkins, 22 Ill. 143.

[h] (Ill. 1875) The wife of defendant in an action for slander is not a competent witness in his behalf.—Hawver v. Hawver, 78 Ill. 412.

[i] (Ill.) In an action of trespass, a wife is not a competent witness for her husband.—(1875) Hayes v. Parmalee, 79 Ill. 563; (1894) Wolff v. Van Housen, 55 Ill. App. 295.

[j] (Ind. 1864) The wife of defendant in an attachment suit is not a competent witness for her husband.—McCollem v. White, 23 Ind. 43.

[k] (Ind. 1881) Act March 11, 1861, § 2, amending the exemption law, provides that, where the execution defendant is absent from the state, his wife may make out the schedule required by the act, and shall be entitled to claim and hold for her husband exempt prop-

erty. Act March 11, 1867, declares that the wife shall not be a competent witness either for or against her husband in any action, with certain exceptions, and repeals all acts and parts of acts inconsistent therewith. *Held*, that in replevin by the husband and wife for exempt property seized under execution against the husband, such action not being within said exception, the wife was not a competent witness. —Roberts v. Porter, 78 Ind. 130.

[l] (Iowa, 1896) In an action by a woman on a note, her husband is not a competent witness for defendants, within Code 1873, § 3641, making husband and wife incompetent witnesses one against the other, "except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other."—Ward v. Dickson, 96 Iowa, 708, 65 N. W. 997.

[m] (La. 1869) Under Code, § 2260, expressly providing that the wife shall not testify for or against the husband, or the husband for or against the wife, the husband could not be a witness for his wife in a suit against her to enforce a written notarial contract of sale executed by her.—Willis v. Kern, 21 La. Ann. 749.

[n] (La. 1871) The husband is not a competent witness on the trial of an injunction suit in which his wife is plaintiff, because his testimony must be either for or against the wife, and therefore within the prohibition of Civ. Code, § 2281.—McDonald v. Thompson, 23 La. Ann. 556.

[o] (La. 1876) In a suit by one claiming to be the owner of property, to enjoin its sale under execution as the property of a partnership with which such alleged owner is not connected, the husband of one of the members of the partnership is not rendered incompetent to testify in behalf of plaintiff by the rule of law which prohibits the husband and wife from testifying for or against each other.—Chevallier v. Dyas, 28 La. Ann. 359.

[p] (Mass. 1860) Before St. 1859, c. 230, a wife was not a competent witness to support an action against her husband for her board.—Burlen v. Shannon, 80 Mass. (14 Gray) 433.

[q] (Mich. 1894) Under 3 How. Ann. St. § 7546, providing that a wife shall not be examined as a witness against her husband without his consent, a wife, when garnished in an action against the husband, cannot testify against her husband's objections.—Berles v. Adsit, 102 Mich. 495, 60 N. W. 967.

[r] (Miss. 1845) In the trial of a right of property for slaves, where the claimant is a feme covert, her husband is not a competent witness to testify in her behalf.—Moore v. McKie, 13 Miss. (5 Smedes & M.) 238.

[s] (Neb. 1895) Under Code Civ. Proc. § 331, providing that the wife can in no case be a witness against her husband, except in a criminal proceeding for a crime committed by one against the other, and Id. § 328, declaring that "neither husband nor wife can be examined in any case, as to any communication made by the one to the other while married," a wife cannot be examined as a witness against her husband, over his objection, in a suit by the latter against his son to obtain the rescission of a deed alleged to have been executed by the father to the son. —Lihs v. Lihs, 44 Neb. 143, 62 N. W. 457.

[t] (N. J. 1846) In a suit for the foreclosure of a mortgage, executed by a married woman and her trustee, of land originally bought by the husband, and by him directed to be conveyed in trust, which mortgage was made subsequently to the trust deed to secure a debt of the husband, the husband is not a competent witness for defendants.—Robbins v. Abrahams, 5 N. J. Eq. (1 Halst. Ch.) 465.

[u] (N. Y. 1855) The wife cannot be examined as a witness against her husband when both are sued for labor and materials furnished her.—Main v. Stephens, 4 E. D. Smith, 86.

[v] (N. Y. 1858) In supplementary proceedings, taken under Code, § 294, the wife of the debtor proceeded against cannot be examined as a witness.—Andrews v. Nelson, 7 Abb. Prac. 3, note; Macondray v. Wardle, 26 Barb. 612, 7 Abb. Prac. 3.

[w] (N. Y. 1864) Upon a collateral reference, e. g., after decree, for the purpose of ascertaining the amount due thereon, the testimony is in the nature of affidavits, and husband and wife may testify for each other.—Laing v. Titus, 18 Abb. Prac. 388.

[x] (R. I. 1863) The testimony of a husband and wife is not admissible in a suit to enforce a mechanic's lien on their estate in which they are parties.—Briggs v. Titus, 7 R. I. 441.

[y] (S. C. 1821) On the trial of an issue between the garnishee and attaching creditors of an absent debtor whether certain goods attached were the goods of the absent debtor or of the garnishee, the wife of the absent debtor is not a competent witness.—Forretier v. Guerrineau's Creditors, 1 McCord, 304.

[yy] (Tenn. 1859) Where the genuineness of a note is put in issue by a plea of non est factum, in an action by the payee, plaintiff and his wife are not competent witnesses.—Barton v. Trent, 40 Tenn. (3 Head) 167.

[z] (Tenn. 1873) In an action by a wife to establish a resulting trust in land purchased by her husband, the husband is incompetent as a witness.—Hyden v. Hyden, 65 Tenn. (6 Baxt.) 406.

[zz] (Wis. 1867) An infant having brought an action to recover the value of services above his maintenance, defendant's wife is not a competent witness for him generally in the cause, however admissible might be her testimony as to any agreement made with her as his agent.—Mountain v. Fisher, 22 Wis. 93.

§ 129. Wife of party suing or sued in representative or official capacity.

[a] In an action against an executor or administrator, his wife is not a competent witness for him.
—(Del. 1886) Bradley v. Kent's Ex'r, 7 Houst. 372, 32 Atl. 286;
(Pa. 1854) Malaun's Adm'r v. Ammon, 1 Grant, Cas. 123.

[b] (Ark. 1894) In an action by a father, as next friend, for his child, his wife is a competent witness, as he is merely the manager of the suit; and the fact that he is liable for costs does not disqualify her, under Mansf. Dig. § 4955, providing that the husband and wife shall be incompetent to testify for or against each other.—St. Louis, I. M. & S. Ry. Co. v. Rexroad, 59 Ark. 180, 26 S. W. 1037.

[c] (Ill. 1894) Where a husband sues as administrator, his wife is not a competent witness for him.—Sun Acc. Ass'n v. King, 53 Ill. App. 182.

[d] (Kan. 1896) The wife of one who is interested in an action only as the next friend of a minor plaintiff is a competent witness in the case.—Potter v. Stamfli, 2 Kan. App. 788, 44 Pac. 46.

[e] (La. 1888) In an action by the father of a minor for the child's benefit, the mother is not disqualified to testify under Rev. Civ. Code, art. 2281, which forbids a husband and wife to testify for or against each other.—Lapleine v. Morgan's L. & T. R. & S. S. Co., 40 La. Ann. 661, 4 South. 875, 1 L. R. A. 378.

[f] (Me. 1856) In a suit brought by an infant by prochein ami, it is no objection to the admissibility of a witness that she is the wife of

the prochein ami.—Leavitt v. City of Bangor, 41 Me. 458.

[g] (Mo. 1854) The widow of a decedent, being at the time of trial the wife of the administrator, is a competent witness for him as to facts which came to her knowledge before he was appointed administrator.—Stein v. Weidman's Adm'r, 20 Mo. 17.

[h] (Vt. 1864) Where an infant prosecutes a suit by his father as his natural guardian, the latter, not being a party to the subject-matter of the litigation, is not a party to the suit in such a sense as to exclude his wife from testifying.—Bonett v. Stowell, 37 Vt. 258.

§ 130. Nature of evidence in general.

[a] (Ala. 1836) The deposition of a husband taken in a cause to which his wife is a party cannot be used in the cause for or against her.—Sadler v. Houston, 4 Port. 208.

[b] (Ga. 1879) A wife is an incompetent witness to testify, either for or against her husband, as to papers consigned by him to her care, and kept exclusively by her under lock and key.—Stanford v. Murphy, 63 Ga. 410.

[c] (Ill. 1875) In a suit against a husband for the price of goods purchased by him in the presence and on the selection of his wife, the latter is not a competent witness in his behalf to prove that the goods were furnished on the credit of a third person, in payment of a debt of such third person to the husband.—Trepp v. Barker, 78 Ill. 146.

[d] (Ind. 1874) In an action of replevin against a married woman, her husband is not a competent witness to testify as to his purchase of the property sought to be recovered, and his sale of it to plaintiff, or to rebut testimony tending to show a gift of the property to the wife, such testimony being against the wife.—Stanley v. Schultz, 47 Ind. 217.

[e] (Ind. 1877) The rule that the testimony or admissions and statements of a wife are not admissible in evidence either for or against her husband does not extend to the exclusion of declarations made by her to the husband, in the presence of a third person, relative to a material matter, and in which declarations the husband either directly or indirectly acquiesces.—Gebhart v. Burkett, 57 Ind. 378, 26 Am. Rep. 61.

[f] (Iowa, 1862) Revision 1860, § 3983, disqualifying a wife from testifying in behalf of her husband, renders both the testimony of a wife and evidence of her declarations inadmissible in favor of her husband.—Karney v. Paisley, 13 Iowa, 89.

[g] (Kan. 1881) A. and wife were sued on a note and mortgage. Judgment was had against A. On a subsequent trial of the issues between plaintiff and A.'s wife, her answer having denied the execution of the note and mortgage, *held*, that A. could not testify in his wife's behalf that she did not execute the note and mortgage.—Jenkins v. Levis, 25 Kan. 479.

[h] (Ky.) A husband is incompetent to testify, where his evidence tends to establish the right of his wife to the property in controversy.—(1823) Wall v. Nelson, 13 Ky. (3 Litt.) 395; (1829) Caperton v. Callison, 24 Ky. (1 J. J. Marsh. 396; (1832) Hopkins v. Smith, 30 Ky. (7 J. J. Marsh.) 263.

[i] (Ky. 1835) The wife cannot be a witness against her husband, still less can her declarations be received as evidence against him, even where they might conduce to prove a scienter.—Tacket v. May, 33 Ky. (3 Dana) 79.

[j] (La. 1853) The declarations of the wife are not admissible in evidence against her husband.—Dubois v. Ferrand, 8 La. Ann. 373.

[k] (Mich. 1852) The declarations of a husband are not competent against the wife in a suit affecting her present estate, as his declarations are subject to the same rules of exclusion which govern his testimony as a witness.—Dawson v. Hall, 2 Mich. 390.

[l] (N. Y. 1862) On an accounting, one of the executors offered himself as a witness to prove that certain property had never been in the actual possession of the executors, but had been given by the testator in his lifetime to his daughter (the wife of the witness) who was also a residuary legatee under the will. *Held*, that the testimony offered was not in violation of the common-law rule that a husband cannot give testimony in favor of his wife, and must be admitted.—Sneckner v. Taylor, 1 Redf. Sur. 427.

[m] (N. C. 1800) Where plaintiff claimed a slave by virtue of a gift from his father, who had afterwards conveyed the slave by deed to defendant, the wife of the alleged donor was not a competent witness for plaintiff, as the husband could not contradict his own deed, and she was not competent to prove the fact which he could not be admitted to prove.—Anonymous, 3 N. C. 127.

[n] (N. C. 1861) The declarations of a woman made shortly after the birth of a child, that it had been born alive, are not competent to prove her husband's title to an estate by the curtesy.—Gardner v. Klutts, 53 N. C. 375, 80 Am. Dec. 881.

[o] (Pa. 1814) A feme covert, through whose heirship in fee plaintiffs (herself and her husband) derive the title on which the suit is brought, is not a competent witness to discredit the title.—Moody's Lessee v. Fulmer, 3 Grant, Cas. 17.

[p] (Pa. 1869) Where a bill had been filed against the husband and wife, and on the examination it was proposed to ask the husband where certain stocks standing in the name of the wife were obtained, and to whom they belonged, *held*, that such evidence was inadmissible, under the laws prohibiting husband and wife from testifying against each other.—Bast v. Anspach, 1 Leg. Gaz. Rep. 25.

[q] (Pa. 1871) A husband or wife may testify directly against each other as to facts which are in their nature secret, and affecting the person.—Commonwealth v. Reid, 1 Leg. Gaz. Rep. 182, 3 Leg. Gaz. 185, 8 Phila. 385.

[r] (Pa. 1873) The wife of defendant in an attachment against stock standing in his name cannot be allowed to testify that the stock belongs to her.—Boyle v. Haughey, 10 Phila. 98.

[s] (Pa. 1887) A married woman is an incompetent witness, in an action brought by her for goods alleged to have been given to her by her husband, and which he afterwards sold to the person against whom the action is brought, for the reason that by proving title in herself she would be testifying against the interest of her husband, who, although not a party to the record, would be interested in the result of the action, which might make him liable on an implied warranty of title in the sale.—Pleasonton v. Nutt, 115 Pa. 266, 8 Atl. 63.

[t] (Pa. 1894) Where a contest of a will which excluded testator's half-sisters, K., S., and P., from any share in his estate, is instituted by S.'s husband, who engaged an attorney, and settled the contest for a certain amount, his declarations to the attorney during the contest that he represented P. as well as S. and K. are admissible on the trial of the claim of P. against the estate of S. for a share of money so obtained; the husband of S., as well as S., being deceased.—In re Seip's Estate, 163 Pa. 423, 30 Atl. 226, 43 Am. St. Rep. 803, 35 Wkly. Notes Cas. 401; Appeal of Probst, 163 Pa. 423, 30 Atl. 226, 35 Wkly. Notes Cas. 401.

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[u] (Vt. 1895) In an action to recover the proceeds of property sold under execution against plaintiff's brother, plaintiff claimed a prior lien thereon by virtue of a chattel mortgage executed by his brother to himself to secure a note. *Held* that, to prove the consideration for said mortgage, the wife of plaintiff's brother was competent to testify that she saw plaintiff give her husband money, and heard the remark that the sum paid made up the amount of the note, since her husband was not a party to the suit and could not be affected by any judgment rendered therein.—Wheeler v. Campbell, 68 Vt. 98, 34 Atl. 35.

[v] (Va. 1886) A deed of trust on its face purported to be for the equal benefit of husband and wife. On a bill to restrain the sheriff from selling under execution issued against the husband, *held*, that depositions of the debtor and his wife, to show that the latter's interest was more than one-half, were inadmissible, under Code 1873, c. 172, §§ 21, 22, disqualifying husband and wife from testifying for or against each other.—Scott v. Rowland, 82 Va. 484, 4 S. E. 595.

[w] (Va. 1892) Part of the deferred purchase price for land sold under a decree in a chancery suit was paid with money belonging to the purchaser's wife, and the commissioner executed a receipt acknowledging payment from the wife. *Held*, in an action against the husband and wife by the creditors of the husband to subject such land to the lien of their judgments, that the husband was not competent to testify that the money receipted for as the wife's was in fact furnished by her father, who was secured by a deed of trust for any money which he might be compelled to pay, as surety, on the deferred purchase-money bonds executed by the husband at the chancery sale.—Bowman v. Reinhart, 89 Va. 435, 16 S. E. 279.

[x] (W. Va. 1889) A wife is incompetent to prove any transaction or communication personally between her husband and herself to create or sustain a resulting trust, or any admissions of his of its existence, not only as against his heirs, but also his creditors seeking to subject it.—Smith v. Turley, 32 W. Va. 14, 9 S. E. 46.

§ 131. Fraudulent acts or conveyances.

[a] In an action to set aside a conveyance by a husband to his wife, she is a competent witness to establish the consideration and the good faith of the transaction.
—(Ill. 1882) Payne v. Miller, 103 Ill. 442;
(Mich. 1891) Blanchard v. Moors, 85 Mich. 380, 48 N. W. 542.

[b] (Ill. 1889) A husband is a competent witness for his wife in an action by his creditors to set aside a conveyance from him to his wife.—Fleming v. Weagley, 32 Ill. App. 183.

[c] (Ind. 1861) Judgment creditors brought suit to set aside for fraud a mortgage of their debtor, joining with him as defendant in the suit the mortgagee and his assignee. The debtor was defaulted; the others answered by a general denial. *Held* that, nevertheless, the wife of the debtor was not a competent witness as to communications made to her by the mortgagee, showing his knowledge of fraudulent intent in the mortgagor, for such evidence tended to authorize the recovery of judgment against her husband.—Perrin v. Johnson, 16 Ind. 72.

[d] (Ind. 1876) On the trial of an action brought by a husband and wife to recover the possession of real estate to which plaintiffs claimed title under a conveyance made to them jointly, both the husband and the wife were competent witnesses for plaintiffs to disprove the charge that said conveyance was made to plaintiffs jointly to defraud creditors of the husband.—McConnell v. Martin, 52 Ind. 434.

[e] (Iowa, 1856) In a suit to set aside fraudulent conveyances, the wife of the alleged fraudulent grantor is a competent witness.—Adams v. Foley, 4 Iowa (4 Clarke) 44.

[f] (Iowa, 1884) In an action against a husband and wife to set aside as fraudulent a conveyance from him to her, he is not competent to testify that he had no other property, though the testimony was against himself, as well as against her.—Stephenson v. Cook, 64 Iowa, 265, 20 N. W. 182.

[g] (Mass. 1866) A bill in equity against a debtor and his wife charged her with holding property of the debtor transferred without consideration and for the purpose of defrauding creditors. Her husband was absent from the country, and had not been duly served with process. *Held*, that plaintiff should not be restrained from taking the deposition of the wife, she being a party to the suit.—Crompton v. Anthony, 95 Mass. (13 Allen) 33.

[h] (N. J. 1840) A wife may testify that a conveyance executed by her and her husband was fraudulent, provided that there is no objection as to interest, nor charge of criminality.—Stewart v. Johnson, 18 N. J. Law (3 Har.) 87.

[i] (N. Y. 1858) In an action against a husband and wife to compel the application of real property standing in her name to his debt, on the ground that it really belonged to him, and was bought in the name of the wife to defraud creditors, the wife is not a competent witness either against her husband or herself.—Macondray v. Wardle, 26 Barb. 612, 7 Abb. Prac. 3.

[j] (S. C. 1834) In a proceeding by creditors to set aside a sale of slaves by their debtor in his life time in fraud of his creditors after the death of the debtor, it was *held*, that the wife of the debtor was a competent witness to prove the declarations of the husband that the sale was voluntary, as the husband himself, if living, would have been a competent witness in the case.—Bell v. Colel, 2 Hill, Eq. 108, 27 Am. Dec. 448.

[k] (Tenn. 1895) In an action to set aside a deed from husband to wife as in fraud of creditors, while the husband and wife are not competent to testify as to the execution and delivery of such a deed four years before the husband's insolvency, the wife is competent to prove as an independent fact that the deed was in her possession from the time it was executed, without regard to the person from whom she obtained it.—Phœnix Fire & Marine Ins. Co. v. Shoemaker, 95 Tenn. (11 Pickle) 72, 31 S. W. 270; Memphis Nat. Bank v. Same, 31 S. W. 270.

[l] (Tex. 1880) A wife may testify, in support of her rights against a third party, as to the fraudulent acts of her husband.—Edwards v. Dismukes, 53 Tex. 605.

§ 132. Offenses in general.

Offenses by husband or wife against the other, see post, §§ 174–176.

[a] (Ill. 1878) In an action on a fire policy by the insured, the declarations of a third person, who also had a policy on the property made to his wife, tending to establish that he caused the building to be destroyed by fire, cannot be proved by the wife's testimony.—Westchester Fire Ins. Co. v. Foster, 90 Ill. 121.

[b] (N. J. 1840) A wife cannot testify, in a suit to which her husband is not a party, to any matter for which her husband may be indicted.—Stewart v. Johnson, 18 N. J. Law (3 Har.) 87.

[c] (N. J. 1864) A husband cannot, in a collateral proceeding, give testimony which directly charges the wife with an offense in its nature indictable, although the wife has already been

tried and acquitted of such offense.—State v. Wilson, 31 N. J. Law (2 Vroom) 77.

[d] (N. J. 1889) A wife cannot testify that certain names entered in an hotel register are in the handwriting of her husband, when such testimony would tend to convict him of a crime. —Rice v. Rice (Ch.) 18 Atl. 457.

[e] (Pa. 1870) Although the general rule is that husband or wife may not testify against each other, yet in collateral proceedings they may testify to facts tending to criminate each other.—Commonwealth v. Reid, 8 Phila. 385.

§ 133. Criminal prosecutions.

Particular prosecutions, see post, §§ 157–165.
Statutory removal of disqualification, see post, §§ 139, 140.

[a] A wife is not a competent witness in a criminal prosecution against her husband.
—(Ala. 1885) Donnelly v. State, 78 Ala. 453; (1889) Hussey v. Same, 87 Ala. 121, 6 South. 420;
(Conn. 1854) Lucas v. State, 23 Conn. 18;
(La. 1896) State v. Pain, 48 La. Ann. 311, 19 South. 138;
(Mo. 1894) State v. Willis, 119 Mo. 485, 24 S. W. 1008;
(N. Y. 1873) Wilke v. People, 53 N. Y. 525;
(Ohio, 1877) Schultz v. State, 32 Ohio St. 276; (1889) Thurman v. Same, 2 O. C. D. 466.

[b] (U. S. 1887) In the courts of the United States a wife is not a competent witness for or against her husband in a criminal case; and this is on the score of public policy.—United States v. Jones (D. C.) 32 Fed. 569.

[c] (Ala. 1886) A wife's testimony against her husband in a prosecution for vagrancy is, under section 4218, Code 1876, not admissible. —Merriwether v. State, 81 Ala. 74, 1 South. 560.

[d] (Cal. 1895) It was not error to permit a witness for the state to testify without objection merely that she was defendant's wife, that she resided at the place where and at the time when the crime charged was alleged to have been committed, where the time and place were not disputed, and defendant testified to the same facts.—People v. Fultz, 109 Cal. 258, 41 Pac. 1040.

[e] (Colo. 1894) Where a husband is indicted for perjury in making a false affidavit in a suit for divorce against his wife, the wife is a competent witness for the state on the trial of such indictment.—Dill v. People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254.

[f] (Ind. 1871) In a prosecution under Act Feb. 23, 1859, with reference to carrying concealed weapons, a wife cannot be a witness against her husband, and hence she cannot make an affidavit against him on which to found such a prosecution.—Taulman v. State, 37 Ind. 353.

[g] (Ind. 1875) Where a husband and wife are indicted for an offense, the declarations of the husband are not admissible in evidence against the wife.—Kingen v. State, 50 Ind. 557.

[h] (N. J. 1884) Under an indictment for unlawfully taking away a child under 15 with intent to seduce her, defendant's mere allegation that she was his wife does not render her an incompetent witness for the state.— State v. Gordon, 46 N. J. Law (17 Vroom) 432.

[i] (N. Y. 1845) The wife of a prisoner may be a witness on the question of insanity.— People v. Griffen, 1 Edm. Sel. Cas. 126.

[j] (N. Y. 1861) In a prosecution for perjury, the conjugal relation will not prevent a woman from testifying as to whether she has had intercourse with other men than her husband. —Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255.

[k] (N. Y. 1872) A husband or wife of a prisoner is not admissible as a witness on the prisoner's behalf on the trial of the indictment.— In re Foster, 13 Abb. Prac. (N. S.) 372, note.

[l] (N. Y. 1876) The wife of one against whom proceedings are instituted as a disorderly person (Laws 1860, c. 508, § 3) is a competent witness for complainant.—People v. Commissioners of Public Charities, 9 Hun, 212.

[m] (N. Y. 1882) Where it is shown to the court, by affidavit, that a wife was introduced before the grand jury that found an indictment against her husband, without his consent, and against his will, and that her testimony was vitally material, the indictment will be set aside.—People v. Moore, 65 How. Prac. 177.

[n] (Pa. 1842) Where on a charge of conspiracy to obtain a divorce the indictment does not allege the commission of personal violence nor the intention to commit it, the wife will not be permitted to testify against her husband.—Commonwealth v. McEwen, 1 Clark, 140.

[o] (Pa. 1896) An indictment of a woman for larceny will be quashed where it appears that the only testimony offered before the committing magistrate and the grand jury was that of her husband. — Commonwealth v. Woodcroft (Quart. Sess.) 17 Pa. Co. Ct. R. 554.

[p] (Tex. 1871) Under Pasch. Dig. art. 3113 (Code Cr. Proc. art. 648), providing that the husband and wife can in no case testify against each other except in criminal prosecutions for an offense committed by one against the other, but they may in all criminal prosecutions be witnesses for each other, where a husband or wife is put on the witness stand to testify in behalf of the other, each is subject to as rigid a cross-examination as any other witness, with the exception only that they cannot be examined in regard to anything against the other about which there had been no testimony on the examination in chief.—Creamer v. State, 34 Tex. 173.

§ 134. —— Testimony against other party.

[a] (Cal. 1883) On a trial for burglary, the wife of a party charged with the same offense in a separate information is competent to testify to matters tending to implicate her husband. Code Civ. Proc. § 1881, and Pen. Code, § 1322, providing that the wife is not a competent witness for or against her husband, apply only to actions in proceedings in which "one or both are parties."—People v. Langtree, 64 Cal. 256, 30 Pac. 813.

[b] (Iowa, 1887) A woman against whose husband an indictment is pending is a competent witness for the state on the trial of an indictment of another person for the same offense; and Code 1873, §§ 3641, 3642, providing that neither a husband nor wife shall in any case be a witness against the other, does not apply. —State v. Rainsbarger, 71 Iowa, 746, 31 N. W. 865.

[c] (N. Y. 1892) The wife of one under indictment for the same offenses as defendant is a competent witness against defendant.—People v. Bosworth, 64 Hun, 72, 19 N. Y. Supp. 114.

[d] (Pa. 1870) Where on a joint indictment there is a separate trial, the husband or wife of defendant not on trial is not necessarily an incompetent witness for the commonwealth; if willing to be examined, he or she is competent.—Commonwealth v. Reid, 1 Leg. Gaz. Rep. 182, 3 Leg. Gaz. 185, 8 Phila. 385.

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[e] (Pa. 1871) When two defendants are jointly indicted for procuring an abortion, and one of them marries the female on whose body the miscarriage was alleged to be procured, and then demands a separate trial, which is granted, and the trial of the other defendant proceeds on such trial, the wife of the other defendant is a competent witness.—Commonwealth v. Reid, 1 Leg. Gaz. Rep. 182, 3 Leg. Gaz. 185, 8 Phila. 385.

[f] (Pa. 1871) Where two defendants are jointly indicted for conspiracy, or any other offense, where both defendants are necessarily involved, the wife of the defendant not on trial is not a competent witness for the commonwealth on the trial of the other.—Commonwealth v. Reid, 1 Leg. Gaz. Rep. 182, 3 Leg. Gaz. 185, 8 Phila. 385.

[g] (S. C. 1855) A wife cannot testify in matters tending to criminate her husband, who is jointly indicted with another person, but is not brought to trial.—State v. Bradley, 9 Rich. Law, 168.

[h] (S. C. 1866) Where three are jointly indicted for a capital offense, and two only are tried, the third not having been arrested, the wife of the one not on trial is a competent witness for the state.—State v. Drawdy, 14 Rich. Law, 87.

§ 135. Impeachment, contradiction, and corroboration.

[a] (U. S. 1839) If husband and wife are called as witnesses in the same suit, and contradict each other, it will not destroy the competency of either.—Stein v. Bowman, 38 U. S. (13 Pet.) 209, 10 L. Ed. 129.

[b] (Ark. 1852) The husband having testified for the state, the wife is a competent witness for the defense to show that he testified under a bias against defendant, but not to contradict him.—Cornelius v. State, 12 Ark. (7 Eng.) 782.

[c] (Ga. 1858) The testimony of a wife, the only tendency of which is to discredit her husband, is not admissible.—Keaton v. McGwier, 24 Ga. 217.

[d] (N. J. 1871) A husband or a wife, in a suit in which neither is a party, can be asked a question for the purpose of disgracing or discrediting the testimony of the other, when the matter inquired into is not an indictable offense.—Ware v. State, 35 N. J. Law (6 Vroom) 553.

[e] (N. Y. 1816) The testimony of a wife is not admissible to impeach the testimony of her husband either directly or collaterally.—In re Francis, 1 City H. Rec. 121.

[f] (N. Y. 1857) The testimony of the wife of an accomplice may be taken into consideration in determining the credibility of the testimony of the husband.—Haskins v. People, 16 N. Y. 344.

[g] (N. C. 1878) The wife is a competent witness to contradict her husband's testimony for the state against a third person indicted for assaulting him; Battle's Revisal, c. 43, § 16, does not apply to such case.—State v. Parrott, 79 N. C. 615.

[h] (N. C. 1889) The defense having on cross-examination sought to impeach the testimony of the complaining witness, a daughter of defendant, as to declarations made to her mother, defendant's wife, it is not a violation of the rule that a wife's evidence is not competent against her husband for the state to introduce, in corroboration of the complaining witness, a third person, who overheard the conversation; it appearing that the corroborating witness mentioned only one declaration by the wife, which was part of the res gestæ of the crime.—State v. Parish, 104 N. C. 679, 10 S. E. 457.

[i] (Ohio, 1858) On a trial for rape, or for an assault with intent to commit a rape, the acts and declarations of the husband of the woman on whom the offense is alleged to have been committed are not admissible to discredit the wife examined as a witness.—McCombs v. State, 8 Ohio St. 643.

[j] (Tex. 1883) A woman is not incompetent as a witness because her husband, not a party to the cause, has also testified as a witness, although her testimony contradicts his.—Clubb v. State, 14 Tex. App. 192.

§ 136. Compelling husband or wife to testify.

Incriminating evidence, see post, § 1032.

Compelling disclosure of evidence of wife by bill of discovery, see "Discovery," vol. 16, c. 1970, § 11 [a].

[a] On the prosecution of a husband for an assault committed on his wife, the wife is not only competent, but she may be compelled, to testify against the husband.
—(Ala. 1891) Johnson v. State, 94 Ala. 53, 10 South. 427;
(Tex. 1858) Bramlette v. State, 21 Tex. App. 611, 2 S. W. 765.

[b, c] (Ind. 1868) A husband cannot be required to testify against his wife.—Kyle v. Frost, 29 Ind. 382.

[d] (Ind. 1877) Where the rights of a party to an action wherein, either with or against him, a husband and wife are also parties, may depend on the testimony of either, such party may compel either of them to testify as a witness, though such testimony must necessarily affect the rights of the other.—Sutherland v. Hankins, 56 Ind. 343.

[e] (Kan. 1871) Under the statute of 1871, the wife of an accused is a competent witness for the state; the court cannot compel her to testify, but will permit her to do so voluntarily.—State v. McCord, 8 Kan. 232, 12 Am. Rep. 469.

[f] (La. 1880) Under Code, art. 2281, the wife may be made a witness against herself, to show that property bought in her name was bought with her husband's funds, and that her title is simulated and fraudulent.—Hennen v. Hacker, 32 La. Ann. 668.

[g] (Me. 1874) Rev. St. c. 187, § 5, provides that in all criminal trials "the husband or wife of the accused shall be a competent witness." *Held*, that in such case a husband or wife may be compelled to testify either for or against the other.—State v. Black, 63 Me. 210.

[h] (Miss. 1882) On an indictment of a husband for an assault and battery on his wife, she may be compelled to testify against him.—Turner v. State, 60 Miss. 351, 45 Am. Rep. 412.

[i] (Neb. 1893) Under Code Civ. Proc. § 331, which provides that the husband or wife cannot be a witness against each other, except in criminal proceedings, for a crime committed by one against the other, neither can, in an action to set aside a deed from husband to wife, be required to testify as to facts which, it is claimed, would show the conveyance to be fraudulent.—Niland v. Kalish, 37 Neb. 47, 55 N. W. 295.

[j] (N. Y. 1841) A married woman may be compelled to testify in any case where her husband would not be disqualified.—Copous v. Kauffman, 8 Paige, 583.

[k] (N. Y. 1849) In an action for assault and battery on the wife, brought in the name of the husband and wife, defendants cannot call on her to testify under the statute of 1847, or section 344 of the Code of Procedure, which authorize one party to call on the other to testify.—Pillow v. Bushnell, 5 Barb. 156.

[l] (N. Y. 1849) The rule that a wife cannot be compelled to testify against her husband is not affected by the Code of Procedure of New York, authorizing a party to a suit to call upon the opposite party to testify.—Erwin v. Smaller, 4 N. Y. Super. Ct. (2 Sandf.) 340.

[m] (N. Y. 1857) In an action against husband and wife, averring special property in the wife, an order was made at special term requiring the wife to appear and testify in the case before a referee. *Held*, that such order could not be sustained as to any party.—Draper v. Henningsen, 14 N. Y. Super. Ct. (1 Bosw.) 611.

[n] (N. Y. 1883) Under Acts 1876, c. 182, § 2, providing that a wife may be a witness in behalf of her husband in a criminal prosecution, a husband has a right to compel his wife to testify.—People v. Hovey, 92 N. Y. 554.

[o] (Pa. 1874) Act 1869, permitting a wife to be called by her husband as a witness, provides for the competency of the witness, not for the effect of her testimony; and she may be compelled on cross-examination to testify against him.—Ballentine v. White, 77 Pa. (27 P. F. Smith) 20.

[p] (Pa. 1887) A husband and wife joined in an action for damages suffered by the wife; the husband being merely a nominal party. *Held*, that he was not such a party as to give the opposite side a right to compel him to testify to matters against the interest of his wife.—Burrell Tp. v. Uncapher, 117 Pa. 353, 11 Atl. 619, 2 Am. St. Rep. 664.

(b) STATUTORY REMOVAL OF DISQUALIFICATION.

IN GENERAL, § 137.
EFFECT OF STATUTORY REMOVAL OF INCOMPETENCY ON GROUND OF INTEREST, § 138.
OFFENSES AND CRIMINAL PROSECUTIONS, § 139.
—— CROSS-EXAMINATION, § 140.
TESTIMONY BY EITHER HUSBAND OR WIFE, BUT NOT BOTH, § 141.

§ 137. In general.

[a] (Ala. 1877) Plaintiff's husband is a competent witness where his testimony does not relate at all to communications between them.—Chapman v. Holding, 60 Ala. 522.

[b] (Ill. 1883) The exception to Act Feb. 14, 1867, § 5, permitting a wife to testify for or against her husband, "where the wife would, if unmarried, be plaintiff or defendant," does not refer to cases where the wife has been married, but subsequently divorced, or her husband has died, but merely to cases where she has never been married—when the action does not concern a right resulting from marriage.—Smith v. Long, 106 Ill. 485.

[c] (Ill. 1883) A wife cannot testify for her husband, except in the cases enumerated in the statute.—Keep v. Griggs, 12 Ill. App. 511.

[d] (Ill. 1895) Under Rev. St. 1893, c. 51, § 5, which permits a husband to testify for his wife in an action in which the wife would, if unmarried, be a party, a husband may testify for his wife, in an action brought by her to recover three times the amount lost by him at gambling, since Rev. St. 1893, c. 38, § 132, allows such an action to be brought by any person.—Johnson v. McGregor, 157 Ill. 350, 41 N. E. 558, affirming (1894) 55 Ill. App. 530.

[e] (Ind. 1879) In an action on an account for work and labor, defendant's wife is a competent witness, under Act March 15, 1879, prescribing when husband and wife are competent witnesses for and against each other, to prove the contract as set out in the answer, where her testimony does not relate to any communications made between her and defendant during the marriage.—Brown v. Norton, 67 Ind. 424.

[f] (Ind. 1882) The act making husband and wife competent witnesses for or against each other applies to occurrences before as well as after its passage.—Wilson v. Wilson, 86 Ind. 472.

[g] (Me. 1860) Laws 1859, c. 102, relating to the competency of husband and wife as witnesses does not render them competent when their testimony would be incompetent on other grounds than that of the relationship.—Drew v. Roberts, 48 Me. 35.

[h] (Me. 1861) By St. 1859, c. 102, the wife is made a competent witness for her husband, in a suit against him by an administrator, she not being a party to the record.—Thompson v. Wadleigh, 48 Me. 66.

[i] (Mass. 1860) In an action by a married woman against an administrator for services rendered to his intestate, plaintiff's husband is a competent witness for her under Laws 1857, c. 305, § 1, providing that in all cases in which the wife is a party or one of the parties she and her husband shall be competent witnesses for or against such other except as to private conversations with each other.—Fowle v. Tidd, 81 Mass. (15 Gray) 94.

[j] (Minn. 1860) The exception in Comp. St. p. 681, § 53, allowing the testimony of the wife against her husband, is inserted only to save those cases where at common law a wife could testify against her husband, and not to introduce any new rule, or extend any old one.—State v. Armstrong, 4 Minn. 335 (Gil. 251).

[k] (Minn. 1890) Neither Laws 1889, c. 72, nor Laws 1885, c. 193, affects, except in the statutory proceeding in aid of execution, the rule in Gen. St. c. 73, § 10, that a husband cannot be examined against his wife without her consent, nor the wife against her husband without his consent.—Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295.

[l] (Mo. 1873) Wag. St. pp. 1372, 1373, do not render either husband or wife competent to testify in an action where they are joined as parties.—Paul v. Leavitt, 53 Mo. 595.

[m] (Mo. 1880) Under the statute permitting the wife to testify, she cannot testify to conversations between her husband and a third party.—Holman v. Bachus, 73 Mo. 49.

[n] (Mo. 1883) In an action against a husband the wife was not a competent witness, though her testimony was to the effect that the right was in her and not in her husband; as the statutes permitting her to testify when a party have not created an exception to the common-law rule such as would permit her to testify for her husband.—Brinsmade v. Groll, 14 Mo. App. 444.

[o] (Mo. 1888) In an action for dower and specific performance of an alleged oral gift of land to plaintiff's husband from his father, where the heirs of the deceased father and son are defendants, the husband of plaintiff's daughter, an heir to an undivided interest in the land, either under her father or grandfather, is a competent witness for plaintiff, being an interested party to the suit, under Rev. St. § 4012, providing that a party may compel an adverse party to testify in his behalf.—O'Bryan v. Allen, 95 Mo. 68, 8 S. W. 225.

[p] (Mo. 1894) A wife is not a competent witness to prove what was said in a conversation between her husband and another, nor to prove any fact done in connection with such conversation, and which might be influenced thereby.—McFadin v. Catron, 120 Mo. 252, 25 S. W. 506.

[q] (Neb. 1894) Comp. St. 1893, c. 53, empowering a married woman to "sue and be sued

in the same manner as if she were unmarried," does not repeal Code Civ. Proc. § 331, providing that in civil actions neither husband nor wife can testify against the other.—Greene v. Greene. 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724.

[r] (N. J. 1871) Act March 18, 1859 (Nix. Dig. p. 1044, § 34), providing that no wife should be admitted as a witness for or against her husband, and Act April 17, 1868 (Nix. Dig. p. 1045, § 36), providing for the admission of a married woman and her husband in suits brought by or against her, do not apply to suits by or against the husband, and a wife is not a competent witness in such suit.—Van Houten's Ex'r v. Post, 21 N. J. Eq. (6 C. E. Green) 355.

[s] (N. Y. 1872) Under Laws 1867, c. 887, providing that a husband and wife may be witnesses in actions between them, with certain exceptions, applies to all trials thereafter had in actions pending when the law took effect.—Southwick v. Southwick, 49 N. Y. 510.

[t] (Ohio, 1874) Under the amendatory act of April 18, 1870, a husband and wife are competent witnesses for and against each other except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person.—Westerman v. Westerman, 25 Ohio St. 500.

[u] (Ohio, 1881) Under Act April 18, 1870 (67 Ohio Laws, p. 113), husband and wife are not competent witnesses for and against each other except as to the matters therein specified. —Howard v. Brower, 37 Ohio St. 402.

[v] (Pa. 1867) The statute allowing a party to call his adversary as a witness does not permit him to examine the wife of the adversary. —O'Rourke v. McGrath, 1 Brewst. 802.

[w] (Pa. 1887) Act April 15, 1869, declaring that it shall not change the law so as to allow husband and wife to testify against each other, and Act May 23, 1887, providing that husband or wife shall not be competent or permitted to testify against each other, only render them competent witnesses in each other's favor, and not as against each other.—Sahms v. Brown, 4 Pa. Co. Ct. R. 488.

§ 138. Effect of statutory removal of incompetency on ground of interest.

[a] (U. S. 1873) Act July 2, 1864, which says that there shall be no exclusion of any witness in civil actions, because he is a party to, or interested in, the issue tried, does not make a wife competent to testify in favor of her husband.—Lucas v. Brooks, 85 U. S. (18 Wall.) 436, 21 L. Ed. 779.

[b] (U. S. 1889) The husband of a defendant to a bill to establish complainant's title as heir of a decedent to certain land, which the wife claims under an alleged trust deed, who joins his wife in a cross-bill asking that the alleged trust be enforced for her benefit, and assents to any decree which will place the property under her sole control, and preserve it for her benefit, is a competent witness for her, under Act Ill. Feb. 19, 1867 (Pub. Laws 1867, p. 183), which provides (sections 1 and 5) that no one shall be disqualified as a witness in civil actions by reason of interest, and that a husband may testify for his wife in cases where she would, if unmarried, be plaintiff or defendant. —Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047.

[c] (U. S. 1874) In Wisconsin, the husband is not a competent witness for his wife in civil suits. The exclusion is not based solely on interest, but rests upon principles of public policy, and, as the statute only removes the ground of interest, the ground of public policy still renders him incompetent.—In re Jones, Fed. Cas. No. 7,444 [6 Biss. 68].

[d] (U. S.) A wife is not a competent witness for her husband, in cases where he is interested, under the statutes of the United States or of Vermont.—(1885) Wooster v. Hill, 22 Fed. 830, 23 Blatchf. 72; (1886) Witters v. Sowles (C. C.) 28 Fed. 121.

[e] (Ala. 1881) Since the statute removing, with certain exceptions, all disqualifications based on the ground of interest, in civil cases, a husband and wife are competent witnesses to prove for each other any fact which did not come to their knowledge through their conjugal relation, or any transaction not confidential.— Gordon v. Tweedy, 71 Ala. 202.

[f] (Cal. 1863) Prac. Act, § 422, provided that parties might testify in their own behalf; but this did not permit a husband and wife who were parties to a suit, to testify for or against each other before the amendment to section 395 in 1863.—Dawley v. Ayers, 23 Cal. 108.

[g] (Conn. 1850) Under the late statute of Connecticut, regarding the competency of witnesses, the wife of a party is a competent witness in his behalf.—Merriam v. Hartford & N. H. R. Co., 20 Conn. 354, 52 Am. Dec. 344.

[h] (Fla. 1891) Act Feb. 4, 1874, removing the disqualification because of interest, does not remove the common-law disability of husband and wife to testify in an action in which the other is interested.—Haworth v. Norris, 28 Fla. 763, 10 South. 18.

[i] (Ill. 1871) The rule that a statute removing incompetency of witnesses by reason of interest does not remove it as to husband and wife applies to Act 1867, § 5, defining the cases wherein a husband or wife may testify against each other. *Held* that, in a suit for malicious prosecution, plaintiff's wife is an incompetent witness to prove the want of probable cause, by showing that the alleged slanderous words, upon which the prosecution had been based imputing to defendant adulterous intercourse with the witness before her marriage to plaintiff, were untrue.—Mitchinson v. Cross, 58 Ill. 366.

[j] (Ind. 1871) The statute admitting parties and persons interested in the result of the action to testify has not changed the rule that husband and wife are incompetent witnesses for or against each other. Where the husband is made a party to answer to an assignment by him of a cause of action to plaintiff, and the assignment is not questioned, the wife may testify as to other matters; but where the husband has a pecuniary interest in the result of the action, she cannot be a witness.—Stanley v. Stanton, 36 Ind. 445.

[k] (Me. 1858) Under Rev. St. 1857, c. 82, that "no person shall be excused or excluded from being a witness in any civil suit or proceeding at law or in equity by reason of his interest in the event thereof as party or otherwise," the husband is not rendered a competent witness in a suit in which the wife is a party.—McKeen v. Frost, 46 Me. 239.

[l] (Mass. 1857) St. 1856, c. 188, by which parties are made competent witnesses, does not render the wife of a party a competent witness in his behalf, since the act in terms does not include the husband or wife of a party.— Barber v. Goddard, 75 Mass. (9 Gray) 71; Ray v. Smith, Id. 141.

[ll] (Mass. 1857) St. 1852, c. 312, § 60, abolishing the disqualification of witnesses on the ground of interest in the suit, does not change the common-law rule as to the competency of the wife of one of the parties as a witness.—Barber v. Goddard, 75 Mass. (9 Gray) 71; Ray v. Smith, Id. 141.

[m] (Mass. 1860) Since St. 1852, c. 312, § 60, removing the disqualification of a witness aris-

ing from interest, the wife of a person interested in the result of a suit, but not a party to the record, is a competent witness in his behalf.—Peaslee v. McLoon, 82 Mass. (16 Gray) 488.

[mm] (Mass. 1866) The incompetency of the wife to be a witness against her husband is not affected by the statute provisions removing disqualification by reason of interest, and enabling parties to testify, and these do not affect the exclusion made on grounds of public policy.—Kelly v. Drew, 94 Mass. (12 Allen) 107, 90 Am. Dec. 138.

[n] (Miss. 1858) Under Rev. Code, p. 510, art. 190, declaring parties to the record and in interest to be competent as witnesses, the wife is competent as a witness for the husband.—Lockhart v. Luker, 36 Miss. 68.

[nn] (Miss. 1859) Under Rev. Code, p. 510, art. 190, making parties to the record and parties in interest competent to testify, a wife is not a competent witness for or against her husband in a civil action.—Dunlap v. Hearn, 37 Miss. 471, overruling Lockhart v. Luker, (1858) 36 Miss. 68.

[o] (Mo.) Under Gen. St. c. 144 (Wag. St. p. 1372) § 1, which enacts that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same," husband and wife are competent witnesses against each other.—(1872) Moore v. Moore, 51 Mo. 118; (1873) Berlin v. Berlin, 52 Mo. 151; (1874) Darrier v. Darrier, 58 Mo. 222.

[oo] (Mo. 1873) Under 2 Wag. St. p. 1372, § 1, which provides that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same, as a party or otherwise," the wife is a competent witness when she is joined with her husband in a suit, except as to communications between herself and her husband.—Buck v. Ashbrook, 51 Mo. 539.

[p] (N. H. 1860) Since the passage of Pamph. Laws, cc. 1952, 2090, removing the disqualification of interest in witnesses, a wife is not a competent witness to testify either for or against her husband, who is the party to a civil suit.—Kelley v. Proctor, 41 N. H. 139; Breed v. Gove, Id. 452.

[pp] (N. H. 1866) In a case where the interests of the husband are directly involved, and would be concluded by any verdict therein, though he is not a party, the wife is not a competent witness, although the disqualification arising from interest has been removed by statute.—Young v. Gilman, 46 N. H. 484.

[q] (N. J. 1862) The rule excluding husband and wife from being witnesses for or against each other does not rest solely or mainly on their identity of interest, but on grounds of public policy, hence their competency as witnesses is not affected by the act of 1859 (Nix. Dig. p. 558), since that act was designed solely to remove the disqualification resulting from interest in the event of the suit.—Bird v. Davis, 14 N. J. Eq. (1 McCart.) 467.

[qq] (N. Y. 1851) The provisions of the Code, making persons competent as witnesses with the exception of those who are parties to a suit or for whose immediate benefit it is brought or defended, do not abrogate the rule of the common law which prohibits husband and wife from being witnesses for or against each other; therefore the husband cannot be a witness in a suit in which his wife is a party or in the event of which she has a certain and direct interest.—Hasbrouck v. Vandervoorst, 1 Code R. (N. S.) 81, 6 N. Y. Super. Ct. (4 Sandf.) 596, affirmed (1853) 9 N. Y. (5 Seld.) 153.

[r] (N. Y. 1860) Under the Code, husband and wife are competent witnesses in their own behalf, when coplaintiffs or codefendants; and in like cases they are also competent witnesses for each other.—Marsh v. Potter, 30 Barb. 506.

[rr] (N. Y. 1860) In actions between a husband or wife and a third person, the one is not a competent witness for or against the other.—Marsh v. Potter, 30 Barb. 506.

[s] (N. Y. 1860) Code, § 399, is sufficiently comprehensive to authorize the wife to be a witness in her own behalf, and the husband in his own behalf, whether they are coplaintiffs or codefendants, or whether the action is brought by one against the other. The real parties to actions, when husband and wife, are competent witnesses, either for the adverse parties or for themselves.—Shoemaker v. McKee, 19 How. Prac. 86.

[ss] (N. Y. 1861) Under Code Civ. Proc. § 399, permitting parties to be examined as witnesses in their own behalf, excepting certain instances, not including husband and wife, they may be examined as other witnesses except as to any communications made by one to the other.—Barton v. Gledhill, 12 Abb. Prac. 246.

[t] (N. Y. 1862) The Code does not allow a husband to use his wife as a witness in a case in which she is not a party.—White v. Stafford, 38 Barb. 419.

[tt] (N. C. 1869) Acts 1866, c. 43, § 1, provides that a person shall not be excluded from testifying by reason of interest, and section 2 makes parties competent and compellable to give evidence. *Held*, that the statute changes the common law only in the particulars specified, and did not make a wife a competent witness for her husband.—Rice v. Keith, 63 N. C. 319.

[u] (Pa. 1870) Under P. L. 1859, p. 30, which allows a party excluded on account of interest or policy to testify, a wife may testify for, but not against, her husband.—Yeager v. Weaver, 64 Pa. (14 P. F. Smith) 425.

[uu] (Pa. 1872) The exception in the witness act of 1869 does not include a husband and wife testifying for each other.—Appeal of Dellinger, 71 Pa. (21 P. F. Smith) 425.

[v] (Pa. 1887) The act of March 24, 1877, and the act of 1885, permitting defendants in certain cases to testify, did not render their wives competent.—Commonwealth v. Brink, 5 Lanc. Law Rev. 23.

[vv] (Tenn. 1871) The act of 1870, that "no person shall be incompetent to testify because he or she is a party to the issue," is a restriction and not an enlargement of the act of 1869, implying, by limitation to matters "before marriage," that a wife is not competent to testify for or against her husband when they "sue or are sued jointly." The act of 1869 is an enlargement of the act of 1868, tantamount to that of 1870.—Goodwin v. Nicklin, 53 Tenn. (6 Heisk.) 256.

[w] (Tenn. 1878) Acts 1868, c. 75, and Acts 1870, c. 78 (Rev. Code, § 3818a et seq.), provide, with limited exception, that no person shall be incompetent to testify because he or she is a party to or interested in the cause. Rev. Code, § 3813f, provides that, where the husband and wife sue or are sued jointly, the wife shall not be held incompetent as to the matter in controversy "that transpired while she was a feme sole or before marriage, although the husband may have acquired an interest in the subject-matter in the controversy by the marriage." *Held*, that a husband or wife who is a party to and directly interested in a suit may be a witness, but the husband or wife, although nominally before the court, may be incompetent to testify for or against such party, on the ground of public policy; but he or she is competent to prove facts which came to his or her knowledge from other sources, and not by

means of the marital relation, though they may relate to transactions of the other.—Patton v. Wilson, 70 Tenn. (2 Lea) 101.

[ww] (Tex. 1878) Act May 10, 1871 (Pasch. Dig. art. 6826), removing a party's disabilities from interest, does not render husband and wife competent; for the exclusion of their testimony rested on grounds of public policy, not on interest only.—Gee v. Scott, 48 Tex. 510, 26 Am. Rep. 331.

[x] (Tex.) Prior to the adoption of the Revised Statutes, the enactment making parties competent witnesses did not render the husband and wife competent as witnesses for or against each other.—(1881) Kaufman v. Alexander, 2 Posey, Unrep. Cas. 532; (1882) Conner v. Holland, Id. 405.

[xx] (Vt. 1832) The provision in the act of February 23, 1797, making each party to an action on book account a competent witness therein, does not extend to the wife of either.—Carr v. Cornell, 4 Vt. 116.

[y] (Vt. 1852) The wife is not a competent witness, under the act of 1852, removing the disqualification arising from interest for or against her husband, in any civil suit or proceeding.—Manchester v. Manchester, 24 Vt. 649.

[yy] (Vt. 1860) The rule of the common law, which excludes a wife from testifying for or against her husband, on the ground of public policy, is not affected by Acts 1852, p. 11, No. 13, which only removes the disqualification of a witness arising from interest in the event of the suit as a party or otherwise.—Cram v. Cram, 33 Vt. 15.

[z] (Vt. 1871) Gen. St. c. 36, § 24, removing the incompetency of witnesses on the ground of interest, does not remove that arising from the rule of policy which forbids husbands and wives testifying for or against each other. When the husband is living and a party to the suit (other than merely collaterally, as bail for costs) and the wife is not a party, she is not a competent witness.—Carpenter's Ex'r v. Moore, 43 Vt. 392.

[zz] (W. Va. 1877) Code 1868, c. 130, §§ 22, 23, providing that no person shall be disqualified as a witness by his being a party or interested in the result, and that husband and wife shall not be examined for or against each other, except in an action or suit between husband and wife, make no material change in the competency of husband or wife, except to allow them to be witnesses for or against each other in suits between themselves.—Hill v. Proctor, 10 W. Va. 59; Rose v. Brown, 11 W. Va. 122.

§ 139. Offenses and criminal prosecutions.

[a] (Dak. 1882) The United States statute permitting defendant in a criminal prosecution to testify in his own behalf does not render his wife a competent witness.—United States v. Crow Dog, 3 Dak. 106, 14 N. W. 437.

[b] (Dak. 1882) The provision of Code Civ. Proc. § 446, permitting a wife to testify in her husband's behalf with his consent, made applicable by Code Cr. Proc. to criminal prosecutions, does not render a wife competent in a criminal prosecution by the United States for a crime committed against its laws within the territory of Dakota.—United States v. Crow Dog, 3 Dak. 106, 14 N. W. 437.

[c] (Fla. 1894) Under Acts 1891, c. 4029, § 1, providing that in the trial of civil actions neither husband nor wife shall be excluded as witnesses where either is an interested party to the suit; and Rev. St. § 2863, providing that "the provisions of law relative to the competency of witnesses in civil cases shall obtain also in criminal cases,"—the wife may testify against the husband in a prosecution against him for murder.—Everett v. State, 33 Fla. 661, 15 South. 543.

[d] (Fla. 1894) Under the statutes of this state, a wife may testify for or against her husband, in a criminal case.—Walker v. State, 34 Fla. 167, 16 South. 80, 43 Am. St. Rep. 186.

[e] (Ind. 1879) On a prosecution for arson in burning stacks of wheat and hay, defendant's wife is a competent witness, under Act March 15, 1879, to testify to matters other than communications made between her and defendant during the marriage.—Hutchason v. State, 67 Ind. 449.

[f] (Kan. 1892) A husband, on a criminal prosecution, cannot object to his wife's testifying against him, where she does not object, since while, under Code Cr. Proc. § 215, the court cannot compel the wife to testify against her husband, it may permit her to do so voluntarily.—State v. Geer, 48 Kan. 752, 30 Pac. 236.

[g] (Md. 1881) Acts 1864, c. 109, and 1876, c. 357, have not made a wife competent to testify for her husband on his indictment for murder.—Turpin v. State, 55 Md. 462.

[h] (Mich. 1894) How. Ann. St. § 7543, removing the disabilities of the connubial partners of parties to testify, does not render the wife a competent witness against her husband on a prosecution for murder, without his consent.—People v. Gordon, 100 Mich. 518, 59 N. W. 322.

[i] (Miss. 1879) Under Code 1871, § 760, a wife is not a competent witness against her husband who is on trial for felony, against his consent.—Byrd v. State, 57 Miss. 243, 34 Am. Rep. 440.

[j] (N. H. 1869) Gen. St. c. 209, § 22, permitting husband or wife to testify for each other "in any case" where it does not lead to a violation of marital confidence, means in any civil case; none but civil cases having been mentioned in the preceding sections.—State v. Moulton, 48 N. H. 485.

[k] (N. H. 1871) Under Laws 1869, c. 23, allowing respondents in criminal cases to testify in their own behalf, the wife cannot be a witness on the trial of an indictment against her husband.—State v. Straw, 50 N. H. 460.

[l] (N. Y. 1879) Since proceedings issued under Laws 1861, c. 127, to secure the conviction of a husband as a disorderly person on complaint of his wife, are criminal in their nature, and Code, § 828, permitting a husband or wife to be witnesses against each other in certain cases applies only to civil actions, she is an incompetent witness against him in such a proceeding.—People v. Crandon, 17 Hun, 490.

[m] (Ohio, 1870) Neither Cr. Code, § 139, removing the incompetency of a witness "by reason of his interest in the event, etc.," nor Civ. Code, § 310 et seq., relating to testimony in civil cases, renders a husband or wife a competent witness for or against the other in criminal prosecutions.—Steen v. State, 20 Ohio St. 333.

[n] (Ohio, 1877) A wife's incompetency to testify for her husband in a criminal prosecution is not removed by either of the Codes of Procedure.—Schultz v. State, 32 Ohio St. 276.

[o] (Ohio, 1890) Under Rev. St. p. 7284, providing that a husband and wife shall be competent witnesses to testify on behalf of each other in criminal prosecutions, the wife may testify in a prosecution against her husband, though no third person was present at the time to which such testimony refers.—State v. Payton, 10 Ohio Dec. 826, 21 Wkly. Law Bul. 337.

[p] (Pa. 1878) The Acts of 1872 and 1877, allowing a person charged with crime to testify, at his request, do not make his wife a competent witness for him.—Gibson v. Commonwealth, 87 Pa. 253.

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[q] (Pa. 1887) Under Act May 23, 1887, §§ 1, 2, declaring all persons competent witnesses in any criminal proceeding, except that husband and wife shall not be permitted to testify against each other, a wife is a competent witness in favor of her husband.—Commonwealth v. Brink, 5 Lanc. Law Rev. 23, 4 Pa. Co. Ct. R. 160; Same v. Koch, 5 Pa. Co. Ct. R. 537.

[r] (R. I. 1893) Under Pub. St. c. 214, § 40, providing that the husband or wife of any respondent in a criminal prosecution, offering himself or herself as a witness, shall not be excluded from testifying because he or she is the husband or wife of such respondent, a wife offering herself as a witness must testify as though the relationship did not exist; and such right is not affected by section 36, providing that the husband and wife are competent witnesses in civil cases, provided that neither shall be permitted to give any testimony tending to criminate the other.—State v. Kenyon, 18 R. I. 217, 26 Atl. 199.

[s] (Tenn. 1891) A wife is not a competent witness for her husband in criminal cases; the common-law rule not having been changed by statute.—Owen v. State, 89 Tenn. (5 Pickle) 898, 16 S. W. 114, 115.

[t] (Tex. 1881) Since, under Code, art. 735, if either husband or wife is competent as a witness against the person on trial, the other is also, on the trial of D. for theft of a barrel of sugar, testimony of the wife of W. (who was not being prosecuted) that D. and W. together took the barrel from a car, is admissible.—Daffin v. State, 11 Tex. App. 76.

§ 140. —— Cross-examination.

[a] (Mich. 1890) The fact that a witness for defendant is his wife does not shield her from such cross-examination as could properly be made of any other witness.—People v. Gosch, 82 Mich. 22, 46 N. W. 101.

[b] (Ohio, 1894) Rev. St. § 7284, makes husband and wife competent witnesses for each other in criminal cases, but provides that they shall not testify concerning any communication by one to the other, or act done by either, not made or done in the known presence of a third person, competent as a witness. *Held*, in a murder trial, that where the wife, who has been called as a witness for the husband, testifies, without objection, that, shortly before the homicide, and not in the presence of others, she and her husband had a fuss, she may be asked, on cross-examination, as to what they were fussing about, and what the husband said.—Haberty v. State, 8 Ohio Cir. Ct. R. 262.

[c] (Tex. 1869) Under Code Cr. Proc. art. 648, making the husband and wife competent witnesses for each other in criminal prosecutions, but not against each other, where a wife is examined in her husband's behalf in a criminal prosecution, she cannot be cross-examined, as such cross-examination might defeat the object of the rule.—Griffin v. State, 32 Tex. 164.

[d] (Tex. 1876) Where the wife testifies in her husband's behalf, in a criminal case, she may be cross-examined touching her testimony on a former examination or trial of the same case.—Hampton v. State, 45 Tex. 154.

[e] (Tex. 1889) Under Code Cr. Proc. art. 735, providing that a husband and wife may testify for each other in criminal cases, but that they shall in no case testify against each other, unless for an offense by one against the other, where a wife has testified in a murder trial as to threats of deceased against her husband, the defendant, and as to the latter's whereabouts on the day of the murder, she cannot be cross-examined by the state as to a gun and pistol of defendant, as to which she was not testified in chief.—Johnson v. State, 28 Tex. App. 17, 11 S. W. 667.

§ 141. Testimony by either husband or wife, but not both.

[a] (Ky. 1883) The statute provides that in actions wherein the wife is the meritorious cause, either she or her husband, but not both, can testify. *Held*, that if she testifies in such an action, this precludes him.—Wise v. Foote, 81 Ky. 10.

[b] (Ky. 1888) Under Civ. Code, providing that in actions which might have been brought by or against the wife had she been unmarried, either the husband or wife may testify, but not both, the husband may testify in a suit to set aside a deed to his wife as in fraud of his creditors.—Howard v. Tenney, 87 Ky. 52, 7 S. W. 547.

[c] (Ky. 1891) The provision of Civ. Code, § 606, that, in actions which might have been brought by or against the wife if she had been sole, either the husband or wife may testify, but not both of them, will not operate in a suit to set aside a conveyance to the wife as fraudulent, where the deposition of the wife has been taken on behalf of plaintiff, to render incompetent the evidence of the husband on behalf of defendants.—Truitt v. Curd, 13 Ky. Law Rep. 118, 16 S. W. 364.

[d] (Ky. 1892) In an action by a wife to set aside a sale of land under an execution issued against her husband, there is no error in admitting the wife's testimony as to her purchase, ownership, and possession of the land, her husband not testifying.—Raison's Adm'x v. Williams, 13 Ky. Law Rep. 656, 18 S. W. 8.

[e] (Ky. 1892) In an action by the husband and wife as joint owners of land for damages occasioned by the excavations of an adjacent owner, only one of them is entitled to testify, Civ. Code, § 606, providing that in such actions "either, but not both, of them may testify."—City of Covington v. Geyler, 93 Ky. 275, 19 S. W. 741.

[f] (Ky. 1895) In an action against husband and wife, where both cannot testify, the husband should be allowed to withdraw his wife's deposition and to testify.—Westview Sav. Bank & Building Co. v. Zooks, 17 Ky. Law Rep. 334, 30 S. W. 1016.

(c) INTEREST OR JOINDER AS PARTY.

INTEREST AS AFFECTING COMPETENCY IN GENERAL, § 142.
INTEREST OR JOINDER AS GROUND FOR ADMISSION OF TESTIMONY IN GENERAL, § 143.
TESTIMONY OF WIFE IN GENERAL, § 144.
TESTIMONY OF HUSBAND IN GENERAL, § 145.
WANT OF INTEREST ON PART OF WIFE, § 146.
SEPARATE INTERESTS OF HUSBAND AND WIFE, § 147.
—— TESTIMONY OF HUSBAND IN GENERAL, § 148.
—— SUFFICIENCY OF INTEREST OF HUSBAND, § 149.
—— TESTIMONY OF WIFE IN GENERAL, § 150.
—— INTEREST OF HUSBAND, § 151.
—— ACTIONS FOR TORTS, § 152.

Competency of husband or wife of party or other person interested, see post, §§ 415–424.

Effect of statutes removing incompetency on ground of interest, see ante, § 138.

§ 142. Interest as affecting competency in general.

[a] (Ga. 1887) A witness is not incompetent because he is the husband of a legatee who is one of the plaintiffs, and because he takes a specific legacy under the will; he being no party to the action, and his legacy not being in question.—Watts v. Baker, 78 Ga. 622, 3 S. E. 773.

[b] (Me. 1859) The objections to the admissibility of the husband and wife, as witnesses for each other at common law, rest not solely on the grounds of interest, but on reasons of public policy.—Dwelly v. Dwelly, 46 Me. 377.

[c] (N. Y. 1845) In a suit to which the trustee of a married woman is a party, her husband, although he has no interest in the subject-matter of the trust, cannot be a witness for the trustee.—Burrell v. Bull, 3 Sandf. Ch. 15.

[d] (N. Y. 1853) The rule that husband and wife shall not be witnesses for or against each other rests on grounds of public policy, and the relation that exists between them, entirely independent of any pecuniary interest that the party offered as a witness may have in the event of the suit.—Hasbrouck v. Vandervoort, 9 N. Y. (5 Seld.) 153.

[e] (N. Y. 1853) A husband cannot be a witness for the plaintiff in a suit brought by his wife's trustee under a marriage settlement against a third party, with reference to the trust property; even though the husband's interest under the settlement be only contingent and remote, and he has released that.—Hasbrouck v. Vandervoort, 9 N. Y. (5 Seld.) 153.

[f] (S. C.) In cases where the interests of husband and wife are either legal or equitable, they are incompetent witnesses for or against each other.—(1848) Footman v. Pendergrass, 2 Strob. Eq. 317; (1849) Mayrant v. Guignard, 3 Strob. Eq. 112.

[g] (Vt. 1884) A husband may testify in an action brought by him as administrator, although his wife is the only heir.—Willey v. Hunter, 57 Vt. 479.

§ 143. Interest or joinder as ground for admission of testimony in general.

[a] (Fla. 1891) Since Act March 7, 1879, which renders married women competent to testify in actions in which their husbands are interested, does not in any manner affect the competency of the husband as a witness, the latter cannot testify in favor of his wife in an action by both to set aside a deed alleged to have been obtained from them by the fraud of the grantee, so far as the wife's right to a surrender of the deed because of her dower interest is affected; but, so far as the husband's right to a surrender of the deed is concerned, both his wife and himself are competent witnesses.—Haworth v. Norris, 28 Fla. 763, 10 South. 18.

[b] (Ind. 1868) A husband and wife jointly sued or suing may each testify in his or her own behalf only.—Albaugh v. James, 29 Ind. 398; Lowe v. Hughes, Id. 399; Crane v. Buchanan, Id. 570.

[c] (Ind. 1870) In an action against husband and wife, for slanderous words spoken by the wife, the husband and wife are competent witnesses in their own behalf.—Mousler v. Harding, 33 Ind. 176, 5 Am. Rep. 195.

[d] (Ind. 1883) In an action by a husband and wife to enjoin the sale of land claimed by them by the entireties, on an execution against the husband, each of the plaintiffs is a competent witness.—Sedgwick v. Tucker, 90 Ind. 271.

[e] (Mo. 1872) Under Wag. St. p. 1373, § 5, a substantial party to a cause should not be excluded from testifying in his own favor, because the wife or husband is also a party and has rights to be protected.—Fugate v. Pierce, 49 Mo. 441.

[f] (Mo. 1889) In an action for an injury to real property of which plaintiffs (husband and wife) are seised in entirety, both have such an interest therein as to be competent witnesses.—Edmondson v. City of Moberly, 98 Mo. 523, 11 S. W. 990.

[g] (N. Y. 1862) By the amendment of 1860 to Code Civ. Proc. § 399, a husband and wife are competent witnesses for or against each other in all cases where they are parties to the action.—Matteson v. New York Cent. R. Co., 62 Barb. 364.

[h] (Tenn. 1879) Where husband and wife are parties to a suit, either may testify, as if the marital relation did not exist between them, except as to facts which have come to their knowledge by reason of the mutual relation.—Orr v. Cox, 71 Tenn. (3 Lea) 617.

[i] (Tex. 1879) The rule that a husband and wife cannot testify for or against each other does not preclude each from testifying in their own behalf in an action against them in which both have a real interest.—Cairrell v. Higgs, 1 Posey, Unrep. Cas. 56.

[j] (Tex. 1881) Where husband and wife are jointly made parties in regard to subject-matters in which they have a joint interest, they are competent witnesses.—Cameron v. Fay, 55 Tex. 58.

[k] (Wis. 1885) In an action brought by a father, as administrator, to recover, for the benefit of himself and his wife, damages for the death of their child caused by negligence, both are competent witnesses.—Strong v. City of Stevens Point, 62 Wis. 255, 22 N. W. 425.

§ 144. Testimony of wife in general.

[a] (Ill. 1895) In an action against husband and wife on a joint note the wife is a competent witness in her own behalf.—Kelly v. Hale, 59 Ill. App. 568.

[b] (Iowa, 1862) Under the statutes, a wife cannot testify for her husband, unless he has waived the statute prohibition; the fact that she is a party with her husband does not render her a competent witness, where she would not be competent if he were sued alone.—Russ v. The War Eagle, 14 Iowa, 363.

[c] (Mo. 1874) Under Wag. St. pp. 1372, 1373, § 5, relative to the competency of witnesses, a wife is a competent witness when she is a substantial party to the action.—Harriman v. Stowe, 57 Mo. 93.

[d] (Mo. 1876) In a proceeding by husband and wife to enjoin a sale under a deed of trust given on land of the wife, and to set aside the deed as being procured by fraud, the testimony of the wife is admissible as being the chief party in interest.—Quade v. Fisher, 63 Mo. 325.

[e] (Ohio, 1859) Where a wife is properly joined with her husband as a party in an action, she is as competent a witness as any other party, notwithstanding her marital relation.—Keith v. New York Cent. R. Co., 2 Ohio Dec. 125, 1 West. Law Month. 451.

[f] (Vt. 1845) If the husband and wife are both parties to an action on book account, the wife is a competent witness on the trial before the auditor.—Andrus v. Foster, 17 Vt. 556.

§ 145. Testimony of husband in general.

[a] (Del. 1891) A husband is a competent witness in an action against his wife for labor alleged to have been performed for her at his instance, under the statute making it lawful for husband and wife to testify in all civil actions in which either or both are or may be parties.—Nichols v. Vinson, 9 Houst. 274, 32 Atl. 225.

[b] (Ind. 1877) Although a husband's testimony may incidentally affect interests of his wife, yet, if he is the party primarily and principally liable, he is competent as a witness.—Wood v. Bibbins, 58 Ind. 392.

[c] (Ind. 1877) Where husband and wife are sued jointly on a note and mortgage on the wife's separate lands, and each files a separate

answer, under which issues are joined, the husband is a competent witness in his own behalf, although his evidence may inure to the benefit of his wife.—Haskit v. Elliott, 58 Ind. 493.

[d] (Ind. 1880) The fact that the wife has an interest and is coplaintiff with the husband in a suit to recover land does not render him incompetent as a witness in his own behalf, where he also has a substantial interest.—Clouse v. Elliott, 71 Ind. 302.

[e] (Kan. 1889) As the husband and wife are jointly interested in an appeal by both from an award in condemnation proceedings of part of the homestead, owned by the wife, but occupied by both as a residence, the husband is a competent witness on the trial of the appeal, under Code Civ. Proc. § 323, authorizing the husband and wife to testify when they are joint parties, and have a joint interest in the action.—Chicago, K. & W. R. Co. v. Anderson, 42 Kan. 297, 21 Pac. 1059.

[f] (La. 1882) In a suit to evict the wife from property transferred to her by her husband, in satisfaction of her rights against him, the latter may be a witness in his own interest as warrantor.—Shantz v. Stoll, 34 La. Ann. 1237.

[g] (Mo. 1879) In an action by a husband and wife to set aside a deed of trust on her land, the fact that his testimony will necessarily affect her interest does not disqualify him as a witness.—Steffen v. Bauer, 70 Mo. 399.

[h] (Mo. 1885) When a husband and wife sue jointly a railroad company for their son's death, they being equally interested in the judgment, the husband is a competent witness.—Bell v. Hannibal & St. J. R. Co., 86 Mo. 599.

[i] (N. Y. 1859) In an action brought by husband and wife to cancel a mortgage executed by them and to restrain the foreclosure of the mortgage, the husband offered himself as a witness to prove usury in the consideration. *Held*, that the husband was a competent witness on his own behalf, notwithstanding the wife's interest in the event of the suit by reason of her inchoate right of dower in the mortgaged premises.—Babbott v. Thomas, 31 Barb. 277.

[j] (N. Y. 1867) Where the husband has a direct pecuniary interest in the result, he is a competent witness in his own behalf, in an action brought by himself and wife.—Maverick v. Eighth Ave. R. Co., 36 N. Y. 378.

§ 146. Want of interest on part of wife.

[a] (U. S. 1879) Where a suit was brought against husband and wife for an abatement in the purchase price of real estate, on the ground of an alleged deficiency in the quantity of land sold, the wife not being a necessary party defendant, *held*, that the husband was competent to testify in favor of any interest of his wife, but not against such interest.—Green v. Taylor, Fed. Cas. No. 5,761 [3 Hughes, 400].

[b] (Ind. 1863) The issue in the case was claimed to have involved the interest of the wife of A. in the subject-matter of the suit as lessee. Defendants had set up a superior outstanding title in the wife as trustee for A. This was denied by plaintiffs. A. and wife were made parties defendant, and failed to answer. *Held*, that A.'s wife had no interest in the suit which would prevent A. from testifying.—Meni v. Rathbone, 21 Ind. 454.

[c] (Ind. 1866) When a complaint upon a mechanic's lien alleges a joint contract with husband and wife, but does not show that the wife has any separate interest in the property, no cause of action is shown against the wife, and hence the husband is a competent witness in his own behalf.—Howell v. Zerbee, 26 Ind. 214.

[d] (Ind. 1867) Where a complaint shows the cause of action to be wholly in the husband, he is a competent witness in his own behalf, although the wife may be joined as a plaintiff.—Lockwood v. Joab, 27 Ind. 423.

[e] (La. 1875) Where, on seizure of a married woman's property on execution, a third person intervenes, claiming the same as between such third opponent and plaintiff, the husband was a competent witness; the wife not being a contestant in that controversy.—Schmidt v. Williston, 27 La. Ann. 315.

[f] (Va. 1886) W., who owed S., delivered to S. a note payable to S.'s wife. She gave nothing for the note, and S. was not her agent. The note was never delivered to her, but was lost or destroyed. S. sued W. on the original cause of action. *Held*, that his wife having no interest in the suit, he was a competent witness.—Wright v. Smith, 81 Va. 777.

[g] (Va. 1892) Though a wife is made a party defendant in a suit, where she has no separate interest in the result, the husband is a competent witness in his own behalf.—Ratliff v. Vandikes, 89 Va. 307, 15 S. E. 864.

§ 147. Separate interests of husband and wife.

[a] (Ind. 1881) Where husband and wife sue jointly and have separate interests, each is a competent witness, though the testimony may benefit the other.—Lafayette v. Larson, 73 Ind. 367.

[b] (La. 1889) Where an insolvent debtor fails to put on his schedule property standing in the name of his wife, and the creditors require, by opposition, that said property be placed thereon, the husband is a competent witness in his own interest, as to his good faith in framing his schedule, and the wife is a competent witness in favor of her separate interest.—Cosgrove v. His Creditors, 41 La. Ann. 274, 6 South. 585.

[c] (N. Y. 1887) In an action by a husband to compel the transfer from his divorced wife of a policy of insurance, on the ground that it had been assigned to her as security for a loan which had been paid, testimony as to a conversation relating to the policy between plaintiff and defendant after its transfer to defendant was permissible in view of the rights of property conferred on married women by the statutes.—Simmons v. Henry, 12 Civ. Proc. R. 204.

[d] (Va. 1888) In a suit against a husband and wife to subject the wife's separate estate to the payment of their joint note, neither the husband nor wife is a competent witness, though no relief is sought against the husband.—Jones v. Degge, 84 Va. 685, 5 S. E. 799.

§ 148. —— Testimony of husband in general.

[a] A husband cannot be a witness either for or against his wife, in a suit concerning the wife's separate estate.
—(Ark. 1878) Berlin v. Cantrell, 33 Ark. 611;
(Ind. 1863) Palmer v. Henderson, 20 Ind. 297;
(Md. 1851) Williamson v. Morton, 2 Md. Ch. 94; (1853) Miller v. Williamson, 5 Md. 219;
(N. J. 1865) Marshman v. Conklin, 17 N. J. Eq. (2 C. E. Green) 282; (1866) Cramer v. Redford, 17 N. J. Eq. (2 C. E. Green) 367, 90 Am. Dec. 594; (1866) Galway v. Fullerton, 17 N. J. Eq. (2 C. E. Green) 389;
(N. Y. 1835) Warne v. Dyett, 2 Edw. Ch. 497.

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[b] The husband is a competent witness for the wife, in her action under the civil damage law for damages from his intoxication.
—(Ill. 1876) Davenport v. Ryan, 81 Ill. 218; (1878) Noy v. Creed, 1 Ill. App. 557;
(Vt. 1877) Snow v. Carpenter, 49 Vt. 426.

CONTRA, see
(Ind. 1876) Jackson v. Reeves, 53 Ind. 231.

[c] (Ala. 1848) Where property is levied on as belonging to the husband, in a controversy by his wife in which she claims it as her separate property, the husband is an incompetent witness for her.—Hodges v. Branch Bank at Montgomery, 13 Ala. 455.

[d] (Ala. 1856) The rule which renders husband and wife, unless in a few excepted cases, incompetent to testify for or against each other, has its foundation, not only in the identity of their legal rights, but in a wise public policy; and there is nothing in any of the statutes of this state, securing to married women their separate estates, which requires that an exception should be made of cases in which the husband is called on to testify to his acts in the capacity of trustee for his wife.—Wilson v. Sheppard, 28 Ala. 623.

[e] (Ala. 1870) The husband is a competent witness for his wife to prove what disposition he has made of money belonging to her separate estate.—Robison v. Robison, 44 Ala. 227.

[f] (Ala. 1884) In an action by the wife on a note payable to her husband he may testify that it belongs to her.—Grantham v. Payne, 77 Ala. 584.

[g] (Ark. 1896) Where a wife claims the property in attachment against the husband, the husband is not competent to testify against the wife.—George Taylor Commission Co. v. Bell, 62 Ark. 26, 34 S. W. 80.

[h] (Colo. 1882) Gen. Laws, c. 104, explicitly permits a husband to testify in a cause where the separate property of his wife is concerned.—Hanna v. Barker, 6 Colo. 303.

[i] (D. C. 1886) In an action against the wife alone on a contract relating to her separate estate, her husband cannot testify for or against her; Rev. St. §§ 876, 877, having no application to such a case.—Holtzman v. Wagner, 5 Mackey, 15.

[j] (Fla. 1887) Where a married woman, by her next friend, files a bill against her husband, and against S., a judgment creditor of her husband, seeking to restrain the latter from selling certain property levied on by him to enforce his judgment, claimed to be her separate property, her husband is not a competent witness for the wife to prove that the property so levied on is his wife's separate property.—Storrs v. Storrs, 23 Fla. 274, 2 South. 368.

[k] (Ga. 1875) The husband is a competent witness for the wife to support her claim to property in a civil suit.—Porter v. Allen, 54 Ga. 623.

[l] (Ill. 1874) The husband is a competent witness in behalf of the wife in an action by her to enforce a vendor's lien for the purchase money due her on the sale of her separate estate.—Wing v. Goodman, 75 Ill. 159.

[m] (Ill. 1884) Under Rev. St. c. 51, § 5, expressly providing that a husband or wife shall not testify for each other except in actions involving her separate property, the husband was a competent witness in trover by the wife for property claimed by her as her separate estate.—Stout v. Ellison, 15 Ill. App. (15 Bradw.) 222.

[n] (Ill. 1889) Under Rev. St. c. 51, § 5, which declares that a husband shall be a competent witness where the litigation concerns the separate property of his wife, he is a competent witness, though his wife's title is not admitted.—J. Obermann Brewing Co. v. Ohlerking, 33 Ill. App. 356.

[o] (Iowa, 1891) On the trial of a wife's claim against an insolvent husband, the husband may be examined as to the details of the transaction, to see if it in fact constituted a borrowing of money; and it is competent for him to explain the reason for antedating the notes given for such debt.—Rea v. Jaffray & Co., 82 Iowa, 231, 48 N. W. 78.

[p] (Kan. 1890) A husband is a competent witness in an action brought by his wife as an executrix of the estate of a deceased person; Code, § 323, prohibiting a husband or wife from testifying for or against each other, notwithstanding.—Van Fleet v. Stout, 44 Kan. 523, 24 Pac. 960.

[q] (Mich. 1891) How. Ann. St. § 7546, provides that a husband shall not be examined as a witness for or against his wife without her consent, except, inter alia, where the wife is party to a suit in which title to the separate property of the husband or title to property derived through him is the subject-matter in controversy in opposition to the claim or interest of the wife. *Held*, that the husband cannot testify against the wife in an action by creditors to set aside an alleged fraudulent conveyance by him to her, as their interests are identical.—Blanchard v. Moors, 85 Mich. 380, 48 N. W. 542.

[r] (Mo. 1894) A husband is a competent witness in an action brought by himself and his wife for injuries to real estate owned by the latter.—Landy v. Kansas City, 58 Mo. App. 141.

[s] (Pa. 1881) In a contest between a wife and her husband's creditors, the husband's testimony, tending to prove the wife's separate ownership of property claimed by the creditors as the husband's, is admissible.—Appeal of Wagner, 3 Walk. 130.

[t] (Pa. 1893) On the trial of a claim by a wife to goods levied on by execution against the husband, the latter is a competent witness for claimant.—Evans v. Evans, 155 Pa. 572, 26 Atl. 755.

[u] (Tex. 1881) A husband is a competent witness in a suit by him to recover the possession, or for the conversion, of the separate property of his wife.—Turnley v. Texas Banking & Ins. Co., 54 Tex. 451.

[v] (Vt. 1858) In an action of book account in favor of a husband and wife, to recover a debt due the latter before coverture, the husband is a competent witness.—Perry v. Whitney, 30 Vt. 390.

§ 149. —— Sufficiency of interest of husband.

[a] (Ind. 1863) Where the husband and wife are both parties to an action, but the subject-matter in controversy is claimed by the wife, and, under the issues in the cause, the husband discloses no such interest as would render him a competent witness in his own behalf, his testimony ought not to be admitted.—Hollowell v. Simonson, 21 Ind. 398.

[b] (Ind. 1866) In a suit by husband and wife to recover the rent of lands belonging to the wife, defendant testified, in his own behalf, to a contract of renting made with the husband, with the wife's consent. The wife then offered her husband as a witness to contradict defendant's testimony. *Held*, that he was not a competent witness; the evidence being offered on a matter in which the husband had no interest.—Jones v. Bassett, 27 Ind. 58.

[c] (Ind. 1873) Where, in a lease executed by a husband and wife, it is stipulated that the rent is payable to the wife, and the premises are to be surrendered to her, an action for the

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rent brought in their joint names concerns only her separate estate, and the husband has no interest in the action except that he would be liable for costs if they could not be made out of her property, and therefore the husband is not a competent witness in such action.—Woodward v. Lindley, 43 Ind. 333.

[d] (Ind. 1878) In a joint action by a husband and his wife to foreclose a mortgage executed for their use, to indemnify the mortgagee against loss by reason of another mortgage which was a lien on other land conveyed to plaintiff by the mortgagor, the husband is a competent witness in his own behalf, although the deed from the mortgagor was made to the wife alone.—Scarry v. Eldridge, 63 Ind. 44.

[e] (La. 1886) One cannot testify in a suit wherein his wife has an interest and he no separate interest.—Beltran v. Gauthreaux, 38 La. Ann. 106.

[f] (Mo. 1875) In ejectment for land of which the wife is not the separate owner, the husband is a substantial party, and may testify, so far as his own interests are concerned.—Cooper v. Ord, 60 Mo. 420.

[g] (Mo. 1877) A husband is not a competent witness in a suit to which his wife is a party, unless he has substantial interest in the controversy, or acted as her agent in the transaction which is the foundation of the suit.—Haerle v. Kreihn, 65 Mo. 202.

[h] (Mo. 1882) In a suit by husband and wife to set aside a deed executed by the wife's father, under whom she claims as heir, the husband has no interest in the land so as to be a competent witness.—Wood v. Broadley, 76 Mo. 23, 43 Am. Rep. 754.

[i] (Mo. 1890) In an action against the daughters of a decedent, whose husbands are joined with them, to restrain an action brought by them to recover land belonging to their late father, the husbands are competent witnesses for defendants, being substantial, and not merely nominal, parties by virtue of their right of possession of lands inherited by their wives.—Brownlee v. Fenwick, 103 Mo. 420, 15 S. W. 611.

[j] (Mo. 1890) In an action against the daughters of a decedent, whose husbands are joined with them, to restrain an action brought by them to recover land belonging to their late father, the husband of a deceased daughter, whose children are parties to the suit though he is not, is a competent witness.—Brownlee v. Fenwick, 103 Mo. 420, 15 S. W. 611.

[k] (Mo. 1891) On the foreclosure of a deed of trust, the land was sold to the heirs of the deceased cestui que trust, one of whom was the trustee's wife. *Held*, that such trustee was a competent witness for the heirs, in an action by them to which he was a party, brought to redeem the land from a sale on foreclosure of a special tax bill, since a husband is a competent witness in litigation involving the title to his wife's general property to which he is made a party.—McKee v. Spiro, 107 Mo. 452, 17 S. W. 1013.

[l] (N. Y. 1859) In an action by a husband and wife to cancel a mortgage executed by them and to restrain its foreclosure, the husband is a competent witness in his own behalf, notwithstanding the wife's interest in the event of the suit by reason of her inchoate right of dower in the mortgaged premises.—Babbott v. Thomas, 31 Barb. 277.

[m] (Vt. 1893) Under Act No. 45, Acts 1886, providing that a wife may sue alone on actions arising out of her separate property, and that a gift from a husband is not her separate property, a husband is properly made a party in a suit by a wife for trespass to property which is a gift to her from him, so as to render him a competent witness under Act No. 140, Acts 1884, making husband and wife competent witnesses when properly joined as parties to an action.—Minard v. Currier, 67 Vt. 489, 32 Atl. 472.

[n] (Va. 1886) Where the husband is joined as a nominal codefendant in a suit against his wife on a matter arising out of her contract, she is a competent witness in her own behalf, but he is not a competent witness for her.—Farley v. Tillar, 81 Va. 275.

[o] (Wis. 1863) Where an objection that a husband is improperly joined in an action that concerns the separate property of the wife is waived, the husband is a competent witness on behalf of plaintiffs.—Hackett v. Bonnell, 16 Wis. 471.

[p] (Wis. 1882) Where a husband and wife join in an action affecting only the wife's separate property, the husband is a competent witness for his wife, under Rev. St. § 4068, providing that no person shall be disqualified as a witness "by reason of his interest" as a party, and that "every party" shall be a competent witness, except as otherwise provided.—Snell v. Bray, 56 Wis. 156, 14 N. W. 14.

§ 150. —— Testimony of wife in general.

[a] (U. S. 1889) Under Rev. St. § 877 [U. S. Comp. St. 1901, p. 667], providing that on the trial of any cause in the District of Columbia the wife shall not be competent to give evidence for or against her husband in any criminal proceeding, in an action by a wife against the heirs of her deceased husband to establish her claim as a creditor of his estate on account of the alleged investment by him of her property in his own name, the wife is a competent witness.—Stickney v. Stickney, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136.

[b] (Ark. 1878) Where a wife interpleads in an action of replevin against the husband to recover property, claiming the property as her separate estate, she is a competent witness in her own behalf.—Berlin v. Cantrell, 33 Ark. 611.

[c] (Cal. 1885) The wife is a competent witness in an action by her husband concerning community property.—Moseley v. Heney, 66 Cal. 478, 6 Pac. 134.

[d] (Conn. 1887) A wife may testify against her husband in proceedings before insolvent commissioners in which the wife seeks to establish a claim against his insolvent estate, such commissioners acting as courts of equity as well as courts of law.—Appeal of Spitz, 56 Conn. 184, 14 Atl. 776, 7 Am. St. Rep. 303.

[e] (Fla. 1890) Act Feb. 4, 1874, removed the disqualification of a wife to testify because of being interested in, or a party to, an action, in all cases not falling within its proviso. Act March 7, 1879, provides that married women shall not be excluded as witnesses in civil actions wherein their husbands are parties and allowed to testify. *Held*, that a wife is a competent witness, as to her own interests, in an action not within the proviso of the act of 1874, and which is brought in her own right by herself and husband.—Williams v. Jacksonville, T. & K. W. Ry. Co., 26 Fla. 533, 8 South. 446.

[f] (Ill. 1871) Where a suit is brought by the husband to recover for the loss of the wearing apparel and ornaments of the wife, as she was, at common law, virtually the owner thereof and could only be devested of such ownership by their sale or gift by the husband, she is interested in the property in suit so as to render her a competent witness therein under the exception to section 5 of the act relating to the competency of witnesses, which declares that, where the suit relates to the separate property of the wife, either may be a witness.—Northern Line Packet Co. v. Shearer, 61 Ill. 263.

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[g] (Ill. 1873) Witness Act 1867, § 5, making the husband and wife witnesses for and against each other in litigation concerning the wife's separate property, is not restricted to cases where she is plaintiff or defendant, and where her title is admitted, but is general. Thus, in replevin she is a competent witness to prove the execution of a bill of sale of the property by plaintiff to her, and to the fact and manner of payment by her.—McNail v. Ziegler, 68 Ill. 224.

[h] (Ind. 1863) In a joint suit by a husband and wife to recover the wife's separate property, both the wife and defendant are competent witnesses.—Gee v. Lewis, 20 Ind. 149.

[i] (Ind. 1863) In a suit to set aside a conveyance of real estate to a married woman, on the alleged ground of its having been made with a view to defraud the husband's creditors and without consideration, the husband and wife being joined as defendants, the wife is a competent witness in her own behalf except as to interviews with her husband since marriage, the real estate being her separate property.—Palmer v. Henderson, 20 Ind. 297.

[j] (Ind. 1871) On the trial of a suit by husband and wife to contest a will, the wife being an heir at law of the testator, she is a competent witness in her own behalf.—Call v. Byram, 39 Ind. 499.

[k] (Ind. 1882) The wife of a retired partner suing his former copartner who assumed the firm debts for services rendered by her for the firm is a competent witness.—Powers v. Fletcher, 84 Ind. 154.

[l] (La. 1871) The wife is a competent witness to testify in a suit brought by a creditor of the husband to annul a judgment of separation of property between the husband and wife.—Keller v. Vernon, 23 La. Ann. 164.

[m] (La. 1872) A wife suing for a separation of property is a competent witness in her own behalf.—Meyer v. Smith, 24 La. Ann. 153.

[n] (La. 1893) In an action by a wife to recover land she is a competent witness as to the threats of her husband which induced her to sign the notarial act.—Vicknair v. Trosclair, 45 La. Ann. 373, 12 South. 486.

[o] (Mich. 1884) When the title to the separate property of either husband or wife is in controversy, How. Ann. St. § 7546, permitting either to testify to the facts which lie at the foundation of the ownership of the property as fully as if the marriage relation did not exist, renders admissible the testimony of the wife to prove a promise by her husband, made, not in the presence of a third person, to repay, from the proceeds of certain property of his when he should sell it, money which, in consideration of this promise, she let him have.—Hunt v. Eaton, 55 Mich. 362, 21 N. W. 429.

[p] (Mo. 1877) In a suit by a wife who has united with her husband in a mortgage on her land to secure his debt, brought to compel another creditor of her husband to resort to other security which he holds, in preference to her lands, the wife is a competent witness.—Wilcox v. Todd, 64 Mo. 388.

[q] (N. H. 1862) In a suit by husband and wife on a cause of action which accrued to the wife before marriage, the wife is not a competent witness for plaintiffs.—Smith v. Boston & M. R. R., 44 N. H. 325.

[r] (N. Y. 1862) Where husband and wife are codefendants in a case where their interests are not conflicting, and where they are contracting parties with each other, and might have been antagonistic parties in a suit between themselves, and she is not required to disclose any communication made by one to the other, the wife may be examined as a witness in her own behalf.—Schaffner v. Reuter, 37 Barb. 44.

[s] (Ohio, 1872) In an action by a married woman to establish as against a third party her title to property which she claimed in her own right, plaintiff is a competent witness in her own behalf under Code, § 314, as amended Feb. 16, 1866 (1 Swan & S. 588).—Robinson v. Chadwick, 22 Ohio St. 527.

[t] (Pa. 1871) A wife is a competent witness in her own behalf in replevin for her separate property, which had been sold by her husband.—Musser v. Gardner, 66 Pa. (16 P. F. Smith) 242.

[u] (Vt. 1894) A wife is a competent witness in support of a claim by her against her husband's estate in insolvency, especially where it does not appear that the proceeding will be determinative of the question of his discharge.—Purdy v. Purdy's Estate, 67 Vt. 50, 30 Atl. 695.

[v] (Va. 1880) In a suit to reach the separate estate of a wife for a liability created by her indorsement of her husband's note, her testimony is admissible, notwithstanding the rule of law prohibiting husband and wife from testifying for or against one another.—Frank v. Lilienfeld, 33 Grat. 377.

§ 151. —— Interest of husband.

[a] (Ark. 1881) In suit against husband and wife to foreclose a mortgage on a homestead, she may defend to avoid preclusion of dower, and, so far, may testify for herself, but not in aid of her husband's defense.—Klenk v. Knoble, 37 Ark. 298.

[b] (Conn. 1831) A testator devised to his grandchildren, children of his daughter A., all his estate, real and personal, to be equally divided between them at her decease. The use of such estate he devised for the support of A. and her children during her life; and to carry this provision into effect he appointed B. and A. trustees, who accepted the trust, and took into their possession the estate devised. C. supplied A. and her children with necessaries in sickness, on the credit of this fund; A. being then a feme covert whose husband was a bankrupt, and she and her children having no property except that so devised. On a bill in chancery brought by C., against the trustees, to obtain satisfaction of her claim out of such fund, *held*, that the declarations of A., though a married woman, were admissible to substantiate plaintiff's claim, since the object of the bill was not to charge the husband, but a trust fund in which he had no interest and over which he had no control.—Donalds v. Plumb, 8 Conn. 447.

[c] (D. C. 1888) The act of congress prohibiting husband and wife from testifying for or against each other does not apply where the wife is the substantial party to the action, the husband being joined merely as a formal party, and in such case the wife is a competent witness.—Beale v. Brown, 6 Mackey, 574.

[d] (Ind. 1865) Defendant in an action of replevin offered his wife as a witness to prove that the property in controversy was her separate property. *Held*, that as the wife was not a party to the suit, and the proposed evidence was only admissible to support a plea of property in another, it was evidence for the husband, and the witness was incompetent under the statute.—Harrell v. Hammond's Adm'r, 25 Ind. 104.

[e] (Ind. 1874) In an action against husband and wife, where her property interests as well as those of the husband are involved, she is a competent witness in her own behalf, and her testimony for herself is not to be disregarded because it may incidentally benefit her husband.—Rogers v. Rogers, 46 Ind. 1.

[f] (Ind. 1881) Under 2 Rev. St. 1876, p. 132, § 1, where a married woman, a plaintiff, is the owner in her own right of the cause of action,

and the husband is a nominal plaintiff, the wife is a competent witness.—Farman v. Chamberlain, 74 Ind. 82.

[g] (Kan. 1874) Where a married woman replevies property she may testify in the case, although defendaut may claim that he as an officer seized and now holds the property as the property of her husband, and that he seized the same by virtue of an execution issued against the property of her husband.—Furrow v. Chapin, 13 Kan. 107.

[h] (La. 1893) In a suit for separation of property to which the husband's syndic is made a party, and the creditors intervene, the husband has no interest in the suit, and the wife is a competent witness for her own interest.—Sembre v. Sembre, 45 La. Ann. 117, 11 South. 942.

[i] (Minn. 1883) In an action by a judgment creditor of a husband to subject land conveyed to his wife on a purchase and payment of the price thereof by the husband to the judgment, to the extent of the wife's interest therein, in which the husband is not made a party, the wife is a competent witness for plaintiff, without the consent of the husband, as her testimony is not "for or against her husband."—Leonard v. Green, 30 Minn. 496, 16 N. W. 399.

[j] (Mo. 1894) Under Rev. St. § 8922, relating to the competency of husband and wife as witnesses, a wife, being the real party in interest, is competent for all purposes except as to communications from her husband.—Scrutchfield v. Sauter, 119 Mo. 615, 24 S. W. 137.

[k] (Mo. 1894) A wife is a competent witness to testify respecting her interest in attached property, although her husband may also be benefited by her testimony, under Rev. St. 1889, § 8918, providing that no one shall be disqualified as a witness by being interested as a party or otherwise.—Toovey v. Baxter, 59 Mo. App. 470, 1 Mo. App. Rep'r, 39.

[l] (N. Y. 1864) Under the married women's acts, and the provisions of the Code of Procedure in 1860, a wife may, as a party to an action, testify on her own behalf like any other party, irrespective of the interest of her husband, except that she cannot be required to disclose communications made by one to the other.—Wehrkamp v. Willet, 4 Abb. Dec. 548.

[m] (Pa. 1871) In ejectment by a husband and wife for property belonging to the wife which had been sold at sheriff's sale as the property of her husband, the wife was a competent witness under the act of 1869, allowing a party to be a witness in his own cause; her testimony was not against her husband, as he did not warrant the title of the sheriff's vendee.—Rowley v. McHugh. 66 Pa. (16 P. F. Smith) 269.

[n] (Pa. 1873) Under the act of April 15, 1869, permitting the parties to an action to testify, but declaring that the act shall not alter the law so as to allow husband and wife to testify against each other, the wife of a defendant in an attachment against stock standing in her husband's name cannot testify that it belonged to her.—Boyle v. Haughey, 30 Leg. Int. 424, 5 Leg. Gaz. 406.

[o] (Pa. 1893) In a proceeding by an execution creditor to reach property alleged by the debtor to belong to his wife, and claimed by her as such, the wife is a competent witness as to her ownership, since she is not interested against the husband, within the meaning of Act May 23, 1887, which renders husband and wife incompetent where they offer to testify "against each other."—Norbeck v. Davis, 157 Pa. 399, 27 Atl. 712, 33 Wkly. Notes Cas. 150.

[p] (R. I. 1861) A wife is not a competent witness in her own favor under Rev. St. c. 187, §§ 33-35, in a suit brought by the husband and wife to recover wages earned by the wife before marriage, the husband being a party, and interested in the costs of the suit.—Donnelly v. Smith, 7 R. I. 12.

[q] (Vt. 1859) In an appeal from a decree of the probate court admitting a will to probate, the appellants, who contested the will, were husband and wife, the latter being one of the heirs at law of the testatrix, but the husband was neither an heir at law nor a legatee. *Held*, that the wife was a competent witness for the appellants.—Robinson v. Hutchinson, 31 Vt. 443.

[r] (Va. 1882) A husband has no such interest in a suit brought by himself and wife to recover from an insurance company the amount of a policy on her father's life for her benefit, as to prevent the wife from being a competent witness in her own behalf, the statute prohibiting each from testifying for or against the other, but permitting each to testify in his or her own behalf. In such a suit, the husband incurs no liability for costs.—Hayes v. Virginia Mut. Protection Ass'n, 76 Va. 225.

[s] (Va. 1887) A wife is a competent witness in a court of equity, in a suit brought by her, where her husband is a mere nominal party, and in nowise bound for the costs, to establish her right to a bond, assigned to her by him as her separate estate.—Nicholas v. Austin, 82 Va. 817, 1 S. E. 132.

[t] (Va. 1891) Where a wife and her husband are both parties to an action, but she alone is interested in the result, she is competent as a witness.—Thomas v. Sellman, 87 Va. 683, 13 S. E. 146.

[u] (Wis. 1863) A married woman is a competent witness for a plaintiff who claims as her vendee, in an action against an officer to recover possession of personal property seized under an execution against her husband; for the latter will not be concluded by the judgment in the action.—Lewis v. McDougall, 17 Wis. 517.

§ 152. —— Actions for torts.

[a] In an action by husband and wife for injury to the wife, the husband is a competent witness for plaintiffs.

—(Ill. 1890) City of Rock Island v. Deis, 38 Ill. App. 409;

(La. 1895) Jones v. Texas & P. Ry. Co., 47 La. Ann. 383, 16 South. 937;

(Wis. 1862) Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670.

CONTRA, see

(Mo. 1889) Harrington v. City of Sedalia, 98 Mo. 583, 12 S. W. 342.

[b] (U. S. 1874) Under the act of Congress of July 6, 1862, enacting that "the laws of the state in which the court shall be held shall be the rule of decision as to the competency of witnesses in the courts of the United States," and under the acts of the legislature of Wisconsin, passed in 1863 and 1868, one of which says that "a party to a civil action * * * may be examined as a witness in his or her behalf on the trial; * * * and in case of an action for damages for personal injury to a married woman, this section shall be so construed as to allow such married woman to be a witness on her own behalf, in the same manner as if she was single"; and another of which says that "a party to any civil action * * * may be examined as a witness in his own behalf or in behalf of any other party"—a married woman may in the circuit court for Wisconsin, in an action on the case by her husband and herself, for injuries done to her person, be examined as a witness for the plaintiffs. It is unimportant whose will be the damages—whether the husband's or wife's—if recovered. The competency of the witness must be determined by the statutes.—Northwestern Union Packet Co. v.

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Clough, 87 U. S. (20 Wall.) 528, 22 L. Ed. 406.

[c] (Ark. 1891) In a joint suit for personal injuries by a husband and wife, where no objection is made to the joinder, either plaintiff, being competent as a witness in his or her own behalf, is not rendered incompetent by the fact of marriage to the other.—St. Louis, I. M. & S. Ry. Co. v. Amos, 54 Ark. 159, 15 S. W. 362.

[d] (Ark. 1891) The wife is a competent witness in an action by herself and her husband for personal injuries to her.—Little Rock & Ft. S. Ry. Co. v. Harkey, 15 S. W. 456.

[e] (Dak. 1875) In a suit by husband and wife for a personal injury to the wife, both may testify under Code Civ. Proc. 1867-68, §§ 319, 320, providing that a party may be examined on his own behalf, or in behalf of any other party, though it is also provided by section 320 that neither husband nor wife can be a witness for or against the other, except as to facts in the exclusive knowledge of such husband or wife, in which case but one can testify. —Sanders v. Reister, 1 Dak. 151, 46 N. W. 680.

[f] (Ill. 1874) Since a married woman is authorized to bring suit in her own name for a malicious prosecution as if she were sole, and is entitled to the proceeds of whatever judgment she may recover, as her separate property, free from the control or interference of her husband, her husband is a competent witness to testify in her behalf in a suit by her for a malicious prosecution against her for a criminal offense, under Act Feb. 14, 1867, providing that, where the litigation concerns the separate property of the wife, the husband may testify for or against her.—Anderson v. Friend, 71 Ill. 475.

[g] (Ill. 1875) The husband of a plaintiff, in an action for slanderous words spoken of her, is a competent witness on her behalf.—Hawver v. Hawver, 78 Ill. 412.

[h] (Ind. 1867) A ruling of the trial court rejecting the testimony of a wife in an action by husband and wife against a physician for malpractice in medical treatment of the wife was affirmed by a divided court.—Carnie v. Murphy, 28 Ind. 88.

[i] (Ind. 1872) In an action by husband and wife against a married woman and her husband for slanderous words spoken by the feme covert defendant of the feme covert plaintiff, each of the married women is a competent witness in her own behalf.—Bennifield v. Hypres, 38 Ind. 498.

[j] (Ind. 1872) In an action of slander against a husband and wife for words spoken by the wife, the husband is not competent to testify as a witness to the words spoken by the wife. —Bonham v. Keen, 40 Ind. 197.

[k] (Ind. 1881) Under Act March 11, 1867, § 1, where a husband and wife sue jointly for a personal injury sustained by the latter, the wife is a competent witness.—Farman v. Lauman, 73 Ind. 568.

[l] (La. 1890) A claim for damages for injury to a married woman, being under the régime of the community, is an asset of the community, on which suit must be brought in the husband's name, and the wife is not a competent witness in such suit.—White v. Vicksburg, S. & P. R. Co., 42 La. Ann. 990, 8 South. 475.

[m] (Mass. 1857) Under St. 1855, c. 188, a wife is a competent witness in support of an action brought by her husband and herself jointly, for a personal injury to her.—Snell v. Inhabitants of Westport, 75 Mass. (9 Gray) 321.

[n] (Mo. 1887) In an action for killing a child, the mother, who is one of the coplaintiffs, may testify in their behalf.—Reilly v. Hannibal & St. J. R. Co., 94 Mo. 600, 7 S. W. 407.

[o] (N. Y. 1865) A married woman is a competent witness in her own behalf in an action against her in which her husband is joined, and which is brought for a personal tort committed by her.—Hooper v. Hooper, 43 Barb. 292.

[p] (Ohio, 1877) Where words defamatory of the character of a married woman are published in the presence and hearing of her husband, he is a competent witness to prove the speaking of the words in an action of slander brought by husband and wife.—Duval v. Davey, 32 Ohio St. 604.

[q] (Vt. 1884) In an action by husband and wife for assault and battery on the wife, the husband is a competent witness.—Simkins v. Eddie, 56 Vt. 612.

[r] (Va. 1886) By Acts 1876-77, p. 333, all real and personal estate thereafter acquired by any married woman, whether by gift, grant, purchase, inheritance, devise, or bequest, shall be and continue her separate estate. She may sue and be sued as if she were a feme sole, but her husband must be joined with her. Under Code, c. 172, §§ 21, 22, husband or wife may testify in his or her own behalf, but they cannot testify for or against each other. *Held*, that an action by husband and wife for damages for personal injuries to the wife is not within the act of 1876-77, the damages not being her separate property, and she is not a competent witness.—Norfolk & W. R. Co. v. Prindle, 82 Va. 122.

[s] (Wis. 1880) In an action by husband and wife for injuries to the person of the wife caused by defendant's negligence, the husband is the real party in interest, and may be examined as a witness for plaintiffs, whatever may be the rule as to actions in which he is only a nominal party.—Kaime v. Village of Omro, 49 Wis. 371, 5 N. W. 838.

[t] (Wis. 1884) In an action by husband and wife for a personal injury to the wife, the husband, being a party to the record, is a competent witness.—Hoverson v. Noker, 60 Wis. 511, 19 N. W. 382, 50 Am. Rep. 381.

(d) AGENCY OF HUSBAND OR WIFE FOR THE OTHER.

IN GENERAL, § 153.
EXISTENCE OF AGENCY, § 154.
NATURE OF ACTION OR ISSUE AND SCOPE OF EVIDENCE, § 155.
KNOWLEDGE OF TRANSACTION, § 156.

Effect of death of husband, see post, § 182 [f, q].

§ 153. In general.

[a] (Ark. 1871) A wife is competent, under the laws of Arkansas, to testify, on behalf of her husband, in an action on a contract which she made as his agent.—Magness v. Walker, 26 Ark. 470.

[b] (Ark. 1879) A husband or wife cannot testify for or against one another in civil cases even when either one acts as agent for the other.—Watkins v. Turner, 34 Ark. 663.

[c] (D. C. 1894) In an action on a building contract, the fact that the wife of one of the parties was selected as the agent of the contracting parties does not render her a competent witness for her husband.—Haller v. Clark, 21 D. C. 128.

[d] (Ill. 1883) The statute which permits a wife to testify concerning business transactions conducted by her as her husband's agent places her on the footing of a feme sole, so far as respects her competency to testify concerning such transactions.—Poppers v. Miller, 14 Ill. App. (14 Bradw.) 87.

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[e] (Ind. 1871) A husband acting as agent for the wife in the transaction of her business is not a competent witness for the wife, to prove the transactions of such agency.—Kemp v. Dickson, 1 Wils. 42.

[f] (Ind. 1879) In an action by a wife to vacate a purchase made without her knowledge or consent on her husband's bid at a foreclosure sale as if her agent, he is not, under 2 Rev. St. p. 132, a competent witness in her behalf.—Case v. Colter, 66 Ind. 336.

[g] (Iowa, 1890) Supplementary proceedings were brought for the discovery of assets of a judgment debtor which was a corporation of which A. was the sole incorporator, it being alleged that A. and M., his wife, had the corporate property and were concealing it. A., on the examination, detailed the incorporation and business of the judgment debtor, and the transfer of its property, first to a partnership and then to a new corporation. To a question as to when and how this transfer was made, M. objected to witness giving any testimony against her, for the reason that, being her husband, he was not competent to testify against her. The only statement referring to M. in his answer was that he was her agent, and that she had some of the notes of the companies, taken in the course of business for money lent. On the cross-examination, M.'s attorneys inquired as to the transactions by witness as agent for M. with the companies, and as to the amounts advanced by him as her agent to these companies. In this connection, the books of the judgment debtor and several of its notes to M. were called out and introduced, and, upon cross-examination as to this new matter, a statement was elicited on which it was claimed by the judgment creditor that there was no consideration for the notes. On the examination of M., she disclaimed any personal knowledge of the transactions of A. as her agent with the companies, uniformly answering, "Ask my agent." *Held*, that the record did not show that A. was permitted to testify against his wife, over her objection.—Estey v. Fuller Implement Co., 82 Iowa, 678, 46 N. W. 1098, 47 N. W. 1025.

[h] (Mass. 1866) Under St. 1865, c. 207, § 2, plaintiff's wife is a competent witness to prove her conversations with defendant and his agent in her husband's absence, when the contract or cause of action at issue was made or transacted with her.—Burke v. Savage, 95 Mass. (13 Allen) 408.

[i] (Mich. 1886) In a suit by a wife against the assignor of a mortgage which had been purchased by her through her husband, defendant set up a settlement of the demand with the husband, who he alleged was her general agent, and offered the husband as a witness for that purpose. *Held*, that the husband was incompetent as a witness without the wife's consent, under How. Ann. St. § 7546.—Eaton v. Knowles, 61 Mich. 625, 28 N. W. 740.

[j] (Mo.) To render a married woman competent as a witness when her husband is a party, it must appear that the matter as to which she is called to testify was a business transaction conducted by her as agent of her husband.—(1868) Hardy v. Matthews, 42 Mo. 406; (1882) Wheeler & Wilson Mfg. Co. v. Tinsley, 75 Mo. 458.

[k] (Mo. 1873) The husband may be a witness for the wife concerning matters wherein he acted as her agent.—Chesley v. Chesley, 54 Mo. 347.

[l] (Mo. 1876) In a proceeding by husband and wife to enjoin a sale under a deed of trust given on land of the wife and to set aside the deed as being procured by fraud, the testimony of the husband is admissible, as being the wife's agent.—Quade v. Fisher, 63 Mo. 325.

[m] (Mo. 1879) A wife is a competent witness for her husband as to matters wherein she acted as his agent.—Degenhart v. Schmidt, 7 Mo. App. 117.

[n] (Mo. 1890) The admission of testimony of a husband in support of the title of his wife to the goods for which she sues in replevin, where it is not shown that he was her agent in the purchase of the goods or in any transaction connected with her acquisition of them, so as to make him a competent witness on her behalf, under Rev. St. 1879, § 4014, is error.—Reno v. Kingsbury, 39 Mo. App. 240.

[o] (Mo. 1894) After a husband has testified to his wife's agency for him, she is a competent witness, under the statute, as to anything done by her in the discharge of such agency.—College Hill Press Brick Works v. Thompson, 59 Mo. App. 98.

[p] (Mo. 1895) It is competent for a wife, acting as the agent of her husband, engaged in selling goods and keeping the books in his store, to detail such transactions as she may have had while so engaged.—Harding v. Brown, 1 Mo. App. Rep'r, 13.

[q] (N. H. 1872) Where a wife has acted as agent for the husband, in a matter requiring no special confidence, and where none is conferred, and where any other person could have acted as well, she may state the facts learned in the course of the agency.—Clements v. Marston, 52 N. H. 31.

[r] (N. J. 1868) Under the statutes, a complainant in forcible entry and detainer against a husband and wife is incompetent as a witness.—Yetman v. Dey, 33 N. J. Law (4 Vroom) 32.

[s] (Vt. 1859) A wife is not a competent witness in a case in which her husband is either plaintiff or defendant (she herself not being a party), even in reference to a transaction where she acted as agent of her husband, and at which no one but her and the other party was present.—Seargent v. Seward, 31 Vt. 509.

[t] (Vt. 1888) A married woman is a competent witness for her husband, to testify to the terms of a contract, where the parties had no personal interview in making it, and she acted as the agent both of defendant, in carrying his proposition to her husband, and of her husband, in carrying his acceptance to defendant.—Martin v. Hurlburt, 60 Vt. 364, 14 Atl. 649.

[u] (Wis. 1862) In all cases where the wife acts as the agent of her husband, she is a competent witness, especially since the enactment of Laws 1858, c. 134, in his behalf, in relation to all business transacted by her for him, within the scope of her agency.—Birdsall v. Dunn, 16 Wis. 235.

[v] (Wis. 1863) In an action by a married woman on a contract made for her by her husband, the husband is a competent witness as to the terms of the contract.—Hobby v. Wisconsin Bank, 17 Wis. 167.

[w] (Wis. 1878) A wife who has acted as her husband's agent is a competent witness for him to prove any act done by her, or fact occurring, within the scope of such agency.—Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567.

[x] (Wis. 1878) Certain questions were put to the defendant's wife, offered as a witness for him; her agency had not been otherwise shown, and the answers to the questions could not have any tendency to show it. *Held*, that there was no error in rejecting the evidence.—Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567.

[y] (Wis. 1886) A husband, in supplementary proceedings against his wife, is not a competent witness for or against her, except as to matters transacted by him as her agent.—Blabon v. Gilchrist, 67 Wis. 38, 29 N. W. 220.

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§ 154. Existence of agency.

[a] A husband or wife is competent to show his or her authority to act as agent of the other.

—(Kan. 1887) Wichita & W. R. Co. v. Kuhn, 16 Pac. 75; (1888) Paulsen v. Hall, 39 Kan. 365, 18 Pac. 225;

(Mass. 1866) Burke v. Savage, 95 Mass. (13 Allen) 408;

(Mo. 1893) Leete v. State Bank, 115 Mo. 184, 21 S. W. 788, disapproving Williams' Adm'r v. Williams (1878) 67 Mo. 661, and Wheeler & Wilson Mfg. Co. v. Tinsley (1882) 75 Mo. 458; (1894) College Hill Press-Brick Works v. Thompson, 59 Mo. App. 98;

(N. Y. 1861) Owen v. Cawley, 36 Barb. 52, 13 Abb. Prac. 13, 22 How. Prac. 10;

(Wis. 1895) Roberts v. Northwestern Nat. Ins. Co., 90 Wis. 210, 62 N. W. 1048.

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(Vt. 1891) Sanborn v. Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

[b] Where chattels are left with the wife during the husband's absence, with instructions not to allow them to be taken away, this constitutes an agency on her part to act for him under his express direction; and as to it she is competent to testify for him.

—(Ill. 1890) Sargeant v. Marshall, 38 Ill. App. 642;

(Vt. 1864) Town v. Lamphire, 37 Vt. 52.

[c] (Ill. 1876) Sending the wife to collect payment on a sale made by the husband is not a transaction had and conducted by such married woman as the agent of her husband, which, under Rev. St. 1874, p. 489, § 5, permits her to testify for him.—Robertson v. Brost, 83 Ill. 116.

[d] (Ill. 1877) In an action by a wife to recover upon an alleged contract to board certain relatives of the defendant's intestate, testimony of the husband that he went with her when she made the bargain, and afterwards "about the matter of pay," *held* not to establish an agency sufficient to let in his testimony in regard to admissions of the deceased, under Rev. St. p. 489, c. 51.—Waggonseller v. Rexford, 2 Ill. App. (2 Bradw.) 455.

[e] (Ill. 1887) In an action by an innkeeper on an account for board, where plaintiff's wife testifies that he was absent most of the time, and that she conducted the hotel in his absence, this is sufficient proof of her agency to make her a competent witness for plaintiff under Rev. St. c. 51, § 5.—Mitchell v. Hughes, 24 Ill. App. 308.

[f] (Ill. 1887) The wife of a party is not, under the laws of Illinois, his agent in such a sense as to make her a competent witness to prove a contract made between him and another for boarding the latter's parents, merely because she did the work and kept the accounts.—Gifford v. Wilkins, 24 Ill. App. 367.

[g] (Ill. 1891) The fact that a wife sometimes tends a dog kept by her husband and his landlord on certain premises does not render her competent, as the agent of the husband, to testify, either generally or on behalf of the landlord, in an action brought against them both for personal injuries occasioned by a bite of the dog.—Garrison v. Barnes, 42 Ill. App. 21.

[h] (Kan. 1878) When, in one's absence from home, his wife acts in protection of property claimed by him and within the home limits, although without any express direction or agreement, she is acting as his agent, and will be a competent witness in an action by or against him, as to what she does.—Fisher v. Conway, 21 Kan. 18, 30 Am. Rep. 419.

[i] (Mass. 1845) A wife who keeps her husband's accounts is a competent witness for him, in a suit in which he introduces his book of original entries, to testify that she made the entries by his direction and in his presence; and after she has so testified, he may be permitted to testify as to the times when the entries were made, and that the charges contained in them are just and true.—Littlefield v. Rice, 51 Mass. (10 Metc.) 287.

[j] (Mass. 1869) Under St. 1865, c. 207, § 2, providing that, whenever the "contract or cause of action was made or transacted with the wife of any one of the parties in the absence of her husband, she may be a witness," on trial of a writ of entry to recover land to which defendant claims title under a deed of plaintiff and plaintiff's wife, she is a competent witness to testify in plaintiff's behalf that she did not sign the deed in his absence.—Morony v. O'Laughlin, 102 Mass. 184.

[k] (Mo. 1887) The statute which makes a married woman competent in her husband's behalf as to transactions in which she acted as his agent applies to a case where she acted as his agent prior to their marriage.—Teckenbrock v. McLaughlin, 25 Mo. App. 524.

[l] (Mo. 1887) In an action against a husband for supplies furnished to his wife, evidence that the person to whom the goods were furnished was defendant's wife, and that she was cohabiting with him as such, is sufficient proof of her agency to qualify her as a witness for defendant, under Rev. St. 1879, § 4014, providing that the wife shall not be disqualified as a witness in any "matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband."—Sauter v. Scrutchfield, 28 Mo. App. 150.

[m] (Mo. 1889) As a wife, in the purchase of necessaries for the household, may bind the husband on the ground of implied agency, she may testify on his behalf touching such transaction without other proof of her agency.—McAllister v. Barnes, 35 Mo. App. 668.

[n] (Mo. 1895) A wife purchasing necessaries is, by operation of law, the agent of her husband in the purchase, and is therefore a competent witness against his estate in a suit for such necessaries.—Reed v. Crissey, 1 Mo. App. Rep'r, 742, 63 Mo. App. 184.

[o] (Vt. 1861) When it became material to show the state of plaintiff's accounts at a given time, and it was shown that the books were kept by the wife, but from original memoranda kept by the husband from day to day, she was not a competent witness for plaintiff, under the act of 1858, to show the state of the accounts at that time.—Eastabrooks v. Prentiss, 34 Vt. 457.

[p] (Vt. 1865) Under Gen. St. p. 327, § 27, a wife is not a competent witness for her husband, to prove a verbal contract for the services of their minor son, entered into by her with a third party; in a suit by her husband to recover on such contract, there being no proof of authority from him to make the contract, or of subsequent ratification by him till long after the controversy arose.—Orcutt v. Cook's Estate, 37 Vt. 515.

[q] (Vt. 1891) In an action for work done, defendant claimed that he had paid $25 to plaintiff on account, and testified that one morning he gave his wife the money to give plaintiff, and then went out, and on his return saw plaintiff standing at a table, with some money in his hand, and heard him say, "It is all right." *Held*, that the wife was her husband's agent in the transaction, and therefore a competent witness as to such payment.—Pierce v. Bradford, 64 Vt. 219, 23 Atl. 637.

[r] (Wis. 1874) In an action against a husband for necessaries furnished the wife after his acts of cruelty had compelled her to leave

the house, she is a competent witness to prove such acts, and in this regard it is immaterial whether his liability be placed on the ground of her implied agency to contract for the necessaries, or on that of his marital duty.—Bach v. Parmely, 35 Wis. 238.

[s] (Wis. 1876) On taking a conveyance of certain property from defendant's intestate, plaintiff caused to be assigned to him a certain mortgage belonging to her husband, executed by one L. Afterwards plaintiff reconveyed to the intestate his said property, and, about a year thereafter, L. paid his mortgage debt to plaintiff's husband, and received from him a satisfaction of the mortgage theretofore executed by the intestate. In the transactions concerning those conveyances, plaintiff's husband acted generally as her agent. *Held*, that in this action he could not testify that he did not act as her agent in receiving the payment of L.'s mortgage.—Menk v. Steinfort, 39 Wis. 370.

[t] (Wis. 1876) A wife requested by her husband to call into their house the indorser of a note held by the husband, "and asked him whether he was going to pay the note," is not the husband's agent in such a sense as to be a competent witness for him to show admissions made to her by the indorser; still less to show a contract made by such indorser and herself (acting for her husband), which would render the former liable on the note, without demand of payment from the maker.—Hale v. Danforth, 40 Wis. 382.

[u] (Wis. 1884) Where a person gave a note to his wife, and told her to collect it for him, she is his agent, and, in an action by him on the note, may testify as to payments made to her taking the note out of the bar of the statute of limitations.—Engmann v. Immel's Estate, 59 Wis. 249, 18 N. W. 182.

[v] (Wis. 1896) Evidence that a memorandum of a contract of sale was entered in the books of account of the vendee by his wife, acting as his bookkeeper, at his direction, in the presence of the parties, and then read over to them by her, will not render the wife competent to testify what the contract was.—Hazer v. Streich, 92 Wis. 505, 66 N. W. 720.

§ 155. Nature of action or issue and scope of evidence.

[a] (Ala. 1874) In detinue against the husband, for a watch and chain which his wife received from plaintiff, in pawn or pledge, as a security for money loaned by her to him, his wife is a competent witness for defendant to prove what contract she made with plaintiff, and that she acted as her husband's agent in making it.—Sumner v. Cooke, 51 Ala. 521.

[b] (Ill. 1889) In an action for trespass, it appeared that defendant's servants entered plaintiff's house, and carried away certain property therefrom, plaintiff's wife being the only person present other than the trespassers. *Held*, that the acts of the trespassers were not "matters of business transactions, where the transactions were had and conducted by such married woman as the agent of her husband," within the statute, so as to make the wife a competent witness.—Poppers v. Wagner, 33 Ill. App. 113.

[c] (Kan. 1889) Where an action is brought by the wife, and the husband, who is not a party or interested in the action, is introduced as a witness in her behalf, the examination of such witness must be confined strictly to transactions in which the husband acted as the agent of the wife.—Council Grove, O. C. & O. Ry. Co. v. Center, 42 Kan. 438, 22 Pac. 574.

[d] (Mass. 1866) The wife of defendant in an action of tort for a malicious prosecution is not a competent witness under St. 1865, c. 207, which makes the wife of a party competent "whenever the contract or cause of action in issue and on trial was made or transacted with the wife of any one of the parties in the absence of her husband," though she acted as his agent in the transaction out of which the malicious prosecution arose.—Bliss v. Franklin, 95 Mass. (13 Allen) 244.

[e] (Mass. 1868) In an action on an account annexed, each item of the account as to which a separate issue is raised is a cause of action as to which, under St. 1865, c. 207, § 2, the wife of either party is a competent witness on the trial, if it was transacted with her in the absence of her husband.—Packard v. Reynolds, 100 Mass. 153.

[f] (Mass. 1869) A statute enabling a wife to testify when the cause of action in issue was made or transacted with her (St. 1865, c. 207, § 2) does not extend to enable her to testify that she made payment, on behalf of her husband, of the demand in suit.—Bruce v. Mathews, 101 Mass. 64.

[g] (Mass. 1869) In an action against a railroad company for causing the death of plaintiff's cow, the fact that plaintiff's wife was the only person who saw and knew the circumstances does not render her a competent witness under St. 1865, c. 207, § 2, admitting a married woman to testify when the contract or cause of action in issue was made or transacted with her in the absence of her husband.—Baxter v. Boston & W. R. Corp., 102 Mass. 383.

[h] (Mass. 1870) In an action for breaking and entering plaintiff's dwelling house and insulting his wife in his absence, she is not a competent witness under St. 1865, c. 207, § 2, making her a witness where "the contract or cause of action in issue was made or transacted with her."—Bunker v. Bennett, 103 Mass. 516.

[i] (Mo. 1884) Under a statute making a married woman a competent witness "in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband," a married woman may testify for her husband as to acts done by or with her while acting as such agent, although the act was in fact outside the scope of her agency.—Curry v. Stephens, 84 Mo. 442.

[j] (Mo. 1886) Revised Statutes disqualifies as a witness a husband in a suit wherein his wife is a party, unless the suit is connected with business conducted by him as her agent. *Held* not to make the husband an unqualified witness for her whenever any question arises as to her ownership of property where he chances to be her agent.—White v. Chaney, 20 Mo. App. 389.

[k] (Mo. 1891) The right of a wife to testify for her husband on the score of agency is confined to a suit which is connected with the business conducted by her as agent; and the fact that a wife purchased household furniture as agent for her husband does not render her a competent witness for him to prove the value of the property in an action by him for damages for its destruction through the negligence of defendant (a third person).—Flannery v. St. Louis, I. M. & S. Ry. Co., 44 Mo. App. 396.

[l] (Vt. 1895) Plaintiff's husband, having acted as agent in letting her farm on shares, is competent to testify, in an action for breach of the agreement to cultivate the same in a good and husbandlike manner, as to the particulars in which the farm was not so carried on.—Reynolds v. Chynoweth, 68 Vt. 104, 34 Atl. 36.

[m] (Wis. 1872) In an action on an insurance policy, where the wife of the insured, having acted as his agent to take care of the property,

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and give notice of a loss, is a competent witness as to facts connected with the loss, defendant company is not entitled to show by her that he did not hold the legal title to the land, such fact not being within the scope of her agency. —O'Conner v. Hartford Fire Ins. Co., 31 Wis. 160.

[n] (Wis. 1889) In an action by a married woman to recover for injuries resulting from defects in a sidewalk, the agency of the husband being established, he may testify to what he did as such agent regarding the service of the requisite notice on the city clerk and the taking of measurements.—Smalley v. City of Appleton, 75 Wis. 18, 43 N. W. 826.

§ 156. Knowledge of transaction.

[a] (Vt. 1861) In order for the wife to be a competent witness for the husband under the act of 1858 (see Sess. Laws 1858, p. 23), her evidence must be as to matters conducted by her as agent of the husband, and of which he has no personal knowledge.—Eastabrooks v. Prentiss, 34 Vt. 457.

[b] (Vt. 1868) A wife may testify to matters which were transacted by her as agent of her husband, although they occurred at her house, and the husband might have known in relation to them.—Lunay v. Vantyne, 40 Vt. 501.

[c] (Vt. 1892) Acts 1886, No. 45, provides that, as to business transactions conducted by a wife as the agent of her husband, she is a competent witness for him. *Held*, that the wife cannot testify to payments made by her in his presence and by his directions, since only transactions of which he has no personal knowledge are contemplated by the statute.—Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013.

[d] (Wis. 1876) In an action by a married woman, her husband may testify in her behalf as to acts done by him as her agent, whether done in her presence or in her absence.—Menk v. Steinfort, 39 Wis. 370.

(e) PARTICULAR ACTIONS, PROSECUTIONS, OR ISSUES IN GENERAL.

TESTIMONY AS TO MARRIAGE IN GENERAL, §§ 157, 158.
NONACCESS, AND LEGITIMACY OR ILLEGITIMACY OF CHILDREN, § 159.
ADULTERY, § 159½.
—— MARRIAGE, § 160.
BIGAMY OR POLYGAMY, § 161.
CRIMINAL CONVERSATION, § 162.
ABANDONMENT, § 163.
ENTICING AND ALIENATING, § 164.
PROCEEDINGS TO OBTAIN CUSTODY OF WIFE OR CHILD, § 165.

§§ 157, 158. Testimony as to marriage in general.

Effect of death of husband, see post, § 182 [o].
In action for criminal conversation, see post, § 162.
—— *for divorce, see* post, § 171.
In prosecution for abandonment, see post, § 163.
—— *for adultery, see* post, § 160.
—— *for bigamy, see* post, § 161 [b, c].

[a] (U. S. 1880) As long as the fact of the husband's first marriage is contested, the second wife is an incompetent witness to prove such first marriage. Where it has by other evidence been duly established to the satisfaction of the court, she may be admitted to prove her marriage with him.—Miles v. United States, 103 U. S. 304, 26 L. Ed. 481, reversing United States v. Miles (1877) 2 Utah, 19.

[b] (Del. 1859) Where a husband or wife is a party to a suit and immediately interested in the result thereof, neither is a competent witness for the other to prove the fact of their marriage.—Burton v. Roe, 2 Houst. 49.

[c] (Md. 1861) On the issue of marriage to determine legitimacy, the mother of the child whose legitimacy is in question is a competent witness to prove the fact of her marriage.—Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323.

[d] (Mass. 1825) In a question of the settlement of a female pauper, depending on the validity of her marriage, the pauper and her supposed husband are competent to testify concerning the marriage.—Inhabitants of Raynham v. Inhabitants of Canton, 20 Mass. (3 Pick.) 293.

[e] (N. Y. 1851) Plaintiff's husband is competent to prove her marriage to sustain the objection that she is a married woman suing without her husband or any next friend.—Willis v. Underhill, 6 How. Prac. 396.

[f] (N. Y. 1855) Presumptive proof of marriage renders the wife an incompetent witness against the husband, to disprove the marriage. —Scherpf v. Szadeczky, 4 E. D. Smith, 110, 1 Abb. Prac. 366.

[g] (N. Y. 1866) A married woman is a competent witness in behalf of her children to prove the marriage between herself and her husband.—Christy v. Clarke, 45 Barb. 529.

[h] (Ohio, 1864) The provision of Code Civ. Proc. § 314, declaring that husband and wife shall be incompetent to testify for or against each other, "except in actions where the wife, were she a feme sole, would be plaintiff or defendant, in which action the wife may testify. Either the husband or wife may testify, but not both"—does not, in an action against husband and wife for services rendered to the wife before her marriage with her codefendant husband, exclude her from being a witness against plaintiff to prove the fact that when the services were rendered she was the wife of a former deceased husband, since after the death of her former husband, and previous to her marriage with her present husband, had she been sued for the services, she would have been the sole defendant.—Nuser v. Beach, 15 Ohio St. 172.

[i] (Pa. 1867) A man is a competent witness to prove that his second marriage was void by reason of a former marriage.—In re Shaak's Estate, 4 Brewst. 305.

[j] (Pa. 1892) On the claim of children to a share in an estate as grandchildren of decedent, their mother is a competent witness to the fact of her marriage to decedent's son, also deceased.—In re Drinkhouse's Estate, 151 Pa. 294, 24 Atl. 1083, 31 Wkly. Notes Cas. 38.

[k] (S. C. 1819) Where the proof of a marriage is only presumptive, the supposed husband and wife are competent witnesses to disprove the marriage.—Allen v. Hall, 2 Nott & McC. 114, 10 Am. Dec. 578.

[l] (S. C. 1869) When, in a civil action, it is material to prove that a man and woman, who are not parties to the suit nor interested therein, were husband and wife at a certain time, the wife is a competent witness to prove that fact. —Leaphart v. Leaphart, 1 S. C. 199.

[m] (Tex. 1860) The husband is not a competent witness to prove a marriage contract in favor of his wife, since they cannot be witnesses for or against each other.—McDuffie v. Greenway, 24 Tex. 625.

§ 159. Nonaccess, and legitimacy or illegitimacy of children.

[a] Neither husband nor wife is competent to testify to facts tending to show nonaccess of the husband.
—(N. H. 1863) Corson v. Corson, 44 N. H. 587;

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(N. Y. 1853) People v. Overseers of Poor of Town of Ontario, 15 Barb. 286; (1887) Same v. Superintendent of Poor of Ontario County, 9 N. Y. St. Rep. 607; (1887) Same v. Court of Sessions of Ontario County, 45 Hun, 54;

(N. C. 1825) State v. Pettaway, 10 N. C. 623; (1874) Boykin v. Boykin, 70 N. C. 262, 16 Am. Rep. 776;

(Pa. 1814) Commonwealth v. Shepherd, 6 Bin. 283, 6 Am. Dec. 449; (1856) Page v. Dennison, 1 Grant, Cas. 377; (1864) Commonwealth v. Reed, 5 Phila. 528, 2 Pittsb. R. 470;

(Wis. 1884) Mink v. State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386.

CONTRA, see

(Ind. 1865) Cuppy v. State, 24 Ind. 389;

(N. C. 1888) State v. McDowell, 101 N. C. 734, 7 S. E. 785.

[b] In proceedings to charge a man with the support of a bastard begotten upon the body of a married woman, the woman is competent to prove the fact of illicit intercourse.

—(N. Y. 1853) People v. Overseers of Poor of Town of Ontario, 15 Barb. 286;

(N. C. 1825) State v. Pettaway, 10 N. C. 623;

(Pa. 1811) Commonwealth v. Connelly, 1 Browne, 284; (1814) Same v. Shepherd, 6 Bin. 283, 6 Am. Dec. 449; (1831) Same v. Wentz, 1 Ashm. 269.

[c] (Md. 1895) On an issue as to the legitimacy of a woman's children born while she was living in lawful wedlock with her husband, the testimony of the alleged father is inadmissible. —Scanlon v. Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

[d] (Md. 1895) A husband or wife is incompetent to testify that children born to the wife during wedlock are bastards. —Scanlon v. Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

[e] (Mass. 1848) Where the complainant in a prosecution under Rev. St. c. 49, relative to the maintenance of bastard children, marries after the commencement of the proceedings, and the husband comes in and joins with her in the prosecution, the wife is not thereby rendered incompetent as a witness.—Hyde v. Chapin, 56 Mass. (2 Cush.) 77.

[f] (N. Y. 1861) Neither under the Code nor at common law is a husband or wife competent to prove nonintercourse during periods of access to each other.—Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255.

[g] (N. Y. 1869) In an action for the partition of real estate, in which the legitimacy of the children is put in issue by the heirs at law of the husband, the widow, even though she be a party to the suit, is a competent witness on behalf of the children.—Van Tuyl v. Van Tuyl, 8 Abb. Prac. (N. S.) 5.

[h] (N. C. 1852) The mother is an incompetent witness to show whether a child alleged to be a bastard was born in wedlock, or whether, if born in wedlock, the facts exist which would still render it a bastard.—State v. Herman, 35 N. C. 502.

[i] (N. C. 1867) The colored mother of a bastard child has such an interest in proceedings in bastardy, within the meaning of Acts 1866, c. 40, § 9, regulating the competency of witnesses, as to render her a competent witness against a white man, whom she alleges to be the father of the child.—State v. Henderson, 61 N. C. 229.

[j] (N. C. 1877) On trial of an issue involving a question of legitimacy of an alleged heir, the mother of the individual may be received to testify that she was always true to her husband, his reputed father, and no other man could have been his father.—Warlick v. White, 76 N. C. 175.

[k] (Pa. 1801) On an indictment for bastardy it appeared that prosecutrix had married a person other than defendant three weeks before the birth of the child, having previously sworn the child to defendant. *Held*, that prosecutrix was a competent witness to prove intercourse with defendant.—Commonwealth v. Stricker, 1 Browne, Appendix, 47.

[l] (Pa. 1856) Nonaccess cannot be proved either by the husband or the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law.—Page v. Dennison, 1 Grant, Cas. 377.

[m] (Pa. 1857) The mother of a child begotten before marriage but born after is incompetent to prove that the child was not begotten by the man who became her husband.—Dennison v. Page, 29 Pa. (5 Casey) 420, 72 Am. Dec. 644.

[n] (Pa. 1874) The policy of the law, as used in the statute declaring that "no interest or policy of the law shall exclude a party from being a witness," etc., does not include the public policy which prevents a husband or wife from proving nonaccess. — Tioga County v. South Creek Tp., 75 Pa. (25 P. F. Smith) 433.

[o] (Pa. 1874) The rule precluding a husband or wife from proving nonaccess for the purpose of bastardizing the issue applies where, on the day following the marriage, the husband abandoned the wife, and the child was born shortly afterwards at the house of her employer, whom she sought to charge with its paternity.—Tioga County v. South Creek Tp., 75 Pa. (25 P. F. Smith) 433.

[p] (Pa. 1887) In a trial on an indictment for fornication and bastardy, in which the prosecutrix was a married woman, the jury were instructed that a married woman, while the relation of coverture existed, would not be permitted to bastardize her child; that neither she nor her husband could testify as to the husband's nonaccess. But if they were satisfied by other evidence beyond a reasonable doubt of the nonaccess of the husband, they could then consider her testimony as to the paternity of the child. *Held* not error.—Easley v. Commonwealth, 11 Atl. 220.

[q] (Pa. 1892) A mother is competent to show that her son was born "eleven or twelve years" before her marriage, and is a bastard, and that his father was one other than her husband.—Appeal of McDonald, 147 Pa. 527, 23 Atl. 892, 30 Wkly. Notes Cas. 166.

[r] (S. C. 1868) On a trial as to the validity of a will by which the testator had made no provision for his wife and child, where the allegation was that the husband's mind had been influenced by insinuations as to his wife's infidelity, it was competent for the widow to testify that the testator was the father of the child, and such testimony was not superseded because the paternity of her child might be inferred from other evidence.—Moseley v. Eakin, 15 Rich. Law, 324.

§ 159½. Adultery.

As offense by husband or wife against the other, see post, § 175.

Effect of divorce, see post, § 181.

In actions for divorce, see post, § 172.

[a] On a prosecution for adultery, the husband of the woman with whom it is alleged to have been committed is incompetent to testify to facts tending to establish the offense.

—(Conn. 1793) State v. Gardner, 1 Root, 485;

(Ga. 1894) Howard v. State, 94 Ga. 587, 20 S. E. 426;

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(Me. 1846) State v. Welch, 26 Me. (13 Shep.) 30, 45 Am. Dec. 94;

(Mass. 1863) Commonwealth v. Sparks, 89 Mass. (7 Allen) 534;

(Mich. 1895) People v. Fowler, 104 Mich. 449, 62 N. W. 572;

(Pa. 1855) Commonwealth v. Jailer, 1 Grant, Cas. 218; (1869) Same v. Gordon, 2 Brewst. 569; (1890) Same v. Geary (Quart. Sess.) 9 Pa. Co. Ct. R. 60.

CONTRA, see

(Minn. 1894) State v. Vollander, 57 Minn. 225, 58 N. W. 878;

(Tex. 1884) Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207.

[b] (Iowa, 1894) Code 1873, § 4008, which provides that no prosecution for adultery can be commenced but on the complaint of the husband or wife, does not render a husband incompetent as a witness against his divorced wife and her husband on the trial of an indictment against them for adultery committed before the divorce was granted, and before the marriage of defendants.—State v. Russell, 90 Iowa, 569, 58 N. W. 915.

[c] (Mich. 1870) Comp. Laws, § 4342, declaring that the husband and wife shall not be competent to testify in a proceeding instituted by either for adultery, does not apply to a criminal proceeding. The fact that a prosecution for adultery is commenced on the complaint of the husband or wife does not make the complainant a party. The state is the "party" instituting the "proceeding."—Parsons v. People, 21 Mich. 509.

[d] (Vt. 1876) On an indictment for adultery, the husband of the woman with whom the act was committed may testify to circumstances that do not directly criminate, but only tend to criminate, her. Thus, the prosecution having shown that, after respondent had been seen to enter the woman's shop, the husband was seen to try unsuccessfully to enter, and respondent, shortly followed by the woman, soon after to come out, the husband may be allowed to testify that he had sometimes tried the door and found it locked.—State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

§ 160. —— Marriage.

[a] (Mich. 1896) On a prosecution for adultery, the husband of the one with whom he is alleged to have committed the offense may testify to his marriage to her.—People v. Isham, 109 Mich. 72, 67 N. W. 819.

[b] (Mich. 1896) A wife who has instituted a prosecution of her husband for adultery cannot testify that she is his wife; 2 How. Ann. St. § 7546, providing that in a proceeding instituted by the husband or wife in consequence of adultery they shall not be competent to testify.—People v. Isham, 109 Mich. 72, 67 N. W. 819.

[c] (Mich. 1896) In a prosecution of a man for adultery, his wife cannot testify for the state as to her marriage to, and cohabitation with, defendant.—People v. Imes, 110 Mich. 250, 68 N. W. 157.

[d] (N. C. 1890) Under Code, § 588, which makes the husband and wife incompetent "to give evidence for or against the other in any action or proceeding on account of adultery, except to prove the fact of marriage," the husband of the female defendant in an indictment for fornication and adultery is a competent witness to prove her marriage to him.—State v. McDuffie, 107 N. C. 885, 12 S. E. 83.

[e] (Wis. 1839) On the trial of an indictment for adultery by a married woman, her husband was an incompetent witness even to prove the fact of her marriage to him, because of the disgrace involved to his family, and because, in the territory, adultery was a ground of divorce, and the husband might use a record of conviction of the wife for adultery, procured by his testimony, as evidence in his favor in a suit for divorce.—Mills v. United States, 1 Pin. 73.

§ 161. Bigamy or polygamy.

As offense by husband or wife against the other, see post, § 176.

Effect of consent, see post, § 177 [c].

Testimony of unlawful wife, see post, § 178.

[a] A man's lawful wife is not a competent witness for the state in a prosecution against him for bigamy.

—(Ill. 1895) Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221;

(Tex. 1894) Boyd v. State, 33 Tex. Cr. R. 470, 26 S. W. 1080.

[b] (Ala. 1870) In a trial for bigamy, the true wife cannot be admitted as a witness to prove her own marriage, or her husband's confession that he had subsequently married another woman.—Williams v. State, 44 Ala. 24.

[c] (Iowa, 1882) Under laws of Iowa, in a prosecution for bigamy, the lawful wife is a competent witness to prove the marriage.—State v. Hughes, 58 Iowa, 165, 11 N. W. 706.

[d] (Mo. 1892) On a trial for bigamy, the person whom the indictment charges to be defendant's lawful wife is incompetent, without defendant's consent, to testify against him.—State v. Ulrich, 110 Mo. 350, 19 S. W. 656.

[e] (N. Y. 1881) Under Laws 1876, c. 182, § 2, a wife, although willing, cannot testify against her husband on his trial for bigamy.—People v. Houghton, 24 Hun, 501.

[f] (Tex. 1883) Code, art. 735, provides that husband and wife may be witnesses for one another in criminal cases. *Held* that, on a trial for bigamy, defendant, the husband, in rebuttal of the state's evidence of the first marriage, might compel the woman with whom it was charged to have been contracted to testify, although against her consent.—Dumas v. State, 14 Tex. App. 464, 46 Am. Rep. 241.

[g] (Utah, 1889) Under Comp. Laws, pp. 114, 115, § 1, providing that in any prosecution for bigamy, polygamy, etc., the lawful husband or wife shall be a competent witness, but shall not be compelled to testify without the consent of the husband or wife, as the case may be, the grand jury investigating a charge of polygamy may ask one claiming to be the lawful wife of the accused, for the purpose of ascertaining whether she was the lawful wife, whether another was married to the accused on the day of witness' marriage; and the court may enforce an answer to the question.—Ex parte Hendrickson, 6 Utah, 3, 21 Pac. 396.

§ 162. Criminal conversation.

Effect of divorce, see post, § 181.

[a] In an action by a husband for criminal conversation, the wife cannot testify, except by the husband's consent, where no divorce has been obtained.

—(Ill. 1888) Groom v. Parables, 28 Ill. App. 152;

(Mich. 1882) Mathews v. Yerex, 48 Mich. 361, 12 N. W. 489; (1892) Reynolds v. Schaffer, 91 Mich. 494, 52 N. W. 15, 30 Am. St. Rep. 492;

(N. Y. 1866) Carpenter v. White, 46 Barb. 291; (1868) Hicks v. Bradner, 2 Abb. Dec. 362;

(Wash. 1896) Speck v. Gray, 14 Wash. 589, 45 Pac. 143.

[b] (Ind. 1860) In a suit for seduction, the declarations of the wife are not evidence for defendant.—Harris v. Rupel, 14 Ind. 209.

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[c] (Ind. 1891) Rev. St. 1881, § 501, providing that the wife shall not be competent to testify in an action by the husband for her seduction, does not apply to evidence of statements by her to her seducer in a conversation between him, the husband, and herself.—Mainard v. Reider, 2 Ind. App. 115, 28 N. E. 196.

[d] (N. H. 1844) The mother is not a competent witness to prove nonaccess by the husband; but, that being proved by other evidence, she is a competent witness to prove the criminal conversation.—Parker v. Way, 15 N. H. 45.

[e] (N. Y. 1873) Under Laws 1867, c. 887, plaintiff in an action for criminal conversation is not a competent witness to prove his marriage.—Dann v. Kingdom, 1 Thomp. & C. 492.

[f] (N. Y.) Plaintiff in an action for criminal conversation is not prohibited from testifying in his own behalf by Code Civ. Proc. § 831, which provides that "a husband or wife is not competent to testify against the other upon the trial of an action * * * founded upon the allegation of adultery, except to prove the marriage or disprove the allegation of adultery," as the wife is not a party.—(1889) Smith v. O'Brien, 53 Hun, 633, 6 N. Y. Supp. 174, judgment affirmed (1891) 127 N. Y. Supp. 684, 28 N. E. 256; (1890) Woods v. Gledhill, 56 Hun, 220, 9 N. Y. Supp. 266.

[g] (Or. 1885) In an action for criminal conversation with plaintiff's wife, plaintiff may prove the fact of his marriage by his own testimony.—Jacobsen v. Siddal, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360.

[h] (Pa. 1887) A husband as plaintiff in an action for criminal conversation is incompetent as a witness to prove his wife's adultery.—Sahms v. Brown, 4 Pa. Co. Ct. R. 488.

[i] (Pa. 1892) In an action for debauching plaintiff's wife, plaintiff is not a competent witness as to the wife's adultery.—Cornelius v. Hambay, 150 Pa. 359, 24 Atl. 515.

[j] (Wis. 1890) In an action for criminal conversation, plaintiff's wife is a competent witness for defendant to any matter in controversy except as to confidential communications between them during the marriage.—Smith v. Merrill, 75 Wis. 461, 44 N. W. 759.

§ 163. Abandonment.

[a] (N. Y. 1839) 1 Rev. St. p. 624, §§ 8, 10, provides that, when a father shall abscond leaving his wife and children chargeable to any town or likely to become so, the overseers of the poor may apply to any two justices for a warrant to seize his goods. *Held*, that the fact that a father has so absconded could not be established solely by the testimony of his wife.—Downing v. Rugar, 21 Wend. 178, 34 Am. Dec. 223.

[b] (N. C. 1872) On the trial of an indictment for abandonment, the wife is a competent witness to prove the fact of abandonment, but not to prove the marriage.—State v. Brown, 67 N. C. 470.

[c] (Pa. 1845) In proceedings by the guardians of the poor under Act March 31, 1812, against a husband, for the desertion of his wife and family, the alleged wife is a competent witness to prove the marriage.—Guardians of Poor v. Nathans, 3 Clark, 139, 5 Pa. Law J. 1.

§ 164. Enticing and alienating.

[a] (Mich. 1895) In an action against plaintiff's father-in-law for the alienation of the affections of her husband, evidence by the husband is inadmissible to contradict that of the wife, since How. Ann. St. § 7546, provides that the husband and wife cannot be witnesses against each other.—Rice v. Rice, 104 Mich. 371, 62 N. W. 833.

[b] (Minn. 1880) Under Gen. St. 1878, c. 73, § 10, providing that a wife cannot be examined "for or against her husband without his consent; nor can either during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"—a wife cannot testify against her husband in an action by him against a defendant for enticing her away.—Huot v. Wise, 27 Minn. 68, 6 N. W. 425.

[c] (Vt. 1894) In an action for alienating the affections of plaintiff's wife, the record of a conviction of plaintiff for an assault on his wife is not admissible, if it was obtained on her testimony, since she is not a competent witness in the action for alienating her affections.—Fratini v. Caslani, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843.

§ 165. Proceedings to obtain custody of wife or child.

[a] (Ind. 1878) In a habeas corpus proceeding by the mother of an illegitimate child, after her marriage, to obtain the custody of the child from one to whom it had been apprenticed, the husband of the mother was not a competent witness in her behalf.—Copeland v. State, 60 Ind. 394.

[b] (N. Y. 1839) On a writ of habeas corpus by a husband to obtain the custody of his wife and child, the wife is competent to testify to acts of cruelty on the part of her husband, making it unsafe and improper for her to return to him.—People v. Mercein, 8 Paige, 47.

(f) ACTIONS BETWEEN HUSBAND AND WIFE AND PROSECUTIONS FOR OFFENSES BY HUSBAND OR WIFE AGAINST THE OTHER.

ACTIONS BETWEEN HUSBAND AND WIFE IN GENERAL, § 166.
ACTIONS TO ANNUL MARRIAGE, § 167.
ACTIONS FOR DIVORCE, § 168.
—— PERSONAL SERVICE OF SUBPŒNA OR RULE TO TAKE DEPOSITION OR APPEARANCE AND ORDER OF COURT, § 169.
—— EVIDENCE ADMISSIBLE IN GENERAL, § 170.
—— MARRIAGE, § 171.
—— ADULTERY, § 172.
APPLICATION FOR WRIT OF NE EXEAT, § 173.
PROSECUTIONS FOR OFFENSES BY HUSBAND OR WIFE AGAINST THE OTHER, § 174.
—— ADULTERY, § 175.
—— BIGAMY OR POLYGAMY, § 176.

§ 166. Actions between husband and wife in general.

[a] (Kan. 1872) A husband and wife are competent witnesses both for and against each other in an action where husband and wife, together with other persons, have been made parties, and in which the judgment may be rendered for or against any one or more of the plaintiffs, and for or against one or more of the defendants.—Ruth v. Ford, 9 Kan. 17.

[b] (La. 1886) A wife cannot be a witness in a suit against her husband for dissolution of the community and recovery of her moneyed claim against him.—Cooley v. Cooley, 38 La. Ann. 195.

[c] (Md. 1882) Under the provisions of Acts 1864, c. 109, and its supplements, a wife is a competent witness against a husband in an action by her to set aside a marriage contract affecting her marital rights in the property of the husband.—Classen v. Classen, 57 Md. 510.

[d] (Mo. 1874) A husband and wife are competent witnesses against each other in a suit

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by the husband to devest the wife of title to land.—Darrier v. Darrier, 58 Mo. 222.

[e] (Neb. 1894) Under Code Civ. Proc. tit. 10, § 331, prohibiting husband or wife to testify against the other "except in criminal proceedings for a crime committed against the other," a wife cannot testify in an action by herself against her husband for the use and occupation by him of her real estate, though Comp. St. 1893, c. 53, empowers married women to contract in relation to their separate property, and to sue and be sued, as if unmarried.—Skinner v. Skinner, 38 Neb. 756, 57 N. W. 534.

[f] (Neb. 1895) In an action by a wife against her husband and her son to cancel, for fraud, a joint deed of her husband and herself to the son, the husband being a mere nominal defendant, plaintiff may testify in her own behalf.—Buckingham v. Roar, 45 Neb. 244, 63 N. W. 398.

[g] (Neb. 1895) Under Code Civ. Proc. § 331, providing that neither husband nor wife shall be competent to testify against the other except in criminal proceedings, the wife is not a competent witness against the husband in an action by her against him for slander.—Bohner v. Bohner, 46 Neb. 204, 64 N. W. 700.

[h] (N. J. 1885) On a bill filed by a wife for moneys received for her by her husband, she cannot be a witness to prove the admissions of her husband.—Gray v. Gray, 39 N. J. Eq. (12 Stew.) 511.

[i] (N. Y. 1870) Under Laws 1867, c. 887, § 1, providing that the husband or wife of any party shall be competent to testify as any other witness, and section 2, providing that a husband or wife may not testify for or against the other in a criminal action or in any suit for divorce or other proceeding instituted in consequence of adultery, except to prove the fact of marriage, the husband or wife may testify in any action between themselves in his or her own behalf.—Minier v. Minier, 4 Lans. 421.

[j] (Pa. 1893) In replevin for household goods, defendant disclaimed title, and averred that it was owned by plaintiff's wife, who was living with defendant, her sister. Plaintiff's replication denied title in his wife, and reaverred title and possession in himself. *Held*, that plaintiff was not competent as a witness as to the ownership of the property, since the issue was between himself and his wife, and neither is competent to testify "against the other," under Act May 23, 1887, § 5, subd. c.—Johnson v. Watson, 157 Pa. 454, 27 Atl. 772, 33 Wkly. Notes Cas. 346.

[k] (Va. 1890) In a suit brought by a wife against the husband to establish a resulting trust in her favor in lands standing in the name of the husband, complainant is not a competent witness.—Crabtree v. Dunn, 86 Va. 953, 11 S. E. 1053.

[l] (W. Va. 1881) Under a law that a husband shall not be examined for or against his wife, nor a wife for or against her husband, except in a suit between husband and wife, where a husband and wife are parties to a suit in company with others, the husband or wife can in general only testify as to controversies, involved in the suit, in which they alone are materially interested.—Zane v. Fink, 18 W. Va. 693.

[m] (W. Va. 1883) Code, c. 130, §§ 22, 23, made no material change in the common-law rule governing the testimony of husband and wife, except in controversies between them. The words "action or suit" as used are synonymous with "controversy," and therefore they are incompetent witnesses for or against each other in a controversy between them and a third party, though they stand in the suit as plaintiff and defendant.—Anderson v. Snyder, 21 W. Va. 632.

§ 167. Actions to annul marriage.

[a] (Ky. 1873) Where plaintiff seeks to set aside his marriage on the ground of duress, he is not a competent witness.—Bassett v. Bassett, 72 Ky. (9 Bush) 696.

[b] (La. 1895) In an action to annul a marriage on the ground that plaintiff's consent thereto was procured by threats of criminal prosecution, the status of the parties before the court being that of husband and wife, neither can testify, though the parents of both spouses are parties to the action.—Lacoste v. Guidroz, 47 La. Ann. 295, 16 South. 836.

[c] (Mass. 1859) On the trial of a libel to annul a marriage, one party cannot be admitted as a witness under the express provisions of St. 1857, c. 305, § 1, if the other is insane.—Little v. Little, 79 Mass. (13 Gray) 264.

[d] (Mass. 1866) A party to the proceeding is a competent witness in a libel for sentence of nullity of marriage, under Gen. St. c. 107, § 4.—Foss v. Foss, 94 Mass. (12 Allen) 26.

§ 168. Actions for divorce.

Effect of agreement, see post, § 177 [a].

[a] In an action for divorce, the parties are competent witnesses.

—(Ark. 1881) Brown v. Brown, 38 Ark. 324;
(1890) Scarborough v. Scarborough, 54 Ark. 20, 14 S. W. 1098;
(Mass. 1866) Foss v. Foss, 94 Mass. (12 Allen) 26;
(Wis. 1865) Hays v. Hays, 19 Wis. 182.

CONTRA, see
(Vt. 1852) Manchester v. Manchester, 24 Vt. 649.

[b] The parties in an action for divorce are not competent to prove anything except the marriage.

—(N. J. 1880) Franz v. Franz, 32 N. J. Eq. (5 Stew.) 483;
(N. Y. 1875) Roe v. Roe, 40 N. Y. Super. Ct. (8 Jones & S.) 1.

[c] (Colo. 1880) Under Act Feb. 11, 1870, § 1, which provides that no person shall be disqualified as a witness by reason of his interest in the event, and section 5, which provides that no husband or wife shall be competent to testify for or against each other except where the action grows out of personal wrong or injury done by one to the other, the husband in a suit for divorce on the ground of desertion is a competent witness in his own behalf.—Stebbins v. Anthony, 5 Colo. 348.

[d] (D. C. 1883) Rev. St. §§ 876, 877, providing that parties to actions may be competent and compellable to testify except where charged with an offense, and except that the husband shall not be competent and be compellable to testify for or against the wife, or the wife to testify for or against the husband, in any proceeding necessitated in consequence of adultery, do not apply to suits for divorce.—Burdette v. Burdette, 2 Mackey, 469.

[e] (Fla. 1882) McClel. Dig. pp. 517, 518, which innovate upon the rule of the common law to the extent that interest in the event of an action, or merely being a party, will not exclude a witness from testifying, and permit married women in civil actions to testify in cases where their husbands are competent witnesses, do not make the husband or wife competent witnesses in a divorce case between them.—McGill v. McGill, 19 Fla. 341.

[f] (Ga. 1871) Under Code, § 3798, a husband is a competent witness in an action for divorce for desertion.—Castello v. Castello, 41 Ga. 613.

[g] (Ind. 1865) Under the act in relation to witnesses, a husband and wife are incompetent

as witnesses in suits for divorce.—Morse v. Morse, 25 Ind. 156.

[h] (Ind. 1886) Special provisions contained in the statute, regulating proceedings in divorce cases, will govern, though different from the rules which obtain in ordinary civil actions; and therefore provisions in the statute making it improper in divorce causes to use interrogatories to the parties will govern, though proper in ordinary civil actions.—Simons v. Simons, 107 Ind. 197, 8 N. E. 37.

[i] (Kan. 1896) Under Gen. St. 1889, par. 4418, providing that a husband and wife shall be incompetent to testify for or against each other, except concerning transactions in which one acted as agent of the other, or when they are joint parties, and have a joint interest in the action, and that in no case shall either be permitted to testify to any communication made by one or the other during the marriage, whether called while that relation subsists or afterwards, a husband and wife are incompetent to testify against each other in an action for divorce or for alimony.—Shepherd v. Shepherd, 4 Kan. App. 546, 45 Pac. 658.

[j] (La. 1834) A suit for separation from bed and board is an action of divorce. Acts 1827, No. 73, § 3, relative to such actions, and removing the disqualification of relationship under Civ. Code, art. 2260, applies to both species of divorce.—Savoie v. Ignogoso, 7 La. 281.

[k] (La. 1880) The exception in Code, art. 2281, does not include testimony of the husband and wife in divorce cases; public policy forbids their testifying therein.—Dillon v. Dillon, 32 La. Ann. 643; Daspit v. Ehringer, Id. 1174.

[l] (Me. 1859) Neither the husband nor wife can, under Rev. St. 1857, c. 82, §§ 77-83, testify as witnesses in a divorce suit to which they are parties.—Dwelly v. Dwelly, 46 Me. 377.

[m] (N. Y. 1828) In a suit brought by either husband or wife for a divorce, her affidavit is admissible against the husband as to any matter in the cause.—Kirby v. Kirby, 1 Paige, 261.

[n] (N. Y. 1861) Under the Code of 1857, a party to a divorce case is a competent witness in his own behalf.—Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255.

[o] (N. Y. 1862) In the trial of an action for limited divorce husband and wife are competent witnesses against each other.—P——— v. P———, 24 How. Prac. 197.

[p] (N. Y. 1866) Where, in an action for divorce, judgment is rendered for plaintiff, and a motion made to set aside the judgment, and a reference made to determine a disputed fact thereon, defendant is not a competent witness to testify on her own behalf before the referee.—Lincoln v. Lincoln, 29 N. Y. Super. Ct. (6 Rob.) 525.

[q] (Pa. 1871) In divorce cases, a husband or wife may testify in his or her favor, but cannot be compelled to testify against themselves.—Bronson v. Bronson, 8 Phila. 261.

[r] (Pa. 1894) Plaintiff in a divorce suit is not a competent witness in his own behalf, further than to prove the marriage, though defendant does not appear.—Koup v. Koup (Com. Pl.) 7 Kulp, 342.

[s] (Tex. 1874) Under Act June 6, 1841 (Pasch. Dig. art. 3452), neither party to a suit for divorce can be a competent witness in regard to matters affecting the right to divorce; and this rule is not affected by the act of 1871, allowing parties in civil actions to testify.—Stafford v. Stafford, 41 Tex. 111.

[t] (Tex. 1882) Rev. St. art. 2247, providing that "the husband or wife of a party to a suit * * * shall not be incompetent to testify therein," does not give parties to divorce suits the right to testify in their own behalf.—Cornish v. Cornish, 56 Tex. 564.

§ 169. —— Personal service of subpœna or rule to take deposition or appearance and order of court.

[a] (Mich. 1882) The testimony of parties in a divorce proceeding should not be taken without an order of court for that purpose.—Stuart v. Stuart, 47 Mich. 566, 11 N. W. 388.

[b] (Pa.) Under Act April 15, 1869, and Act March 4, 1870, libelant is incompetent as a witness where personal service of the subpœna is not made on the respondent, or he does not appear and defend.—(1878) Ramsey v. Ramsey, 1 Leg. Chron. 47, 55, 5 Leg. Gaz. 53; (1877) Koch v. Koch, 1 Leg. Rec. Rep. 67.

[c] (Pa. 1890) Under Act May 23, 1887 (P. L. 159), which provides that neither husband nor wife shall testify against each other except in proceedings for divorce in which personal service of the subpœna, or of a rule to take depositions, has been made upon the opposite party, or in which the opposite party appears and defends, libelant may testify to the facts set forth in her libel, when neither the subpœna has been served on respondent nor has he appeared, when notice of the meeting before the master had reached respondent by registered letter.—Kolp v. Kolp (Com. Pl.) 3 Pa. Dist. R. 1.

[d] (Pa. 1891) Act May 23, 1887, § 5 (P. L. 158), provides that neither the husband nor wife shall be permitted to testify against the other except in proceedings for divorce, in which personal service of the subpœna or a rule to take deposition has been made upon the opposite party, or in which the opposite party appears and defends. *Held*, that a wife cannot testify against her husband in divorce proceedings in which service was had upon the husband by publication, though she has by registered letter served upon her husband notice of her intention to testify.—Payne v. Payne (Com. Pl.) 5 Pa. Dist. R. 188.

§ 170. —— Evidence admissible in general.

[a] (D. C. 1883) In a suit brought by a wife for divorce for cruelty, she may testify as to what took place between herself and her husband in the absence of third persons; Rev. St. §§ 876, 877, regulating the competency of witnesses, not applying to such a case.—Burdette v. Burdette, 2 Mackey, 469.

[b] (Ind. 1881) By Acts 1879, p. 245, a wife is a competent witness against her husband in an action by her for divorce as to his habits of intoxication and general treatment of her, the only exceptions of said acts being in actions by him for her seduction, and as to communications to each other during marriage.—Smith v. Smith, 77 Ind. 80.

[c] (Me. 1834) In a libel by a wife for a divorce from bed and board on the ground of cruelty, a record of the husband's conviction for an assault and battery on the wife, in which it appears that there was a trial in the case and that the wife was a witness, is not admissible.—Woodruff v. Woodruff, 11 Me. (2 Fairf.) 475.

[d] (Miss. 1880) A wife is not competent to testify as a witness against her husband in a suit by her for divorce even as to acts of personal violence.—Anonymous, 58 Miss. 15.

[e] (N. J. 1880) The husband's testimony in a divorce suit is not competent to prove her handwriting on an intercepted letter to her alleged paramour.—Doughty v. Doughty, 32 N. J. Eq. (5 Stew.) 32.

[f] (N. Y. 1892) Under Code Civ. Proc. § 831, which provides that "a husband or wife is not competent to testify against the other upon the trial of an action * * * founded upon an allegation of adultery, except to prove

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the marriage, or disprove the allegation of adultery," a wife who is plaintiff in an action for divorce on the ground of adultery is incompetent to testify to the jurisdictional facts required by section 1756, namely, the venue of the offense and the residence of the parties.—Dickinson v. Dickinson, 63 Hun, 516, 18 N. Y. Supp. 485.

[g] (N. C. 1873) In a suit for divorce, the husband is a competent witness to prove the impotence of his wife.—Barringer v. Barringer, 69 N. C. 179.

[h] (Pa. 1895) Under Act May 23, 1887, § 5, cl. c, making either party in a proceeding for divorce competent to testify when personal service of the subpœna has been made, a wife may testify as to conduct and statements of her husband.—Seitz v. Seitz, 170 Pa. 71, 32 Atl. 578.

[i] (Tex. 1893) On an issue as to whether plaintiff in a divorce suit had contracted a venereal disease from defendant, evidence that defendant sent her a package of medicine, with written directions as to its use, is competent; sending such package being an act, and not a confession or admission, on his part, and the written instructions sent therewith constituting a part of the act, and being admissible as such.—Hanna v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720.

§ 171. — Marriage.

[a] (N. Y. 1869) Under the statutes enabling a wife to testify affecting her husband, she may testify in her own behalf, in her action for a divorce, to prove a marriage in fact; there having been no ceremonial marriage.—Bissell v. Bissell, 55 Barb. 325, 7 Abb. Prac. (N. S.) 16.

[b] (N. Y. 1877) In a divorce suit, a husband or wife is not competent to testify to his or her previous marriage for the purpose of showing that the subsequent marriage to the opposite party in the divorce suit was void.—Finn v. Finn, 12 Hun, 339.

[c] (Pa. 1888) The libelant in a divorce proceeding is, under Act May 23, 1887, competent to prove the fact of marriage.—Burke v. Burke, 1 Lack. Jur. 12.

§ 172. — Adultery.

[a] (Ga. 1872) Under Rev. Code, § 3799, the husband, in a suit for divorce, is an incompetent witness, to prove the adultery of the wife.—Cook v. Cook, 46 Ga. 308.

[b] (N. H. 1867) On a libel for a divorce on the ground of adultery, confessions of the libelee may be received, and, if corroborated, may justify a decree of divorce.—Burgess v. Burgess, 47 N. H. 395.

[c] (N. J. 1870) On a bill for divorce on the ground of adultery, testimony of defendant and of her alleged accomplice in guilt is competent.—Mayer v. Mayer, 21 N. J. Eq. (6 C. E. Green) 246.

[d] (N. J.) Neither husband nor wife can be a witness for or against the other in a suit for divorce on the ground of adultery.—(1878) Marsh v. Marsh, 29 N. J. Eq. (2 Stew.) 296; (1880) Doughty v. Doughty, 32 N. J. Eq. (5 Stew.) 32.

[e] (N. J. 1880) Acts 1880, p. 52, does not remove the disability of a wife, defendant in a divorce suit for adultery, to testify in denial of the charge.—Wells v. Wells, 33 N. J. Eq. (6 Stew.) 4.

[f] (N. Y. 1844) The husband of a woman with whom another man had committed adultery is a competent witness to prove the fact, in a suit for a divorce, by the wife of the latter, under the laws of New York, where adultery was not a criminal offense.—Van Cort v. Van Cort, 4 Edw. Ch. 621.

[ff] (N. Y. 1857) Code, § 399, as amended in 1851, permitting a party to a proceeding to be examined as a witness in his own behalf, the same as any other witness, does not permit, in an action by the wife against the husband for divorce on ground of adultery, that she may testify against him.—Smith v. Smith, 15 How. Prac. 165.

[g] (N. Y. 1862) Code, § 399, permitting a party to be examined as a witness in his own behalf, does not permit a wife to testify against her husband in an action for divorce for adultery.—A. A. C. v. T. C., 25 How. Prac. 432.

[h] (N. Y. 1866) A wife who is defendant in an action by her husband for a divorce on the ground of adultery cannot testify in her own behalf.—Rivenburgh v. Rivenburgh, 47 Barb. 419.

[i] (N. Y. 1886) While, under Code, § 831, a husband is not competent to testify against his wife on the trial of an action founded on adultery, yet, in his divorce suit against her, founded on that ground, he is competent to testify to her insanity or to facts showing that he condoned her adultery.—Bailey v. Bailey, 41 Hun, 424.

[j] (N. Y. 1887) In an action for absolute divorce against the wife, an order requiring the wife to attend the trial for the purpose of enabling a witness to see whether or not the person he referred to in his testimony is defendant is a proper one, and does not violate the provision of Code Civ. Proc. § 831, rendering a husband or wife incompetent to testify against the other on the trial of an action founded on the allegation of adultery, except to prove the marriage; a simple appearance for identification cannot be held to be testifying within the meaning of such section.—Jacobson v. Jacobson, 12 Civ. Proc. R. 198.

[k] (N. Y.) Code Civ. Proc. § 831, as amended by Laws 1887, c. 103, permitting a husband or wife, on the trial of an action founded on an allegation of adultery, to testify against the other "to disprove the allegation of adultery," does not limit defendant's testimony to denials simply, but she may testify to any fact or circumstance, within her knowledge, competent and material on the question whether the act charged was committed.—(1887) Irsch v. Irsch, 12 Civ. Proc. R. 181; (1889) Stevens v. Stevens, 54 Hun, 490, 8 N. Y. Supp. 47; (1890) Steffens v. Steffens, 11 N. Y. Supp. 424, 19 Civ. Proc. R. 267, 16 Daly, 363.

[l] (N. Y. 1890) Plaintiff asked for separation on the ground of cruel and inhuman treatment, and alleged that after she left defendant he declared that she could not return to him, and, for the purpose of injuring her, circulated false reports among her friends, charging her with adultery. Defendant, in his answer, alleged adultery on the part of plaintiff, and asked for divorce. Code Civ. Proc. § 831, provides that "a husband or wife is not competent to testify against the other upon the trial of an action * * * founded upon an allegation of adultery, except to prove the marriage." *Held*, that plaintiff was not debarred, by reason of the counterclaim, from testifying as to the falsity of the report which he had circulated in regard to her adultery, so far as it was relevant to her cause of action, either before or after defendant introduced his evidence in support of his counterclaim.—De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 906, 17 Am. St. Rep. 652.

[m] (N. Y. 1892) Under Code Civ. Proc. § 831, providing that "a husband or a wife is not competent to testify against the other upon the trial of an action or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage," evidence by plaintiff in a suit for divorce, pointing to her husband's adultery, is incompetent, and will not be considered for any

purpose, even if received without objection by defendant.—Fanning v. Fanning (Com. Pl.) 2 Misc. Rep. 90, 20 N. Y. Supp. 849.

[n] (N. Y. 1893) Code Civ. Proc. § 831, declares a husband or wife incompetent to testify on a trial of an action founded on an allegation of adultery, except to prove the marriage or disprove the adultery. In an action by a wife for divorce for adultery, the husband testified that his wife desired a divorce so that she could marry a richer man; that at her request he went with her cousin to a house of ill fame, and went into a room with an inmate, but had no criminal intercourse with her; that said cousin at once told his wife, who next day got him his meals, and the day following amicably divided with him their household stuff. *Held* competent to disprove the adultery, and to explain otherwise damaging circumstances.—Huntley v. Huntley, 73 Hun, 261, 26 N. Y. Supp. 266.

[o] (N. Y. 1894) In a suit for divorce on the ground of adultery, in which defendant made a counter charge of adultery, testimony of plaintiff, if competent on either issue, was admissible.—McCarthy v. McCarthy, 143 N. Y. 235, 38 N. E. 288.

[p] (N. C. 1883) In an action for divorce on the ground of adultery, neither the husband nor the wife is a competent witness under 2 Battle's Revisal, c. 17, § 340, providing that in actions for divorce neither the husband nor the wife shall be a competent witness to prove the adultery of the other.—Perkins v. Perkins, 88 N. C. 41.

[q] (N. C. 1893) Code, § 1288, which provides that adultery cannot be shown either by the direct testimony of the parties, or the confessions of husband and wife, made to each other, does not render incompetent the testimony of a third person as to the declarations of the paramour of the accused party, and the conversation between such party and the paramour growing out of it, though amounting to an admission of criminality; nor does it render a third person incompetent to testify to a command uttered in her presence by the husband to the wife forbidding the house to the paramour, in connection with evidence of the wife's disregard of such command at the instance of the paramour.—Toole v. Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479.

§ 173. Application for writ of ne exeat.

[a] (Ga. 1850) On application for a writ of ne exeat by a wife, against her husband, pending a suit for a partial divorce and alimony, her affidavit is admissible.—McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407.

[b] (N. Y. 1815) On an application for a writ of ne exeat by a wife, against her husband, pending a suit for alimony, her oath is admissible; the wife, for the purposes of the suit, being considered as independent of her husband.—Denton v. Denton, 1 Johns. Ch. 441.

§ 174. Prosecutions for offenses by husband or wife against the other.

[a] A husband or wife may testify for or against one another on a prosecution for personal injuries inflicted by one on the other.

—(U. S. 1835) United States v. Fitton, Fed. Cas. No. 15,106 [4 Cranch, C. C. 658]; (1836) Same v. Smallwood, Fed. Cas. No. 16,316 [5 Cranch, C. C. 35];

(Ala. 1844) State v. Neill, 6 Ala. 685; (1882) Tucker v. State, 71 Ala. 342;

(Me. 1828) In re Soule, 5 Me. (5 Greenl.) 407;

(Md. 1885) Hanon v. State, 63 Md. 123;

(Mass. 1862) Commonwealth v. Murphy, 86 Mass. (4 Allen) 491;

(Mich. 1887) People v. Sebring, 66 Mich. 705, 33 N. W. 808;

(Mo. 1894) State v. Pennington, 124 Mo. 388, 27 S. W. 1106;

(N. C. 1877) State v. Davidson, 77 N. C. 522;

(Ohio, 1877) Whipp v. State, 34 Ohio St. 87, 32 Am. Rep. 359;

(Pa. 1871) Commonwealth v. Reid, 1 Leg. Gaz. R. 182, 3 Leg. Gaz. 185, 8 Phila. 385;

(S. C. 1833) State v. Boyd, 2 Hill, 288, 27 Am. Dec. 376.

[b] The wife of the accused, being the person injured, is a competent witness for the state in a trial for procuring an abortion by violence.—(Me. 1871) State v. Dyer, 59 Me. 303;

(Pa. 1895) Commonwealth v. Kreuger (Quart. Sess.) 17 Pa. Co. Ct. R. 181, 26 Pittsb. Leg. J. (N. S.) 182;

(Tex. 1887) Navarro v. State, 24 Tex. App. 378, 6 S. W. 542.

[c, d] (Ala. 1844) In a prosecution against a husband for assault and battery committed on his wife, the wife is a competent witness for the husband to disprove the charge.—State v. Neil, 6 Ala. 685.

[e] (Iowa, 1893) Code 1873, §§ 3636, 3641, provide that persons of sufficient capacity to understand the obligations of an oath are competent witnesses in all cases, but that husband or wife shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by one against the other. *Held*, that incest committed by a husband is a crime against his wife, and she was a competent witness against him.—State v. Chambers, 87 Iowa, 1, 53 N. W. 1090, 43 Am. St. Rep. 349.

[f] (Ky. 1881) Gen. St. c. 37, § 24, providing that neither husband nor wife shall be competent for a witness against each other, is applicable to criminal as well as civil proceedings. Therefore the admission of the testimony of the husband against the wife, on the trial of an indictment against the wife and another jointly indicted for willful and malicious cutting and wounding of the husband, is ground for reversal.—Turnbull v. Commonwealth, 3 Ky. Law Rep. 275.

[g] (La. 1890) On the trial of a husband for an attempt to murder his wife, she is a competent witness against him.—State v. Parker, 42 La. Ann. 972, 8 South. 473.

[h] (Md. 1851) The only exception to the rule that neither the husband nor wife can be witnesses for or against each other is where the husband commits an offense against the person of the wife.—Williamson v. Morton, 2 Md. Ch. 94.

[i] (Mich. 1893) An indecent assault by a husband on his nine year old daughter is not such a "personal" wrong or injury to the wife as to allow her to testify against the husband in a criminal prosecution.—People v. Westbrook, 94 Mich. 629, 54 N. W. 486, following Same v. Quanstrom (1892) 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723.

[j] (N. Y. 1850) Since a wife can be a witness against her husband in a criminal proceeding only when he is charged with committing or threatening an injury to her person, on an indictment against the husband for using criminal means, subornation of perjury, to wrong her in a judicial proceeding, she cannot be a witness on the part of the people.—People v. Carpenter, 9 Barb. 580.

[k] (N. Y. 1857) On the trial of an indictment for a personal injury by a husband to his wife, the wife is a competent witness in behalf of her

husband.—People v. Fitzpatrick, 5 Parker, Cr. R. 26.

[l] (N. Y. 1857) On trial of an indictment for personal injury by the husband on his wife, the prosecution could not be compelled to call the prosecutrix as a witness.—People v. Fitzpatrick, 5 Parker Cr. R. 26.

[m] (N. Y. 1857) Where, on prosecution of a husband for a personal injury to his wife, the state refused to call the prosecutrix as a witness, the husband was entitled to call her as a witness in his behalf.—People v. Fitzpatrick, 5 Parker, Cr. R. 26.

[n] (N. Y. 1867) A wife is a competent witness for the prosecution on the trial of her husband for an attempt to poison her; and, being a competent witness, there is no rule whereby any part of her testimony should be excluded if admissible on other grounds.—People v. Northrup, 50 Barb. 147.

[nn] (N. C.) Husband or wife is competent against the other on a trial for assault and battery committed by the other on the witness, if the violence used involved or threatened lasting injury; otherwise not.—(1852) State v. Hussey, 44 N. C. 123; (1877) Same v. Davidson, 77 N. C. 522.

[o] (Pa. 1842) Where, in a charge of conspiracy to obtain a divorce, the indictment does not allege the commission of personal violence, or the intention to commit it, a wife will not be permitted to testify against her husband.—Commonwealth v. McEwen, 1 Clark, 140, 1 Pa. Law J. 388.

[p] (Pa. 1850) A female who has been seduced, and, after the birth of a child, married and deserted by her seducer, is not a competent witness against him on an indictment for seduction, under the statute of 1843.—Commonwealth v. Eichar, 4 Clark, 326, 1 Am. Law J. (N. S.) 551.

[q] (Pa. 1890) On a trial for a conspiracy to have the wife of one of the conspirators declared insane, the wife is a competent witness against her husband under Acts 1887 (P. L. 158), which render either husband or wife competent to testify "in any criminal proceeding against either for bodily injury or violence attempted, done, or threatened upon the other."—Commonwealth v. Spink, 137 Pa. 255, 20 Atl. 680.

[r] (R. I. 1869) A wife is a competent witness against a person accused of producing abortion on her at her husband's command.—State v. Briggs, 9 R. I. 361, 11 Am. Rep. 270.

[s] (S. C. 1811) A wife may be admitted as evidence against her husband, in an indictment for an assault and battery committed on her by him, where no other person was present when the offense was committed.—State v. Davis, 3 Brev. 3, 5 Am. Dec. 529.

[t] (Tex. 1875) A wife cannot testify against her husband on his trial for theft of her property.—Overton v. State, 43 Tex. 616.

[u] (Tex. 1882) A wife is not a competent witness against her husband in a prosecution against him for incest with her daughter, his stepdaughter, under Cr. Code, art. 735, rendering husband and wife competent witnesses against each other in a criminal prosecution "for an offense committed by one against the other."—Compton v. State, 13 Tex. App. 271, 44 Am. Rep. 703, overruling Roland v. Same (1880) 9 Tex. App. 277, 35 Am. Rep. 743.

[v] (Tex. 1895) It is error, on the trial of a husband for slander of his wife, to permit the latter to testify against him, as Code Cr. Proc. art. 735, allowing either to do so in a "criminal prosecution by one against the other," applies only to cases of personal violence.—Baxter v. State, 34 Tex. Cr. R. 516, 31 S. W. 394, 53 Am. St. Rep. 720.

§ 175. —— Adultery.

Prosecutions for adultery in general, see ante, §§ 159½, 160.

[a] (Iowa, 1871) In a prosecution against a wife for adultery, the husband is a competent witness for the state; it is a "crime committed against" him, in the sense of the Revision, § 3983.—State v. Bennett, 31 Iowa, 24.

[b] (Minn. 1860) A prosecution of a married man for adultery is not within the exception of Pub. St. p. 681, § 53, allowing a wife to testify against her husband in "a criminal action or proceeding for a crime committed by one against the other," notwithstanding the provision of Pub. St. p. 728, § 1, that "no prosecution for adultery shall be commenced except on the complaint of the husband or the wife."—State v. Armstrong, 4 Minn. 335 (Gil. 251).

[c] (Neb. 1885) Under Code Civ. Proc. § 331, providing that a husband and wife cannot testify against each other except in a criminal proceeding for a crime committed by the one against the other, a wife can testify against her husband in a prosecution against him for adultery.—Lord v. State, 17 Neb. 526, 23 N. W. 507.

[d] (Tex. 1880) Under a statute permitting husband and wife to testify against one another on a criminal prosecution, for an offense committed by one against the other, the one may testify against the other on an indictment of the other for adultery.—Roland v. State, 9 Tex. App. 277, 35 Am. Rep. 743.

[e] (Tex. 1894) Adultery is not an offense committed by a husband against his wife, so as to admit her testimony against him in a prosecution thereon (Code Cr. Proc. art. 735); and error in admitting such evidence is not cured by charging the jury to consider it only against the female defendant.—McLean v. State, 32 Tex. Cr. R. 521, 24 S. W. 898.

§ 176. —— Bigamy or polygamy.

Prosecutions for bigamy or polygamy in general, see ante, § 161.

[a] (U. S. 1890) Code Civ. Proc. Utah, § 1156, declares that, without the other's consent, neither husband nor wife shall be examined against the other, or be questioned during or after marriage as to any communication made between them, but that this rule does not apply to a civil action by one against the other, or to a criminal proceeding "for a crime committed by one against the other." *Held*, that a subsequent marriage by a married man is not a crime against the lawful wife which can be proved by her evidence of his confessions to her.—Bassett v. United States, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762, reversing United States v. Bassett (1887) 5 Utah, 131, 13 Pac. 237.

[b] (Iowa, 1880) Code 1873, § 3641, provides that neither the husband nor wife shall be a witness against the other, except in a criminal proceeding for a crime committed by one against the other. *Held*, that on an indictment for bigamy the legal spouse of defendant is a competent witness for the state.—State v. Sloan, 55 Iowa, 217, 7 N. W. 516.

[c] (La. 1860) The exception recognized as to the competency of the wife to testify against her husband, where she has sustained a personal injury, does not extend to cases of bigamy; in these the lawful wife is held to be incompetent.—State v. McDavid, 15 La. Ann. 403.

[d] (Mich. 1892) Bigamy on the part of a husband is not such a "personal" wrong or injury to the wife as to allow her to testify against the husband in a criminal prosecution, under 3 How. Ann. St. § 7546, forbidding her testimony except in cases growing out of such

a wrong or injury, and forbidding it also in any proceeding instituted by her in consequence of adultery.—People v. Quanstrom, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723.

[e] (Pa. 1869) A second wife is not a competent witness against the husband, indicted for bigamy, unless the fact of the former marriage is clearly proved and the defendant has failed to show its dissolution.—Commonwealth v. Wyman, 3 Brewst. 338.

[f] (Utah, 1887) Under Civ. Code, § 1156 (Laws 1884), permitting a husband or wife to testify in a criminal action or proceeding for a crime committed by one against the other, on the trial of a husband, on an indictment for polygamy, the wife is a competent witness against him.—United States v. Bassett, 5 Utah, 131, 13 Pac. 237.

[g] (Utah, 1888) Under Civ. Code, § 1156 (Laws 1884, p. 359), permitting a husband or wife to testify in a criminal action or proceeding for a crime committed by one against the other, the legal wife is competent to testify against her husband before the grand jury which found an indictment against him for polygamy.—United States v. Cutler, 5 Utah, 608, 19 Pac. 145.

(g) EFFECT OF CONSENT, INVALIDITY OF MARRIAGE, OR TERMINATION OF RELATION.

CONSENT OF OR AGREEMENT BY HUSBAND OR WIFE AS TO ADMISSION OF TESTIMONY BY THE OTHER, § 177.
INVALIDITY OF MARRIAGE, § 178.
TERMINATION OF RELATION IN GENERAL, § 179.
DIVORCE OR SEPARATION, § 180.
—— ADULTERY AND CRIMINAL CONVERSATION, § 181.
DEATH OF HUSBAND OR WIFE, § 182.

§ 177. Consent of or agreement by husband or wife as to admission of testimony by the other.

[a] (Me. 1859) A husband or wife cannot by agreement become competent witnesses in an action between them for a divorce.—Dwelly v. Dwelly, 46 Me. 377.

[b] (Mich. 1883) When a husband is present in court, and does not object to his wife's testifying, his consent is to be presumed.—Benson v. Morgan, 50 Mich. 77, 14 N. W. 705, distinguishing Hubbell v. Grant (1878) 39 Mich. 641.

[c] (N. J. 1858) A wife cannot testify against her husband on a charge of bigamy, even with his consent.—Wilson v. Hill, 13 N. J. Eq. (2 Beasl.) 143.

[d] (S. C. 1830) In a suit to which her husband is not a party, a wife is competent to testify against the interest of her husband, if he do not object.—Jackson v. Heath, 1 Bailey, 355.

[e] (Wash. 1888) A husband who calls his wife as a witness, and questions her, thereby consents that she may testify.—Columbia & P. S. R. Co. v. Hawthorne, 3 Wash. T. 353, 19 Pac. 25.

§ 178. Invalidity of marriage.

Competency of concubine in general, see ante, § 108 [f].

Marriage pending suit and marriage for purpose of suppressing testimony, see ante, § 126.

[a] The common-law rule or a statutory prohibition against the husband or wife testifying one against the other does not include parties living unlawfully together, though they recognize each other as husband and wife.
—(Ark. 1867) Flanagin v. State, 25 Ark. 92;
(1876) Rickerstricker v. Same, 31 Ark. 207;
(Ga. 1871) Hill v. State, 41 Ga. 484;
(N. Y. 1870) Dennis v. Crittenden, 42 N. Y. 542;
(Tex. 1876) Mann v. State, 44 Tex. 642;
(1892) Sims v. State, 30 Tex. App. 605, 18 S. W. 410.

[b] The second wife of a bigamist is competent to testify against him on a criminal trial.
—(Ga. 1878) Johnson v. State, 61 Ga. 305;
(La. 1860) State v. McDavid, 15 La. Ann. 403;
(Tenn. 1859) Finney v. State, 40 Tenn. (3 Head) 544.

[c] (Ala. 1846) Slaves, though living together as husband and wife, may be witnesses for or against each other, in a criminal case.—Smith v. State, 9 Ala. 990.

[d] (Ala. 1871) The marriage relations formerly allowed to be contracted between slaves having been declared lawful marriages as between persons who have continued to live as husband and wife since emancipation (Pamph. Acts, 175, Ord. No. 23, § 1), a wife by such a marriage of one formerly a slave is within the general rule forbidding a wife to be a witness for or against her husband.—Hampton v. State, 45 Ala. 82.

[e] (Ala. 1875) Where a freedman and freedwoman, living together as husband and wife, by the operation of the act of December 31, 1868, are to be regarded as legally married, neither is a competent witness against the other on the trial for an offense committed on a third person.—Jackson v. State, 53 Ala. 472.

[f] (Ga. 1861) On the trial of slaves or free persons of color, the husband or wife is not admissible as a witness for or against one another.—William v. State, 33 Ga. Supp. 85.

[g] (Ga. 1894) A woman to whom defendant was married during the life of his lawful wife, is a competent witness against him.—Wrye v. State, 95 Ga. 466, 22 S. E. 273.

[h] (La. 1854) The rule that a wife cannot testify for or against her husband does not prevent a woman who had lived with accused for four years as his mistress from testifying in his behalf.—State v. Johnson, 9 La. Ann. 308.

[i] (La. 1876) The objection to a wife testifying against her husband cannot be sustained, where the woman produced as a witness testifies on the voir dire that she has never been married to the accused, though she has lived with him as his wife.—State v. Brown, 28 La. Ann. 279.

[j] (Mich. 1869) After the prosecution in a criminal case has shown by a woman on the voir dire an actual marriage between defendant and the witness, prima facie valid and in good faith, on which defendant might reasonably and honestly rely as valid, and which on the trial he did rely on and claim as valid, it is not competent for the prosecution to introduce opposing testimony for the purpose of establishing the invalidity of the marriage, so as to make the alleged wife a competent witness against defendant.—Dixon v. People, 18 Mich. 84.

[k] (N. C. 1836) The concubinage of slaves does not constitute the marriage relation, and forbid the parties testifying against each other.—State v. Samuel, 19 N. C. 177.

[l] (N. C. 1868) Defendant in a criminal prosecution and a woman while slaves had cohabited as man and wife, and after their emancipation they observed the ceremonies prescribed by

St. 1866, c. 40, § 5. *Held* that the woman was the wife of defendant, and was not admissible as a witness in his behalf.—State v. Harris, 63 N. C. 1.

[m] (Pa. 1869) The second wife is not a competent witness against a defendant, indicted for bigamy, unless the fact of a former marriage is clearly made out and defendant has failed to show its dissolution.—Commonwealth v. Wyman, 3 Brewst. 338.

[n] (Utah, 1874) Under Prac. Act, § 379, which excludes the wife from testifying for or against her husband, except when the action is between themselves, when a witness is offered by a party to the suit, with the statement that "she is his plural or second wife," such witness will be excluded, and the court will not try the question of the validity of marriage, or the relations of the parties.—Freil v. Wood, 1 Utah, 160.

[o] (Vt. 1895) In an action for deceit against one who induced plaintiff to marry him by false representations that he was single, where it appeared that defendant was not divorced from his wife until after the second marriage, plaintiff could testify in her own behalf, since the parties were not husband and wife.—Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

§ 179. Termination of relation in general.

[a] (Ind. 1859) After the marriage relation ceases to exist, a husband or wife are competent as to anything the knowledge of which was not obtained through the privacy thereof.—Woolley v. Turner, 13 Ind. 253.

§ 180. Divorce or separation.

[a] The rule that neither the husband nor wife can be a witness for or against the other extends to cases where the wife is divorced from the husband.

—(Ill. 1859) Waddams v. Humphrey, 22 Ill. (12 Peck) 661;

(Md. 1851) Williamson v. Morton, 2 Md. Ch. 94;

(Tenn. 1858) Kimbrough v. Mitchell, 38 Tenn. (1 Head) 539; (1878) Patton v. Wilson, 70 Tenn. (2 Lea) 101.

[b] (Ala. 1888) A divorced wife is competent to testify as to matters which have occurred after the divorce.—Long v. State, 86 Ala. 36, 5 South. 443.

[c] (Del. 1853) A wife, though separated by partial divorce, cannot be a witness against her husband.—Kemp v. Downham, 5 Har. 417.

[d] (Ind. 1872) Where the marriage relation has terminated by divorce, the wife may testify as to statements made to third persons by the husband during its existence.—Mercer v. Patterson, 41 Ind. 440.

[e] (Ky. 1877) The rule which excludes a husband or wife from testifying against the other does not apply to facts known to a divorced husband or wife, independent of the previous existence of the marriage.—Elswick v. Commonwealth, 76 Ky. (13 Bush) 155.

[f] (Ky. 1890) On the trial of a husband for an attempt to poison his wife, since divorced, she is a competent witness against him, to prove that she saw him sprinkle some substance on food intended for her, and that the food produced at the trial, and proved to contain arsenic, is part of that prepared for her, and in the same condition as when she received it from him; though Civ. Code, § 606, provides that "neither husband nor wife shall be competent for or against each other, or concerning any communication made by one to the other during marriage, whether called while that relation subsists or afterwards."—Commonwealth v. Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405.

[g] (La. 1856) The voluntary separation of husband and wife does not affect the rule rendering them incompetent to testify for or against one another.—Tulley v. Alexander, 11 La. Ann. 628.

[h] (Md. 1849) The rule of evidence, that husband and wife cannot be witnesses for or against each other, is firmly established, and is founded partly on identity of interest, and partly on that principle of public policy which seeks to prevent discord in families, a policy of which no evasion will be permitted, even after divorce.—Bradford v. Williams, 2 Md. Ch. 1.

[i] (Mich. 1878) At the trial of a woman for murder committed in an attack by herself and others upon her husband and some associates, the husband is a competent witness, he and defendant having been living apart for some time under circumstances of great hostility, and divorce proceedings being then pending, under which a divorce was granted previous to the trial.—People v. Marble, 38 Mich. 117.

[j] (Mo. 1894) A divorced wife is not disqualified as a witness for or against her former husband, except as to communications between them while the marital relation existed.—Toovey v. Baxter, 59 Mo. App. 470, 1 Mo. App. Rep'r, 39.

[k] (N. Y. 1847) After a wife has been divorced from her husband, she will not be permitted to testify against him in respect to transactions which took place prior to the divorce and during coverture.—Barnes v. Camack, 1 Barb. 392.

[l] (Ohio, 1849) A woman who has been divorced is not competent to prove a contract made with her husband during coverture.—Cook v. Grange, 18 Ohio, 526.

[m] (S. C. 1830) A husband is incompetent to testify for the benefit of an estate, of which his wife is a distributee, although they live apart, deal separately, and are under bonds not to interfere with the property of each other.—Terry v. Belcher, 1 Bailey, 568.

[n] (S. D. 1894) In an action to foreclose a mortgage executed by a married man alone, wherein his subsequently divorced wife claims a homestead right, the mortgagor may testify, without his late wife's consent, as to his intention in occupying the premises as a homestead therein.—Clark v. Evans, 6 S. D. 244, 60 N. W. 862.

[o] (Tenn. 1858) In an action for assault and battery, where the difficulty was claimed by defendant to have arisen because of the abuse inflicted by plaintiff on his wife, who was defendant's sister, the wife, though divorced from plaintiff, is incompetent to testify as to the abuse inflicted on her during the continuance of their union.—Kimbrough v. Mitchell, 38 Tenn. (1 Head) 539.

[p] (Tex. 1889) Separation and noncohabitation do not remove the restriction of Code Cr. Proc. art. 735, that a husband or wife shall not testify against the other in prosecutions for offenses committed against third persons.—Johnson v. State, 27 Tex. App. 135, 11 S. W. 34.

[q] (Tex. 1895) A divorced woman may give in evidence against her former husband the dying declarations of their daughter, made prior to the divorce, to the effect that her father caused her death.—Ex parte Fatheree, 34 Tex. Cr. R. 594, 31 S. W. 403.

[r] (Vt. 1801) A woman divorced a vinculo is a competent witness in support of an indictment against her former husband for a forgery committed during coverture.—State v. J. N. B., 1 Tyler, 36.

[s] (Vt. 1803) A woman divorced a vinculo is not a competent witness on an indictment against her former husband for a crime commit-

ted during coverture.—State v. Phelps, 2 Tyler, 374, overruling Same v. J. N. B. (1801) 1 Tyler, 36.

[t] (Vt. 1892) In replevin it is not error to permit plaintiff's divorced wife to testify to facts contradictory of plaintiff relating to a settlement between him and defendant in the witness' presence, during the existence of the marriage relation, where none of such facts are direct evidence of the commission of a crime by plaintiff.—French v. Ware, 65 Vt. 338, 26 Atl. 1096; Same v. Follett, Id.

[u] (Vt. 1892) Under the common law, a divorced wife is a competent witness to testify against her divorced husband to any facts or acts occurring during their marriage which did not come to her knowledge in confidence growing out of the marital relation, though they may tend to show that the husband has committed a fraud, to discredit him as a witness, or to indirectly, but not directly, show that he has been guilty of a crime.—French v. Ware, 65 Vt. 338, 26 Atl. 1096; Same v. Follett, Id.

§ 181. —— Adultery and criminal conversation.

[a] (Ill. 1868) A divorced wife is incompetent to testify in behalf of her former husband, in an action by him against another for seducing her.—Rea v. Tucker, 51 Ill. 110, 99 Am. Dec. 539.

[b] (Mass. 1850) In an action on the case brought by a husband for criminal conversation with his wife, the latter, after a divorce from the bonds of matrimony, is a competent witness for plaintiff, to prove the charge in the declaration.—Dickerman v. Graves, 60 Mass. (6 Cush.) 308, 53 Am. Dec. 41.

[c] (Mich. 1894) The applicability of 2 How. Ann. St. § 7546, prohibiting a husband or wife from testifying in a suit by one of them on account of adultery, is not affected by the fact that they have been divorced since the time of the alleged adultery.—Hanselman v. Dovel, 102 Mich. 505, 60 N. W. 978, 47 Am. St. Rep. 557.

[d] (N. Y. 1841) After a divorce a vinculo, a wife may be a witness for her former husband in an action of criminal conversation, brought by him against a third person, though the offense was committed during her marriage.—Ratcliff v. Wales, 1 Hill, 63.

[e] (N. Y. 1877) In an action for criminal conversation, the divorced wife of plaintiff is a competent witness for him, both to prove the marriage and the offense.—Wottrich v. Freeman, 71 N. Y. 601.

[f] (N. C. 1838) In an indictment for fornication and adultery, one who had been the husband of the feme defendant, but had been divorced from her on account of her adultery, is incompetent to testify against defendants as to the adulterous intercourse, or any other fact which occurred while the marriage subsisted. And if the testimony be received at the trial, after objection made to it, and defendants be found guilty, and the man alone appeals, it is not thereby rendered competent against him.—State v. Jolly, 20 N. C. 108, 32 Am. Dec. 656.

[g] (N. C. 1883) On a trial for fornication and adultery, the husband of defendant is not a competent witness against her, though he have obtained a divorce before the trial.—State v. Jones, 89 N. C. 559.

[h] (Wis. 1858) After a divorce a vinculo, the husband is competent to prove the marriage on an indictment against another for adultery with the wife before divorce.—State v. Dudley, 7 Wis. 664.

§ 182. Death of husband or wife.

[a] (Ala. 1843) If one of two defendants in a suit against them as makers of a note dies pending the suit, his widow becomes a competent witness for plaintiff, although no entry has been made suggesting the death of her husband.—Saunders v. Hendrix, 5 Ala. 224.

[b] (Ark. 1874) After the husband's death, the wife is competent to testify as to such matters, touching his business, as came under her observation during his life, and were not learned by communications from him.—Spivey v. Platon, 29 Ark. 603.

[c] (Conn. 1808) A wife may be a witness for her husband in an action of book debt, after his death, though the charges accrued in his lifetime.—Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255.

[d] (Ga. 1873) In a suit by an administrator de bonis non to recover property of the intestate, sold by his predecessor as his own, on which there is a charge in favor of the latter's wife which defendants claim she has relinquished, the wife is a competent witness, notwithstanding the death of the husband.—Seabrook v. Brady, 47 Ga. 650.

[e] (Ill. 1888) In an action for partition and assignment of dower and homestead, in which complainant claims through his deceased wife, and defendants dispute her title except as to a one-fifth interest, and assert title as heirs of another deceased person, the husband is not incompetent, under Rev. St. c. 51, § 5, which renders a husband and wife incompetent to testify for or against each other in certain cases.—Best v. Jenks, 123 Ill. 447, 15 N. E. 173.

[f] (Ill. 1892) Rev. St. c. 51, § 5, makes a wife competent to testify in all matters of business in which she acted as agent of her husband. *Held*, that she is competent to testify as to such matters even after his death.—Robnett v. Robnett, 43 Ill. App. 191.

[g] (Ind. 1863) Where plaintiff having sold land to a feme covert, since deceased, sues to enforce his lien for the purchase money against her husband and heirs, the husband may be made a witness for plaintiff, but questions as to matters either for or against his wife, and perhaps also as to communications made to him by her during coverture, must not be put to him.—Haugh v. Blythe's Ex'rs, 20 Ind. 24.

[h] (Ind. 1864) A widow is a competent witness in favor of her husband's administrator, to give general evidence either for or against her husband.—Adams v. Adams' Adm'r, 23 Ind. 50.

[i] (Iowa, 1887) Code 1873, § 3641, forbidding a husband or wife to testify against each other, does not render a widow incompetent to testify for plaintiff in an action against her husband's executor on an account alleged to be due from the testator.—Parcell v. McReynolds, 71 Iowa, 623, 33 N. W. 139.

[j] (Ky. 1841) After the death of her husband, the wife is competent to prove his public acts, not affecting his character.—McGuire v. Maloney, 40 Ky. (1 B. Mon.) 224.

[k] (Ky. 1871) A surviving wife or husband may testify, in behalf of the administrator of the estate of the deceased, to facts known by the witness from other means of information than such as result from the marriage relation, where the witness is not otherwise incompetent, although the testimony may relate to transactions of the deceased husband or wife.—English's Adm'r v. Cropper, 71 Ky. (8 Bush) 292.

[l] (La. 1876) The rule which forbids a husband or wife to testify does not operate after death of the other.—Reilly v. Succession of Reilly, 28 La. Ann. 669.

[m] (La. 1878) When a dation en paiement by a husband to his wife is attacked, after the wife's death, as fraudulent, the husband is a competent witness for the wife's succession, to prove the amount and verity of his wife's

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claims against him.—Lehman v. Levy, 30 La. Ann. 745.

[n] (La. 1881) A husband is a competent witness concerning a claim against the estate of his deceased wife, although, during her lifetime, his testimony would not have been admissible. —Succession of Ames, 33 La. Ann. 1317.

[o] (Md. 1873) A woman claiming the right as widow to administer on the estate of a deceased person is not competent under Acts 1864, c. 109, as modified by Acts 1868, c. 116, to testify as to the fact of her marriage with the intestate.—Redgrave v. Redgrave, 38 Md. 93.

[oo] (Mo. 1885) A woman, after her husband's death, may testify to her husband's transactions, if her knowledge was not derived from her marital relation.—Cannon v. Moore, 17 Mo. App. 92.

[p] (Mo. 1891) A widow is competent, in a suit against her husband's estate, to testify to the genuineness of his signature, from information of his handwriting which she derived before marriage.—Stillwell v. Patton, 108 Mo. 352, 18 S. W. 1075.

[pp] (Mo. 1891) Under Rev. St. 1889, § 8922, relieving the wife from the common-law disability to testify to matters where her husband was a party, but stipulating "that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admissions or conversations of her husband, whether made to herself or to third parties," a surviving wife, in an action by her on a policy of insurance on the life of her deceased husband, is incompetent to testify to the acts of the husband in making the application for the policy, or to his declarations, or want of declarations, while so doing.—Herndon v. Triple Alliance, 45 Mo. App. 426.

[q] (Mo. 1895) Under Rev. St. 1889, § 8922, a surviving wife is a competent witness in an action against her husband's executor on a contract made by her as her husband's agent.—Reed v. Crissey, 1 Mo. App. Rep'r, 742, 63 Mo. App. 184.

[qq] (N. H. 1860) Plaintiff was a married woman when she received an injury from an alleged defect in a highway in defendant town, but before suit was brought her husband died. *Held*, on the trial, that she was a competent witness.—Winship v. Enfield, 42 N. H. 197.

[r] (N. H. 1866) A surviving wife may testify as to matters in which her deceased husband was interested, unless she acquired her knowledge of the facts through confidential communications from her husband.—Ryan v. Follansbee, 47 N. H. 100.

[rr] (N. C. 1851) After the death of a husband, the wife is a competent witness to prove the execution of a deed made by him in favor of a third person.—Gaskill v. King, 34 N. C. 211.

[s] (Ohio, 1855) After the death of a husband, the widow is a competent witness against his administrator to prove the fact of work and labor performed for him by plaintiff, where her testimony does not violate her husband's confidence or in any way prejudice his reputation. —Stober v. McCarter, 4 Ohio St. 513.

[ss] (Ohio, 1859) Civ. Code, § 314, providing that husband and wife shall be incompetent to testify for or against each other or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted or afterwards, changes the common-law rule so that the husband and wife are not competent witnesses for or against each other, or the administrator or executor of either, when the facts to be proved transpired before the death of such deceased person.—Neil v. Cherry, 2 Ohio Dec. 417.

[t] (Pa. 1836) The wife, on the death of the husband, is competent to prove a warranty deed, signed by herself and husband, not to be fraudulent, under the statute of St. 13 Eliz. —Chambers v. Spencer, 5 Watts, 404.

[u] (Pa.) A widow is competent to testify against her husband's estate as to facts coming to her knowledge otherwise than through confidential communications of the husband.—(1884) In re Rindt's Estate, 2 Lehigh Val. Law Rep. 246; (1890) In re Tucker's Estate, 9 Pa. Co. Ct. R. 345.

[uu] (S. C. 1832) The dissolution of a marriage by the death of the husband makes the wife a competent witness, in an action against the executor of her husband, to prove a gift by him in his lifetime.—Caldwell v. Stuart, 2 Bailey, 574.

[v] (S. C. 1851) A wife is not an incompetent witness merely because of the conjugal relation, to prove, after the husband's death, that a parol gift, alleged to have been made by the husband in his lifetime, was, in fact, a loan.—Hay v. Hay, 3 Rich. Eq. 384.

[vv] (Tenn. 1871) The widow of a trustee is not a competent witness as to his disposition of the trust fund.—State v. McAuley, 51 Tenn. (4 Heisk.) 424.

[w] (Tenn. 1878) Incompetency as a witness, arising, under Code, § 3813a et seq., from the relation of husband and wife, continues after that relation is terminated by death.—Patton v. Wilson, 70 Tenn. (2 Lea) 101.

[ww] (Vt. 1835) Where a co-signer of a note, who was but a surety for the other signer, and who was constituted an agent by the creditor to collect the note of the other signer, brought suit thereon to which the other signer interposed the defense that he had paid the amount to such agent for the creditor, after such agent died insolvent and his estate had been settled, his widow was a competent witness in support of the defense.—Williams v. Baldwin, 7 Vt. 503.

[x] (Vt. 1835) A widow may be called to testify to a transaction of her late husband, known to her by personal inspection. — Williams v. Baldwin, 7 Vt. 503.

[xx] (Vt. 1858) In an action by husband and wife to recover a debt due the latter before coverture, the wife died after one trial had taken place. *Held*, that the husband was a competent witness on a second trial to prove what the wife testified to on the former trial, provided the testimony itself was proper.—Perry v. Whitney, 30 Vt. 390.

[y] (Vt. 1886) The widow of a deceased party is a competent witness, in an action brought for the killing of a horse belonging to the husband, to defendant's declarations not disclosing matters of confidence between herself and her husband, nor affecting his character.—Stowe v. Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569.

[yy] (Va. 1855) A husband is not a competent witness to prove the consideration for a postnuptial settlement on the wife, in favor of those claiming under her, though after her death.—William & Mary College v. Powell, 12 Grat. 372.

[z] (Va. 1887) In an action by infants to set aside a deed of trust and sale of property in which they had an equitable title as heirs of their mother, the father was called as witness for the children, to prove that the grantees in the deed and purchasers at the sale had actual notice of the claim of plaintiffs to the property. The testimony was excluded, on the ground that the property in question had belonged to the wife. *Held*, that as the wife was not a par-

ty to the suit, the husband was a competent witness as to any transactions arising since her death and affecting plaintiff's title to the property.—Dugger's Children v. Dugger, 84 Va. 130, 4 S. E. 171.

[zz] (Va. 1894) Where a paper in the form of a will is attempted to be established as a contract, the widow of the one who executed it is incompetent to testify as to the value of the services rendered by the beneficiary.—Swann v. Housman, 90 Va. 816, 20 S. E. 830.

9. JUDGES, JURORS, AND JUDICIAL OFFICERS.

COMPETENCY IN GENERAL, § 183.
COMPETENCY AS TO PROCEEDINGS BY OR BEFORE THEM IN GENERAL, § 184.
JUDGES, JUSTICES OF THE PEACE, AND OTHER MAGISTRATES, § 185.
GRAND JURORS, § 186.
TRIAL JURORS, § 187.
COMMISSIONERS, MASTERS, REFEREES, AND ARBITRATORS, § 188.

§ 183. Competency in general.

[a] (Ala. 1880) Neither the personal testimony nor the affidavit of a probate judge is admissible in a proceeding tried before him.—Dabney v. Mitchell, 66 Ala. 495.

[b] (Ark. 1894) A judge presiding at a criminal trial cannot, against the objection of defendant, be sworn and testify as a witness for the prosecution.—Rogers v. State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465.

[c] (Ark. 1894) The statutory provision that the Civil Code shall apply to the summoning and coercing the attendance of witnesses in all criminal actions does not render Sand. & H. Dig. § 2965, providing that "the judge or juror may be called as a witness by either party," applicable to a criminal trial.—Rogers v. State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465.

[d] (Cal. 1890) It is not error to permit the prosecuting attorney to be called as a witness, and testify to facts within his knowledge, pertinent to the issue on trial.—People v. Hamberg, 84 Cal. 468, 24 Pac. 298.

[e] (Ga. 1892) The sole presiding magistrate in a justice's court cannot testify as a witness before a jury trying a case on appeal in the court over which he presides, as the law makes no provision for administering an oath to him as a witness, and he cannot be sworn before himself.—Baker v. Thompson, 89 Ga. 486, 15 S. E. 644.

[f] (Kan. 1886) A district judge is not competent as a witness in a cause tried before him.—Gray v. Crockett, 35 Kan. 66, 10 Pac. 452.

[g] (La. 1824) A district judge cannot be a witness in a cause where he presides, except, perhaps, in a jury case.—Ross v. Buhler, 2 Mart. (N. S.) 312.

[h] (La. 1845) A judge before whom a cause is tried is competent for either party. Act March 25, 1828, No. 83, § 6, provides the mode of swearing him and reducing his testimony to writing.—Babin v. Nolan, 10 Rob. 373.

[i] (Miss. 1895) A juror is a competent witness for a party in a suit on trial before himself and fellows, where he testifies only as to the character of the party calling him.—White v. State, 73 Miss. 50, 19 South. 97.

[j] (Mo. 1876) Neither a sheriff nor his substitute can be disqualified as a witness by reason of his having summoned the jury before whom he testifies.—Crowe v. Peters, 63 Mo. 429.

[k] (N. Y. 1851) One of a board of several referees, before whom a cause is tried, cannot be sworn and examined as a witness on the trial of such cause.—Morss v. Morss, 11 Barb. 510, 1 Code R. (N. S.) 374.

[l] (Pa. 1866) A juror in a criminal cause may be examined as a witness therein.—Howser v. Commonwealth, 51 Pa. (1 P. F. Smith) 332.

[m] (Tenn. 1891) Where the child alleged to have been born of the intercourse between defendant indicted for abduction for purposes of prostitution and the girl after the alleged abduction is produced before the jury, it is not error to refuse to allow defendant to call the jurors as witnesses to testify that the child bears no resemblance to defendant.—Scruggs v. State, 90 Tenn. (6 Pickle) 81, 15 S. W. 1074.

[n] (Vt. 1802) A juror may be a witness to a fact in the case in his knowledge before he was sworn as a juror, but not to anything indicating his opinion as to the merits.—Dunbar v. Parks, 2 Tyler, 217.

[o] (Wash. 1896) The judge presiding at the trial cannot testify against the objection of one of the parties.—Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117.

§ 184. Competency as to proceedings by or before them in general.

[a] (U. S. 1809) An officer to whose care a jury had been committed cannot be compelled to testify to the fact of the jury's separating after a cause was committed to them, and before they had agreed on their verdict.—Howard v. Cobb, Fed. Cas. No. 6,755 [Brunner, Col. Cas. 75, 3 Day, 309].

[b] (Ga. 1853) The clerk of the inferior court is a competent witness to prove that no license had been granted by that court to the accused on trial for retailing liquor.—Elkins v. State, 13 Ga. 435.

[c] (Ind. 1860) In a suit to set aside a sheriff's sale of real estate, the sheriff is competent as a witness to prove the steps taken by him in the sale.—Draper v. Vanhorn, 15 Ind. 155.

[d] (Mo. 1893) The prosecuting attorney is incompetent as a witness as to matters occurring in the grand jury room.—State v. Johnson, 115 Mo. 480, 22 S. W. 463.

[e] (N. Y. 1848) Where, on habeas corpus, it appears that the prisoner is held on process, the justice who issued the process, and the clerk of his court, are competent witnesses to prove on what papers the process issued; and there is no impropriety in their appearing as witnesses.—In re Heyward, 3 N. Y. Super. Ct. (1 Sandf.) 701.

§ 185. Judges, justices of the peace, and other magistrates.

[a] (Ark. 1856) A justice who issues civil process is a competent witness to prove his own official character, in an indictment for resisting it.—Oliver v. State, 17 Ark. 508.

[b] (Conn. 1895) Where defendant pleads a prior judgment in bar, the deposition of the judge who tried the former action as to the issues therein tried is admissible, where the facts do not appear by the unaided record.—Perkins v. Brazos, 66 Conn. 242, 33 Atl. 908.

[c] (Ga. 1856) The justices of the inferior court are competent witnesses to testify for the court, on the question whether the inferior court is liable to a mandamus, on refusing to pay for a bridge.—Talbot County v. House, 20 Ga. 328.

[d] (Ga. 1856) The justices of the inferior court are competent witnesses to prove mistake or fraud in the consideration of a note signed by them, where payment thereof is sought to

be enforced by mandamus against the county treasurer.—Rogers v. Mandeville, 20 Ga. 627.

[e] (Ill. 1861) A justice is a competent witness to prove and explain entries on his docket and to identify the cause and parties.—Haven v. Green, 26 Ill. (16 Peck) 252.

[f] (La. 1825) The parish judge who received the sheriff's bond may prove its loss, though liable to a penalty for permitting the sheriff to act without giving bond.—Villere v. Armstrong, 4 Mart. (N. S.) 21.

[g] (La. 1841) A parish judge may prove a mortgagee's assent to the sale of the property under administration on terms fixed by the administrator.—Williams v. Bank of Louisiana, 17 La. 378.

[h] (Md. 1862) The magistrate who has taken the acknowledgment of a married woman to her deed is not a competent witness to contradict or impeach his certificate of such acknowledgment.—Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597.

[i] (Md. 1864) It is against the policy of the law that justices of the peace should be permitted to contradict as witnesses what they have officially certified to as magistrates, and to that extent they are incompetent as witnesses. Beyond this there is no rule of law which precludes them from testifying to facts which do not contradict their official certificates, although those facts may incidentally operate on the legal effect of the instrument acknowledged before them. They may testify to the age and health of the grantor, to the payment or nonpayment of the consideration money, the reading or omission to read the instrument, or other collateral facts not conflicting with what they have certified.—Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593.

[j] (Mich. 1860) After judgment pronounced, and before the proceedings are entered in the docket, it is competent to prove the judgment by the oath of the justice, who produces his minutes of the trial, which are as complete as the entry on the docket is required to be.—Hickey v. Hinsdale, 8 Mich. 267, 77 Am. Dec. 450.

[k] (Mich. 1884) When a plea of former judgment is set up as a defense, and the record fails to show why the judgment was rendered in favor of defendant, the testimony of the justice of the peace by whom the judgment was rendered may be admitted to show that the cause was dismissed, and not tried on its merits, because the claim was not then due.—Wood v. Faut, 55 Mich. 185, 20 N. W. 897.

[l] (Mich. 1889) Where the record of the former trial does not show on what ground the judgment was based, and the trial was by the court, evidence of the trial judge as to the ground on which he based his decision is admissible.—Black v. Miller, 75 Mich. 323, 42 N. W. 837.

[m] (Mo. 1848) A justice of the peace before whom a cause was tried is a competent witness to prove the grounds on which the cause was determined.—Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119.

[n] (Mo. 1880) At a second trial of a cause, the testimony of a witness at the first trial, since deceased, may be shown by the judge who presided at the first trial, who may also prove that such testimony was preserved in a bill of exceptions, signed by him.—Corby v. Wright, 9 Mo. App. 5.

[o] (N. Y. 1806) A judge who has taken the proof of the execution of a deed while out of the jurisdiction of the state is a competent witness as to that fact; but he is not bound to answer any question which may impeach his conduct as a public officer.—Jackson v. Humphrey, 1 Johns. 498.

[p] (N. Y. 1883) A justice cannot testify as to the grounds on which he based his decision, where such testimony was offered on the issue of whether a certain matter was res adjudicata, because embraced in a previous decision.—Agan v. Hey, 30 Hun, 591.

[q] (Ohio, 1859) Since a judgment rendered on a technical point is not a bar to a subsequent action for the same cause, the parol evidence of the magistrate is admissible to show on what ground he decided the case, where the record is silent in that respect.—Mahaffey v. Rogers, 10 Ohio Cir. Ct. R. 24, 6 O. C. D. 88.

[r] (Ohio, 1862) A magistrate before whom a deed is acknowledged, and who certifies that the grantor "acknowledged the same to be his voluntary act and deed," is not thereby precluded from testifying to the legal incapacity of the grantor at the time.—Truman v. Lore's Lessee, 14 Ohio St. 144.

§ 186. Grand jurors.

[a] That the testimony of a witness before a grand jury was different from his testimony on the trial may be shown by the testimony of a member of the grand jury.

—(Me. 1874) State v. Benner, 64 Me. 267;

(Md. 1893) Izer v. State, 77 Md. 110, 26 Atl. 282;

(Mass. 1858) Commonwealth v. Mead, 78 Mass. (12 Gray) 167, 71 Am. Dec. 741;

(Mo. 1894) State v. Ragsdale, 59 Mo. App. 590;

(Or. 1895) State v. Brown, 28 Or. 147, 41 Pac. 1042;

(Pa. 1879) Gordon v. Commonwealth, 92 Pa. 216, 37 Am. Rep. 672;

(Tenn. 1888) Crocker v. State, 19 Tenn. (Meigs) 127;

(Tex. 1882) Canton v. State, 13 Tex. App. 139, overruling Ruby v. Same (1880) 9 Tex. App. 353.

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(N. J. 1800) Imlay v. Rogers, 7 N. J. Law (2 Halst.) 347.

[b] (U. S. 1813) Grand jurors may testify as to the confessions made by the prisoner before them, upon oath, when under examination as a witness against another person.—United States v. Charles, Fed. Cas. No. 14,786 [2 Cranch, C. C. 76].

[c] (U. S. 1888) 1 Rev. St. 1879, §§ 1791, 1793, 1794, providing that members of the grand jury may be compelled to disclose the names of witnesses who have appeared before it, and the evidence heard in the grand jury room, only (1) to show whether the testimony of a witness on trial is consistent with or different from that given before the grand jury; and (2) on trial for perjury committed before that body—establish much more than a rule of evidence. They declare the public policy of the state, and so are binding on the federal courts sitting in the state.—Fotheringham v. Adams Exp. Co. (C. C.) 34 Fed. 646.

[d] (U. S. 1888) Under Rev. St. Mo. 1879, §§ 1791, 1793, 1794, providing that members of the grand jury may be compelled to disclose the names of witnesses who have appeared before it, and the evidence heard in the grand jury room only—First, when it is necessary to show whether the testimony of a witness on the trial of an indictment is consistent with or different from that given before the grand jury; and, second, when a person is on trial for perjury committed before the grand jury—a plaintiff in an action for malicious prosecution cannot show by a member of the grand jury what testimony was given before that body at that time.—Fotheringham v. Adams Exp. Co. (C. C.) 34 Fed. 646.

[e] (Cal. 1867) An indictment founded on the testimony of the grand jurors before whom the perjury was alleged to have been committed is not founded on illegal evidence, although the witnesses were not required to testify by judicial order.—People v. Young, 31 Cal. 563.

[f] (Conn. 1888) Grand jurors may testify as to declarations made to them by the prisoner in the grand jury room, when they were made to the witnesses as individuals, and were no part of the grand jury proceedings.—State v. Coffee, 56 Conn. 399, 16 Atl. 151.

[g] (Fla. 1895) Rev. St. § 2814, providing that members of the grand jury may be required to testify whether the testimony of a witness examined before such jury is consistent with the evidence given by him before the trial court, and to disclose the testimony given before such jury by any person on the trial of a complaint against such person for perjury, or on his trial for such offense, does not alter or limit the rule making it discretionary with the trial court to permit a grand juror to be examined as to what a witness testified to before the grand jury.—Jenkins v. State, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267.

[h] (Ind. 1873) The oath of grand jurors to make their proceedings secret does not prevent the public or individual from proving by one of the jurors in a court of justice what passed before the grand jury.—Burdick v. Hunt, 43 Ind. 381.

[i] (Ky. 1809) In an action for malicious prosecution, a grand juror is competent to prove that defendant appeared before the grand jury to prosecute an indictment against plaintiff, and the attorney for the commonwealth is not the only admissible witness.—White v. Fox, 4 Ky. (1 Bibb) 369, 4 Am. Dec. 643.

[j] (Ky. 1879) A grand juryman is a competent witness to prove that he is not a citizen, and therefore that he was not a competent juror.—Raganthall v. Commonwealth, 77 Ky. (14 Bush) 457.

[k] (La. 1896) A member of the grand jury cannot be permitted to impeach its finding by testifying that he, as a witness before that body to support the indictment, was not sworn.—State v. Comeau, 48 La. Ann. 249, 19 South. 130.

[l] (Me. 1827) Grand jurors may be examined as witnesses to the question whether 12 of the panel concur or not in the finding of an indictment as provided by Const. art. 1, § 7.—In re Low, 4 Me. (4 Greenl.) 380, 16 Am. Dec. 271.

[m] (Md. 1895) In an action for malicious prosecution, after the foreman of the grand jury testified that the criminal proceeding against plaintiff was dismissed, it was proper to refuse to permit him to state why it was dismissed.—Owens v. Owens, 81 Md. 518, 32 Atl. 247.

[n] (Mass. 1853) A member of the grand jury which found an indictment is a competent witness on the trial to prove that a certain person did not testify before the grand jury.—Commonwealth v. Hill, 65 Mass. (11 Cush.) 137.

[o] (Minn. 1871) The affidavit of one of the grand jury by whom an indictment was found is not admissible to prove that there was no legal evidence before the grand jury upon which it was found, nor that there was illegal evidence used by the grand jury, nor that the names of certain witnesses were indorsed on the indictment who were not sworn or examined by or before the grand jury during the examination or consideration of the charge set forth in the indictment.—State v. Beebe, 17 Minn. 241 (Gil. 218).

[p] (Minn. 1894) A grand juror is not competent to testify in a civil case as to the statements of a witness before the grand jury.—Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138.

[q] (Miss. 1849) In an action of slander against one who has given testimony before the grand jury in relation to the charge which is the basis of the slander suit, the court may, in its discretion, permit the grand jurors to testify on the subject.—Sands v. Robison, 20 Miss. (12 Smedes & M.) 704, 51 Am. Dec. 132.

[r] (Miss. 1859) Under Rev. Code, p. 614, art. 252, a grand juror is a competent witness to prove the proceedings in the grand jury room.—Rocco v. State, 37 Miss. 357.

[s] (Miss. 1894) Testimony of members of the grand jury that brought the indictment is inadmissible to show the character of the evidence taken before them, for the purpose of disproving the identity of the case on trial with that on which the grand jury acted.—Newman v. State, 72 Miss. 124, 16 South. 232.

[ss] (Mo. 1855) In an action of slander for saying that plaintiff's wife swore falsely before a grand jury, defendant justified by alleging the truth of the words spoken. *Held*, that a grand juror cannot be permitted to testify how a witness swore before the grand jury.—Tindle v. Nichols, 20 Mo. 326.

[t] (Mo. 1891) It is not error to reject evidence of grand jurors disclosing testimony given before the grand jury. Rev. St. 1879, §§ 1791-1793.—Kennedy v. Holladay, 105 Mo. 24, 16 S. W. 688.

[tt] (Mo. 1893) Evidence by members of the grand jury indicting defendant, that the prosecuting attorney was present during their investigation, and while expressing their opinions and finding the indictment against him, is inadmissible, though Rev. St. 1889, § 4077, provides that such officer shall not be present during the expression of their opinions or the giving of their votes on any matter, since grand jurors are incompetent to testify to their own actions.—State v. Johnson, 115 Mo. 480, 22 S. W. 463.

[u] (Nev. 1865) Grand jurors may be called to testify against a witness, who is indicted for perjury, to prove what was sworn to before them.—State v. Logan, 1 Nev. 509.

[uu] (N. H. 1873) The foreman or any member of the grand jury may be called and compelled to testify what a witness stated before the grand jury, for the purpose of contradicting such witness, or for any other purpose, when in the opinion of the court the cause of justice requires it to be done.—State v. Wood, 53 N. H. 484.

[v] (N. C. 1875) A member of a grand jury which founded an indictment is not incompetent as a witness on the trial of the prisoner; especially when such member declined to vote on the bill, on the ground he might be a witness.—State v. McDonald, 73 N. C. 346.

[vv] (Or. 1887) On a trial for murder, evidence of a grand juror as to statements made by defendant to the grand jury which indicted another person for the crime of which defendant is charged is admissible.—State v. Moran, 15 Or. 262, 14 Pac. 419.

[w] (Or. 1895) A person who served on a grand jury, called to contradict a witness as to testimony given by her before the grand jury, may testify as to her condition at the time she appeared before the grand jury.—State v. Brown, 28 Or. 147, 41 Pac. 1042.

[ww] (Pa. 1834) A grand juryman, who returned the bill "ignoramus," is a competent witness in a subsequent action for malicious prosecution to prove who the prosecutor was.—Huidekoper v. Cotton, 3 Watts, 56.

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[x] (Pa. 1888) The oath of secrecy administered to grand jurors should not be so construed as to obstruct the due course of justice, and accordingly a grand juror may be examined to show that a presentment was not made upon the personal knowledge of the grand jury, but upon the testimony of witnesses without the knowledge of the court.—Commonwealth v. Green, 5 Lanc. Law Rev. 321, affirmed (1889) 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

[xx] (Pa. 1888) An indictment cannot be impeached by the testimony of the grand jurors that when the bill was presented to them they ignored it; that thereupon the district attorney repeatedly addressed them, urging them to find a true bill; that he furnished them with further evidence; and that, at his urgent request, they reversed their former action and returned a true bill.—Zeigler v. Commonwealth, 14 Atl. 237.

[y] (Pa. 1889) A member of the grand jury is competent to testify as to the manner in which the jury acquired information of the alleged offense.—Commonwealth v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894, 24 Wkly. Notes Cas. 149.

[yy] (Tenn. 1871) The oath of secrecy on the part of a grand juror does not render him incompetent to testify as to the testimony of witnesses, given before the jury, in a subsequent action for malicious prosecution by a person against whom an indictment was found.—Jones v. Turpin, 53 Tenn. (6 Heisk.) 181.

[z] (Utah, 1886) Upon the trial of one for unlawful cohabitation, the testimony of one of the grand jury that found the indictment, that accused had made a voluntary confession before the grand jury, is admissible under Laws 1878, p. 89, providing that every member of the grand jury must keep secret whatever he himself, or any other grand juror, may have said, or how voted, but may be required by any court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given by the witness upon the trial, or upon the trial of a charge of perjury.—United States v. Kirkwood, 5 Utah, 123, 13 Pac. 234.

[zz] (Utah, 1892) On a prosecution for gaming, the foreman of the grand jury may be called as a witness concerning an admission of gaming made by defendant when testifying before the grand jury concerning another offense, since Comp. Laws 1888, § 4921, enjoining secrecy as to proceedings before the grand jury, is intended only for the protection of the jurors and of the public.—People v. Reggel, 8 Utah, 21, 28 Pac. 955.

§ 187. Trial jurors.

[a] (Ga. 1890) The testimony of jurors on a former trial may be received as to the existence of bloodstains on an article when it was exhibited to them at that time.—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

[b] (Iowa, 1865) On a trial for forgery, a juror who tried the action on the alleged forged instrument cannot testify as to what were the issues in such suit.—State v. Thompson, 19 Iowa, 299.

[c] (Iowa, 1875) While the evidence of a juror is admissible to show the identity of the subject-matter in different actions, it cannot be received to contradict the record.—Stapleton v. King, 40 Iowa, 278.

[d] (Iowa, 1875) The fact that one offered as a witness served on the jury on a former trial of the cause does not disqualify him.—Cramer v. City of Burlington, 42 Iowa, 315.

[e] (Mich. 1882) A juror may be called, like any other witness, to state what took place in open court during the trial of the case, but not to state what took place in the jury room.—Hewitt v. Chapman, 49 Mich. 4, 12 N. W. 888.

[f] (Mich. 1896) On an indictment for perjury committed on a trial of another for burglary, the jury in the burglary case may testify as to the evidence given by the accused in such case to show its materiality.—People v. Ostrander, 110 Mich. 60, 67 N. W. 1079.

[g] (N. H. 1870) A declaration in trespass to realty alleged, by way of aggravation of damages, the taking and conversion of a fence. The fact of the conversion appeared aliunde to have been submitted to the jury. *Held*, in a subsequent action between the same parties involving a controversy as to the fence, that the testimony of the jurors in the former action, that they did not include the fence in their assessment of damages, was inadmissible to show that the title thereto did not pass to defendant by the judgment therein.—Smith v. Smith, 50 N. H. 212.

[h] (Pa. 1873) On a second action plaintiff may prove by jurors in the first what issues were passed on.—Follansbee v. Walker, 74 Pa. (24 P. F. Smith) 306.

[i] (Pa. 1874) It is not permitted jurymen, when giving parol evidence as to whether defendant submitted evidence of set-off, to inquire into the principle on which they rendered their decision, or to show what was allowed or disallowed.—Lazarus' Adm'rs v. George, 3 Lux. Leg. Reg. 143.

§ 188. Commissioners, masters, referees, and arbitrators.

[a] (Cal. 1867) A commissioner appointed to assess damages resulting from the widening of a street is a competent witness on a trial in the county court, on the question of confirming the report of the commissioners when it is objected to.—Appeal of Brooks, 32 Cal. 558.

[b] (Ind. 1854) The testimony of commissioners appointed to assign dower may be given to impeach the assignment made by them.—McCormick v. Taylor, 5 Ind. 436.

[c] (Me. 1853) The testimony of referees is admissible to identify matters submitted, and to show that they acted on them.—Buck v. Spofford, 35 Me. 526.

[d] (Md. 1793) In replevin for a cannon sunk in a wharf, the trustee appointed by a decree of chancery to sell the wharf is a competent witness to prove that when the wharf was sold the cannon were excepted.—Williams v. Donaldson, 3 Har. & McH. 127.

[e] (Mass. 1884) Where the issues in an action against a sheriff for wrongful attachment of property are tried by a referee, such referee cannot, in an action by the sheriff on the attaching creditor's indemnity bond, give his reasons for awarding judgment against the sheriff.—Wiggin v. Atkins, 136 Mass. 292.

[f] (Pa. 1865) In an action for breach of a contract to deliver logs, a former recovery in trover against a third party for their value was set up in defense, and the record thereof given in evidence. *Held*, that it was competent for plaintiff to show, by one of the arbitrators in the trover suit, that the award was made, and recovery had by plaintiff, for only a small portion of the lumber declared for in that action.—Converse v. Colton, 49 Pa. (13 Wright) 346.

10. OBJECTIONS TO COMPETENCY AND DETERMINATION THEREOF AND EFFECT OF INCOMPETENCY.

(a) OBJECTIONS AND WAIVER THEREOF, §§ 189-194.
(b) EVIDENCE AND EXAMINATION OF WITNESS AS TO COMPETENCY, §§ 195-200.
(c) DETERMINATION AS TO COMPETENCY AND EFFECT OF INCOMPETENCY, §§ 201-206.

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(a) OBJECTIONS AND WAIVER THEREOF.

OBJECTIONS IN GENERAL, § 189.
TIME FOR OBJECTION AND WAIVER THEREOF, § 190.
—— EFFECT OF EXAMINATION OF WITNESS BY PARTY OBJECTING, § 191.
—— HUSBAND AND WIFE, § 192.
REQUISITES AND SUFFICIENCY OF OBJECTION, § 193.
—— HUSBAND AND WIFE, § 194.

§ 189. Objections in general.

[a] (La. 1826) A party introducing an incompetent witness cannot object to the other party's cross-examining him to establish his defense.—Buard's Curator v. Buard's Heirs, 5 Mart. (N. S.) 134; Castleman v. Stone, Id. 282.

[b] (La. 1826) Not even when the witness so called, being incompetent from relationship, was the sole subscribing witness to the writing to be proved.—Buard's Curator v. Buard's Heirs, 5 Mart. (N. S.) 134.

§ 190. Time for objection and waiver thereof.

[a] The incompetency of a witness cannot be objected to for the first time on appeal.
—(Ark. 1860) Allen v. Hightower, 21 Ark. 316;
(Ill. 1880) Gillett v. Booth, 95 Ill. 183;
(Iowa, 1886) Schmidt v. Littig, 69 Iowa, 277, 28 N. W. 594;
(La. 1855) Canal Bank v. McGloin, 10 La. Ann. 240;
(S. C. 1831) Henshaw v. Freer's Adm'rs, Bailey, Eq. 311;
(Tenn. 1869) German v. German, 47 Tenn. (7 Cold.) 180;
(Tex. 1885) St. Paul Fire & Marine Ins. Co. v. McGregor, 63 Tex. 399; (1890) Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293.

[b] An objection to the competency of a witness, if known, must be taken before the witness is sworn or examined.
—(Ga. 1888) Brunswick & W. Ry. Co. v. Clem, 80 Ga. 534, 7 S. E. 84;
(Me. 1861) State v. Damery, 48 Me. 327;
(Mass. 1822) Commonwealth v. Green, 17 Mass. 515;
(N. Y. 1837) People v. McGarren, 17 Wend. 460;
(Pa. 1865) Howser v. Commonwealth, 51 Pa. (1 P. F. Smith) 332.

[c, d] (La. 1856) A prisoner cannot be permitted to take chances on the testimony of a witness, availing himself of its benefits if favorable to him, and reserving the right to object to his testimony if unfavorable. *Held*, therefore, where a mulatto had been examined as a witness for the state, and on cross-examination it appeared that he had been a slave, and thereupon the prisoner's counsel asked the court to exclude his testimony, as it did not appear that he had been emancipated, that the objection came too late, there being no averment that the incompetency of the witness was not known before his examination in chief, and as the color of the witness would naturally have suggested an inquiry into his condition on his voir dire, there could have been no surprise when, on cross-examination, he testified to the fact of his having been a slave.—State v. Taylor, 11 La. Ann. 430.

[e, f] (Me. 1861) Objections to the competency of a witness, which become known after the examination is commenced, are waived if the witness is allowed to testify without objection.—State v. Damery, 48 Me. 327.

[g] (Mo. 1894) Objection to the competency of a witness is waived, if not made at the time he is introduced, and it cannot be made on motion for new trial.—State v. Crab, 121 Mo. 554, 26 S. W. 548.

[h] (S. C. 1829) It is too late after verdict to object to the competency of a witness.—State v. Scott, 1 Bailey, 270.

[i] (Va. 1893) An objection to the competency of a witness is not necessarily waived by failure to make it before his examination in chief.—Hill v. Postley, 90 Va. 200, 17 S. E. 946.

[j] (Wis. 1883) Where, on stipulation between the parties, a case is determined on evidence taken in another case, and no other testimony is taken, and in neither action is any objection to the competency of a witness who testified in the former suit made, the admission of such evidence cannot be considered error.—Byrnes v. Clark, 57 Wis. 13, 14 N. W. 815.

§ 191. —— Effect of examination of witness by party objecting.

[a] (Ala. 1882) By cross-examining a witness a party waives his right to object to his competency.—Planters' & Merchants' Ins. Co. v. Tunstall, 72 Ala. 142.

[b] (N. J. 1860) Where the introduction of a witness is objected to, it is no waiver of the objection that the witness is cross-examined, or that rebutting proof is introduced by the objecting party.—Meeker v. Boylan, 28 N. J. Law (4 Dutch.) 274.

[c] (Va. 1896) To cross-examine a person as to matters about which he has not testified in chief is, in effect, to make said person a witness for the party cross-examining, and to waive an objection as to his competency.—Miller v. Miller's Adm'r, 92 Va. 510, 23 S. E. 891.

§ 192. —— Husband and wife.

[a] (Cal. 1879) A party, by the examination of her husband as a witness on her behalf, waives her objection to his examination by the opposite party on any of the issues in the action.—Stelnburg v. Meany, 53 Cal. 425.

[b] (Iowa, 1865) Revision, § 3983, prohibits either husband or wife from being a witness for or against the other, except in certain cases; but under section 3986, providing that "the prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted waives the right thereby conferred," a husband or wife who calls the other as a witness waives the right, which exists in his or her favor and not that of the opposite party, and the witness is competent.—Blake v. Graves, 18 Iowa, 312.

[c] (Iowa, 1876) An objection to the competency of husband or wife to testify against each other should be made when the witness is offered and sworn, and if not then made it will be deemed waived.—Watson v. Riskamire, 45 Iowa, 231.

[cc] (Iowa, 1879) On trial of an indictment for murder, an objection that defendant's wife testified against him before the grand jury comes too late when raised in the first instance after conviction.—State v. Houston, 50 Iowa, 512.

[d] (La. 1876) The objection that accused's wife testified in his behalf should have been made to her testifying at all; after testifying it was too late to have her testimony stricken out.—State v. Williams, 28 La. Ann. 604.

[dd] (Mich. 1878) The statutory rule (Comp. Laws, § 5969), that a husband may not testify against his wife without her consent, cannot be waived in her absence by omission of her attorney to object to the testimony.—Hubbell v. Grant, 39 Mich. 641.

[e] (N. Y. 1860) In a suit where the question was whether land standing in the name of the

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wife was rightfully attached as the property of the husband, plaintiff, having availed himself of the wife's testimony so far as it went to show that the property was treated as her husband's, could not then object to her as being an incompetent witness to state further facts on the same point in her husband's favor, if they were such facts as might have been properly proved by any other witness.—Tappan v. Butler, 20 N. Y. Super. Ct. (7 Bosw.) 480.

[f] (N. Y. 1867) Plaintiff may be asked on cross-examination whether she is married to defendant, inasmuch as a wife is not a competent witness against her husband, and defendant does not waive his objection to her competency by permitting her to be examined in chief.—Schmidt v. Herfurth, 28 N. Y. Super. Ct. (5 Rob.) 124.

[g] (Tex. 1879) Objection cannot be raised for the first time on appeal that a husband was permitted to testify for his wife, in her action to recover for her wanton expulsion from a railway train.—Texas & P. R. Co. v. Casey, 52 Tex. 112.

§ 193. Requisites and sufficiency of objection.

[a] An objection that certain evidence is incompetent is insufficient as an objection to the competency of the witness from whom it was received.

—(Iowa, 1894) Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69;
(Pa. 1872) Garsed v. Turner, 71 Pa. (21 P. F. Smith) 56.

CONTRA, see
(Iowa, 1883) Dedric v. Hopson, 62 Iowa, 562, 17 N. W. 772.

[b] (Ind. 1848) The ground of objection to the competency of a witness must be pointed out to the court, or the overruling of the objection cannot be assigned for error.—White Water Valley Canal Co. v. Dow, Smith, 62.

[c] (Ind. 1860) If the particular ground of objection does not appear, the admission of a witness competent under certain circumstances will be deemed correct.—Fleming v. Potter, 14 Ind. 486.

[d] (Me. 1848) Where the exceptions state merely that "the witness was objected to," and was admitted, without stating any cause of objection, no question is presented for the consideration of the supreme court.—Glidden v. Dunlap, 28 Me. (15 Shep.) 379.

[e] (Md. 1855) The presumption of law is in favor of the competency of witnesses, and a party making objections to such competency must state the ground on which they are based; a general indefinite objection will not avail.—Pegg v. Warford, 7 Md. 582.

[f] (Pa. 1854) A general objection to the competency of a witness is not good, if he be competent for any purpose.—Patterson v. Fay, 1 Phila. 473.

§ 194. —— Husband and wife.

[a] (Ind. 1888) The wife being a competent witness to testify as to what she herself did or did not do concerning the petition in a divorce suit, though as to some matters she was not competent, an objection to her competency to testify at all is properly overruled.—Brown v. Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823.

[b] (Minn. 1883) An objection that a witness for plaintiff, being her husband, was not competent, cannot be considered on appeal where objection was not made at the trial to his competency, but only to the competency of the testimony proposed to be given by him.—Coles v. Shepard, 30 Minn. 446, 16 N. W. 153.

[c] (Wis. 1877) In an action by a husband and wife to recover damages for personal injuries to the wife, where the husband's claim for loss of services is joined, a general objection to the competency of the wife or husband as a witness is bad, and does not raise the question whether the examination of either as a witness could be restricted.—Holmes v. City of Fond du Lac, 42 Wis. 282.

[d] (Wis. 1878) After evidence showing that the wife of a party acted as his agent in respect to the matter in litigation, a general objection will not lie against her competency as a witness; but if she is asked any questions relating to a matter not fairly within the scope of her agency, specific objection should be taken on that ground.—Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567.

[e] (Wis. 1881) A husband may testify for his wife as to matters in which he acted as her agent; and his answering a question not admissible under that rule cannot be treated as error under a mere general objection at the outset to his competency.—Arndt v. Harshaw, 53 Wis. 269, 10 N. W. 390.

(b) EVIDENCE AND EXAMINATION OF WITNESS AS TO COMPETENCY.

IN GENERAL, § 195.
KNOWLEDGE AND DEGREE OF MENTAL CAPACITY, § 196.
RACE OR COLOR, § 197.
RELIGIOUS BELIEF AND OBLIGATION OF OATH, § 198.
INFAMY OR CONVICTION OF CRIME, § 199.
HUSBAND AND WIFE, § 200.

Leading questions to expert as to competency, see post, § 849 [a].

Best and secondary evidence, see "Evidence," vol. 20, cc. 723, 724, § 478.

§ 195. In general.

[a] (Ark. 1867) Where, on a criminal trial, the accused against whom a witness is called makes application to have the witness put on his voir dire, in order to show his incompetency, he should state the object and ground of the application.—Brown v. State, 24 Ark. 620.

[b] (La. 1856) Where the objection to the competency of a witness arises from his own examination, he may be further interrogated as to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible. When the whole ground of objection comes from himself only, what he says must be taken together as he says it.—State v. Taylor, 11 La. Ann. 430.

[c] (Md. 1855) The party offering a witness is not bound to show, until the contrary is at least prima facie established, that such witness is competent.—Pegg v. Warford, 7 Md. 582.

[d] (Minn. 1875) Preliminary examination of a witness by the opposite party is proper to show the incompetency of his testimony, but not to show matters in avoidance of the fact to be proved.—Lautenschlager v. Hunter, 22 Minn. 267.

[e] (N. H. 1867) The order at a law term for a trial by jury was as follows: "Issue to trial term. To be tried upon evidence as now taken." *Held*, that the record of a suit at law, brought by plaintiffs to recover the same premises in question, and not a part of the evidence taken before the order, was inadmissible to show the competency of one of the witnesses of defendant.—Bell v. Woodward, 47 N. H. 539.

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§ 196. Knowledge and degree of mental capacity.

[a] (U. S. 1895) Questions regarding the age, antecedents, business, and experience of a witness are largely within the discretion of the court, and there is no error in permitting a witness about to testify in relation to false entries in the report of a national bank to be asked whether he had any experience in bank business before he was made cashier of the bank in question.—Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

[b] (Ala. 1841) The examination of an infant witness as to his qualifications must be had in open court, in presence of the prisoner and his counsel, and he cannot be admitted on a private examination had by the judge.—State v. Morea, 2 Ala. 275.

[c] (Ala. 1847) It is not error for which judgment will be reversed that the court for its own information made inquiries of a physician as to the extent of knowledge usually possessed by midwives.—Milton v. Rowland, 11 Ala. 732.

[d] (Ala. 1850) Where a witness has testified that certain persons were partners, the party against whom the testimony is given may interrogate the witness as to the sources of his knowledge, and if it be found that his statement is opinion merely, it may then be rejected. —McGrew v. Walker, 17 Ala. 824.

[e] (Colo. 1890) In an action for the alleged wrongful attachment of a stock of goods, where there is a wide difference of opinion among witnesses as to its value, it is not improper for the trial judge to subject the witnesses to a searching examination as to their competency, to enable the jury to judge of the value of their evidence.—Keith v. Wells, 14 Colo. 321, 23 Pac. 991.

[f] (Conn. 1859) Where the competency of a witness, sane at the time he testified, was questioned on the ground that he was insane at the time of the transaction in regard to which he testified, the fact of his insanity at the time of the transaction is to be proved in the same manner as insanity in any other case, and evidence of his insanity before and after the time of the transaction is admissible for the purpose. —Holcomb v. Holcomb, 28 Conn. 177.

[g] (Ga. 1857) A plaintiff examined on voir dire as to what portion of work charged in his books was done of his own knowledge need not answer unless it is suffered to go to the jury. —Bailey v. Barnelly, 23 Ga. 582.

[h] (Ind. 1894) A witness who testifies to the age of a party is presumed to testify from personal knowledge unless the contrary is shown, and an objection on the ground that he had not showed himself possessed of any knowledge was properly overruled.—Ross v. State, 9 Ind. App. 35, 36 N. E. 167.

[i] (Iowa, 1883) On the question of damages to a farm by a railroad company taking a portion, a witness may testify as to what other lands sold for in the vicinity, and what he heard others say as to the price they received for lands sold by them, for the purpose of showing his knowledge of the value of land in that vicinity, thereby qualifying him to testify as to value.—Winklemans v. Des Moines N. W. R. Co., 62 Iowa, 11, 17 N. W. 82.

[j] (Mass. 1857) If the question whether a defendant, when making confessions of guilt, was so intoxicated as not to understand them, is submitted to the court as preliminary to the admission of a witness to the confessions, and is decided by the court on the testimony of that witness only, rejecting evidence of other witnesses that shortly before and after the conversation at which the confession was made defendant was intoxicated, it is ground of exception.—Commonwealth v. Howe, 75 Mass. (9 Gray) 110.

[k] (Miss. 1876) A prisoner has a right to question a witness against him, to ascertain his competency, as, for want of intellectual capacity; and the presiding judge cannot deny the privilege on the ground that, on an independent occasion, to which the accused was not a party, the same witness was produced, and shown to have then been competent.—White v. State, 52 Miss. 216.

[l] (Or. 1891) In proving the market value of hops at a certain time and place, a witness was asked if he thought he knew what the price of hops was at Independence, November, 1888, and he answered: "Seventeen and a half cents. I knew of one man getting that who lived within two miles of Independence." *Held* not error to refuse to strike out the answer.—Bump v. Cooper, 20 Or. 527, 26 Pac. 848.

[m] (Tex. 1896) After a witness of the homicide has described the difficulty and the positions of deceased and defendant at the time, and testified that deceased had no weapon in his hand, it is not error to permit him to be asked whether he was in a position to have seen the weapon if deceased had had one.— McGrath v. State, 35 Tex. Cr. R. 413, 34 S. W. 127, 941.

[n] (Vt. 1844) To exclude a witness from testifying, as being non compos, or an idiot, the fact must be proved by other testimony, and not by a preliminary examination of the witness; and even if the court have any discretion by which they may permit such preliminary examination, still it is not error for them to refuse to allow it.—Robinson v. Dana, 16 Vt. 474.

§ 197. Race or color.

[a] (Cal. 1859) The color of a witness is not, as matter of law, sufficient to show that he is incompetent under the statute; thus, a dark-colored native of Turkey is competent in the absence of proof as to his descent.—People v. Elyea, 14 Cal. 144.

[b] (Del. 1847) On the trial of an indictment for kidnapping a free negro, the person kidnapped is not a competent witness to prove his own freedom, where there is no other proof of his being free.—State v. Jeans, 4 Har. 570.

[c] (Ind. 1864) It is the duty of the court to determine the competency of witnesses, and where the objection to the competency of the witness rests on the allegation that he has such an amount of negro blood as disqualifies him to testify, the court may, on inspection, determine prima facie his competency; but if his blood be not sufficiently apparent for such mode of determination, then the court may examine other witnesses, either to prove the blood of the witness from reputation amongst those who know him, or to establish the character of his blood by the testimony of experts. — Nave's Adm'r v. Williams, 22 Ind. 368.

[d] (La. 1812) Where the evidence of a party offering a person of color, objected to because presumed a slave, shows that he was emancipated by notarial act, it must, if insisted on, be produced, and cannot, without proof of its loss, be supplied by secondary evidence, e. g., the testimony of the former master that he had emancipated the witness.—State v. Cecil, 2 Mart. (O. S.) 208.

[e] (La.) A person of color, being presumed free, is admissible as a witness.—(1812) State v. Cecil, 2 Mart. (O. S.) 208; (1829) Pilie v Lalande, 7 Mart. (N. S.) 648; (1850) State v Levy, 5 La. Ann. 64.

[f] (La. 1829) A witness' actual enjoyment of freedom is prima facie evidence of his competency.—Pilie v. Lalande, 7 Mart. (N. S.) 648.

[g] (La. 1847) A person of color could not be admitted as a witness on testimony of one who alleged that he had formerly owned such colored person and had emancipated him, but the

production of the written act of emancipation must be presented or its loss accounted for.—Roebuck v. Curry, 2 La. Ann. 998.

[h] (La. 1856) Where a witness testifies that he was once a slave, but is now free, he must be accepted as competent to testify.—State v. Taylor, 11 La. Ann. 430.

[i] (N. J. 1813) Evidence that a negro has been reputed free from his childhood is sufficient evidence of his freedom to admit him as a witness.—Potts v. Harper, 3 N. J. Law (2 Penning.) 1030.

[j] (N. J. 1826) A black color is presumptive evidence of slavery, which must be overcome before a person of such color can be admitted as a witness.—Fox v. Lambson, 8 N. J. Law (3 Halst.) 275.

[k] (N. J. 1826) Where a person of color was reputed free, and for more than 20 years had been in the full and actual enjoyment of freedom, it was sufficient evidence to overcome the presumption of slavery arising from color.—Fox v. Lambson, 8 N. J. Law (3 Halst.) 275.

[l] (S. C. 1835) Where witnesses are objected to as incompetent on the ground that they are persons of color, and an issue is framed for the jury, the condition of the proffered witness is not to be determined solely by the visible mixture of negro blood, but by reputation, by his reception into society, and by his having commonly exercised the privileges of a white man.—State v. Cantey, 2 Hill, 614.

§ 198. Religious belief and obligation of oath.

[a] The declarations of a witness are competent evidence of his disbelief of the existence of a Supreme Being.

—(Me. 1841) Smith v. Coffin, 18 Me. (6 Shep.) 157.

CONTRA, see

(Vt. 1842) Scott v. Hooper, 14 Vt. 535.

[b] (U. S. 1836) A witness, objected to on the ground of his disbelief in a God and a future state of rewards and punishments, cannot be examined respecting his religious sentiments, but will be permitted to explain them.—United States v. White, Fed. Cas. No. 16,675 [5 Cranch, C. C. 38].

[c] (Conn. 1792) Parol evidence is admissible to prove a witness an infidel.—Bow v. Parsons, 1 Root, 480.

[d] (Del. 1837) The witness' belief may be proved by evidence of his declarations; and his own assertion of a change of belief, made at the time he is offered to be sworn, will not restore him to competency.—State v. Townsend, 2 Har. 543.

[e] (Fla. 1890) On a murder trial, it is not error for the trial judge to propound leading questions to witnesses of tender years for the purpose of ascertaining whether or not the witnesses understand the obligations of an oath, and an objection to this mode of examination of the witnesses is frivolous.—Hodge v. State, 26 Fla. 11, 7 South. 593.

[f] (Ill. 1856) Religious disbelief may be established by testimony of others, or the court may decide on explanation by the party himself.—Central Military Tract R. Co. v. Rockafellow, 17 Ill. 541.

[g] (Iowa, 1883) Though a witness testifies as to his belief in God, he does not thereby waive his right to refuse to testify as to his belief in a future life.—Dedric v. Hopson, 62 Iowa, 562, 17 N. W. 772.

[h] (Iowa, 1883) A witness cannot be compelled to testify as to his opinions on matters of religious faith, for the purpose of showing his incompetency.—Dedric v. Hopson, 62 Iowa, 562, 17 N. W. 772, following Searcy v. Miller (1881) 57 Iowa, 613, 10 N. W. 912.

[i] (Md. 1880) A witness for plaintiff was objected to on the trial as incompetent on the ground that he had alleged his disbelief in God and in future punishment. He was sworn on his voir dire, and asked by the court whether he believed in God and in future punishment, and he replied that he did. The court then offered defendant the opportunity to contradict him, but the offer was declined, whereupon he was permitted to testify. *Held*, that this was not error.—Arnd v. Amling, 53 Md. 192.

[j] (Mass. 1829) If an objection is taken to a witness on account of his religious sentiments, such sentiments should be proved by other witnesses.—Commonwealth v. Batchelder, Thacher, Cr. Cas. 191.

[k] (Mass. 1836) After the incompetency of a witness, on account of a defect of religious belief, has been established by testimony, he cannot be sworn upon the voir dire, to restore his competency by his own declarations.—Commonwealth v. Wyman, Thacher, Cr. Cas. 432.

[l] (Mass. 1848) An objection to the competency of a witness on the ground of a want of religious belief may be proved by the testimony of witnesses.—Thurston v. Whitney, 56 Mass. (2 Cush.) 104.

[m] (Mass. 1854) The want of religious belief in a witness cannot be shown by examination of the witness himself.—Commonwealth v. Smith, 68 Mass. (2 Gray) 516, 61 Am. Dec. 478.

[n] (Mass. 1860) The common-law rule that a witness cannot be examined as to his religious belief either on the voir dire or on cross-examination was not changed by Gen. St. c. 131, § 12, as the effect of that provision was to render disbelievers competent witnesses, and to allow their disbelief to be proved only to affect their credibility.—Commonwealth v. Burke, 82 Mass. (16 Gray) 33.

[nn] (N. J. 1857) A witness' belief in God is to be presumed till the contrary appear.—Donnelly v. State, 26 N. J. Law (2 Dutch.) 463, affirmed in error (1857) 26 N. J. Law (2 Dutch.) 601.

[o] (Ohio, 1833) A defendant may be compelled to answer inquiries relating to his religious belief when and so far as it is necessary to settle a right to property which depends on such belief.—Kisor v. Stancifer, Wright, 323.

[p] (Pa. 1854) Stronger evidence is required to exclude a witness for defect of religious belief than is required to set aside a juror.—McFadden v. Commonwealth, 23 Pa. (11 Harris) 12, 62 Am. Dec. 308.

[q] (Pa. 1867) On objection to a witness as an atheist and a disbeliever in a state of future reward and punishment, the presumption is in favor of competency.—Commonwealth v. Winnemore, 1 Brewst. 356.

[r] (Pa. 1867) The presumption is in favor of a competent religious faith on the part of a witness, and the want of it must be clearly established by the party objecting to him in order to render him incompetent.—Commonwealth v. Winnemore, 2 Brewst. 378.

[s] (S. C. 1846) An acknowledgment of belief in God and his providence is sufficient to establish the competency of a witness who has been objected to on account of defective religious belief.—Jones v. Harris, 1 Strob. 160.

[t] (Tenn. 1858) On an inquiry as to the religious belief of a witness as bearing on the question of his competency, where evidence as to his declarations to others on the subject has been admitted, it may be shown in rebuttal that his declarations have been misunderstood.—Harrel v. State, 38 Tenn. (1 Head) 125.

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[tt] (Tenn. 1858) Incompetency of a witness for want of religious belief may be proved at the option of the party seeking to exclude him either by the voir dire or by evidence of his declarations previously made.—Harrel v. State, 38 Tenn. (1 Head) 125.

[u] (Tenn. 1871) The incompetency of a witness on the ground of disbelief in a God may be proved by his declarations to others on the subject.—Anderson v. Maberry, 49 Tenn. (2 Heisk.) 653.

[v] (Tenn. 1871) It is error to require a witness, objected to for a defect of religious belief, to be examined on his voir dire, when the objector proposes to resort to proof aliunde.—Odell v. Koppee, 52 Tenn. (5 Heisk.) 88.

§ 199. Infamy or conviction of crime.

[a] (Ark. 1886) To prove that a witness for the defense had heretofore been convicted of larceny before a justice of the peace, parol testimony, and a document which purported to be not an exemplification of the docket entries of the justice, but a report of convictions in his court, required to be filed by law in the clerk's office, were introduced. *Held* error, as not being the best evidence available under the circumstances.—Scott v. State, 49 Ark. 156, 4 S. W. 750.

[b] (Me. 1861) The only evidence to show the incompetency of a witness on the ground of infamy is the record of his conviction and judgment thereon by a court having jurisdiction.—State v. Damery, 48 Me. 327.

[c] (Mass. 1822) Objections to the competency of a witness, founded on a conviction of crime, must be supported by the record of the conviction and judgment.—Commonwealth v. Green, 17 Mass. 515.

[d] (Mo. 1887) To sustain an objection that a witness for the state named R. W. had been hitherto convicted of grand larceny, defendant offered the record of the conviction of one R. B. Said W. testified that he had never been known by the name of B. Another witness testified that he was not certain that W. ever went by the name of B., but that witness had heard him called B. several times. *Held*, that the objection was properly overruled.—State v. Rose, 92 Mo. 201, 4 S. W. 733.

[e] (Pa. 1866) Where a witness for the commonwealth on a criminal trial testifies, in answer to questions by the prisoner's counsel, that he had been pardoned out of the penitentiary, where he had been imprisoned on conviction of burglary, the pardon is sufficiently proved to justify the admission of the witness.—Howser v. Commonwealth, 51 Pa. (1 P. F. Smith) 332.

[f] (S. C. 1886) Where a witness is objected to on the ground that he has been convicted of a felony, the only evidence of such conviction being his own admission of the fact, his further statement that he has been pardoned is sufficient to establish his competency; but if the record of his conviction be introduced, like evidence of his pardon is necessary.—State v. Anderson, 24 S. C. 109.

[g] (Tenn. 1896) After accused's witness has admitted on cross-examination that he has been indicted for a certain crime in a certain court, the state may introduce in evidence the record in such case, containing the judgment declaring him infamous, and disqualifying him from testifying in the courts of this state.—Moore v. State, 96 Tenn. (12 Pickle) 209, 33 S. W. 1046.

[h] (Tex. 1877) A witness shown by production of the record to have been convicted of felony and sentenced for a term yet unexpired, and so disqualified, will not be presumed to have been pardoned merely because he is in attendance and apparently at large, but may be interrogated whether he has received a pardon.—Schell v. State, 2 Tex. App. 30.

[i] (Tex. 1879) The rule that pardon of a convict witness, relied on to restore competency, must be proved by the charter of pardon, is not changed by Pasch. Dig. art. 3110.—Cooper v. State, 7 Tex. App. 194.

[j] (Tex. 1894) Where defendant, on presentation by the state of a witness, is permitted without objection to elicit from him, for the purpose of showing his incompetency, that he had been convicted of a crime, and had not been pardoned, he should be held incompetent, the right to have his conviction shown by the records thereof being waived by the state.—White v. State, 33 Tex. Cr. R. 177, 26 S. W. 72.

[k] (Tex. 1895) To render inadmissible the testimony of a witness on the ground that he has been convicted of a felony, the record of conviction must be produced. It is insufficient to prove the conviction by the cross-examination of the witness.—Bratton v. State, 34 Tex. Cr. R. 477, 31 S. W. 379.

§ 200. Husband and wife.

[a] (U. S. 1849) A woman offered as a witness, and objected to on the ground that she is the wife of the party calling her, cannot be examined to disprove the marriage, when there is sufficient evidence aliunde before the court to raise a presumption of marriage.—Rose v. Niles, Fed. Cas. No. 12,050 [Abb. Adm. 411].

[b] (Ala. 1890) In a prosecution for bigamy, the woman whom defendant was charged with having lawfully married having testified that she was his wife, there was no error in allowing the state to ask her if she was not the person he married at a certain time, so as to show, in connection with evidence that he was at that time already married, that she was not incompetent to testify against him.—Salter v. State, 92 Ala. 68, 9 South. 550.

[c] (Ga. 1881) A witness was objected to by defendant on the ground that she was his wife. The court allowed her to be sworn and asked whether she was living with defendant on March 9, 1866, the day Code, § 1667, took effect, legalizing the relationship of man and wife between persons of color. On an affirmative answer being given she was rejected and her answer stricken out. *Held* not error, as the court had a right to know that she was incompetent.—Williams v. State, 67 Ga. 260.

[d] (Pa. 1896) Where a woman testifies against defendant in a criminal case, and defendant claims that she is his wife, which she denies, the burden is on him to prove the same.—Commonwealth v. Mudgett 174 Pa. 211, 34 Atl. 588, affirming judgment (O. & T. 1895) 4 Pa. Dist. R. 739.

[e] (Wis. 1878) Proof of a wife's agency should generally be elicited by direct interrogatories on that subject.—Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567.

(c) DETERMINATION AS TO COMPETENCY AND EFFECT OF INCOMPETENCY.

DETERMINATION AS TO COMPETENCY IN GENERAL, § 201.
AGE AND MATURITY OF MIND, § 202.
QUESTIONS OF LAW AND FACT, § 203.
EXCEPTIONS AND REVIEW, § 204.
EFFECT OF INCOMPETENCY IN GENERAL, § 205.
EFFECT AS DISQUALIFYING ADVERSE PARTY, § 206.

§ 201. Determination as to competency in general.

[a] (Cal. 1864) If a party to a suit objects to a witness who is offered against him on the ground that she is his wife, and sufficiently ex-

tablishes that ground by circumstantial evidence, and the court erroneously admits her as a witness, such error is cured by the statement made by her on cross-examination by such party, that she is not his lawful wife.—People v. Anderson, 26 Cal. 129.

[b] (Iowa, 1886) Where the examination of a witness is objected to on the ground that it does not appear that he has been before the grand jury, as required by Code 1873, § 4421, it is the duty of the court to determine from the indictment and the minutes of the evidence whether the facts are such as to entitle the state to examine him.—State v. Briggs, 68 Iowa, 416, 27 N. W. 358.

[c] (Mich. 1857) The court having ruled that a person offered as a witness could not be sworn, and afterwards offered to allow him to be sworn, the first ruling was not ground of error.—McBride v. Cicotte, 4 Mich. 478.

[d] (Mich. 1894) Where the record shows that the trial judge was satisfied that a witness mentally weak was competent to testify, and properly charged the jury as to the weight to be given her testimony, his refusal to directly pass on her competency before admitting her testimony is not ground for reversal.—Mead v. Harris, 101 Mich. 585, 60 N. W. 284.

[e] (Wis. 1878) The question whether a wife acted in a given transaction as her husband's agent (though she is probably a competent witness on that question) is to be determined by the court before she is admitted to testify in chief.—Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567.

§ 202. Age and maturity of mind.

Discretion of court, see ante, § 98.

[a] (Kan. 1894) Civ. Code, § 323, subd. 2, provides that "children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly" are incompetent as witnesses. *Held*, that the competency of a girl nine years of age might be determined during her examination, rather than before examination.—State v. Douglas, 53 Kan. 669, 37 Pac. 172.

[b] (Mo. 1890) The fact that the court permits a witness to testify, after objection made on account of his youth, is equivalent to a ruling that it is satisfied of witness' competency.—Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270, 14 S. W. 760, affirming (1890) 102 Mo. 270, 13 S. W. 889.

[c] (Tex. 1882) The method of determining the competency of a child is within the discretion of the judge.—Williams v. State, 12 Tex. App. 127.

§ 203. Questions of law and fact.

[a] The competency of a witness is a question for the court, not the jury.

—(Ill. 1862) Kelly v. People, 29 Ill. 287;

(Ind. 1863) Duncan v. Welty, 20 Ind. 44;

(Mass. 1809) Amory v. Fellowes, 5 Mass. 219, 229;

(Mo. 1844) Chouteau v. Searcy, 8 Mo. 733;

(N. Y. 1844) Reynolds v. Lounsbury, 6 Hill, 534;

(N. C. 1875) McLean v. Elliott, 72 N. C. 70;

(Pa. 1871) East Mt. Laffee Coal Co. v. Schuyler, 1 Walk. 342;

(S. C. 1820) City Council v. Haywood, 2 Nott & McC. 308;

(W. Va. 1893) State v. Michael, 37 W. Va. 565, 16 S. E. 803.

[b] (Ala. 1875) It is error in a criminal case to receive the testimony of a witness objected to as being the wife of defendant, with a direction to the jury to disregard her testimony, if from the evidence they believe her to be defendant's wife.—Jackson v. State, 53 Ala. 472.

[c] (Conn. 1859) The question whether a person who is offered as a witness is insane at the time goes to the competency of the witness, and is a preliminary question to be decided by the court.—Holcomb v. Holcomb, 28 Conn. 177.

[d] (Ga. 1888) A witness having been examined on interrogatories by commission is, prima facie, mentally competent to testify; and evidence afterwards taken, tending to show that he was insane when examined, is for consideration of the jury, and not for the court; there being also testimony in favor of sanity.—City of Gainesville v. Caldwell, 81 Ga. 76, 7 S. E. 99.

[e] (Md. 1875) In civil cases, where the question of the competency of a witness is one of fact, the court can refer the question to the jury.—Spencer v. Trafford, 42 Md. 1.

[f] (Mich. 1877) The judge determines a witness' competency, unless it depends on a disputed question of evidence, which he may refer to the jury.—Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

[g] (Minn. 1895) Where a witness' sanity is attacked in order to impeach his competency or credibility, evidence of prior temporary delusions and of insanity of ancestors and relatives is insufficient to take the question of sanity to the jury, and it was hence not error to reject the same, in the absence of other evidence.—State v. Hayward, 62 Minn. 474, 65 N. W. 63.

[h] (Pa. 1853) The jury may infer the minority of a witness examined before them.—Snodgrass v. Bradley, 2 Grant, Cas. 43.

[i] (S. C. 1831) Whether one offered as a witness is or is not a mulatto, or person of color, is to be decided by a jury on the evidence of features and complexion afforded by inspection, the evidence of reputation as to parentage, and the evidence of station in society occupied by the party.—State v. Davis, 2 Bailey, 558.

[j] (Va. 1874) Whether a witness, by reason of being a lunatic, is incompetent, is a question of law for the court.—Coleman v. Commonwealth, 25 Grat. 865, 18 Am. Rep. 711.

§ 204. Exceptions and review.

[a] (Ark. 1876) On the rejection of a witness for incompetency as the wife of defendant, it is unnecessary to set out what the party offering him expected to prove by the witness.—Rickerstricker v. State, 31 Ark. 207.

[b] (Cal. 1896) Under Code Civ. Proc. § 1880, declaring that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses, the determination of the judge as to the competency of such a witness is not reviewable.—People v. Craig, 111 Cal. 460, 44 Pac. 186.

[c] (Ind. 1894) A child was called as a witness for plaintiff, said he was 9 years old in answer to questions asked by the court and plaintiff, and was found incompetent by the court. *Held*, that a refusal to permit plaintiff to interrogate the child further, to prove by him that he was over 10 years old, would not be reviewed, plaintiff having asked the child no pertinent question.—Taylor v. McGrath, 9 Ind. App. 30, 36 N. E. 163.

[d] (Me. 1854) The question whether the mother of a bastard was constant in her accusation, so as to become a competent witness under Rev. St. c. 131, § 8, is one of fact to be determined by the presiding judge; and exceptions to his decision will not lie.—Jackson v. Jones, 38 Me. 185.

[e] (Mass. 1849) Where it does not appear that a witness, rejected as incompetent, knew or could testify to anything relevant to the is-

sue on trial, such rejection is not a valid ground of exception.—Bates v. Barber, 58 Mass. (4 Cush.) 107.

[f] (Mass. 1852) The question whether a person is or is not an atheist, and so an incompetent witness, is a question of fact for the presiding judge alone, and his decision is not open to exception.—Commonwealth v. Hills, 64 Mass. (10 Cush.) 530.

[g] (Mass. 1870) The determination by the presiding judge of the fact whether "the cause of action in issue was transacted" with the wife in the absence of her husband, preliminary to her admission or exclusion under St. 1865, c. 207, § 2, is not the subject of an exception.—O'Connor v. Hallinan, 103 Mass. 547.

[h] (N. C. 1853) On an issue as to the qualifications of a witness, the trial court is the exclusive judge whether the witness understands the obligation of an oath, and has intelligence sufficient to give evidence.—State v. Perry, 44 N. C. 330.

[i] (N. C. 1857) An exception to the competency of a witness need not set out the testimony which the witness was called to give.—Wright v. Stowe, 49 N. C. 516.

[j] (Pa. 1889) Where a witness' testimony is rejected as incredible, the question of his competency is immaterial.—Appeal of Ahl, 129 Pa. 26, 18 Atl. 471, 25 Wkly. Notes Cas. 113.

[k] (Vt. 1842) Whether the objection to the competency of a witness who believed that there is no God has been removed by a change of views is a question of fact for the court, and is not matter of error.—Scott v. Hooper, 14 Vt. 535.

§ 205. Effect of incompetency in general.

[a] (Me. 1861) If the incompetency of a witness, because of infamy, becomes manifest by legal evidence at any stage of the trial, his testimony should form no part of the evidence to be considered, if seasonably objected to.—State v. Damery, 48 Me. 327.

§ 206. Effect as disqualifying adverse party.

[a] (N. J. 1862) A defendant is an incompetent witness under Nix. Dig. p. 928, when a husband and wife are plaintiffs.—Handlong v. Barnes, 30 N. J. Law (1 Vroom) 69.

[b] (N. J. 1891) A corporation, though physically unable to testify in its aggregate capacity, is not legally incapacitated from testifying through its officers and agents, and, in an action against it by an individual, cannot object to the testimony of the opposite party because of the provision of the New Jersey statute that no party shall be sworn where the opposite party is legally incapacitated from being a witness.—North Hudson County R. Co. v. May, 48 N. J. Law (19 Vroom) 401, 5 Atl. 276.

[c] (Va. 1886) Code 1873, c. 172, § 22, provides that where one of the original parties to the contract under investigation is incompetent to testify for any cause, the other party shall not be permitted to testify in his own behalf. In an action against the wife on a bond given by her husband as her trustee, *held*, that the payee's deposition should be excluded.—Lindsay v. McCormick, 82 Va. 479, 5 S. E. 534.

[d] (Va. 1886) One who is trustee for his wife is incompetent to testify to payments of the price of property purchased by him as trustee out of trust funds. And the husband being incompetent, so, also, was the special commissioner at a judicial sale, to whom the payments were made.—Lindsay v. McCormick, 82 Va. 479, 5 S. E. 534.

[e] (Va. 1892) In assumpsit against husband and wife jointly, both of whom are parties in interest, plaintiff cannot testify as to matters in the knowledge of both himself and the husband, where the latter is excluded as a witness because of his wife's interest.—Johnson v. Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

[f] (Va. 1894) The obligor and obligee of a bond being dead, their declarations concerning it cannot be proved by the assignee of said bond, and his incompetence disqualifies opposing parties in interest from similar proof.—Ginter v. Breeden, 90 Va. 565, 19 S. E. 656.

(B) PARTIES AND PERSONS INTERESTED IN EVENT.

1. IN GENERAL, §§ 207-216.
2. PARTIES OF RECORD, §§ 217-248.
3. INTEREST OF PERSONS OTHER THAN PARTIES IN GENERAL, §§ 249-265.
4. INTEREST IN PROPERTY IN GENERAL, §§ 266-283.
5. GRANTOR OR VENDOR, §§ 284-294.
6. INTEREST ARISING FROM PARTICULAR OBLIGATIONS OR TRANSACTIONS IN GENERAL, §§ 295-308.
7. PARTIES TO BILLS AND NOTES, §§ 309-322.
8. INTEREST ARISING FROM STATUS OR RELATION OF PARTIES IN GENERAL, §§ 323-370.
9. INTEREST OF MEMBER, STOCKHOLDER, OR OFFICER OF CORPORATION OR ASSOCIATION, AND OF INHABITANT OR CITIZEN OF MUNICIPALITY OR STATE, §§ 371-377.
10. INTEREST OF PRINCIPAL AND OF AGENTS, EMPLOYÉS, OR OTHER REPRESENTATIVES, §§ 378-394.
11. LIABILITY FOR COSTS, §§ 395-402.
12. INTEREST IN CRIMINAL PROSECUTION OR PENAL ACTION, §§ 403-414.
13. HUSBAND OR WIFE OF PARTY OR OTHER PERSON INTERESTED AND WIDOW OF DECEASED, §§ 415-424.
14. TRANSFER, RELEASE, OR EXTINGUISHMENT OF INTEREST OR LIABILITY, AND INDEMNITY AGAINST LIABILITY, §§ 425-475.
15. DETERMINATION OF LIABILITY OF CODEFENDANT BY DISMISSAL, DEFAULT, OR SEPARATE VERDICT OR JUDGMENT, §§ 476-490.
16. STATUTORY REMOVAL OF INCOMPETENCY, §§ 491-529.
17. EFFECT OF CALLING OR EXAMINATION AS WITNESS BY ADVERSE PARTY AND OF ADMISSION OF TESTIMONY OF ADVERSE PARTY, §§ 530-534.
18. OBJECTIONS TO COMPETENCY AND DETERMINATION THEREOF, §§ 535-549.

Compelling parties and persons interested to testify, see ante, § 6.
Interest as ground of impeachment, see post, §§ 1177–1208.
Right to compensation, see ante, §§ 50–54.
Testimony of parties or persons interested for or against representatives, survivors, or successors in title or interest of persons deceased or incompetent, see post, §§ 550–731.
Examination before trial, see "Discovery," vol. 16, cc. 2052–2055, § 61.
In proceedings before arbitrators, see "Arbitration and Award," vol. 4, c. 150, § 179.

1. IN GENERAL.

NATURE AND GROUNDS OF INCOMPETENCY IN GENERAL, § 207.
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BALANCE OF INTEREST AS BETWEEN ADVERSE PARTIES IN GENERAL, § 210.
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—— PROOF AS TO DAMAGES, § 214.
CONSENT OF PARTIES TO TESTIMONY, § 215.
EXTENT AND EFFECT OF INCOMPETENCY, § 216.

§ 207. Nature and grounds of incompetency in general.

[a] To exclude a witness on the ground of interest, he must appear to be interested in favor of the party who calls him.

—(Ind. 1831) Sims v. Givan, 2 Blackf. 461;

(Ky. 1808) Kennedy v. Barnett, 4 Ky. (1 Bibb) 154;

(N. Y. 1806) Jackson v. Vredenbergh, 1 Johns. 159; (1811) Lansingburg v. Willard, 8 Johns. 428.

[b] (Mich. 1859) It is the interest of the party in the subject-matter as to which he is examined, and not the effect his evidence may have in the final determination of the issue, that renders him incompetent.—Emerson v. Atwater, 7 Mich. 12.

§ 208. Statutory provisions.

Statutory removal of incompetency, see post, §§ 492, 493.

[a] (U. S. 1868) Act Cong. June 25, 1868 (15 Stat. c. 71), providing that no claimant "shall be a competent witness in the court of claims in supporting" any claim, and that "no testimony given by such claimant shall be used," applies to testimony given before as well as after the act took effect; and the prohibition applies as well to defendants as to claimants.—In re Hubbell, 4 Ct. Cl. 37.

[b] (Ala. 1846) Since the passage of Acts 1845, p. 136, § 2, the defendant in execution cannot be received as a witness in a trial of the right of property, although the suit was in progress and the deposition taken before the passage of the act.—Yarborough v. Moss, 9 Ala. 382.

[c] (Me. 1867) Rev. St. c. 82, § 79, providing that parties should not be witnesses when the cause of action implied any offenses against the criminal law unless defendant first offered himself as a witness, was repealed by Pub. Laws 1864, c. 272, providing that no defendant shall be compelled to testify in suits when the cause of action implies an offense against the criminal law on the part of the said defendant, and if he shall offer himself as a witness, he shall be held to waive his privilege of not testifying where his testimony might criminate himself, but that his testimony should not be used against him in a criminal prosecution involving the same subject-matter.—Buckman v. Perkins, 55 Me. 490.

[d] (N. C. 1880) In a suit on a contract, the competency of a witness to testify as to the contract is to be determined by the law in force at the time of trial, regardless of the competency of the witness at any prior time.—Tabor v. Ward, 83 N. C. 291.

§ 209. Actions on judgments or bonds for payment of money.

[a] (N. C. 1879) It is not admissible for plaintiff to prove by his own oath or to examine defendant to prove the nonpayment of a bond executed prior to August 1, 1868, in view of Acts 1879, c. 183, providing that no person who is a party to a suit on a bond executed previous to August 1, 1868, shall be a competent witness.—Cannon v. Morris, 81 N. C. 139.

[b] (N. C. 1880) Acts 1879, c. 183, making a party to a suit on a bond executed prior to August 1, 1868, a competent witness, does not apply to notes, and hence plaintiff was not incompetent to testify that he signed a note in 1860 for defendant's accommodation.—Smith v. Haynes, 82 N. C. 448.

[c] (N. C. 1880) Act March 11, 1879, provided that no person who was a party to a suit then existing, or which might thereafter be commenced on any judgment rendered, or on any bond under seal for the payment of money executed prior to August 1, 1868, should be a competent witness, "but the rules of evidence in force when said judgment was rendered, or said bond under seal was executed, shall be applicable to said suit." In a suit on a sealed note made in 1866, when parties to a suit were by law competent witnesses, *held*, that the last clause of the act should be interpreted to have reference to the rules of evidence in force when the note was executed, other than that which was made the especial subject of legislation in the act.—Tabor v. Ward, 83 N. C. 291.

[d] (N. C. 1881) A party to a sealed note executed prior to 1868 is an incompetent witness in an action thereon to prove payment of the note under Acts 1879, c. 183, providing that no party to a suit founded on any bond for the payment of money executed prior to August 1, 1868, shall be a competent witness.—Blue v. Gilchrist, 84 N. C. 239.

[e] (N. C. 1882) Acts 1879, c. 183, which renders incompetent as a witness a party to a suit "on any bond for the payment of money, or conditioned to pay money," executed prior to August 1, 1868, does not apply to official bonds to secure fidelity in the discharge of duty, but is confined to money obligations to pay a fixed sum.—Morgan v. Bunting, 86 N. C. 66.

[f] (N. C. 1884) Acts 1879, c. 183, making a party to a suit on a judgment rendered previous to August 1, 1868, an incompetent witness, does not apply to an action to recover the amount of firm debts paid by plaintiff after it was decided by arbitration that they should be paid by defendant.—Clanton v. Price, 90 N. C. 96.

[g] (N. C. 1885) Code, § 580, making one having an interest in a bond incompetent as a witness in an action founded on it, does not prevent an obligor in a bond from testifying that it has been paid, where the action is not on the bond, but to rescind a contract for fraud in representing the bond to be unpaid.—Borden v. Gully, 92 N. C. 127.

[h] (N. C. 1887) Where, in a suit begun June 22, 1886, against an administrator of the obligor of bonds for the payment of money, executed in 1849, 1852, and 1857, the defense of statutory presumption of payment from lapse of time is set up, the administrator is not, under the disabling act of 1883, rendering parties to actions founded upon bonds executed prior to August 1, 1868, incompetent to testify except where the defendant pleads payment in fact, or a counterclaim, and supports his plea by his own testimony, a competent witness to prove that he heard the testator say, some time before his death, "that he owed his brother John (the plaintiff), and wanted the principal of the debt paid"; the debt referred to being that secured by the bonds.—Smith v. Smith, 97 N. C. 27, 2 S. E. 365.

[i] (N. C. 1890) Where defendant pleads payment of a bond executed prior to 1868, but on the trial relies solely on the presumption of payment, a witness who is interested in the result of the action is not competent to testify, under Code, § 580, which provides that no person who has any interest in a bond executed prior to 1868 shall be a competent witness on the trial of an action on it, except where defendant "relies upon the plea of payment in fact," as merely pleading payment, without re-

lying on the plea, does not prevent the application of the inhibitory part of the statute.—Alston v. Hawkins, 105 N. C. 8, 11 S. E. 164, 18 Am. St. Rep. 874.

§ 210. Balance of interest as between adverse parties in general.

As between grantor or vendor and adverse party, see post, §§ 290, 294.

—— *mortgagor and adverse party, see* post, § 276.

[a] Where the interest of a witness is equally balanced, he is competent to testify for every purpose.

—(U. S. 1813) Stump v. Roberts, Fed. Cas. No. 13,561 [Brunner, Col. Cas. 224];

(Ala. 1851) Governor v. Gee, 19 Ala. 199;

(Cal. 1865) Elgin v. Hill, 27 Cal. 372;

(Ill. 1862) Montague v. Mitchell, 28 Ill. (18 Peck) 481; (1863) Kennedy v. Evans, 31 Ill. 258;

(Ky. 1848) Tyler v. Trabue, 47 Ky. (8 B. Mon.) 306;

(La. 1862) Rhodes v. Myers, 16 La. Ann. 398;

(Mass. 1815) Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66;

(Mo. 1850) Bridges v. Bell, 13 Mo. 69;

(Pa. 1851) Canon v. Campbell, 18 Pa. (6 Harris) 164.

[b] A witness who, if liable at all, is liable no matter which way the decision goes, is competent.

—(U. S. 1806) Harrison v. Evans, Fed. Cas No. 6,135 [1 Cranch, C. C. 364];

(Ala. 1846) Spence v. Mitchell, 9 Ala. 744; (1847) Locket v. Child, 11 Ala. 640;

(Ill. 1855) Cadwell v. Meek, 17 Ill. (7 Peck) 220;

(La. 1853) Peck v. Dwight, 8 La. Ann. 449;

(N. Y. 1804) Milward v. Hallett, 2 Caines, 77;

(Pa. 1793) Nessly v. Swearingen, Add. 144.

(S. C. 1846) Ford v. McKibbon, 1 Strob. 33; (1851) Thomasson v. Kennedy, 3 Rich. Eq. 449.

[c] Where a witness is in every event liable, and his testimony is to determine to which of the parties he is liable, he is a competent witness for either party.

—(U. S. 1855) Scott v. The Plymouth, Fed. Cas. No. 12,544 [6 McLean, 463];

(Mass. 1806) Cushman v. Loker, 2 Mass. 106;

(Pa. 1832) Stewart v. Stocker, 1 Watts, 135.

[d] If the interest of defendant in equity in the question is balanced, he may be examined as a witness for plaintiff, notwithstanding he is a party.

—(Ky. 1831) Douglass v. Holbert, 30 Ky. (7 J. J. Marsh.) 1;

(N. Y. 1839) Miller v. McCan, 7 Paige, 451.

[e] A witness with an equally balanced interest is competent, and if there is a preponderance of interest in favor of one party, the other party may, if he pleases, waive the objection and call him as a witness.

—(Ill. 1861) Muchmore v. Jeffers, 25 Ill. (15 Peck) 199;

(Iowa, 1860) Kingsbury v. Buchanan, 11 Iowa, 387.

[f] (Cal. 1857) That a witness is to be paid out of the disputed property on which he works, it appearing that he will be paid at any rate, does not render him incompetent.—Live Yankee Co. v. Oregon Co., 7 Cal. 40.

[g] (Conn. 1838) A. having attached goods in the possession of B., as his property, to secure a debt against him, C. brought replevin against A., claiming that the goods were his, and that he had delivered them to B. as a bailee only. A. claimed that the goods had been sold to B., and had been paid for in the note of a third person, who it was admitted was insolvent, and in support of this claim A. offered B. as a witness. *Held*, that B. had a direct and certain interest, which his testimony would sustain; that his liability over to C. was doubtful and uncertain in amount; and that there was not, therefore, that balance of interest which would render him competent.—Barker v. Green, 13 Conn. 54.

[h] (Ga. 1832) Where a person offered as a witness will be liable in any event of the suit, but in one case for the whole amount sued for, and in the other only for contribution, he is incompetent.—Miller v. Hale, Dud. 119.

[i] (Ga. 1892) Under the evidence act of 1889 a witness not a party to the case, who is liable to plaintiff if the action fails, and is equally liable to defendant if it succeeds, is competent to testify in behalf of either party, as his interest is balanced.—Hidell v. Dwinell, 89 Ga. 532, 16 S. E. 79.

[j] (Ill. 1842) It is not a fatal objection that a defendant, used as a witness against a codefendant, has an interest in the event of the suit, unless his interest be against the party whose interest is sought to be prejudiced by his testimony; and even where he has an interest in favor of the party calling him, he may still be competent, if it appear that he has an equal interest on the other side.—Dyer v. Martin, 5 Ill. (4 Scam.) 146.

[k] (Ky. 1852) Where a verdict for either party would equally benefit a witness, he is not incompetent.—Adams v. Gardiner, 52 Ky. (13 B. Mon.) 197.

[l] (La.) A witness equally responsible, whatever the result, is competent; his interest is counterpoised. Where the opposite interests are unequal, their difference disqualifies him to defeat the larger liability. Where, however, in one event he would be liable for costs, and the other not, he is still competent if the agent of the party calling him.—(1826) Martial v. Cotterel, 5 Mart. (N. S.) 277; (1843) Bell v. Western Marine & Fire Ins. Co., 5 Rob. 423; (1845) McDonogh v. Delassus, 10 Rob. 489.

[m] (N. Y. 1809) A. and B. being indebted to C., he attached money in the hands of D. belonging to B. In an action brought by C. against D. for the money so attached, and held by him to answer to C., *held*, that A. was a competent witness for plaintiff; for though the recovery of plaintiff would so far go to discharge the debt due by the witness, yet he would be liable over for the same amount to B., so that his interest was balanced between the parties.—McLeod v. Johnston, 4 Johns. 126.

[n] (N. Y. 1841) Where the interest of the witness is prima facie balanced between the parties, the possibility that he may have a better defense against one than the other will not prevent his being sworn. — Starkweather v. Mathews, 2 Hill, 131.

[o] (N. C. 1847) A. owed B. a debt, which C. had promised to pay, and A. was offered as a witness in an action between B. and C. on C.'s promise. *Held*, as he was equally interested on both sides, that he was a competent witness.—Carraway v. Cox, 30 N. C. 79.

[p] (Tex. 1859) A preponderance of interest on one side makes the witness incompetent on that side.—Gill v. Campbell, 24 Tex. 405.

[q] (Va. 1839) In assumpsit for goods furnished a third person, such person is a compe-

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tent witness for plaintiff.—Ware v. Stephenson, 10 Leigh, 155.

[r] (Va. 1857) An interest in a witness in one way cannot be counterbalanced or outweighed by an equal or greater in the opposite, unless the latter is also direct and immediate.—Brown's Adm'r v. Johnson, 13 Grat. 644; Isbell's Ex'r v. Same, Id.

§ 211. Testimony admissible notwithstanding interest in general.

Testimony of salvors, see post, § 232.

[a] (U. S. 1871) The exception of the common law, by which a party is allowed to testify in his own behalf, ex necessitate rei, because his is the only testimony that the circumstances admit of being furnished, is confined to cases where defendant is a wrongdoer. It does not apply in a suit in the court of claims under the act of congress of 1866 (14 Stat. 44), brought to obtain relief for a loss of government funds. —Christian v. United States, 7 Ct. Cl. 431.

[b] (Ga. 1857) Interested parties to the record are incompetent as witnesses, and only admitted to prove what from the necessity of the case cannot be otherwise shown.—Brady v. Little, 21 Ga. 132; Field v. Reid, Id. 314.

[c] (Ga. 1857) In an action for the recovery of land, defendants in the declaration signed on the back thereof an acknowledgment of the service of the within writ, "and waive the necessity of copy of it, and service thereof by the sheriff." *Held*, that a codefendant who executed such acknowledgment is a competent witness to show his own intention in making such acknowledgment to waive the service of process. —Ingram v. Little, 21 Ga. 420.

[d] (Miss. 1852) A party to the record can give evidence in his own favor when no other can reasonably be expected, or when otherwise there would be a failure of justice.—Lampley v. Scott, 24 Miss. (2 Cushm.) 528.

[e] (Pa. 1791) A party is competent to testify as to pedigree.—Douglass' Lessee v. Sanderson, 1 Yeates, 15.

[f] (Pa. 1842) A party to a suit is a competent witness to prove the service of notice on the opposite party.—Siltzell v. Michael, 3 Watts & S. 329.

[g] (Pa. 1845) A plaintiff is a competent witness to prove that a deposition was taken at the time called for in the notice and rule.—Black v. Moore, 1 Pa. (1 Barr) 344.

[h] (Pa. 1845) Plaintiff, in an action against a justice of the peace, for marrying his daughter, a minor, without his consent, is incompetent to prove notice of the action.—Minor v. Neal, 1 Pa. (1 Barr) 403.

[i] (Tex. 1854) An interested witness may testify where a question of practice is involved. —Gillespie's Adm'r v. Redmond, 13 Tex. 9.

[j] (Vt. 1834) Plaintiff is a competent witness to prove that articles for which suit is brought were not adjudicated on in a former suit of the same nature.—McLaughlin v. Hill, 6 Vt. 20.

[k] (Vt. 1838) A party may testify to the admissions of the other party.—Reed v. Talford, 10 Vt. 568.

§ 212. —— Proof preliminary to introduction of secondary evidence.

[a] In an action on a note alleged to be lost, testimony of plaintiff is admissible to prove the loss.

—(Del. 1834) Shrowders v. Harper, 1 Har. 444;
(Ill. 1850) Wade v. Wade, 12 Ill. (2 Peck) 89;
(Ind. 1844) Bean v. Keen, 7 Blackf. 152;
(Miss. 1845) Davis v. Black, 13 Miss. (5 Smedes & M.) 226;
(N. Y. 1822) Chamberlain v. Gorham, 20 Johns. 144.

CONTRA, see
(Ill. 1840) Dormady v. State Bank, 3 Ill. (2 Scam.) 236;
(S. C. 1818) Sims v. Sims, 2 Mill, Const. 225; (1831) Davis v. Benbow, 2 Bailey, 427; (1839) Mothershed v. Cliburn, 1 Rice, 293;
(Vt. 1826) Wright v. Jacobs, 1 Aikens, 304.

[b] Parties and persons interested are competent witnesses in respect to facts and circumstances necessary to lay a foundation for secondary evidence of a writing.

—(Ala. 1846) Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448;
(Ark. 1857) Moore v. Maxwell, 18 Ark. 469;
(Cal. 1856) Grass Valley Quartz Min. Co. v. Stackhouse, 6 Cal. 413; (1858) Bagley v. Eaton, 10 Cal. 126;
(Conn. 1848) Fitch v. Bogue, 19 Conn. 285;
(Ind. 1837) Harris v. Barnett, 4 Blackf. 369;
(Ky. 1820) Hamit v. Lawrence, 9 Ky. (2 A. K. Marsh.) 366;
(N. H. 1840) Woods v. Gassett, 11 N. H. 442; (1848) Hill v. Barney, 18 N. H. 607;
(N. J. 1832) Stafford v. Stafford, 1 N. J. Eq. (Saxt.) 525.

[c] The testimony of a party or person interested in a cause may be received, to prove to the court the loss of a deed, in order to lay a foundation for the introduction of secondary evidence to prove the contents of the deed.

—(Ga. 1842) Maynor v. Lewis, Ga. Dec. 205, pt. 2;
(N. H. 1831) McNiel v. McClintock, 5 N. H. 355; (1844) Bachelder v. Nutting, 16 N. H. 261.

CONTRA, see
(Conn. 1810) Coleman v. Wolcott, 4 Day, 388.

[d] The affidavit of a party may be received to prove the loss of a writing in order to admit secondary evidence of its contents.

—(U. S. 1828) Tayloe v. Riggs, 26 U. S. (1 Pet.) 591, 7 L. Ed. 275;
(La. 1869) Yale v. Oliver, 21 La. Ann. 454;
(Ohio, 1853) Wells v. Martin, 1 Ohio St. 386.

CONTRA, see
(Mo. 1862) Gould v. Trowbridge, 32 Mo. 291.

[e] A party to a suit is not a competent witness to the loss of a penal bond with a view to the introduction of secondary proof of its contents.

—(N. C. 1813) Cotton v. Beasley, 6 N. C. 259;
(Vt. 1825) Penfield v. Cook, 1 Aikens, 96.

[f, g] (Ala. 1845) The sureties to a bond for an attachment are competent witnesses on plea in abatement to establish that an affidavit was made and was lost, so that another may be substituted.—Ex parte Simpson, 7 Ala. 842.

[h] (Cal. 1858) The affidavit of a party is admissible, though the court has also the right to examine him orally, to prove the destruction of a writing, though the existence and contents of the paper must be established by testimony competent under the ordinary rules of evidence. —Bagley v. Eaton, 10 Cal. 126.

[i] (Cal. 1861) In a suit by the assignees of a firm upon certain indebtedness originally contracted by defendant with the firm, a member of the firm is a competent witness for the assignee to prove the loss of the firm book of original entries, in order to let in the ledger to which such entries were subsequently transferred.—Caulfield v. Sanders, 17 Cal. 569.

[j] (Conn. 1848) There is no distinction, as affecting the competency of a party to prove

the loss of an instrument, between cases where the action is on the instrument and where the question arises indirectly.—Fitch v. Bogue, 19 Conn. 285.

[k] (Fla. 1851) The affidavit of a party, as to the loss of a deed, document, or other writing, after evidence of the existence thereof by other testimony, is admissible.—Porter v. Ferguson, 4 Fla. 102.

[l] (Ill. 1870) On an application for assignment of dower by a widow whose husband derived title as purchaser under execution which is alleged to have been lost and cannot be found, the ex parte affidavits of the clerk of the court from which the execution issued, and of the widow and administratrix of the sheriff who made the sale, are inadmissible to prove that proper search has been made for the lost execution, with the view to lay the foundation for secondary evidence, since the persons making such affidavits are competent witnesses and can be called to testify before the court in respect to the facts sought to be proved.—Becker v. Quigg, 54 Ill. 390.

[m] (Ky. 1820) To prove the loss of a lease under which plaintiff claimed in an action of forcible detainer, the plaintiff is a competent witness.—Hamit v. Lawrence, 9 Ky. (2 A. K. Marsh.) 366.

[n] (Ky. 1831) The rule which permits a party for the purpose of introducing inferior testimony to depose to the loss of a paper extends only to papers the custody or control of which the party has or may be presumed to have.—Drake v. Vaughan, 29 Ky. (6 J. J. Marsh.) 143.

[o] (La. 1838) A party's affidavit is admissible to show the loss of his title papers and support the facts rendering it probable.—Gravier's Curator v. Rapp, 12 La. 162.

[p] (Me. 1852) In an action by an administrator for money loaned to defendant, for which he was alleged to have given notes now lost, plaintiff's affidavit, stating that he had reason to believe that the testator at the time of his death was possessed of notes and that affiant had made diligent search, that he had inquired at the banks and of relatives of the intestate and other persons with whom many of intestate's effects were left or were likely to have been left, and at places that he had reason to suppose that any such effects might have been left or deposited, but had been unable to find any, is inadmissible as facts for the consideration of the jury.—Mason v. Tallman, 34 Me. 472.

[q] (Miss. 1850) In an action involving the title of a slave sold under execution in another state on a justice's judgment rendered in that state, the party claiming under the sale made affidavit of the loss of the book kept by the justice in which the entry of the judgment and proceedings was copied, and offered to prove the contents of the book and character of the entry. *Held*, that it was competent for such party to prove by his own affidavit, addressed to the court, the loss of the justice's docket with a view of laying a foundation for the introduction of secondary evidence of its contents.—Scott v. Loomis, 21 Miss. (13 Smedes & M.) 635.

[r] (Mo. 1822) A person of whom a plaintiff purchased a slave is a competent witness to prove the loss of a bill of sale of the slave given by defendant to the witness, notwithstanding the latter may have warranted the title to plaintiff.—Ellis v. Ellis, 1 Mo. 220.

[rr] (N. H. 1818) The cashier of a bank is a competent witness for the bank to prove that a note belonging to the bank was lost while he was cashier.—Strafford Bank v. Cornell, 1 N. H. 192.

[s] (N. Y.) Preliminary to proof of its contents by parol, a party seeking to prove a will may prove by his own testimony that a futile search was made therefor.—(1825) Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395; (1826) Jackson v. Betts, 6 Cow. 377.

[t] (N. Y. 1825) An interested person, or even a party to the suit, is a competent witness to prove the death of a subscribing witness to a lease, for the purpose of letting in secondary proof of its execution.—Jackson v. Davis, 5 Cow. 123, 15 Am. Dec. 451.

[tt] (N. Y. 1830) Plaintiff in ejectment may be sworn on the trial of a cause to prove search made for a will under which he claims, but cannot be permitted to testify to other matters.—Betts v. Jackson, 6 Wend. 173.

[u] (N. Y. 1841) A party to a suit may be called to prove the loss of a written instrument, but he cannot be examined as to its former existence.—Woodworth v. Barker, 1 Hill, 172.

[uu] (N. Y. 1847) The rule of evidence which permits a party to a suit to give evidence on his own behalf to the court, touching the loss or destruction of a paper, in order to lay a foundation for the admission of secondary evidence, is not limited to facts peculiarly within the knowledge of the party, such as that the paper is not in his own possession, but allows him to testify to any matters pertinent to the inquiry; as, for example, the extent of the search which he has made for the document elsewhere than among his own papers.—Vedder v. Wilkins, 5 Denio, 64.

[v] (N. Y. 1850) Where a party to the record is called to prove the loss of a paper for the purpose of enabling secondary evidence to be given, his testimony must be confined to the fact of loss, and to such matters as identify or describe the paper, so as to show that the one lost was the one in question. Nevertheless, if he goes somewhat beyond this, and it appears that the incompetent statements were disregarded, the error will be overlooked.—Hollenbeck v. Van Valkenburgh, 5 How. Prac. 281, 1 Code R. (N. S.) 33.

[vv] (N. Y. 1864) It was always competent to prove the loss or destruction of a paper by the party, in order to let in the secondary proof of its contents; and there is no provision of the Code that operates to the exclusion of a party from thus testifying.—Williston v. Williston, 41 Barb. 635.

[w] (Ohio, 1848) In actions where the claim is founded on book account, a party, in case the original books be lost by accident, may be examined on oath to prove their loss, and touching the validity of the account, though the contents of the books must be proved by other testimony.—Smiley v. Dewey, 17 Ohio, 156.

[ww] (Pa. 1791) Plaintiff is a good witness to prove the death of a subscribing witness to a deed, in order to let in evidence of the handwriting.—Douglass' Lessee v. Sanderson, 2 Dall. 116, 1 L. Ed. 312.

[x] (Pa. 1791) A party is competent to testify as to the death or absence of a subscribing witness to a deed.—Douglass' Lessee v. Sanderson, 1 Yeates, 15.

[xx] (Pa. 1818) In laying the foundation for the introduction of secondary evidence of the contents of a deed, plaintiff is a competent witness to prove notice to the defendant to produce such deed.—Jordon v. Cooper, 3 Serg. & R. 564.

[y] (Pa. 1846) Where an interested party was offered, and admitted to prove the loss of title deeds, and exception was taken, the record not showing that the testimony was given to the court only, it was *held* erroneous.—Grant v. Levan, 4 Pa. (4 Barr) 393.

[yy] (S. C. 1805) The loss of a mortgage cannot be proved by the oath of the party claiming under it.—Ross v. McCartan, 1 Brev. 507.

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[z] (S. C. 1805) A defendant in an action to try title to land cannot prove the loss or destruction of a deed under which he claims by his own oath in order to prove by other evidence the existence and contents of such deed. —Ross v. McCartan, 1 Brev. 507.

[zz] (Va. 1813) A copy of a bill of exchange and notarial certificate of protest, with an affidavit of the payee, who was a party, that the original is lost or mislaid, is not legal evidence to charge the drawer.—Wright v. Hencock, 3 Munf. 521.

§ 213. —— Proof of contents of lost document.

[a] (Ark. 1857) An administrator is a competent witness to prove the existence and contents of a lost bond for title given by his intestate for an interest in land sold by him in his lifetime, though the administrator has, in pursuance of law, executed a deed with warranty to the purchaser in accordance with the bond.—Moore v. Maxwell, 18 Ark. 469.

[b] (Mass. 1828) A party to a suit may be a competent witness to prove the loss of a deed or a record for the purpose of letting in secondary evidence, but not to prove the contents thereof.—Adams v. Leland, 24 Mass. (7 Pick.) 62.

[c] (Miss. 1845) In an action on a lost note, the affidavit of plaintiff of the loss of a note is incompetent as proof of the contents of the note.—Davis v. Black, 13 Miss. (5 Smedes & M.) 226.

[d] (Mo. 1855) A defendant cannot prove by his own oath the contents of a lost receipt which he relies on as evidence of payment of the demand sued on.—Beachboard's Adm'r v. Luce, 22 Mo. 168.

[e] (N. H. 1856) An assignee in bankruptcy is a competent witness to prove that notices of the sale of property belonging to the bankrupt were duly posted, and also to prove their contents, it appearing that he had no knowledge where they were, or what had become of them. —Bean v. Brackett, 34 N. H. 102.

[f] (N. C. 1854) In an action on a note, an affidavit of plaintiff that a note for a certain sum had been executed to him by defendant, and that plaintiff had not negotiated the note, and that it had been mislaid or lost, was inadmissible, for though plaintiff might give evidence of the loss of the note in order to establish a foundation for secondary evidence, it was not permissible to establish its contents in that manner or that it had not been transferred.—Grant v. Reid, 46 N. C. 512.

[g] (Tenn. 1853) Affidavits of a party are good to prove the loss of a document, but not its contents, which go to the merits and must come from a competent witness.—Pharis v. Lambert, 33 Tenn. (1 Sneed) 228.

§ 214. —— Proof as to damages.

[a] (U. S. 1877) Act June 25, 1868, providing that a claimant of any right against the United States or any person interested therein shall be a competent witness in the court of claims in supporting the same, does not exclude such claimant, where his right to relief is established by other evidence, from proving the contents of a package in regard to which his claim to relief has already been established. — United States v. Clark, 96 U. S. 37, 24 L. Ed. 696.

[b] (U. S. 1877) Independent of any statute enabling parties to testify in their own behalf, a party is competent (ex necessitate) to testify to the contents of a trunk or package the loss of which, and the liability of defendant therefor, has been established by independent evidence.—United States v. Clark, 96 U. S. 37, 24 L. Ed. 696.

[c] (U. S. 1844) The seaman is a competent witness ex necessitate rei to prove the contents of his trunk when delivered on board, in a libel to recover for its loss.—Smith v. The Utica, Fed. Cas. No. 13,123.

[d] (U. S. 1886) If a United States disbursing officer establishes the fact of the loss of government funds in his charge by other testimony than his own, he is a competent witness to prove the amount.—Hoyle v. United States, 21 Ct. Cl. 300.

[e] (Ala. 1861) Plaintiff in an action against a common carrier for a loss of a trunk may testify as to its contents and their value; and his deposition may be taken for a like purpose.—Douglass v. Montgomery & W. P. R. Co., 37 Ala. 638, 79 Am. Dec. 76.

[f] (Ga. 1852) In an action against a common carrier for the loss of a trunk, the evidence of the plaintiff or his wife is inadmissible to prove its contents, if other evidence is attainable.—Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460.

[ff] (Ga. 1867) In an action to charge an innkeeper for the loss of a trunk and its contents, the wife of plaintiff is admissible to prove the contents of the trunk, independently of the act of 1866, when no other evidence is attainable, upon a policy in favorem justitiæ, springing out of the necessity of the case and the nature of the subject.—Sasseen v. Clark, 37 Ga. 242.

[g] (Ill. 1858) In an action against a common carrier, the plaintiff is a competent witness to prove the contents of his own lost baggage, where he cannot adduce other evidence of these contents. — Parmelee v. McNulty, 19 Ill. (9 Peck) 556.

[gg] (Ill. 1858) In an action for baggage lost, a person who may have had some of the articles lost in his trunk, or may have had articles which belonged to him in the trunk lost, is a competent witness.—Parmelee v. Austin, 20 Ill. (10 Peck) 35.

[h] (Ill. 1859) The owner of lost baggage should not be permitted to prove the value of the articles in which it is packed. So of other articles, the value of which may be established from description.—Davis v. Michigan Southern & N. I. R. Co., 22 Ill. (12 Peck) 278, 74 Am. Dec. 151.

[hh] (Ill. 1860) In an action against a carrier for loss of a trunk, either plaintiff or his wife (who was a passenger with him) may testify as to the contents of the trunk, but not of their value.—Illinois Cent. R. Co. v. Taylor, 24 Ill. (14 Peck) 323; Same v. Copeland, 24 Ill. (14 Peck) 332, 76 Am. Dec. 749.

[i] (Ill. 1860) The owner cannot testify, with relation to the value of articles in a lost trunk, in an action by himself, without showing that no other witnesses can testify as to the value from his description of them.—Illinois Cent. R. Co. v. Taylor, 24 Ill. (14 Peck) 323; Same v. Copeland, 24 Ill. (14 Peck) 332, 76 Am. Dec. 749.

[ii] (Ill. 1866) The general rule of evidence, forbidding parties interested in a suit from testifying, precludes one who has shipped a trunk by express from testifying as to its contents in an action against the company for its loss; the exception to the general rule which allows travelers in actions against carriers for loss of their baggage to testify as to the contents thereof not being applicable in such a case.—Adams Exp. Co. v. Haynes, 42 Ill. 89.

[j] (Ind. 1829) In an action of debt on a delivery bond executed by the debtor and his surety and conditioned for delivery of the property taken on execution in as good order as it was at the date of the bond, a breach of the bond was alleged in that the property was not delivered in as good order as when the bond was ex-

ecuted. *Held*, that the sheriff was a competent witness to prove the value of the property.—Chinn v. Perry, 2 Blackf. 268.

[jj] (Ind. 1862) In an action against a railroad company by a passenger to recover the value of a lost trunk, the ex parte affidavit of plaintiff is not competent evidence to prove the contents of the trunk, but the plaintiff himself is a competent witness for that purpose.—Indiana Cent. R. Co. v. Gulick, 19 Ind. 83.

[k] (Ky. 1859) In an action to recover for the loss of a valise and its contents, which had been placed in the custody of defendant at his tavern by plaintiff as a guest, the latter is not a competent witness to prove the contents of the valise or their value.—Packard v. Northcraft's Adm'r, 59 Ky. (2 Metc.) 439.

[kk] (La. 1866) In an action by a passenger against a carrier for the loss of baggage containing a trunk, the passenger is inadmissible as a witness to testify as to the contents of the trunk and its value, under Civ. Code arts. 2257–2940.—Block v. The Trent, 18 La. Ann. 664.

[l] (Me. 1820) A shipmaster having received a trunk of goods on board his vessel, to be carried to another port, which, on the passage, he broke open and rifled of its contents, the owner of the goods, proving the delivery of the trunk and its violation, was admitted as a witness, in an action for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained.—Herman v. Drinkwater, 1 Me. (1 Greenl.) 27.

[ll] (Me. 1847) In an action against a common carrier for the loss of a box alleged to contain medical books, medicines, surgical instruments, and chemical apparatus, plaintiff should not be allowed to prove the contents of the box on his own oath, although it did not appear that he had any other means of showing it.—Pudor v. Boston & M. R. R., 26 Me. (13 Shep.) 458.

[m] (Me. 1847) The testimony of the plaintiff in an action against a common carrier for the loss of a package, in respect to the contents, should be limited to clothing and personal ornaments.—Pudor v. Boston & M. R. R., 26 Me. (13 Shep.) 458.

[mm] (Md. 1857) In a suit against an innkeeper for a robbery of a trunk in his house, plaintiff may testify to the value of its contents; and this exception grows rather ex necessitate rei, than from a presumption in odium spoliatoris.—Pettigrew v. Barnum, 11 Md. 434, 69 Am. Dec. 212.

[n] (Md. 1857) A plaintiff's oath as to the contents of his trunk, robbed at an inn, is always admissible, unless it appears from the facts that there was other proof to which he might have resorted on this same point.—Pettigrew v. Barnum, 11 Md. 434, 69 Am. Dec. 212.

[nn] (Mass. 1846) In an action by a passenger against a railroad company to recover for loss of a trunk, plaintiff is not a competent witness as to the contents and value of the trunk, though he has no other evidence.—Snow v. Eastern R. Co., 53 Mass. (12 Metc.) 44.

[o] (Mass. 1857) The provision of St. 1851, c. 147, § 5, that in any action "brought by a passenger against any railroad corporation, steamboat proprietor or other common carrier," the plaintiff, after proof of the bailment of his trunk to the defendants, and of its loss "by the fault of such carrier, or of the agents of such carrier," shall be allowed to put in evidence a descriptive list of its contents, sworn to by himself, applies to the case of the loss of a trunk left by the passenger with the baggage master of a railroad corporation after arriving at his place of destination.—Harlow v. Fitchburg R. Co., 74 Mass. (8 Gray) 237.

[oo] (Mich. 1853) The contents of a trunk taken as freight cannot be proved by the owner's oath, in an action against a carrier to recover for its loss.—Wright v. Caldwell, 3 Mich. 51.

[p] (Mo. 1847) A party is a competent witness in his own favor, in cases in which defendant has been guilty of some tortious act, or of some fraud, and where no other evidence can be had, as in the case of a bailee who breaks open a box committed to his care, and steals the contents; and the rule also extends to innkeepers whose lodgers are robbed; but, in all such cases, the tort or robbery must first be proved by evidence aliunde, and clearly established (of which the court must judge), before plaintiff can, by his own oath, establish the articles stolen or lost.—Sparr v. Wellman, 11 Mo. 230.

[pp] (Mo.) A passenger whose baggage has been lost by the negligence of the agents or servants of the carrier is a competent witness to prove the contents of the baggage and its value in an action against the company.—(1866) Nolan v. Ohio & M. R. Co., 39 Mo. 114; (1867) Williams v. Frost, Id. 516.

[q] (N. H. 1845) In a mortgagor's suit to recover the mortgaged chattel, defendant set up that plaintiff had received another chattel covered by the same mortgage, and was chargeable with the value thereof, and that his debt had been satisfied thereby. *Held*, that the mortgagor was a competent witness as to the value of such chattel.—Gage v. Whittier, 17 N. H. 312.

[qq] (N. Y. 1854) In an action by a guest, against an innkeeper, to recover the value of property lost, the guest is a competent witness to prove the value of the property so far as it is personal baggage.—Taylor v. Monnot, 1 Abb. Prac. 325.

[r] (N. Y. 1854) Plaintiff in a suit brought against a hotel keeper to recover a sum of money carried by him bona fide for traveling expenses, which was stolen from his locked portmanteau while he was a guest at the house, is a competent witness to prove both the fact of the loss and its amount.—Taylor v. Monnot, 11 N. Y. Super. Ct. (4 Duer) 116.

[rr] (N. Y. 1854) Plaintiff's possession of baggage check, with proof of the usage of the company to give checks for baggage to passengers, is sufficient proof of plaintiff's being a passenger to entitle him to testify, under the act of 1850, as to the contents of a trunk lost by the railroad company.—Davis v. Cayuga & S. R. Co., 10 How. Prac. 330.

[s] (N. Y. 1857) The general railroad law (St. 1850), allowing plaintiff to testify in his own behalf in actions for lost baggage, is limited to companies formed under that act.—Garvey v. Camden & A. R. Co., 4 Abb. Prac. 171, 1 Hilt. 280.

[ss] (N. Y. 1857) The rule of evidence which from necessity allows a plaintiff, in an action against a carrier for the loss of baggage, to prove the value of the contents by his own oath, is confined to cases in which fraud or willful wrong is proved on the trial, and does not apply to losses due to negligence.—Garvey v. Camden & A. R. Co., 4 Abb. Prac. 171, 1 Hilt. 280.

[t] (N. C. 1860) Quære whether the owner of a lost trunk, in an action against a carrier, can be admitted to prove, by his own oath, the contents of the trunk.—Herring v. Utley, 53 N. C. 270.

[tt] (N. C. 1864) In an action by a passenger on a railroad train to recover for the loss of his trunk, the plaintiff is not a competent witness to prove the loss of the trunk or its contents, though he offers to swear that he has no means of proving these facts or either of them

except by his own oath.—Smith v. North Carolina, R. Co., 60 N. C. 202.

[u] (Ohio, 1851) From the necessity of the case, the owner of a trunk, or his wife, having first otherwise proved its delivery to the carrier, and its loss, is a competent witness, in a suit brought by him against a common carrier for its loss, to prove the contents of the trunk, and their value; but this rule will not be extended further than to the proof of such articles as are commonly carried in a traveling trunk.—Mad River & L. E. R. Co. v. Fulton, 20 Ohio, 318.

[uu] (Pa. 1840) Where a traveler sues a warehouseman or forwarder for the price of a trunk lost, plaintiff may prove the contents.—Clark v. Spence, 10 Watts, 335.

[v] (Pa. 1841) In an action against a stage owner by a passenger, to recover the value of a trunk cut from the stage coach, plaintiff is not competent to testify that there was money in the trunk, or how much.—David v. Moore, 2 Watts & S. 230.

[vv] (Pa. 1843) In an action by a passenger against a common carrier to recover the value of goods delivered to him to be carried, the plaintiff cannot prove the contents of a trunk, nor their value, on his own oath.—Bingham v. Rogers, 6 Watts & S. 495, 40 Am. Dec. 581.

[w] (Pa. 1845) In a suit to recover the value of a trunk lost from a stagecoach, the plaintiff is competent to prove the contents of his trunk, and the value of the articles composing them.—Whitesell v. Crane, 8 Watts & S. 369.

[ww] (Pa. 1846) The principle of necessity which enables a party, under certain circumstances, to prove the contents of a lost trunk or box, applies with as much, if not greater, force to the wife as to the husband.—McGill v. Rowand, 3 Pa. (3 Barr) 451, 45 Am. Dec. 654.

[x] (Pa. 1846) Either husband or wife may be admitted to prove the quantity and value of the wearing apparel belonging to each, including in the catalogue the wife's jewelry, and every other article pertaining to her wardrobe that may be necessary or convenient to either in traveling.—McGill v. Rowand, 3 Pa. (3 Barr) 451, 45 Am. Dec. 654.

[xx] (Pa. 1848) In an action against the county for the destruction of property by a mob, plaintiff may testify to her ownership and the value of the wearing apparel destroyed; but she is incompetent to prove the destruction of household furniture, etc.—County v. Leidy, 10 Pa. (10 Barr) 45.

[y] (Tenn. 1848) A. was indebted to B. and conveyed property to a trustee, C., for sale for the payment of the debt. The debt was assigned to D. E., the agent of A., converted the property, and suit was brought against him by C. *Held*, that D. was a competent witness for C. as to the value of the property converted.—Garvin v. Luttrell, 29 Tenn. (10 Humph.) 16.

[yy] (Tenn. 1850) The plaintiff's own evidence is admissible to prove the contents of his trunk, and the value of the baggage taken from it, in a suit by a passenger against a common carrier to recover the value of baggage taken from a trunk broken open and despoiled while in the possession of the carrier.—Johnson v. Stone, 30 Tenn. (11 Humph.) 419.

[z] (Tenn. 1860) Plaintiff in an action is admissible as a witness to prove the value of his property which defendant has been guilty of a felonious, fraudulent, or other tortious and unwarrantable intermeddling with, when no other evidence can be had of the amount of damages.—Queener v. Morrow, 41 Tenn. (1 Cold.) 123.

§ 215. Consent of parties to testimony.

[a] (Ill. 1844) All the parties to a suit must consent before one of them can be used as a witness.—Frazier v. Laughlin, 6 Ill. (1 Gilman) 347.

[b] (Ky. 1838) The deposition of a party, read by consent, will be considered as evidence for him as well as for a codefendant, especially where by his own insolvency he has no interest in the suit.—Fletcher's Adm'r v. Sanders, 37 Ky. (7 Dana) 345, 32 Am. Dec. 96.

[c] (Mo. 1838) It is not error to allow an interested witness to testify with the consent of the parties.—Allen v. Brown, 5 Mo. 323.

§ 216. Extent and effect of incompetency.

[a] (U. S. 1807) A witness, interested to diminish certain admitted items in plaintiff's account, is still a competent witness as to other items.—Smith v. Carrington, 8 U. S. (4 Cranch) 62, 2 L. Ed. 550.

[b] (U. S. 1843) A witness may be competent to prove some facts, and incompetent to prove others.—Wright v. Rogers, Fed. Cas. No. 18,090 [3 McLean, 229].

[c] (Cal. 1861) Where defendant in ejectment disclaimed as to all, except a lot of 80 acres, his brother, who acknowledged an interest in the crops of 30 of these 80 acres, being a separated lot, was a competent witness to prove defendant's prior possession of the remainder of the 80 acres, outside the 30-acre lot.—Hicks v. Whitesides, 18 Cal. 700.

[d] (Conn. 1789) A witness may be admitted to testify on a point in a case in which he is not interested, though he may be interested on some other point.—Shelton v. Tomlinson, 2 Root, 132.

[e] (Ga. 1856) On a motion for alimony, in a proceeding for divorce, witnesses who would be incompetent, by reason of interest, on a hearing of the main issue, may yet be examined on the question of the authority of libelant's counsel to appear.—Swearingen v. Swearingen, 19 Ga. 265.

[f] (Ind. 1842) If a witness be competent to answer any questions in the cause, he ought not to be rejected generally.—Prather v. Lentz, 6 Blackf. 244.

[g] (Ky. 1822) A judgment procured against a purchaser, on the evidence of a witness interested against the vendor, is inadmissible in a suit against the vendor for recourse.—Baylor v. Smither's Heirs, 11 Ky. (1 Litt.) 105.

[h] (Ky. 1833) A witness who states that he is interested for some of those constituting the party by whom he is offered is not competent.—Norton v. Sanders, 31 Ky. (1 Dana) 14.

[i] (Mass. 1849) A witness who is admissible at all is liable to be examined on all matters pertinent to the issue on trial; and one who is incompetent by reason of interest in the event of the suit cannot be made competent by being called to testify only to a fact in which he is not interested, and not to the question of damages.—Gerrish v. Cummings, 58 Mass. (4 Cush.) 391.

[j] (Mass. 1849) When several actions are tried together, which it is in the discretion of the judge to direct, the testimony of a witness who is competent in one is not to be excluded, because it is admissible in the others, on the ground of interest, and may possibly have some effect on the decision of them; but, in such case, the jury are to be directed to confine the testimony of the witness to the case in which he is competent.—Kimball v. Thompson, 58 Mass. (4 Cush.) 441, 50 Am. Dec. 799.

[k] (N. Y. 1809) Where a witness is interested in any part of the demand of plaintiff, he cannot be admitted to testify as to another part.—Gage v. Stewart, 4 Johns. 293.

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[l] (N. Y. 1848) In the court of chancery, where many issues are frequently combined in one suit, a witness is not to be rejected altogether because he is interested as to one part only of the case; but he may be examined as to another part of the case in which he has no interest, or in which his interest is adverse to the party calling him.—Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

2. PARTIES OF RECORD.

(a) IN CIVIL ACTIONS AND PROCEEDINGS IN GENERAL, §§ 217-226.
(b) IN PARTICULAR ACTIONS, §§ 227-238.
(c) REPRESENTATIVE OR OFFICIAL CAPACITY OF PARTIES, §§ 239-242.
(d) DEFENDANTS IN CRIMINAL PROSECUTIONS, §§ 243-248.

Conduct of party, see ante, § 108.
Liability for costs, see post, § 396.
Statutory removal of incompetency, see post, §§ 497–502.
Transfer, release, or extinguishment of interest, see post, § 431.

(a) IN CIVIL ACTIONS AND PROCEEDINGS IN GENERAL.

IN GENERAL, § 217.
WHO ARE PARTIES AND EFFECT OF CONSOLIDATION OF CAUSES OR AGREEMENT TO LET SUIT ABIDE EVENT OF ANOTHER, § 218.
—— FAILURE TO SERVE OR APPEAR, § 219
NATURE OF PROCEEDING OR ISSUE AND CHARACTER OF EVIDENCE IN GENERAL, § 220.
INTEREST OF PARTY IN GENERAL AND NOMINAL OR UNNECESSARY PARTIES, § 221.
WITNESSES FOR OR AGAINST OTHER PARTIES IN GENERAL, § 222.
—— INTEREST IN GENERAL, § 223.
—— EFFECT OF DISCLAIMER, § 224.
EXAMINATION BY ADVERSE PARTY AND TESTIMONY AGAINST INTEREST IN GENERAL, § 225.
PROCEEDINGS PRELIMINARY TO ADMISSION OF TESTIMONY, § 226.

§ 217. In general.

[a] (U. S. 1847) In actions in the federal courts, parties to the record cannot be examined as witnesses.—The Neptune, Fed. Cas. No. 10,120 [Olcott, 483].

[b] (U. S. 1865) A party to an action in the court of claims cannot testify in his own behalf.—Jones v. United States, 1 Ct. Cl. 383.

[c] (Ill. 1860) A party to the record is incompetent as a witness.—Marks v. Butler, 24 Ill. (14 Peck) 567.

[d] (Ind. 1859) It is not error to refuse to allow a party to testify on his own motion.—Johnson v. Cox, 12 Ind. 362.

[e] (La. 1858) The general rule that a party to a record is not a competent witness must be observed, unless a necessity is shown in a particular case for a departure from it.—Beer v. Word, 13 La. Ann. 467.

[f] (N. Y. 1850) The general common-law rule is that a party to the record cannot be a witness for himself or for his coplaintiff or defendant; and this is the rule although he had no interest in the event of the suit.—Pack v. City of New York, 3 N. Y. (3 Comst.) 489.

[g] (Pa. 1790) A judgment given merely on the attestation of the party plaintiff cannot be sustained.—Sharpe v. Thatcher, 2 Dall. 77, 1 L. Ed. 296.

§ 218. Who are parties and effect of consolidation of causes or agreement to let suit abide event of another.

[a] (Ga. 1855) Several actions being brought by the same plaintiff against different defendants, involving the same questions, it was agreed that one case should be tried for the whole, and that such evidence should be admitted in the one case as would have been admissible in either. *Held*, that under this agreement a defendant in one of the other cases was a competent witness.—Reeves v. Matthews, 17 Ga. 449.

[b] (Ga. 1855) As long as a plea of "puis darrein continuance" of a defendant remains undisposed of, such defendant is a party to the suit, and not a competent witness for himself.—James v. Mercer University, 17 Ga. 515.

[c] (Ky. 1868) Where several creditors sue out separate attachments against a debtor, and the suits are heard and tried together by the court without an order of consolidation, plaintiffs in some of the actions are competent witnesses for other plaintiffs.—Jarboe v. Colvin, 67 Ky. (4 Bush) 70.

[d] (Miss. 1840) A mere naked agreement between counsel, to let the event of one suit abide the fate of another, does not render plaintiff in the former incompetent to testify in the latter.—Clapp v. Mandeville, 6 Miss. (5 How.) 197.

[e] (N. J. 1857) The officers and directors of a corporation are not parties in an action in which the corporation is a party within the rule precluding parties from testifying as witnesses.—Cole v. Bergen County Mut. Assur. Ass'n, 26 N. J. Law (2 Dutch.) 362.

[f] (N. J. 1857) In a suit by or against a corporation, a corporator is not a party to the record, and is not, on that ground, an incompetent witness.—Cole v. Bergen County Mut. Assur. Ass'n, 26 N. J. Law (2 Dutch.) 362.

[g] (N. Y. 1850) In a suit brought by or against a municipal corporation, the provisions of the Code do not exclude the corporators as witnesses on the ground that they are parties to the suit.—Pack v. City of New York, 3 N. Y. (3 Comst.) 489.

[h] (Pa. 1847) Under Act Feb. 24, 1834, directing that devisees and heirs be joined in an action against the executor to charge decedent's land with debts, a notice given to a devisee on a writ, directing notice generally, makes him a party to the action, and hence he is incompetent to testify therein.—Norris v. Johnston, 5 Pa. (5 Barr) 287.

§ 219. —— Failure to serve or appear.

[a] If a writ is issued against two, and one only be taken, and the suit proceed against him alone, the one not taken may be a witness.
—(N. Y. 1813) Stockham v. Jones, 10 Johns. 21;
(Pa. 1817) Purviance v. Dryden, 3 Serg. & R. 402.

[b] (Cal. 1856) A defendant who has not been served with process is not a competent witness for his codefendants, in an action of trespass.—Gates v. Nash, 6 Cal. 192.

[c] (Del. 1840) A codefendant is a good witness, if not taken nor declared against.—Clark v. Malony, 3 Har. 68.

[d] (Del. 1860) In trespass for assault and battery, a co-trespasser, joined in the writ, but not served, and therefore not formally a party, by reason of his having evaded the service, was a competent witness for the defense.—Pepper v. Pepper, 2 Houst. 286.

[e] (Ind. 1853) When a writ is returned "not found" as to a portion of the defendants, and plaintiff goes to trial without adopting either

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course provided in such case by Rev. St. 1843, the writ abates as to those on whom process has not been served, and they may be witnesses, being no longer incompetent as parties, or as interested.—Conwell v. Smith, 4 Ind. 359.

[f] (La. 1859) A defendant named in the petition, but not cited, is not in reality a party to the suit, so as to render him incompetent as a witness.—Taylor v. Hancock, 14 La. Ann. 693.

[g] (Md. 1858) In a suit against two parties jointly liable on a written agreement which has been lost, one only having been taken, and non est inventus having been returned as to the other, the latter is a competent witness for plaintiff to prove the terms of the missing agreement.—Baugher v. Culler, 12 Md. 6.

[h] (Mass. 1822) A person on whom the writ is not served, although named in it as one of the defendants, and originally liable on the same cause of action, is no party to the suit, and may be a competent witness for the others, if he be not liable to them for a contribution.—Gibbs v. Bryant, 18 Mass. (1 Pick.) 118.

[i] (Mo. 1842) A person named as a defendant in the writ, if not served with process, is not a party to the action, and is competent to testify for the defendant, if released from contribution.—Steigers v. Gross, 7 Mo. 261.

[j] (N. H. 1844) In a suit against all the surviving makers of a note, of whom the principal is not within the jurisdiction, and has not been reached by the process, he is not, unless released, a competent witness for the other defendants.—Concord Bank v. Rogers, 16 N. H. 9.

[k] (N. Y. 1832) Where in assumpsit against two one of them is misnamed in the capias, which is returned non est inventus as to him, and the suit is proceeded in against the other, the one who was misnamed, though nominally not a party to the suit, was not competent as a witness for the defendant.—Van Norden v. Striker, 9 Wend. 286.

[l] (N. Y. 1849) In an action of tort, a defendant, though not served and not appearing, cannot be a witness for his codefendant, whom he is liable to indemnify in case of recovery.—Dodge v. Averill, 5 How. Prac. 8.

[m] (N. Y. 1853) In an action, not on contract, commenced against two, and process served on one only, the one not served ceases to be a party, and is a competent witness for either party.—Robinson v. Frost, 14 Barb. 536.

[n] (Pa. 1838) On a suit against three joint obligors of a bond, the sheriff returned that one had been summoned, and "nihil habuit" as to the others. *Held*, that one of the obligors not summoned is not a witness for defendant, though defendant have paid into court principal, interest, and costs.—Smith v. Sillyman, 3 Whart. 589.

[o] (Pa. 1843) One of the codefendants, on whom process was not served, may be a competent witness for plaintiff to prove particular facts material to the issue.—Heckert v. Fegely, 6 Watts & S. 139.

[p] (Pa. 1846) A defendant who is not served with process, and is released by his codefendant, is an incompetent witness for such codefendant.—Parke v. Bird, 3 Pa. (3 Barr) 360.

[q] (Pa. 1855) In scire facias on a judgment, a person who was a party defendant in the judgment, but not served with process, nor a party to the issue, is not a competent witness for his codefendant.—Marshall v. Franklin Bank, 25 Pa. (1 Casey) 384.

[r] (Pa. 1859) Where a co-trespasser with other defendants was named in the præcipe and writ, but was not arrested, and the jury was not sworn to try him, he was a competent witness for the other defendants.—Entriken v. Brown, 32 Pa. (8 Casey) 364.

§ 220. Nature of proceeding or issue and character of evidence in general.

[a] (U. S. 1850) A proceeding under Act Sept. 18, 1850 (9 Stat. 462), in relation to fugitive slaves, is civil, and not criminal, in its nature, and the right of property must be proved according to the rules relating to evidence and witnesses which prevail in other suits to recover property. Therefore a party in interest is incompetent as a witness.—Ex parte Garnet, Fed. Cas. No. 5,243.

[b] (Ala. 1838) A party is not competent to testify to facts tending to show an excuse for not returning a paper, which he had covenanted to return on a certain day or pay a certain sum of money.—Morrow v. Campbell, 7 Port. 41, 31 Am. Dec. 794.

[c] (Ala. 1845) Where an application is collateral to the main question, and merely auxiliary to the suit, addressing itself to the court, and not to the jury, and having no tendency either to prove or disprove the matter in controversy, but relating to the preparation of the suit for trial, the parties to the record are competent witnesses.—Ex parte Simpson, 7 Ala. 842.

[d] (Ala. 1849) The sheriff, on a trial of a rule against himself and securities for failing to return an execution, is incompetent to testify against the plaintiff.—Vastbinder v. Spinks, 16 Ala. 385.

[e] (Ala. 1868) In an action against an administrator in his individual capacity to recover damages for the conversion of a watch which plaintiff claims under a verbal gift from the intestate, and which defendant, as administrator, holds as assets of the estate, plaintiff is not a competent witness to prove the gift to herself.—Stuckey v. Bellah, 41 Ala. 700.

[f] (Conn. 1803) A party cannot, in any action, be a witness to prove payments which he has made.—Bradley v. Goodyear, 1 Day, 104.

[g] (Del. 1858) Where property is sold under a junior judgment, and the proceeds brought into court, on an issue to try what is due on the older judgment, defendant is not a competent witness to prove that it has been paid, because he is a party to the record and is interested in the result.—Union Bank of Delaware v. Prettyman, 2 Houst. 16.

[h] (Del. 1865) One who has become a party to the record as an opposing creditor is not a competent witness against the petitioner in insolvency.—Edwards v. Townsend, 3 Houst. 100.

[i] (Ga. 1855) The testimony of defendant is inadmissible in regard to the loss of property intrusted to a mandatary.—McNabb v. Lockhart, 18 Ga. 495.

[j] (Md. 1845) A judgment was entered for the use of a third party, and defendant made a motion to strike out the use. *Held*, that plaintiff was a competent witness to prove the consideration of the assignment to such third party.—Baldwin v. Wright, 3 Gill, 241.

[k] (Miss. 1857) A fraudulent vendee, being a material defendant in an action to set aside the sale, cannot be examined as a witness to prove the fraud.—Stanton v. Green, 34 Miss. 576.

[l] (N. H. 1851) A petitioner is not admissible as a witness before road commissioners, if he is objected to at the time.—Watts v. Derry, 22 N. H. (2 Fost.) 498; In re Kennett, 24 N. H. (4 Fost.) 139.

[m] (N. Y. 1860) A party to the record in proceedings before a surrogate on the final accounting of an administrator is not a competent witness.—Terry v. Dayton, 31 Barb. 519.

[n] (N. C. 1813) A. gave his bond to B., and C. was the subscribing witness. B. assigned

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the bond to C., who sued A. *Held* that C. could not prove the execution of the bond.—Johnson v. Knight, 6 N. C. 237.

[o] (Pa. 1887) In proceedings to establish a claim against the estate of a decedent, it was not error to refuse to allow counsel for claimant to call his client against her own interest in order to prove certain payments on account, thereby making her a general witness and enabling her to prove her own claim; for, if she desired to allow the credits, she might do so without establishing them.—In re Voldemar's Estate, 4 Pa. Co. Ct. R. 577.

[p] (S. C. 1821) In an action to recover the penalty under a city ordinance imposing a penalty for driving around a street corner faster than a walk, unless the party proves that urgent causes compelled it, defendant is incompetent as a witness, where the ordinance does not expressly make him competent, to prove that urgent causes compelled him to drive faster than a walk.—City Council v. Dunn, 1 McCord, 333.

[q] (Tex. 1859) Plaintiff, in an action brought by an agent against his principal, cannot be excepted from the general rule that a party cannot be his own witness.—Kerr v. Cotton, 23 Tex. 411.

§ 221. Interest of party in general and nominal or unnecessary parties.

[a] A party to the record, who has no interest in the result of the suit, is a competent witness.
—(U. S. 1816) Willings v. Consequa, Fed. Cas. No. 17,767 [Pet. C. C. 301];
(Cal. 1862) Easterly v. Bassignano, 20 Cal. 489;
(Ky. 1820) Ford v. Sproule, 9 Ky. (2 A. K. Marsh.) 528, 12 Am. Dec. 439; (1855) Nixon v. Jack, 55 Ky. (16 B. Mon.) 174; (1859) Chenowith v. Fielding, 59 Ky. (2 Metc.) 517; (1869) Bryant v. Hunter, 69 Ky. (6 Bush) 75;
(La. 1856) Bryan v. Day, 11 La. Ann. 601; (1867) Beebe v. Kaiser, 19 La. Ann. 270;
(Md. 1853) Barker v. Ayers, 5 Md. 202;
(Mo. 1851) Block v. Chase, 15 Mo. 344;
(N. H. 1859) Jackson v. Barron, 37 N. H. 494;
(N. Y. 1849) Safford v. Lawrence, 6 Barb. 566;
(S. C. 1825) Knight v. Packard, 3 McCord, 71;
CONTRA, see
(U. S. 1846) Smyth v. Strader, 45 U. S. (4 How.) 404, 11 L. Ed. 1031; (1847) Bridges v. Armour, 46 U. S. (5 How.) 91, 12 L. Ed. 64;
(Ala. 1844) Goodwin v. Harrison, 6 Ala. 438;
(Ga. 1843) Hardaway v. Tinsley, Ga. Dec. 148, pt. 2; Smith v. Halk, Ga. Dec. 164, pt. 2;
(Ill. 1842) Smith v. Moore, 4 Ill. (3 Scam.) 462; (1844) Gillett v. Sweat, 6 Ill. (1 Gilman) 475;
(N. J. 1837) Little v. Arrowsmith, 16 N. J. Law (1 Har.) 221;
(N. Y. 1838) Benjamin v. Coventry, 19 Wend. 353;
(S. C. 1797) Canty v. Sumter, 2 Bay, 93;
(Tenn. 1846) Evans v. Gibbs, 25 Tenn. (6 Humph.) 405.

[b] (Ga. 1867) T. sold to C., for himself and A., certain slaves, warranting them sound. C., for the use of himself and A., brought suit on the warranty. While suit was pending C. died, and his administrator was made the party plaintiff. *Held*, that the interest of A. was no ground for his exclusion as witness in his own behalf.—Chisholm v. Turner, 36 Ga. 565.

[c] (La. 1826) A witness, because a defendant on record, is not incompetent, if a nominal, not a real, defendant. So plaintiff cannot deprive the real defendant of the testimony of their mutual agent by making the latter, who is without interest, codefendant—Marc v. Church of St. Martins, 5 Mart. (N. S.) 7.

[d] (La.) A party to a suit, if interested, is incompetent to testify.—(1840) Brander v. Ferriday, 16 La. 296; (1846) Baudoin v. Nicolas, 12 Rob. 594.

[e] (La. 1848) On an appeal by a landowner from the report of a jury appointed to lay out a road, assessing damages for the injury sustained, the president of the police jury, being a mere nominal party, is competent as a witness.—Frosard v. Police Jury of St. Landry, 3 La. Ann. 560.

[f] (La. 1858) The broker or agent of both parties, who is a party to the record, but without interest in the suit, is a competent witness.—Rutherford v. Hennen, 13 La. Ann. 336.

[g] (Md. 1848) Where there must be a decree against all of the defendants, because of their joint or blended interests, there is no one of them who can be examined as a witness in the case.—Lingan v. Henderson, 1 Bland, 236.

[h] (N. Y. 1822) A party to the record cannot be a witness, unless by consent of the real parties in interest.—Frear v. Evertson, 20 Johns. 142.

[i] (N. Y. 1858) In an action against three, in which the only defense is a joint defense, it would be an idle ceremony to swear the defendants as witnesses, when it appears from the pleadings that neither of them could be allowed to testify in any matter in issue in the cause.—Ward v. Woodburn, 27 Barb. 346.

[j] (N. Y. 1861) Before the surrogate, as formerly in our court of chancery, a party to the record, not interested, nor actually litigating, is a competent witness.—Talbot v. Talbot, 23 N. Y. 17.

[k] (Pa. 1835) A plaintiff cannot become a witness by suing in the name of a formal transferee.—Sypher v. Long, 4 Watts, 253.

[l] (Pa. 1841) In an action of debt on a written obligation, in the name of the obligee, for the use of another, the defense being payment to the obligee before he transferred the obligation, the obligee is not a competent witness, although the costs of the suit which have accrued, or may accrue, are paid.—Stroh v. Hess, 1 Watts & S. 147.

[m] (Pa. 1851) Wherever an issue is ordered, it should be between the parties directly in interest, and not so framed that the testimony of a person who really has no interest, but is a nominal party, is for that reason excluded.—Pepper v. Bavington, 1 Phila. 337.

[n] (Pa. 1866) A debtor, who is a party to the record, is not incompetent from interest to testify in a suit between creditors, unless he will gain or lose by the decision.—Updegraff v. Rowland, 52 Pa. (2 P. F. Smith) 317; Ferree v. Thompson, Id. 353.

[o] (Tenn. 1835) Where a suit is brought in the name of A., for the use of B., A. cannot be a witness to prove the demand, although B., by Acts 1825, c. 29, is deemed the real plaintiff, and liable for costs.—Anderson v. Bradie's Adm'rs, 15 Tenn. (7 Yerg.) 297.

[p] (Vt. 1848) It is no objection to a witness, who is willing to testify and has no interest in the event of the suit, or is called to testify against his interest, that he is a party to the record.—Paine v. Tilden, 20 Vt. 554.

[q] (Va. 1894) In a suit to establish a resulting trust it was contended that two of the defendants were incompetent to testify because they were parties to the suit and to the trans-

actions under review, that they co-operated with the trustee in a devastavit, and were liable over to the other defendants. They were brought into the suit on motion, and without a review by the court as to the necessity for such action. No relief was sought against them, and they were released by decrees in bankruptcy from all liability in the matter. *Held*, that they were competent to testify.—Moorman v. Arthur, 90 Va. 455, 18 S. E. 869; Same v. Town of Danville, Id.

§ 222. Witnesses for or against other parties in general.

Determination of liability by dismissal, default, or separate verdict or judgment, see post, §§ 476–490.

In suits in equity, see post, § 228.

[a] One of two codefendants is not a competent witness for the other.
—(Mo. 1854) Rice v. Morton, 19 Mo. 263; (1856) Rankin v. Harper, 23 Mo. 579;
(Tex. 1859) Calhoun v. Wright, 23 Tex. 522.

[b] (U. S. 1811) In trespass, one defendant cannot be a witness for the other, in a joint action, although they plead severally.—Johnson v. Chapman, Fed. Cas. No. 7,378 [2 Cranch, C. C. 32].

[c] (U. S. 1811) In a joint action of trespass against two defendants, if they plead severally, they may be mutually examined as witnesses for each other.—Piles v. Plum, Fed. Cas. No. 11,165 [2 Cranch, C. C. 32].

[d] (Ala. 1828) In an action against two obligors, one of them is not a competent witness to prove that the other executed the instrument.—Whatley v. Johnson, 1 Stew. 498.

[e] (Ind. 1860) If the contract sued on is admitted by the answer, and a defense set up which will defeat the action as to all the defendants, such codefendants are not competent witnesses to establish the defense.—Hubbell v. Woolf, 15 Ind. 204.

[f] (Ind. 1861) In a suit against two defendants for damage done by a vicious animal, averred to be their property, evidence was introduced, part of which tended to show ownership in one defendant, part to show ownership in the other. *Held*, that in this case neither was a competent witness in behalf of the other to show ownership in a third person, though it might have been otherwise, had there been no evidence to fix ownership in the offered witness.—Frammell v. Little, 16 Ind. 251.

[g] (Iowa, 1856) In an action for a joint libel, one defendant cannot be a witness for a codefendant, even if separate trials are granted.—Forshee v. Abrams, 2 Iowa (2 Clarke) 571.

[h] (Ky. 1877) A party to a suit, called as a witness for himself and his co-parties, is competent, unless all the adverse parties are persons against whom he could not testify, if they were sued singly.—Worthley's Adm'r v. Hammond, 76 Ky. (13 Bush) 510.

[i] (La. 1811) Defendant in attachment cannot prove an intervener's title to the property attached.—Pleasants v. Ross, 2 Mart. (O. S.) 114.

[j] (Miss. 1843) A defendant, charged with colluding with his codefendant in regard to the transaction sought to be impeached, cannot be a witness for his codefendant, especially where he is liable for costs.—Pope v. Andrews, Smedes & M. Ch. 135.

[k] (Miss. 1856) A defendant may be examined as a witness by complainant, and, where a defendant is not interested in the matter to which it is proposed to examine him, he may be examined as a witness by a codefendant; but a co-complainant cannot be examined as a witness for the other complainant, nor can he be examined as a witness by the defendant.—Servis v. Beatty, 32 Miss. 52.

[l] (Mo. 1860) A witness should not be allowed to testify for his codefendant, where his testimony will bear in his own favor.—Vaughn v. Scade, 30 Mo. 600.

[m] (N. Y. 1851) When parties to a contract may be sued severally, defendants are competent witnesses for each other; and they are not disqualified by being all united as defendants in one action on the same contract.—Ladue v. Van Vechten, 8 Barb. 664.

[n] (N. Y. 1852) One of three joint and several promisors could be a witness for the others, although a judgment by default had been already rendered against him.—Austin v. Fuller, 12 Barb. 360.

[o] (Pa. 1865) A defendant in an action of ejectment against a brother and two sisters is not a competent witness for his codefendants.—Cambria Iron Co. v. Tomb, 48 Pa. (12 Wright) 387.

[p] (S. C. 1840) One of the plaintiffs, a suing creditor, who resisted the application for the benefit of the prison bounds act, was not a competent witness for the other plaintiffs to prove that defendant's schedule was false.—Cavan v. Dunlap, Cheves, 241.

[q] (Vt. 1847) A party of record may call the opposing party as a witness with his consent, or a coparty; they being devested of all interest in the suit. This is the utmost extent to which the authorities upon this subject have gone.—Abbott v. Clark, 19 Vt. 444.

§ 223. —— Interest in general.

[a] A mere party to the record, not interested in the event, is a competent witness for his coparties.
—(Ga. 1859) Foster v. Leeper, 29 Ga. 294;
(Ind. 1859) Draper v. Vanhorn, 12 Ind. 352;
(N. Y. 1855) Keteltas v. Penfold, 4 E. D. Smith, 122.

[b] (Ala. 1853) A defendant, who is a formal party to a bill as husband of one of the heirs at law of an insolvent decedent, is a competent witness for his codefendant, especially when he testifies against his own interest.—Burns v. Taylor, 23 Ala. 255.

[c] (Conn. 1849) D., one of the defendants in a suit brought by B., on the hearing before the committee offered his codefendant C. as a witness in behalf of D. to testify to matters for D.'s benefit, but in no way to affect the rights or claims of C.; but it appeared that C. was materially interested in the suit, and liable to be affected by a decree in favor of B. *Held*, that C. was an incompetent witness.—Bowen v. Bowen, 20 Conn. 127.

[cc] (Ga. 1848) A. brought ejectment for land, and held B.'s deed as part of his chain of title. B. was offered as a witness for defendant, and, being examined on his voir dire, said that he never made the deed under which plaintiff claimed; that he was the grantee from the state, and had never sold the land to any one but to defendant; that he contracted to sell it to defendant, and took his notes for the purchase money, which he still held, and gave him his bond for titles, to be made when the purchase money was paid. It also appeared that B. was notified to appear and defend the suit. *Held*, that he was not a competent witness for defendant.—Fain v. Garthright, 5 Ga. 6.

[d] (Ind. 1859) Where the point to be proved is special damages to the separate property of a coplaintiff, there is no interest which will exclude the witness.—Draper v. Vanhorn, 12 Ind. 352.

[e] (Ky. 1843) On an application for the establishment of a private way over adjoining

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land, one who has no vested interest in the land, or in the damage to be assessed, is a competent witness for those opposing the way, though made a defendant to the proceedings.—McCauley v. Dunlap, 43 Ky. (4 B. Mon.) 57.

[f] (Ky. 1859) Defendants, who rely on the same matters of defense, although by separate answers, are parties to the issue, and one cannot testify in behalf of the other, even where not incompetent on the score of interest.—Chenowith v. Fielding, 59 Ky. (2 Metc.) 517.

[g] (Ky. 1867) In an action involving in issue a parol agreement by children of an intestate to pay certain other children money pro rata on account of land advancements, *held*, that evidence by any one of the defendants interested, which would tend to bind or exonerate all, was inadmissible, though the agreement, joint in form, might be several in operation.—Mason v. Mason, 66 Ky. (3 Bush) 35.

[h] (La. 1865) A livery stable-keeper sued A. and B. for the loss of a horse, occurring through their careless and reckless driving. A. answered, admitting the hiring, but averring that B. had nothing to do with the hiring, and that he was only the invited companion of A. On the trial B. was offered as a witness in behalf of A. on the ground that there was no testimony in the case going to charge B. *Held*, that B., being a party to the suit, was rightly rejected as a witness.—Bell v. Black, 17 La. Ann. 11.

[i] (Md. 1832) Where defendants are properly joined, and have a common interest in the subject-matter of the suit, they are not competent witnesses for each other.—Chambers v. Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572.

[j] (Mich. 1859) Where one defendant answers, and the other interposes a plea, which is put in issue, and the defendant answering is examined as a witness for his codefendant, his testimony must be restricted to matters in proof of the plea, in which he is not himself interested.—Emerson v. Atwater, 7 Mich. 12.

[k] (Mo. 1863) A defendant in the record is not disqualified as a witness for his codefendant by that fact alone. He is competent to testify as to some matters. When the witness is sworn, objections may be taken to so much of the testimony as may be inadmissible.—Alexander v. Shortridge, 33 Mo. 349.

[l] (N. H. 1839) A defendant in an action ex contractu, if he has no interest in the costs, may be a witness to sustain a defense by another defendant, which goes only to the personal discharge of the latter.—Essex Bank v. Rix, 10 N. H. 201.

[m] (N. Y. 1817) A defendant who has no interest in the cause, but is made a party pro forma only, may be examined as a witness for his codefendant, notwithstanding plaintiff has filed a replication to the answer of such defendant.—Kirk v. Hodgson, 2 Johns. Ch. 550.

[n] (N. Y. 1823) A defendant, who is charged with fraud, but against whom nothing specific is prayed, may be a witness for his codefendant.—McDonald v. Neilson, 2 Cow. 139, 14 Am. Dec. 431, affirming Neilson v. McDonald (1822) 6 Johns. Ch. 201.

[o] (N. Y. 1851) The competency of a defendant as a witness for his codefendant is to be determined by the relations to each other in which they have placed themselves by their contract, and not by those relations as parties to the action which have been involuntarily imposed on them by the act of plaintiff.—Ladue v. Van Vechten, 8 Barb. 664.

[p] (Tex. 1863) A defendant, directly interested as a party to the contract sued on, cannot be a witness for his codefendant and himself.—Gould v. Beal, 26 Tex. 665.

§ 224. —— Effect of disclaimer.

[a] (Ill. 1884) In partition proceedings, a defendant, disclaiming all interest in the suit, is a competent witness for his codefendant.—Scheerer v. Scheerer, 109 Ill. 11.

[b] (N. H. 1845) A defendant in a real action, who has filed a disclaimer, on which plaintiffs have not taken issue, and who is not shown to be in privity or otherwise an interested person, is a competent witness for the other defendant.—Jenness v. Berry, 17 N. H. 549.

[c] (Pa. 1838) One of several defendants in ejectment, by disclaiming title, cannot become a witness for his codefendants, though costs be paid up to the time of disclaimer.—Stub v. Leis, 7 Watts, 43.

[d] (Pa. 1846) One of two defendants in ejectment, on whom the writ has been served, and who has pleaded, cannot make himself a competent witness for his codefendant by disclaimer; his plea having been permitted to be withdrawn. He may still be liable for mesne profits and the costs.—Kirk v. Ewing, 2 Pa. (2 Barr) 453.

§ 225. Examination by adverse party and testimony against interest in general.

Effect of admission of testimony of adverse party, see post, § 532.

—— *of calling or examination as witness by adverse party, see* post, § 530.

In suits in equity, see post, § 229.

[a] (Ala. 1840) A defendant may examine the nominal plaintiff as a witness, if the latter does not object to giving evidence.—Duffee v. Pennington, 1 Ala. 506.

[b] (Ala. 1846) In a summary proceeding by motion against a sheriff and his sureties for his failure to pay over money collected by him, the sheriff, if willing to testify, is a competent witness for plaintiff to prove that he converted the money before the persons joined with him in the motion ceased to be his sureties, and thus fix a liability upon the latter, instead of their successors, in his official bond. The sheriff, in the event of a recovery, would be liable to either set of sureties who were made to answer for his default; consequently his interest is balanced.—Dumas v. Patterson, 9 Ala. 484.

[c] (Conn. 1834) The testimony of a party to a suit, offered by the opposite party and given voluntarily against the interest of the witness, is admissible.—Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60.

[d] (Conn. 1837) The deposition of a party to a suit, voluntarily given, is admissible as evidence for the other party.—Woodruff v. Westcott, 12 Conn. 134.

[e] (Del. 1842) Though a coplaintiff may testify voluntarily against his own interest, an infant party will not be permitted to do so, even with the consent of a next friend, by whom he sues.—Rickards v. Laws, 3 Har. 393.

[f] (Iowa, 1853) A defendant, offered as a witness by plaintiff, is competent to testify against himself, but not to transfer the liability from himself to his codefendant.—Merchand v. Cook, 4 G. Greene, 115.

[g] (Me. 1836) One of several plaintiffs of record, having no interest in the suit, is not a competent witness for defendant, though willing to testify.—Kennedy v. Niles, 14 Me. (2 Shep.) 54.

[h] (Mich. 1843) A complainant has no right to examine as a witness a defendant against whom he seeks relief.—Thomas v. Stone, 1 Walk. Ch. 117.

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[i] (Miss. 1846) In an action brought in the name of plaintiff for the use of another, the nominal plaintiff is a competent witness, where his testimony is against himself, though objected to by the usee, if such nominal plaintiff does not himself object to testifying.—Smith v. Elder, 15 Miss. (7 Smedes & M.) 507.

[j] (Mo. 1860) Any of the adverse parties to a suit may be examined as witnesses by the party on the opposite side.—Fagan v. Long, 30 Mo. 222.

[k] (Pa. 1846) Parties to the record are competent witnesses for the opposite side, but they cannot be examined without their consent.—Solms v. McCulloch, 5 Pa. (5 Barr) 473.

[l] (Pa. 1856) A party plaintiff, who is willing to testify for defendant, cannot be excluded by a coplaintiff or assignee of the cause of action.—Moore v. Weber, 2 Phila. 81.

[m] (Pa. 1860) A defendant, in an action of indebitatus assumpsit, may be examined as a witness for plaintiff, if he be willing to testify. —Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. (12 Casey) 498, 78 Am. Dec. 390.

[n] (S. C. 1832) Plaintiff has the right to examine a defendant as a witness without his consent on any point in the case in which defendant is not interested, and with his consent he may examine him against his interest, and the other defendants cannot object.—Farr v. Sims, Rich. Eq. Cas. 122, 24 Am. Dec. 396.

[o] (S. C. 1853) One of two defendants, consenting to be sworn, though objected to by the other defendant, is a competent witness for plaintiff.—Corrie v. Calder, 6 Rich. Law, 198.

[p] (Tex.) Merely being a party to the record does not of itself render the party incompetent to testify, when called for that purpose by the opposite party. If willing to testify, he is competent, notwithstanding the objection of his coplaintiff or codefendant, provided his interest, if any, in the suit, is adverse to the party calling him.—(1849) Parsons v. Phipps, 4 Tex. 341; (1857) Ware's Adm'rs v. Bennett, 18 Tex. 794.

[q] (Tex. 1857) A nominal plaintiff, and on the record having an apparent interest with his coplaintiff, cannot be called as a witness by defendant, and his declarations may therefore be proved.—Nalle v. Gates, 20 Tex. 315.

[r] (Vt. 1846) The party of record may, if he consent, be sworn as a witness and give evidence in the cause for the opposite party, either when he has no interest in the event of the trial, or when he is called to give evidence for the party whose interest is contrary to his own.—Sargeant v. Sargeant, 18 Vt. 371.

[s] (Vt. 1848) If one of several defendants be called as a witness in the case by plaintiff, and be willing to testify, he is a competent witness, although his codefendants may object to his being called.—Miner v. Downer, 20 Vt. 461.

§ 226. Proceedings preliminary to admission of testimony.

[a] A party to the record cannot be examined as a witness in equity, without an order of court first had for that purpose.

—(Md. 1837) Clagett v. Hall, 9 Gill & J. 80;
(N. J. 1847) Hewitt v. Crane, 6 N. J. Eq. (2 Halst. Ch.) 159;
(N. C. 1843) Bell's Adm'r v. Jasper, 37 N. C. 597; (1845) Jones v. Hays, 38 N. C. 502, 44 Am. Dec. 78;
(Pa. 1858) Pusey v. Wright, 31 Pa. (7 Casey) 387.

[b] An order may be obtained to examine one of several defendants as a witness, subject to cross-examination by the other defendants.

—(Me. 1844) Robinson v. Sampson, 23 Me. (10 Shep.) 388;
(Md. 1832) Stewart v. Stone, 3 Gill & J. 510.

[c] (U. S. 1825) Although no relief can be had against a certificated bankrupt or insolvent, who is a party defendant to a bill, and he is not, therefore, a necessary party to the bill, yet he cannot be examined as a witness in the cause without an order on motion for that purpose. — De Wolf v. Johnson, 23 U. S. (10 Wheat.) 367, 6 L. Ed. 343.

[d] (U. S. 1833) The testimony of parties to an admiralty suit should be taken under a special order showing the cause therefor, so that the court may in its order limit the inquiry to matters within the exception to the rule that parties are not competent.—The Boston, Fed. Cas. No. 1,673 [1 Sumn. 328].

[e] (Ala. 1852) Orders for the examination of a defendant as a witness are made as matters of course, reserving the question of his competency to be made at the hearing; and there is no rule requiring an affidavit to be previously made of his want of interest.—Colgin v. Redman, 20 Ala. 650.

[f] (Ill. 1842) To affect his codefendant, a defendant must be called on by the adverse party in the same way as any other witness, usually under a rule of court; and then the inquiry arises whether he has any interest adverse to the party against whom he is called. If he has, he is incompetent; if he has not, he is as competent as if his name did not appear on the record.—Dyer v. Martin, 5 Ill. 146.

[g] (Ind. 1842) Complainant in chancery has a right to an order to examine defendant as a witness on the trial of an issue, saving just exceptions; and, though it is usual to suggest in the petition that the party is not interested, such suggestion is not necessary.—McPheeters v. McPheeters, 6 Blackf. 221.

[h] (Md. 1853) The order for the examination of a party as a witness is granted almost as a matter of course, leaving the objections to be made and considered when the testimony is brought in.—Tolson v. Tolson, 4 Md. Ch. 119.

[i] (Mo. 1847) To authorize complainant to examine one of several defendants in chancery, if an answer has been filed by him, and a replication filed, the replication must be withdrawn, and an affidavit of want of interest of such party made.—Arnett v. Dodson, 10 Mo. 783.

[j] (N. H. 1843) Leave is always granted to examine merely formal parties, on motion and a suggestion that the witness is not interested, and saving all just exceptions.—Second Congregational Soc. in Hopkinton v. First Congregational Soc. in Hopkinton, 14 N. H. 315.

[k] (N. J. 1864) The evidence of a codefendant is not rendered incompetent by the fact that no order was made for his examination.—Giveans v. McMurtry, 16 N. J. Eq. (1 C. E. Green) 468.

[l] (N. Y. 1834) The testimony of a party who has been examined as a witness, without an order for that purpose, under the rule, will be suppressed, if objected to in time.—Bogert v. Bogert, 2 Edw. Ch. 399.

[m] (N. Y. 1837) Where the testimony of a mere nominal plaintiff is necessary to sustain the suit, the proper course is to move to strike out his name.—Eckford v. De Kay, 6 Paige, 565.

[n] (N. Y. 1839) To allow a defendant to testify, there must be an order, based on an affidavit that defendant is a material witness, and not interested in the matter to which he is examined; and an objection taken at the commencement of the examination of a defendant without such an order, and noted by the examiner, is sufficient, without a formal notice to suppress.—Hitchcock v. Skinner, 1 Hoff. Ch. 21.

[o] (N. Y. 1845) An order to produce witnesses, in an equity suit, may be either in the form

originally used, requiring the adverse party to produce witnesses within 40 days, or in the more modern form requiring the parties to do so.—Murray v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773.

[p] (N. C. 1840) An order to examine a co-defendant in a suit in equity on matters as to which he is not interested is granted as a matter of course upon a proper allegation.—Williams v. Maitland, 36 N. C. 92.

[q] (Wis. 1868) A plaintiff cannot be a witness in his own behalf, in an action on a demand against a vessel for supplies, without giving the notice of his intention to testify prescribed by Laws 1863, c. 17.—Ernst v. The Brooklyn, 22 Wis. 649.

(b) IN PARTICULAR ACTIONS.

SUITS IN EQUITY, § 227.
—— TESTIMONY FOR CO-PARTY, § 228.
—— TESTIMONY FOR ADVERSE PARTY AND AGAINST CO-PARTY, § 229.
—— EFFECT AS RELEASE, § 230.
SUITS IN ADMIRALTY, § 231.
—— SALVORS, § 232.
ACTIONS ON ACCOUNTS, § 233.
ACTIONS ON BILLS OR NOTES, § 234.
—— ADVERSE PARTIES, § 235.
ACTIONS BY OR AGAINST PARTNERS, § 236.
—— ADVERSE PARTIES AND TESTIMONY AGAINST CO-PARTY, § 237.
USURIOUS TRANSACTIONS, § 238.

§ 227. Suits in equity.

[a] A merely formal defendant in equity, against whom no decree is prayed, and who has no disqualifying interest, may be examined as a witness.

—(Conn. 1842) Butler v. Elliott, 15 Conn. 187; (Del. 1853) Clendaniel v. Hastings, 5 Har. 408; (Ga. 1848) Ragan v. Echols, 5 Ga. 71; (Ky. 1838) Allison's Devisees v. Allison's Heirs, 37 Ky. (7 Dana) 90; (N. C. 1833) Jones v. Bullock, 17 N. C. 368.

[b] (U. S. 1813) Where a defendant to a bill is not concerned in interest, either side may examine him as a witness. So, where no material evidence is produced against him, and no decree can be had against him; and a defendant whose evidence is sought for the purpose of charging him may testify, if he chooses, and where parties were insolvent, and therefore no decree was to be made against them, they were *held* competent witnesses, on the ground that they had no interest in the case. —Van Reinsdyk v. Kane, Fed. Cas. No. 16,872 [1 Gall. 630].

[c] (Ala. 1852) The mere fact that a witness is a party to a suit in chancery does not render him incompetent. If he has no interest in that part of the litigation about which he is called to testify, or if, being interested, he is examined as to matters which militate against that interest, he is perfectly competent.—Colgin v. Redman, 20 Ala. 650.

[d] (Conn. 1790) A party cannot be admitted to testify in his own favor in chancery any more than at law.—Webb v. Fitch, 1 Root, 177.

[e] (Ill. 1842) A tenant in possession of a part of the mortgaged premises was made a defendant in a bill to foreclose a mortgage, and answered, admitting the allegation of the bill, and stating that he had bargained with the mortgagor for a part of the premises, but in his deposition disclaimed all interest in the land. *Held*, that his deposition was admissible. —Sproule v. Samuel, 5 Ill. (4 Scam.) 135.

[f] (Ill.) In chancery, a witness is not necessarily incompetent because he is a party to the record. The inquiry is not so much whether the name of the witness appears on the record, as whether he is in fact swearing to promote his own interest.—(1842) Sproule v. Samuel, 5 Ill. (4 Scam.) 135; (1842) Dyer v. Martin, 5 Ill. (4 Scam.) 146; (1864) Power v. McCord, 36 Ill. 214.

[g] (Ind. 1859) A suit for the rescission of a contract for the conveyance of land was against two, alleging that one was plaintiff's agent to sell; that he wrote to plaintiff, misrepresenting the value of the land; that thereupon plaintiff sold for less than the real value to the other defendant; and that the two had previously agreed to share the land. *Held*, that the agent could not testify to facts going to exonerate both.—Roy v. Haviland, 12 Ind. 364.

[h] (Ind. 1861) Proceedings for foreclosure so far affect the property mortgaged as to preclude the holder thereof, when it has passed from the mortgagor, from testifying on points involving the liability of the property in his hands to the mortgage debt, in cases where he is a party to the record.—Indianapolis, & C. R. Co. v. Waggoner, 16 Ind. 367.

[i] (Ind. 1861) In a suit for partition, brought by certain heirs against others, one of the defendants filed his cross-complaint, alleging an exclusive title in himself to the whole land by purchase from the common ancestor, and making all the other heirs defendants. *Held*, that they all became adverse parties as to the matters set up in the cross-complaint, and were incompetent witnesses to disprove them.—Cluster v. Gibson, 17 Ind. 477.

[j] (Miss. 1856) It is erroneous to examine a complainant in a cross-bill to sustain the allegations of his own bill, where a discovery was prayed in reference to the identical facts to which it is proposed to examine him as a witness.—Servis v. Beatty, 32 Miss. 52.

[k] (N. J. 1868) Upon a bill against a husband and wife for the specific performance of an agreement to convey land, both they and complainant are incompetent witnesses.—Petrick v. Ashcroft, 19 N. J. Eq. (4 C. E. Green) 339.

[l] (Vt. 1847) A nominal party to a contract, in regard to which a suit in equity is pending, who is so devested of all interest as not to be a necessary party to the bill, is a competent witness in the case.—Day v. Cummings, 19 Vt. 496.

§ 228. —— Testimony for co-party.

[a] One defendant may be a witness for his codefendant, if his testimony does not affect his own interest.

—(Ill. 1882) Bradshaw v. Combs, 102 Ill. 428; (1882) Smith v. West, 103 Ill. 332; (1893) Camp v. Shaw, 52 Ill. App. 241; (N. C. 1840) Williams v. Maitland, 36 N. C. 92; (1859) Wilder v. Mann, 58 N. C. 66; (S. C. 1827) Wright v. Wright, 2 McCord, Eq. 185.

[b] (Conn. 1831) On a bill in chancery, brought by A., B., and C., creditors of D., against D. and his sons, E., F., and G., charging them with a fraudulent conspiracy to withdraw the property of D. from the plaintiffs' reach by means of notes given by D. to E., F., and G., and suits by attachment brought thereon, and praying for an injunction against such suits and proceedings, *held*, that E. was not competent to testify as to the consideration of the notes given by D. to F. and G., though he had previously withdrawn the suit commenced by him against D.—Dwight v. Brown, 9 Conn. 83.

[c] (Conn. 1831) On a bill in chancery, brought by A., B., and C., creditors of D. against D. and his sons, E., F., and G., char-

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ging them with a fraudulent conspiracy to withdraw the property of D. from the plaintiff's reach by means of notes given to E., F., and G., and suits by attachment brought thereon, and praying for an injunction against such suits and proceedings, *held*, that D. was not a competent witness to prove the consideration and validity of the notes given by him to the other defendants, since he was a party to the suit and interested in the costs.—Dwight v. Brown, 9 Conn. 83.

[d] (Conn. 1849) The rule in equity, as well as at law, before the statute of 1848, was that, if a defendant had no interest in the result of the suit, he might be a witness; but, if he had such interest, he could not be called by a codefendant.—Bowen v. Bowen, 20 Conn. 127.

[e] (Ill. 1864) Where a conveyance from a father to his son is alleged to be fraudulent, and a suit in chancery is brought for relief, the father is a competent witness for his son, who is a codefendant.—Mixell v. Lutz, 34 Ill. 382.

[f] (Ill. 1888) The rule in chancery that one defendant is competent to testify in behalf of a codefendant on a question in the decision of which he has no interest is not impaired by Rev. St. c. 51, § 2, providing that no party in a civil action shall be allowed to testify in his own behalf.—Nance v. Nance, 28 Ill. App. 587.

[g] (Ind. 1861) In a suit by judgment creditors to set aside a mortgage as being fraudulent, where the mortgagor, mortgagee, and his assignee are parties defendant, the mortgagee is not a competent witness to prove that his assignee took in good faith, as this tends to prevent recovery of a judgment against himself.—Perrin v. Johnson, 16 Ind. 72.

[h] (Ky. 1850) One of several defendants to a bill in equity is a competent witness for another defendant, inasmuch as he might still be liable for debts and costs, though the defendant for whom he was offered as a witness maintained his defense.—Craddock v. Thornton, 49 Ky. (11 B. Mon.) 100.

[i] (Me. 1851) A defendant cannot use a codefendant as a witness to prevent the obtaining of a decree against them both.—Farley v. Bryant, 32 Me. 474.

[j] (Md. 1831) A codefendant, as to whom it is not asked to have the decree opened on application for a bill of review, is a competent witness as to any fact as to which another defendant wishes to have the decree opened.—Hodges v. Mullikin, 1 Bland, 503.

[k] (N. J. 1852) Where mortgaged premises were sold under an execution on a judgment against the mortgagor, and the mortgagee afterwards brought foreclosure proceedings against the mortgagor and the purchaser at the sheriff's sale, the mortgagor was a competent witness for the purchaser.—Brolasky v. Miller, 8 N. J. Eq. (4 Halst. Ch.) 789.

[l] (N. Y. 1865) The wife of a mortgagor cannot be a witness for her husband in an action for foreclosure, where, though she is a party, no personal claim is made against her, and she does not answer, nor otherwise appear in the action.—Hall v. Hall, 30 How. Prac. 51.

[m] (N. C. 1840) The interest of a codefendant in equity, in order to disqualify him as a witness, must be such as would tend to influence him against the party excepting to his testimony.—Williams v. Maitland, 36 N. C. 92.

[n] (N. C. 1843) The deposition of a defendant against whom a decree is prayed, and who is interested in the event of the suit, cannot be read for his codefendants.—Bell's Adm'r v. Jasper, 37 N. C. 597.

[o] (Ohio, 1835) In chancery, a party who has transacted, as principal, the greater part of the business with regard to which the litigation arises, who is charged with fraud, and may be liable for more than the costs, cannot testify for a codefendant.—Ormsby's Adm'rs v. Bakewell, 7 Ohio (7 Ham.) 98, pt. 1.

§ 229. —— Testimony for adverse party and against co-party.

[a] (U. S. 1815) The deposition of one defendant in chancery is not admissible against his codefendant, unless he is made a disinterested witness by being discharged from all joint liabilities; and semble, that a certificate of discharge from all debts and contracts prior to the date of the discharge under the act of assembly of Rhode Island of 1757, although the debt in suit was contracted prior to such discharge, will not make one a disinterested witness, where the debt was contracted in a foreign country.—Clark v. Van Riemsdyk, 13 U. S. (9 Cranch) 153, 3 L. Ed. 688.

[b] (U. S. 1839) Complainant cannot be examined as a witness against defendant in a bill for injunction to restrain defendant from removing from the District of Columbia plaintiff's slave, who has been sold by plaintiff to defendant for a term of years only, at the expiration of which term the slave is to be free.—Thomas v. Mackall, Fed. Cas. No. 13,903 [5 Cranch, C. C. 536].

[c] (Ark. 1854) Complainant in chancery may, on a rule for that purpose, obtain the testimony of one of the defendants, saving exceptions as to his interest.—Folsom v. Fowler, 15 Ark. 280.

[d] (Ill. 1842) A. purchased land of B., and afterwards sold the same to C., and received the purchase money. The legal title remained in B., and $500 remained due to him of the purchase money. On a bill by C. against A. and B. to obtain the legal title, *held*, that A. was not a competent witness for complainant, as his interest preponderated in favor of his recovery.—Dyer v. Martin, 5 Ill. (4 Scam.) 146.

[e] (Ill. 1865) A defendant in chancery is competent as a witness against his codefendants, even if he has an interest in favor of the party calling him, provided it appears that he has an equal interest on the other side.—Smalley v. Ellet, 36 Ill. 500.

[f] (Ind. 1861) Some of the defendants, in proceedings for partition, claimed to hold as tenants in common with plaintiffs by descent from the same ancestor from whom plaintiffs deraigned title. Other defendants claimed an adverse and exclusive title to the whole property by purchase from the same ancestor. *Held*, that the former class of defendants were not competent witnesses against the latter.—Hunter v. Miller, 17 Ind. 88.

[g] (Ky. 1835) In a suit in equity, a defendant may be a competent witness against a codefendant, when they were both necessary parties, when the witness will not be affected by the decree against his codefendant, and does not swear in favor of his own interest.—Williams v. Beard, 33 Ky. (3 Dana) 158.

[h] (La. 1842) In an injunction suit for damages against a seizing creditor and the sheriff, the latter cannot testify for plaintiff. He must be released or interrogated on oath.—Dabbs v. Hemken, 3 Rob. 123.

[i] (Me. 1851) Where a plaintiff in equity, in order to obtain relief, must have a decree against a defendant, he cannot use the testimony of that defendant against the other defendants.—Farley v. Bryant, 32 Me. 474.

[j] (N. Y. 1834) Where an answer has been held good upon exceptions, a motion by plaintiff to examine defendant as a witness will be denied.—Palmer v. Van Doren, 2 Edw. Ch. 192.

[k] (N. Y. 1839) If defendant in equity is not interested in favor of plaintiff, he may be ex-

amined for him, although a party.—Miller v. McCan, 7 Paige, 451.

[l] (N. C. 1853) A pro forma party to a bill in equity, having no interest in the questions involved in it, may be examined as a witness by the adverse party.—Wilson v. Allen, 54 N. C. 24.

[m] (Ohio, 1846) Where a party joined as a defendant to a suit for a conveyance is incompetent as a witness for plaintiff, because his liability to his codefendants, if plaintiff succeed, will be less than his liability to plaintiffs if they fail, an answer by him disclaiming all interest in the suit will not render him competent.—Dille v. Woods, 14 Ohio, 122.

[n] (Ohio, 1846) Where the liability of a party joined as a defendant to a suit for a conveyance to his codefendants in case plaintiff succeeds will be less than his liability to plaintiffs if plaintiffs fail in their suit, such defendant is incompetent as a witness for the plaintiff on the ground of interest.—Dille v. Woods, 14 Ohio, 122.

[o] (Tenn. 1871) On a bill by J. against A. and the heirs of H., alleging that J., A., and H., contracted to enter and hold jointly certain lands, and praying to have J.'s interest vested in him, *held*, that A. was a competent witness to prove J.'s case against the heirs of H., his testimony being against his interest; and this, although he had previously answered and admitted the trust as to himself.—Gardner v. Gardner, 51 Tenn. (4 Heisk.) 303.

[p] (Tex. 1863) A defendant cannot, by filing an answer in the nature of a cross-bill to which a witness in the original suit is made a party defendant, and who has no interest in that suit, deprive the plaintiff in the original suit of the testimony of the witness on issues involved in it, and which can in no way affect the result of the cross-bill against him.—Thompson v. Herring, 27 Tex. 282.

[q] (Va. 1842) Where, under a decree in chancery for the sale of land, four commissioners are named as obligees in a bond for purchase money, and suit is brought on the bond in the name of the four, for the benefit of another person, one of the obligees, having no interest in the case, is a competent witness for defendant on a plea of non est factum.—Hicks v. Goode, 12 Leigh, 479, 37 Am. Dec. 677.

§ 230. —— Effect as release.

[a] (U. S. 1872) The examination of the respondent in equity as a witness by the orator does not operate as a release to him of the matters concerning which he is examined.—Scammon v. Hobson, Fed. Cas. No. 12,434 [1 Hask. 406].

[b] (Mich. 1843) Where a defendant, against whom a decree was sought, was examined as a witness, his deposition was suppressed. *Held*, that the examination did not operate as a release, but that a decree might still be had against him, if warranted by other evidence.—Norris v. Hurd, Walk. Ch. 102.

[c] (N. Y. 1833) Where plaintiff examines a defendant as a witness, no decree can afterwards be had against such party.—Fulton Bank v. New York & S. Canal Co., 4 Paige, 127.

[d] (N. Y. 1834) Where a defendant, whether sole or one of several, is examined as a witness for plaintiff, no decree can be had against him on the facts as to which he has been examined.—Palmer v. Van Doren, 2 Edw. Ch. 192.

[e] (N. Y. 1836) The rule that where a defendant, who is primarily liable, is examined as a witness against a codefendant whose liability is secondary, no decree can be obtained by plaintiff against either of the defendants as to that part of the case which is covered by the testimony of such witness, unless his liability is admitted in the answer, does not apply to the case of a defendant who is a mere trustee and has no personal interest in the suit.—Bradley v. Root, 5 Paige, 632.

[f] (N. Y. 1836) Where a defendant, who is primarily liable, is examined as a witness against a codefendant whose liability is secondary, no decree can be obtained by the plaintiff against either of the defendants as to that part of the case to which the defendant has been examined, unless his liability is admitted in the answer.—Bradley v. Root, 5 Paige, 632.

[g] (N. C.) In equity, the examination as a witness of the party primarily liable operates as a release both to the party examined and to a codefendant who is only secondarily liable.—(1840) Lewis v. Owen, 36 N. C. 290; (1849) Burton v. Stamper, 41 N. C. 14.

§ 231. Suits in admiralty.

Interest of captain and pilot or helmsman of vessel, see post, § 382.

—— *of master and crew of vessel, see* post, § 381.

—— *of stevedore, see* post, § 383.

[a] (U. S. 1804) In an action by the mate against the master and owner for wages, the master will not be allowed to testify as a witness, where the right to wages depends on the question as to whether there was a justifiable discharge of the mate by the master, and where it appears that there was much personal animosity involved in the controversy between the mate and master.—Atkyns v. Burrows, Fed. Cas. No. 618 [1 Pet. Adm. 244].

[b] (U. S. 1805) In a suit for seamen's wages, where the master is made a party to the suit, but no process has issued against him, he is incompetent as a witness for the respondent.—Malone v. Bell, Fed. Cas. No. 8,994 [1 Pet. Adm. 139].

[c] (U. S. 1813) Seamen joining in a common libel for wages have not a common interest, in such sense as to render them entirely incompetent to testify in behalf of each other; but in such cases the court is inclined to adopt the rule of the civil law, which requires at least two witnesses.—Powell v. The Betsy, Fed. Cas. No. 11,355 [2 Browne, 335].

[d] (U. S. 1813) In proceedings to condemn a vessel for having been engaged in trade with the enemy, on an order of further proof, the affidavits of the captors are admissible in evidence, though they had not released their interest in the capture.—The Sally, Fed. Cas. No. 12,258 [1 Gall. 401].

[e] (U. S. 1833) The rules of the common law as to the incompetency of parties as witnesses on the ground of interest, are adopted in the admiralty, in the exercise of its jurisdiction as an instance court.—The Boston, Fed. Cas. No. 1,673 [1 Sumn. 328].

[f] (U. S. 1833) In a suit in rem by a seaman for wages, the deposition of the master, who has interposed a claim and answer in the action and continues a party to the suit, cannot be read in evidence on the part of the owners of the vessel.—The Exchange, Fed. Cas. No. 4,594 [1 Blatchf. & H. 366].

[g] (U. S. 1846) Where all the crew unite in a suit for double wages because of a short allowance of bread, each is a competent witness for his fellow.—The Childe Harold, Fed. Cas. No. 2,676 [Olcott, 275].

[h] (U. S. 1872) In admiralty, interested parties may testify; but their testimony relating to what can be construed into their own misconduct should be received with suspicion.—Roberts v. The St. James, Fed. Cas. No. 11,914.

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§ 232. —— Salvors.

[a] (U. S. 1823) In cases of salvage, the salvors, though interested, are admitted as witnesses from necessity.—The Elizabeth and Jane, Fed. Cas. No. 4,356 [1 Ware (35) 27].

[b] (U. S. 1833) The case of salvage is an exception to the rule as to the incompetency of witnesses on account of interest. The salvors are, from necessity, witnesses as to facts occurring at the time of the salvage service, but only as to such facts.—The Boston, Fed. Cas. No. 1,673 [1 Sumn. 328].

[c] (U. S. 1833) In a salvage suit in admiralty, the salvors, being parties to the suit, are not competent witnesses as to facts occurring in port after the property is brought in.—The Boston, Fed. Cas. No. 1,673 [1 Sumn. 328].

[d] (U. S. 1833) Salvors are ex necessitate admitted as witnesses to all facts which are deemed peculiarly or exclusively within their knowledge. To other facts they are incompetent witnesses.—The Henry Ewbank, Fed. Cas. No. 6,376 [1 Sumn. 400].

[e] (U. S. 1850) A person claiming as a salvor will be permitted to testify in his own behalf, without determining by technical refinements, whether the service was strictly a salvage service or not.—The Huntress, Fed. Cas. No. 6,912.

[f] (U. S. 1858) Cumulative testimony of salvors is admissible in evidence ex necessitate as to facts concerning the alleged service, notwithstanding their apparent interest in the result of the proceeding.—Jones v. The Richmond, Fed. Cas. No. 7,492.

§ 233. Actions on accounts.

Statutory removal of incompetency, see post, § 501.

Examination of parties by auditor, see "Account, Action on," vol. 1, cc. 689, 690, § 23.

Oath of parties, see "Account," vol. 1, c. 618, § 90; "Account, Action on," vol. 1, cc. 686, 687, §§ 16, 17.

[a] (Conn. 1794) In an action of book debt, plaintiff was not competent to testify to any special agreement or promise in virtue of which she would be entitled to recover, but might testify to an acknowledgment of the debt made by defendant.—Johnson v. Gunn, 2 Root, 130.

[b] (Conn. 1822) In an action of book debt, plaintiff is a competent witness to prove the admissions of defendant relative to the matters in issue.—Bryan v. Jackson, 4 Conn. 288.

[c] (Conn. 1828) In an action of book debt, plaintiff is not a competent witness to prove the acknowledgment and promise of defendant, in order to take a case out of the statute of limitations.—Weed v. Bishop, 7 Conn. 128.

[d] (Conn. 1836) The rule that would restrict the testimony of parties to the quantity, quality, and delivery of the articles charged, is not sanctioned by practice. Quoad the book debt, they are admissible, like other witnesses, to testify fully in support or confutation of the account.—Peck v. Abbe, 11 Conn. 207.

[e] (Me. 1833) An account book and the party's oath are not competent evidence to prove defendant to be his agent, and a delivery of goods to him as such, and an agreement to sell and account.—Dunn v. Whitney, 10 Me. (1 Fairf.) 9.

[f] (Me. 1842) Where, in an action to recover for the price of sails and rigging, plaintiff offers in evidence his original books of entry, with his own suppletory oath, it is not competent for him to testify to facts not entering into any items of charge as found in the books, as that he was directed by defendant to deliver the sails on board another vessel, and that he did so deliver them.—Amee v. Wilson, 22 Me. (9 Shep.) 116.

[g] (Ohio, 1816) A book account, commencing 3 or 4 years ago, and containing a regular series of charges, the last of which are within a year of the time when suit was commenced, is a book account of not more than 18 months' standing, within the sixth section of the statute of frauds, providing that, where any claim or defense is founded on book accounts of not more than 18 months' standing, in which is drawn in question the validity or amount of any such book accounts, the court may examine the party under oath, etc.—Marshall v. Bond, Tapp. 99.

[h] (Ohio, 1838) The party testifying to sustain the charges on his book cannot testify as to the value of the articles charged, or of the labor performed; much less, if there is a specific contract, can he testify of that.—Cram v. Spear, 8 Ohio (8 Ham.) 494.

[i] (Pa. 1788) The practice of admitting the oath of plaintiff to prove his shopbook is confined to charge the original debtor. Therefore, where defendant accompanied A. to plaintiff's store, and told plaintiff he would see him paid for such goods as A. should buy, and plaintiff charged defendant in his shopbook as the original purchaser, plaintiff could not be a witness to prove the undertaking.—Poultney v. Ross, 1 Dall. 238, 1 L. Ed. 117.

[j] (S. C. 1837) A vendue master is required to keep a book, and in an action by the original owner he might be a competent witness to prove his entries; but, when he brings the action himself, he must support it, like any other plaintiff, by competent evidence, and the highest evidence the case admits of.—Carter v. Bennett, Riley, 287.

[k] (Vt. 1827) The examination of the parties before the auditors, respecting accounts exhibited, is to be extended to all circumstances connected with those accounts.—Fay v. Green, 2 Aikens, 386.

[l] (Vt. 1831) A party to an action on book account may testify, before auditors, as to a settlement, or as to payments and items in his account from which a settlement may be inferred.—May v. Corlew, 4 Vt. 12.

[m] (Vt.) Defendant may testify to the fact of having paid, on delivery, for goods charged to him on plaintiff's books, or that they were received in payment of a pre-existing debt; and if plaintiff is examined, the auditors must decide upon the whole examination and proof, according to the weight of evidence.—(1831) May v. Corlew, 4 Vt. 12; (1833) Mattocks v. Owen, 5 Vt. 42.

[n] (Vt. 1833) It is competent for the parties in an action on book to testify as to the persons who owned and sold the articles charged, with a view to show a nonjoinder of plaintiffs.—Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286.

[o] (Vt. 1836) Before auditors, in an action of book, parties are competent witnesses as to payment.—Delaware v. Staunton, 8 Vt. 48.

[p] (Vt. 1843) In an action on book account against two defendants, where plaintiff presented a charge for money lent, he may prove by the defendant to whom the money was delivered that defendants were partners at the time the money was lent, and that it was obtained upon the credit and for the use of the firm.—Keeler v. Mathews, 17 Vt. 125.

[q] (Vt. 1846) Where husband and wife are joined as plaintiffs, in an action on book account, the wife, as well as the husband, may be examined on oath as a witness to sustain the account.—Gay v. Rogers' Estate, 18 Vt. 342.

[r] (Vt. 1848) In the action on book account, the parties may testify to every material fact

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in relation to the account proper to be considered in deciding upon the merits of their respective claims.—Clark v. Marsh, 20 Vt. 338.

[s] (Vt. 1850) In an action on a book account, the parties are competent witnesses as to all facts and agreements on which any of its items are based; and where, on a mutual settlement of accounts, a balance struck was charged as an item in a new account, in a suit thereon the parties were competent to prove the stating of the former account and their agreement on the balance.—Warren v. Bishop, 22 Vt. 607.

[t] (Vt. 1851) If the vendor bring an action of book account to recover for the price of the liquors sold for the purpose of being retailed by the vendee without license, the vendee may prove by his own testimony that he had no license, and that he gave notice to the agent of the vendor, at the time of the contract, that he intended to sell the liquors within the state without a license.—Smith v. Allen, 23 Vt. 298.

[u] (Vt. 1851) A party to an action on book account cannot by his own testimony prove a new promise, to avoid the statute of limitations. —White v. Dow, 23 Vt. 300.

§ 234. Actions on bills or notes.

Determination of liability, see post, § 483.
Interest in event, see post, §§ 309–322.

[a] (Ala. 1844) In an action against two as joint makers of a note, one of them, although he makes no defense, is not a competent witness for the other; for a verdict for such other would operate a discontinuance as to the witness.—Turner v. Lazarus, 6 Ala. 875.

[b] (Ky. 1859) In a suit against indorsers, each denied his own signature, the issues were all tried together, but the defenses were distinct and independent. *Held*, that each was competent to testify for the others.—Smith's Adm'x v. Northern Bank, 58 Ky. (1 Metc.) 575.

[c] (La. 1844) Where the maker pleads that she executed the note as surety for her husband, and was not benefited by the consideration, the indorser, who, sued with her, answers separately, adopting the same defense, is not a good witness for her, being interested to destroy her obligation as maker.—Macarty v. Roach, 7 Rob. 357.

[d] (Me. 1834) Defendant's affidavit was not competent to prove that certain notes, which constituted the subject of controversy, had once been given up to him by the holders thereof, and that they had been taken from him by accident with other papers.—Potter v. Titcomb, 11 Me. (2 Fairf.) 157.

[e] (Me. 1861) In an action by a bank against the maker of a note, the maker himself is a competent witness to testify that the note was given by him with the express understanding with the officers of the bank that it should be used only for exhibition to the bank commissioners to increase the apparent assets of the bank, and was to be used for no other purpose. —Lime Rock Bank v. Hewett, 50 Me. 267.

[f] (Mass. 1810) In an action by an agent of the payee on a bill of exchange, the agent is a competent witness to show that the indorsement to him, though not limited in terms, was in fact made for the use of the payee.—Barker v. Prentiss, 6 Mass. 430.

[g] (Mass. 1850) Where the attesting witness of a note, payable to a person named or to bearer, becomes the holder, and brings an action on the note in the name of the payee, he cannot be allowed to testify to the execution of the note, or to prove the same within the exception of the statute of limitations (Rev. St. c. 120, § 4) as to witnessed notes, by evidence of the handwriting of the maker and of himself.—Jourdain v. Sherman, 60 Mass. (6 Cush.) 139.

[h] (Miss. 1843) Where the makers of a note, who are sued, sever in their defenses, one of the makers cannot testify for another maker, unless released from all liability for contribution.—Commercial & R. Bank v. Lum, 8 Miss. (7 How.) 414.

[i] (N. Y. 1842) In a suit against two makers of a joint and several note, one maker cannot examine the other.—Miller v. McCagg, 4 Hill, 35.

[j] (N. Y. 1855) The subscribing witness to a note bought the note of the payee, and brought an action on it in his own name. *Held*, that he could not recover merely by proving his own handwriting as subscribing witness.—Edwards v. Perry, 21 Barb. 600.

[k] (N. Y. 1856) In an action on a note, signed by two persons as principal and surety, neither of the defendants is a competent witness to prove payment by the other.—Newell v. Salmons, 22 Barb. 647.

[l] (N. Y. 1857) In an action against two persons as principal and surety of a note, the principal is not a competent witness for the surety. —Strong v. Grannis, 26 Barb. 122.

[m] (Pa. 1836) A. was the payee and indorser of a note made by B. for the accommodation of C. A. guarantied its payment at maturity. *Held*, that A. was a competent witness in a suit by B. against himself.—Robertson v. Stewart, 5 Watts, 442.

[n] (Pa. 1845) One of the makers of a note, in whose favor an award unappealed from was made, who at the time his deposition was taken was a certificated bankrupt, and who had not a particle of interest in the event of the suit, but who, at the impetration of the writ and the award, was a party to the suit, is not a competent witness.—Wolf v. Fink, 1 Pa. (1 Barr) 435, 44 Am. Dec. 141.

[o] (Tenn. 1871) The assignor of a note is a competent witness for his assignees, although the suit is pending in his own name against the makers.—Gardner v. Smith, 52 Tenn. (5 Heisk.) 256.

§ 235. —— Adverse parties.

[a] (Iowa, 1856) The maker, for labor to be performed by the payee, gave the note, on which both he and the indorser, who was the payee, were sued. The latter indorsed it to plaintiff. The maker answered that the work was not performed, and that the consideration therefore had failed. The payee answered that the work was performed. *Held* that, being interested in the event, he was incompetent to prove for plaintiff that the consideration had not failed.—Hickman v. Sloan, 2 Iowa (2 Clarke) 64.

[b] (Me. 1849) In an action brought by the indorsee on a note, plaintiff cannot be called by defendant to testify, although he was the subscribing witness.—Cushman v. Downing, 29 Me. (16 Shep.) 459.

[c] (Miss. 1849) The nominal plaintiff, in a suit on a note, is a competent witness for defendant, if he is willing to testify.—Blundell v. Vaughan, 20 Miss. (12 Smedes & M.) 625; Coopwood v. Foster, Id. 718.

[d] (Mo. 1862) When the indorser is joined as defendant in a suit with the maker of a note, the indorser is not a competent witness for plaintiff against the maker and prior indorsers, as being an adverse party. The last indorser is interested in having judgment rendered against the maker and the prior indorsers.— Presbury v. Papin, 31 Mo. 490.

[e] (N. Y. 1809) In an action on a note, a person who is the real plaintiff in interest may be called and examined by the defendants.— Connor v. Bradey, Anth. N. P. 99.

§ 236. Actions by or against partners.

Determination of liability, see post, § 486.
Interest in event, see post, §§ 349–355.

[a] (Ala. 1859) Under Code, § 2142, a firm can be sued by the firm name. There was some evidence that certain persons did transact the business concerning which the suit was brought under the name alleged. *Held*, that one of those persons was not competent to prove that the firm name was wrongly alleged in the petition, in which case the action would have abated, and he would by his own evidence discharge himself from a pending suit.—Jemison v. Minor, 34 Ala. 33.

[b] (Ind. 1860) Where several persons are sued jointly as partners, and one of them answers separately, denying that he is a partner, his codefendants are competent witnesses as to such defense, as it is not a matter in which they are jointly interested or liable with him.—Hubbell v. Woolf, 15 Ind. 204.

[c] (Ky. 1871) A defendant is a competent witness for his two codefendants, to prove that they are not his partners and are not liable with him for the debt sued on.—Culbertson v. Holden, 71 Ky. (8 Bush) 161.

[d] (Ky. 1875) G., one of two partners, mortgaged his interest in the partnership property to C. and left the state; and C. brought suit to foreclose against him by constructive service, and against L., his partner, by actual service of process. L. answered, alleging an indebtedness to himself by the firm on account of advances, for which he claimed a prior lien on the partnership property. *Held*, that under Gen. St. c. 37, § 27, permitting no party to testify, where the "adverse party is not before the court, otherwise than by constructive service," as between C. and L., L. was a competent witness to prove the nature and extent of L.'s claim; but neither L. nor C. was a competent witness as against G.—Love v. Cummings, 73 Ky. (10 Bush) 578.

[e] (La. 1855) One partner is not competent to prove that the other has paid a judgment against the partnership. If the defense is not sustained, he remains liable in solido to the creditor, and must look to his partner for the latter's contributive share; but, if sustained, he will be liable no longer to the creditor, but only to his partner for one-half.—Ellis v. Fisher, 10 La. Ann. 482.

[f] (La. 1858) The defendants were sued as the partners of a third person to render them liable for the drafts of the latter as advances to a firm of which they were alleged to be members. *Held*, that one was not a competent witness for the other to prove that he was not a member of the firm.—Bailey v. Doak, 13 La. Ann. 272.

[g] (Miss. 1854) Where a firm is sued, and one of the members, against whom a judgment might be rendered, is offered as a witness for his codefendant, he cannot be permitted to testify.—Wilson v. Clarke, 27 Miss. (5 Cushm.) 270.

[h] (N. Y. 1858) Where it appears, in an action against three partners for the recovery of personal property, that there is no issue involving anything personal to either of them, but all the defense made is a joint defense, neither can be a witness for the others.—Ward v. Woodburn, 27 Barb. 346.

[i] (N. Y. 1859) A party sued as a copartner is not a competent witness for his codefendant to prove a defense which would be a general one to both.—City Bank of Brooklyn v. McChesney, 20 N. Y. 240.

[j] (Pa. 1859) A defendant, who has entered no appearance and offers no defense, is not a competent witness for his codefendant, to prove actual notice of dissolution.—Little v. Clarke, 36 Pa. (12 Casey) 114.

[k] (S. C. 1856) On a question between creditors as to the amount paid by the copartnership, and the amount paid by each copartner, for a lot and buildings, the object being to ascertain how much of the value of the lot should be treated as copartnership assets and how much as the individual estate of each copartner, *held*, that the copartners, they being parties to the bill, were incompetent witnesses to prove how much each had paid out of his individual funds.—Fleming v. Billings, 9 Rich. Eq. 149.

[l] (Tenn. 1843) Where one member of a firm executes his individual note to obtain money, he is not an incompetent witness to prove that the money was obtained on the credit of the firm and went into the business of the firm in an action against it.—Foster v. Hall, 23 Tenn. (4 Humph.) 346.

[m] (Tenn. 1858) One of the copartners of a firm, in a contest between third persons and the firm, is not a competent witness to prove the existence of the partnership, or that the debt sued for was created for or on account of the firm.—Philips v. Henry, 39 Tenn. (2 Head) 133.

[n] (Vt. 1820) In an action against A. and B. as partners, the parties may be examined and have a right to testify as to the fact on whose account the articles charged were delivered.—Burton v. Ferris, Brayt. 78.

[o] (Vt. 1853) The parties, in an action of book account, are witnesses to the same extent, where a question of partnership is concerned, as other witnesses, and may testify to every material fact proper to be considered in deciding the merits of the case.—Carter v. Wright, 25 Vt. 656.

§ 237. —— Adverse parties and testimony against co-party.

[a] (Ala. 1846) In a suit by several partners, one of the plaintiffs, consenting to be sworn as a witness, is competent for defendant, although the other partners may object to him.—Cunningham v. Carpenter, 10 Ala. 109.

[b] (Cal. 1862) In a suit on an alleged indebtedness, plaintiff sought to prove a partnership between the two parties joined as defendants. *Held*, that one of these defendants was incompetent as a witness, when offered to prove the existence of the partnership, against the denial of it by his codefendant.—Easterly v. Bassignano, 20 Cal. 489.

[c] (Ill. 1864) In an action against a firm on their note, one of the partners, who by mutual agreement was liable for the firm debts, was a competent witness against his codefendant.—Bell v. Thompson, 34 Ill. 529.

[d] (Ill. 1864) A partner, not disqualified on the ground of interest, is a competent witness against his copartners in an action against the firm.—Bell v. Thompson, 34 Ill. 529.

[e] (La. 1848) In an action against part of the owners of a steamer, who were bound in solido on a note given for materials, reciting that the steamer and owners promised to pay, and signed by two of the partners, who acted as agents for the rest, those who signed were not incompetent as witnesses for plaintiff on the ground of interest.—Knight v. Lauve, 3 La. Ann. 64.

[f] (La. 1849) Where the maker of a note appeared to be the only party who was liable thereon, but suit was brought against him and another, alleged to be part owner of a steamer for the price of which the note was given, the maker could not be called as a witness by plaintiff to establish the liability of his codefendant as a partner with him.—Ellis v. Lauve, 4 La. Ann. 245.

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[g] (Miss. 1835) One partner, who is a defendant, cannot be made a witness to prove that a codefendant was a partner; for it is his interest to establish this fact and make the codefendant liable for contribution.—Garner v. Myrick, 30 Miss. 448.

[h] (N. H. 1842) In a suit on a note against partners, one of the defendants was not served with the writ, and on the trial was introduced as a witness by plaintiff to show the existence of a partnership between himself and the defendant served. *Held*, that he was incompetent.—Latham v. Kenniston, 13 N. H. 203.

[i] (N. H. 1858) Where a suit is brought against two as partners, but service is made on one only, the person not served with process and not appearing in the action is not a competent witness for the other party to prove the partnership.—Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319.

[j] (Ohio, 1855) In a suit by a surety against the manager and members of a firm for whom he had bound himself as surety, which was defended on the ground that it was the sole debt of the manager, the latter was not, prior to the acts to improve the law of evidence (2 Curw. St. pp. 1522, 1597), a competent witness for complainant to establish the liability of the firm.—Hale v. Wetmore, 4 Ohio St. 600.

[k] (Pa. 1828) Plaintiff, by omitting to serve one of a firm, cannot make such member a witness for him.—Taylor v. Henderson, 17 Serg. & R. 453.

[l] (Pa. 1842) In a suit against a partnership, if a partner voluntarily submits to be examined on the part of plaintiff against himself and his copartners jointly, his evidence is admissible for that purpose. The rule is the same in contract and in tort.—O'Brien v. Vantine, 1 Clark, 210, 2 Pa. Law J. 94.

[m] (Pa. 1843) One of the codefendants on whom process is not served is not competent to testify for plaintiff as to a partnership between himself and his codefendant.—Heckert v. Fegely, 6 Watts & S. 139.

[n] (Pa. 1844) One of several partners, who are plaintiffs in an action, if he be willing to testify, is a competent witness for defendant.—Moddewell v. Keever, 8 Watts & S. 63.

[o] (Pa. 1851) One of two partners is a competent witness for defendant in an action of debt on book account, brought in their names for the use of another, to prove that his copartner and himself agreed, before the claim was transferred, that an account of defendant against the witness should be credited to defendant in the account in suit.—Canon v. Campbell, 18 Pa. (6 Harris) 164.

[p] (Tex. 1860) In a suit by a partnership on an account, defendant claimed that the account had been settled by an agreement with the partnership that it should be set off against an individual debt of one of the partners to defendant. *Held*, that such individual partner was a competent witness for defendant to prove the fact alleged, since his interest was balanced by the fact that if the defense prevailed he would be indebted to his firm, and if it did not prevail he would be indebted to the same amount to defendant.—Young v. Read, 25 Tex. Supp. 113.

[q] (Vt. 1848) One member of a firm purchased property for the benefit of the firm, and on their credit, and afterwards, on a settlement between the copartners, assumed the debt himself; and a suit was then commenced against the firm to recover the debt, and the defendant who had thus assumed the debt was called as a witness on the part of plaintiff, and was willing to testify. *Held*, that he had no interest in behalf of plaintiff, in the event of the suit, which would render him incompetent as a witness.—Miner v. Downer, 20 Vt. 461.

[r] (Vt. 1848) The interest of such witness in the suit is not in any manner increased or affected by the fact that he has received his discharge in bankruptcy subsequent to the time when he thus assumed the debt.—Miner v. Downer, 20 Vt. 461.

§ 238. Usurious transactions.

Determination of liability, see post, § 485.
Interest in event, see post, §§ 300–304.
Statutory removal of incompetency, see post, §§ 509–511.
Transfer, release, or extinguishment of interest, see post, § 447.

[a] (Conn.) A defendant is not admissible as a witness to sustain a plea of usury filed by him under the statute.—(1789) Fliming v. Bates, 1 Root, 129; (1791) Livingston v. Bird, Id. 255.

[b] (Conn. 1843) On a complaint of usury, filed, in an action on a note, under the third section of the statute, defendant himself cannot be examined to prove the facts alleged in such complaint.—Williams v. Denison, 16 Conn. 28.

[c] (Ill. 1861) After usurious money has been paid, the parties are not competent witnesses in a suit to recover it back.—Lucas v. Spencer, 27 Ill. 15.

[d] (Me. 1847) In a suit by an indorsee against the maker of a note, defendant will not be permitted to prove usury by his own oath in defense.—Myric v. Hasey, 27 Me. (14 Shep.) 9, 46 Am. Dec. 583.

[e] (Me. 1849) The oath of defendant cannot be admitted to establish the defense of usury in an action on a note, brought in the name of the indorsee; and whether or not the note was ever the property of the payee is immaterial.—Cushman v. Downing, 29 Me. (16 Shep.) 459.

[f] (Mass. 1810) The promisor cannot show usury by his own oath, in an action against him by an indorsee, after a mere showing that the action was instituted for the benefit of the original promisee and that he was the real creditor.—Binney v. Merchant, 6 Mass. 190.

[g] (N. J.) Where the equity of redemption has been sold by the sheriff, and no decree of foreclosure is necessary against the mortgagor, he is a competent witness to prove usury in the mortgage.—(1846) Cummins v. Wire, 6 N. J. Eq. (2 Halst. Ch.) 73; (1852) Brolasky v. Miller, 9 N. J. Eq. (1 Stockt.) 807.

[h] (N. Y. 1840) In a joint action against the maker and indorser of a note, which by the evidence of the maker, who is called as a witness for the indorser, is proved to be usurious, plaintiff may have a verdict against the maker, as his evidence cannot benefit himself.—Bloodgood v. Faxon, 24 Wend. 385.

[i] (N. Y. 1856) An indorsee is a competent witness for his codefendants, in an action against the makers and indorsers of a note, to show usury in the note.—Bank of Auburn v. Walter, 23 Barb. 441.

[j] (N. Y. 1871) An action was brought by an administrator on a note made to his intestate by C. and indorsed by three other defendants. All of the defendants joined in an answer of usury. *Held*, that C. was not competent as a witness to prove the usury.—Fox v. Clark, 61 Barb. 216, note.

(c) REPRESENTATIVE OR OFFICIAL CAPACITY OF PARTIES.

IN GENERAL, § 239.
EXECUTORS AND ADMINISTRATORS, § 240.
TRUSTEES, § 241.
GUARDIAN AND WARD, § 242.

Liability for costs, see post, § 400.
Transfer, release, or extinguishment of interest, see post, § 433.

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§ 239. In general.

[a] (Ala. 1847) Where a motion is made by a county treasurer, under the statute, against a clerk for not rendering an account, the treasurer is a competent witness to prove that the account was not rendered, as the motion is a county prosecution, in which the officer has no interest.—Douglass v. Terrell, 11 Ala. 583.

[b] (Ill. 1844) After the commencement of a suit by certain individuals as county commissioners, one of them, whose term of office had expired before the trial, was called as a witness on the trial, and was permitted to testify. *Held*, that as it was unnecessary to have brought the suit in their individual names, and as he had ceased to be a commissioner, he was a competent witness.—Frazier v. Laughlin, 6 Ill. (1 Gilman) 347.

[c] (Ind. 1839) In a suit by the state, on the relation of the county treasurer, on the bond of a collector of county revenue, the treasurer is an incompetent witness for the state, on account of his interest in the event of the suit.—Jones v. State, 5 Blackf. 141.

[d] (La. 1836) An attorney in fact, who sues in his principal's name, is competent to prove plaintiff's demand.—Zino v. Verdelle, 9 La. 52.

[e] (La. 1841) The parish treasurer, but nominally a party, is competent for the parish in a suit against the sheriff for taxes.—Iberville Police Jury v. Sherburne, 17 La. 342.

[f] (Mich. 1858) Where an action is brought by highway commissioners by their name of office, one of them, in office at the commencement of the suit, but no longer such at time of trial, is competent as a witness.—Highway Com'rs of Port Huron v. Stockman, 5 Mich. 528.

[g] (Miss. 1847) A president of a board of police, in the name of whose predecessor an action was brought, was a competent witness to sustain the suit, on the ground that he had no interest in the suit, and was not personally liable for costs.—Ellis v. Carlisle, 16 Miss. (8 Smedes & M.) 552.

[h] (N. H. 1851) If the assignee of an insolvent, with a view to protect the interests of the assignor or his creditors, appears by leave of court to defend an action in the name of the defendant, he is neither a privy nor party to the suit, in the legal acceptation of those terms, and, unless security for costs be furnished as a condition of his appearance, so as to make him liable for costs, he is not legally interested in the result.—Swamscot Mach. Co. v. Walker, 22 N. H. (2 Fost.) 457, 55 Am. Dec. 172.

[i] (N. H. 1851) Where A., the assignee of B. and C., by leave of the court appeared to defend an action against D., and afterwards, before the trial, withdrew his appearance by leave of the court, without any security for costs having been required or furnished, *held*, that he had no legal interest in the result of the suit, and was a competent witness for defendant.—Swamscot Mach. Co. v. Walker, 22 N. H. (2 Fost.) 457, 55 Am. Dec. 172.

[j] (N. Y. 1851) In an action to recover for work done for defendant, he was not a competent witness to prove that he was acting only in a representative character as a receiver when he made the contract sued on.—Doughty v. Busteed, 3 Code Rep. 187.

[k] (N. Y. 1856) Where a joint-stock association is sued in the name of its president or treasurer, such officer may be examined in proceedings supplementary to the execution, on showing him to be indebted to the association, as the members of the club are not defendants, and are not personally liable.—Curtois v. Harrison, 3 Abb. Prac. 96.

[l] (N. Y. 1862) A relator, suing in the name of the people for a writ of mandamus, is a competent witness in behalf of the plaintiffs.—People v. Albright, 14 Abb. Prac. 305, 23 How. Prac. 306.

[m] (N. C. 1867) Before the evidence act of 1866, the relator, in an action brought in the name of the state, was not competent as a witness.—Kirkland v. Mangum, 61 N. C. 177.

[n] (S. C. 1827) Where a third person brings suit on an administration bond in the name of the ordinary, entering his own name on the record as the real plaintiff, and acknowledging himself liable for costs, the ordinary is a competent witness to prove the bond.—Price v. Gregory, 4 McCord, 261.

[o] (Tenn. 1859) A suit by the justices of the county court is in legal effect a suit by the county, so that, though the names of the justices appear as parties to the record, they are competent witnesses.—Ezell v. Justices of Giles County, 40 Tenn. (3 Head) 583.

§ 240. Executors and administrators.

Interest in event, see post, § 356.

[a] (Ark. 1857) An administrator is not a competent witness in his own favor in a suit against himself.—Grimes v. Booth, 19 Ark. 224.

[b] (Conn. 1831) In the adjustment of an executor's account, all the parties in interest may testify. Where, therefore, the administrator of A., who before his death had been executor of C.'s estate, with B., applied to the court of probate for the settlement of A.'s account, claiming the allowance of certain payments made by A. for the benefit of C.'s estate, the executor, B., though a party to the proceeding and interested in the event, was an admissible witness to disprove such claim.—Fairman v. Bacon, 8 Conn. 418.

[c] (Ind. 1832) To an action of covenant against an administrator, on an obligation of the intestate, brought by an assignee, defendant pleaded nonassignment by the obligee, and payment to him by the intestate. *Held*, that defendant was not a competent witness against plaintiff to prove the truth of the pleas.—Sinks v. English, 3 Blackf. 138.

[d] (Ky. 1822) The deposition of one of several executors is not competent evidence in a suit between the heirs of the intestate and the executors.—Saunders' Heirs v. Saunders' Ex'rs, 12 Ky. (2 Litt.) 314.

[e] (Ky. 1828) An executor cannot be a witness in an action against him as such.—Lampton v. Lampton's Ex'rs, 22 Ky. (6 T. B. Mon.) 616.

[f] (Ky. 1829) An executor, having no other interest than his fiduciary character imparts to him, is a competent witness to prove the will.—In re McDaniel's Will, 25 Ky. (2 J. J. Marsh.) 331.

[g] (Ky. 1864) In an action by an executor on notes given to him in purchase of land sold by him under a power in the will, the purchaser alleged that there was no bond for title or other written memorial of the sale, and pleaded the statute of frauds. *Held*, that the executor, although a contingent legatee, could, as conclusive corroboration of the probable deduction that such memorial had been delivered simultaneously with the delivery of the notes, testify that such written memorial was executed.—Hill's Adm'r v. Spalding's Ex'r, 62 Ky. (1 Duv.) 216.

[h] (La. 1846) One sued, as administrator, for a debt alleged to be due by the deceased, having no personal interest in the case, is a competent witness to prove that the claim had been paid by the deceased.—De Kerlegand v. Robin, 1 La. Ann. 227.

[i] (Mass. 1819) In an action by the administrator of the payee of a note, the defendant administrator is not a competent witness, though

the estate of his intestate is insolvent.—Fox v. Whitney, 16 Mass. 118.

[j] (Mass. 1838) Where the deposition of an administrator was taken in perpetuam at the instance of the plaintiff in relation to facts which came to his knowledge before he was appointed administrator, it was not admissible in an action against the administrator as a deposition; the deponent being a party to the record.—Faunce v. Gray, 38 Mass. (21 Pick.) 243.

[k] (N. H. 1844) An administrator, having no interest, is a competent witness in a suit brought by him on a contract, in the name of the party thereto, and for the benefit of the estate.—Barker v. Barker, 16 N. H. 333.

[l] (Pa.) An executor defendant is competent to show when, where, and in what condition he found the papers of his testator.—(1796) Lenox v. Dehaas, 2 Yeates, 37; (1797) Standley's Ex'rs v. Weaver, Id. 256.

[m] (Pa. 1819) One of two executors, defendants, cannot be a witness for the defendants on the pleas of non assumpsit, payment, and setoff, though all the costs, past and future, are paid.—Conrad v. Keyser, 5 Serg. & R. 370.

[n] (Pa. 1821) An administrator, who is one of several plaintiffs, is admissible as a witness after he has released all claims to commissions, and paid all costs, however the verdict may be, unless he is in danger of being involved in a devastavit.—Patton's Adm'rs v. Ash, 7 Serg. & R. 116.

[o] (Pa. 1824) One suing as executor, and paying all the costs which have accrued or which may accrue in the suit, is not a competent witness without having released the commissions to which he may be entitled on the money to be recovered.—Anderson v. Neff, 11 Serg. & R. 208.

[p] (Pa. 1845) An executor, who is defendant, cannot be a witness to discharge himself, thereby discharging the land of a devisee, who is codefendant, from the decedent's debts.—Hunt v. Moore, 2 Pa. (2 Barr) 105.

[q] (Pa. 1855) On the trial of an issue devisavit vel non, one named as executor is a competent witness against its validity.—Landis v. Landis, 1 Grant, Cas. 248.

[r] (S. C. 1826) On an issue devisavit vel non the executor, who was a party to the record, is not competent to testify to the circumstances under which the will was found.—Vinyard v. Brown, 4 McCord, 24.

[s] (S. C. 1827) An executor, who is a coplaintiff in a suit, is an incompetent witness for plaintiff, though he may never have qualified as an executor.—Christie's Ex'rs v. Furman's Ex'rs, Harp. 553.

[t] (S. C. 1832) An executor plaintiff, as such, is not competent to testify in the suit, both on account of being a party and being interested in the event of the suit.—Bellamy's Ex'rs v. Cains, 3 Rich. Law, 354.

[u] (S. C. 1833) In an action by distributees against an administratrix, deceased's widow, and the administrator of her second husband's estate for a devastavit by her, and seeking to hold the estate of the second husband liable, the assignee of one of plaintiffs and guardian of the others executed a release of her liability. *Held*, that she was not incompetent as a witness either by reason of being a party or being interested in the event of the suit.—Capehart v. Huey, 1 Hill, Eq. 405.

[v] (Vt. 1847) An administrator de bonis non, in whose name a suit is progressing, is not so devested of all interest as to be a competent witness in the case, notwithstanding it may appear that the suit was commenced prior to his appointment, and that the estate which he represents is clearly solvent.—Abbott v. Clark, 19 Vt. 444.

[w] (Va. 1844) On the trial of an issue to contest the validity of a will which has been admitted to probate, the executor, who claims no interest as devisee or legatee under the will, and not having acted so as to subject himself to costs, is a competent witness, though he is a party defendant in the suit, has settled his accounts, showing large balances in his hands, and is entitled to commissions upon his receipts and disbursements.—Coalter's Ex'r v. Bryan, 1 Grat. 18.

§ 241. Trustees.

Interest in event, see post, § 324.

[a] A defendant, who is a trustee without any real interest in the suit, may be a witness for a codefendant.

—(Me. 1851) White v. Means, 33 Me. 495;

(Mo. 1852) McLaughlin v. McLaughlin's Adm'r, 16 Mo. 242; (1866) Hale v. Meegan, 39 Mo. 272;

(N. J. 1840) Neville v. Demeritt, 2 N. J. Eq. (1 H. W. Green) 321.

[b] (Ala. 1841) A plaintiff of record cannot be examined as a witness to support the action, although he is shown to be a mere trustee.—Stone v. Bibb, 2 Ala. 100.

[c] (Ky. 1865) A trustee, who is the nominal plaintiff in a case of forcible detainer, in which he has no beneficial interest, is competent to testify for plaintiff.—Spalding v. Bull, 62 Ky. (1 Duv.) 311.

[d] (Mass. 1836) A person called as a witness stated that he was indebted to defendant, and that he had been summoned in the action as his trustee. *Held*, that he was not interested in the event of the suit, and so not incompetent to testify.—Dana v. Kemble, 34 Mass. (17 Pick.) 545.

[e] (N. H. 1843) While leave is always granted to examine merely formal parties, on motion and a suggestion that the witness is not interested, an executor holding property in trust cannot be examined as a witness on behalf of his cestui que trust. — Second Congregational Soc. v. First Congregational Soc., 14 N. H. 315.

[f] (N. C. 1816) A trustee defendant, having a legal interest altogether nominal, is an incompetent witness at law, but not in equity, as to the merits or designs of the trust deed.—Hawkins v. Hawkins, 4 N. C. 431.

[g] (Pa. 1849) Where the name of a plaintiff for the use of another is on the record only as a naked trustee, and the cestuis que trust, who are liable for costs, are alone interested in the suit, and could have maintained it in their own names as legal plaintiffs, such plaintiff for use is a competent witness for them.—Keim v. Taylor, 11 Pa. (1 Jones) 163.

[h] (Pa. 1859) A nominal plaintiff, whose name is on the record as a naked trustee, and who is not liable for costs, may be a witness for the parties in interest.—Ryerss v. Trustees of Presbyterian Congregation of Blossburg, 33 Pa. (9 Casey) 114.

§ 242. Guardian and ward.

Interest in event, see post, § 323.

[a] (Ala. 1867) Prior to Act Feb. 14, 1867, relative to the competency of witnesses (Sess. Acts 1866–67, p. 435), a guardian, on the final settlement of his accounts, was not a competent witness generally in his own behalf; but he might testify to the correctness of any item under $20.—Padgett v. Padgett, 41 Ala. 382.

[b] (Ark. 1855) A party prosecuting as prochein ami for an infant cannot be a witness for the infant.—Pryor v. Ryburn, 16 Ark. 671.

[c] (Ill. 1883) In an action by sureties on a guardian's bond against him and the ward to

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reach trust funds in the hands of the ward, in order to reimburse themselves for payment of a judgment obtained against the guardian by the ward, the guardian may testify against his ward's interest.—Rice v. Rice, 108 Ill. 199.

[d] (Ky. 1866) Where the guardian of an infant brings a suit in his own name on a note executed to him, he will not be a competent witness for himself, although the note belongs to the infant.—Murphy v. Hubble, 63 Ky. (2 Duv.) 247.

[e] (La. 1844) Minors, for whose board the tutor is sued, being substantially parties, are incompetent for plaintiff.—Dwight v. Smith, 9 Rob. 32.

[f] (La. 1853) A tutor, suing for damages for the abduction of his ward, to whose benefit they inure, is a good witness. His interest in the suit goes only to his credibility.—Brown v. Crockett, 8 La. Ann. 30.

[g] (Mass. 1815) A guardian is incompetent to testify in an action against him in favor of his ward's estate.—Sears v. Dillingham, 12 Mass. 358.

[h] (Mo. 1857) A guardian ad litem of a party to a suit may be a witness for the party.—Murphy v. Murphy, 24 Mo. 526.

[i] (Mo. 1860) A guardian is a competent witness for his ward, whose case he conducts.—McCullough v. McCullough, 31 Mo. 226.

[j] (S. C. 1804) In an action on an administration bond, the plaintiff, a minor, and his guardian, are incompetent witnesses as to the value of the distributive share of the deceased's estate claimed.—Ordinary of Kershaw Dist. v. Bracey, 2 Bay, 542.

[k] (Va. 1822) One who is made prochein ami to an infant without his knowledge or consent is not disqualified from being a witness.—Burwell v. Corbin, 1 Rand. 131, 10 Am. Dec. 494.

(d) DEFENDANTS IN CRIMINAL PROSECUTIONS.

IN GENERAL, § 243.
PERSONS JOINTLY INDICTED IN GENERAL, § 244.
SEPARATE TRIALS OF PERSONS JOINTLY INDICTED, § 245.
BEFORE DISPOSAL OF CASE AGAINST WITNESS, § 246.
PERSONS SEPARATELY INDICTED, § 247.
—— JOINT TRIAL, § 248.

Determination of liability, see post, §§ 487–489.
Effect of calling or examination as witness by adverse party and of admission of testimony of adverse party, see post, § 534.
Husband or wife of party to criminal prosecution, see post, §§ 420–423.
Interest in criminal prosecution, see post, §§ 403–410.

§ 243. In general.

[a] Defendant in a criminal prosecution is not a competent witness in his own behalf.
—(Ind. 1864) Whelchell v. State, 23 Ind. 89;
(Iowa, 1874) State v. Laffer, 38 Iowa, 422; (1874) Same v. Bixby, 39 Iowa, 465.

[b] (Ala. 1850) On the trial of an issue, formed on an indictment under the statute, for refusing to testify before the grand jury in reference to gaming, defendant cannot be allowed to give evidence in his own favor. The practice of permitting defaulting witnesses, on an application to the court, to excuse themselves by their own testimony, furnishes no authority for such procedure.—Batre v. The State, 18 Ala. 119.

[c] (Pa. 1762) Where no prosecutor is indorsed on the indictment as required by Act 1705, defendant himself is not a competent witness to prove the person prosecuting, but it must be proved by indifferent witnesses.—Rex v. Lukens, 1 Dall, 5, 1 L. Ed. 13.

[d] (Pa. 1878) Since a defendant has not the right to give his testimony to the jury, as to crimes which are exclusively triable in the court of oyer and terminer, and that court has exclusive jurisdiction of the offense of receiving stolen goods, one charged with such offense cannot give testimony in his own behalf.—Commonwealth v. Lenox, 12 Phila. 601.

§ 244. Persons jointly indicted in general.

[a] When two persons are indicted jointly, neither is admissible as a witness for or against his codefendant.
—(Ky. 1884) Lisle v. Commonwealth, 82 Ky. 250;
(Mo. 1854) State v. Edwards, 19 Mo. 674; (1881) Same v. Martin, 74 Mo. 547;
(Ohio, 1816) State v. Foy, Tapp. 103;
(Or. 1884) State v. Drake, 11 Or. 396, 4 Pac. 1204.

[b] (Ga. 1822) An accessory joined in an indictment with the principal may be called to testify for the state, but, it seems, not for the principal.—State v. Calvin, R. M. Charlt. 151.

[c] (N. C. 1881) On trial for an affray prior to the act of 1881, allowing defendants to testify in their own behalf, one defendant could not oppose the testifying of his codefendant for himself, the state's counsel not objecting.—State v. Hamlett, 85 N. C. 520.

[d] (Pa. 1789) One indicted with others, for forcible entry, cannot be a witness for the defense after circumstances are proved from which it is possible for the jury to presume facts sufficient to justify his conviction.—State v. Leach, Add. 352.

[e] (Tex. 1889) Under Code Cr. Proc. art. 731, forbidding persons charged as principals, accomplices, etc., to testify for each other, one jointly charged with a defendant, though indicted under the wrong name, as his name was unknown to the grand jury, cannot testify for defendant.—Anderson v. State, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644.

[f] (Va. 1894) The court has a right to call as a witness one who is jointly indicted with defendant, and who was present at the transaction.—Commonwealth v. Brown, 90 Va. 671, 19 S. E. 447.

§ 245. Separate trials of persons jointly indicted.

[a] Where several persons are jointly charged, but separately tried, they are competent witnesses for each other.
—(Cal. 1855) People v. Labra, 5 Cal. 183; (1862) Same v. Newberry, 20 Cal. 439;
(Ga. 1846) Jones v. State, 1 Ga. (1 Kelly) 610;
(Ind. 1855) Everett v. State, 6 Ind. 495; (1856) Marshall v. Same, 8 Ind. 498; (1857) Hunt v. Same, 10 Ind. 69; (1860) State v. Spencer, 15 Ind. 249;
(Ohio, 1859) Allen v. State, 10 Ohio St. 287;
(Tenn. 1878) Poteete v. State, 68 Tenn. (9 Baxt.) 261;
(Va. 1853) Lazier v. Commonwealth, 10 Grat. 708.

CONTRA, see
(Ky. 1861) Cornelius v. Commonwealth, 60 Ky. (3 Metc.) 481;
(Mich. 1866) Grimm v. People, 14 Mich. 300;

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(Minn. 1860) State v. Dumphey, 4 Minn. 438 (Gil. 340);
(N. Y. 1838) People v. Williams, 19 Wend. 377; (1853) McIntyre v. People, 9 N. Y. (5 Seld.) 38;
(Pa. 1873) Staup v. Commonwealth, 74 Pa. (24 P. F. Smith) 458.

[b] Where persons jointly indicted are tried separately, one of them may testify against the other.
—(Miss. 1860) George v. State, 39 Miss. 570;
(N. J. 1879) Noyes v. State, 41 N. J. Law (12 Vroom) 418;
(Va. 1894) Smith v. Commonwealth, 90 Va. 759, 19 S. E. 843;
(Wyo. 1893) McGinness v. State, 4 Wyo. 115, 31 Pac. 978, 53 Pac. 492.

[c] (U. S. 1824) On a joint indictment of three persons for a riot, where one only is put upon trial, the others, who have forfeited their recognizances, cannot be examined as witnesses for him.—United States v. Rutherford, Fed. Cas. No. 16,210 [2 Cranch, C. C. 528].

[d] (U. S. 1835) Upon a joint indictment against two for assault and battery, it is not a matter of right that they should be tried separately, at their request; and neither can be examined as a witness for the other, unless there be no evidence against one, in which case the jury may acquit him, and then he may be examined for the other defendant.—United State v. Davidson, Fed. Cas. No. 14,922 [4 Cranch, C. C. 576].

[e] (Ala. 1880) Where the trial of two persons jointly indicted for murder is severed by the adjudication that one of them is insane, the testimony of either, given when sane, at a former trial, is admissible against the other.—Marler v. State, 67 Ala. 55, 42 Am. Rep. 95.

[f] (Ark. 1859) Where several accessories before the fact are jointly indicted with the principal, they are incompetent witnesses for him upon his trial.—Collier v. State, 20 Ark. 36.

[g] (La. 1873) It makes no difference whether an accomplice who becomes a witness for the state has been convicted or not, or whether he be joined or not in the same indictment with the prisoner to be tried, provided he be not put upon his trial at the same time.—State v. Prudhomme, 25 La. Ann. 522.

[h] (La. 1886) An accomplice joined in the same indictment with the prisoner to be tried may testify unless put on trial at the same time.—State v. Mason, 38 La. Ann. 476.

[i] (Mass. 1860) Where two were jointly indicted for uttering a forged note, and the trial of one was postponed, he could not be called as a witness for the other.—Commonwealth v. Marsh, 27 Mass. (10 Pick.) 57.

[j] (Minn. 1858) Whether tried together or separately, one defendant cannot testify in behalf of a codefendant.—Baker v. United States, 1 Minn. 207 (Gil. 181).

[k] (Mo. 1851) Where two are jointly indicted, neither is admissible as a witness for the other, whether they are tried jointly or separately; being incompetent, not on the ground of interest, but of public policy; but, if there is no evidence to criminate one, or if he is made a defendant by mistake, or for the purpose of excluding his testimony, the practice of the courts is to direct his acquittal that he may testify for the other.—State v. Roberts, 15 Mo. 28.

[l] (N. Y. 1875) Upon the separate trial of one of two persons jointly indicted for rape, his codefendant is a competent witness against him.—People v. Satterlee, 5 Hun, 167.

[m] (N. C. 1871) When two persons are indicted for a felony in the same bill, the one as principal and the other as accessory, the latter, although not on trial himself, is not a competent witness against the former.—State v. Dunlop, 65 N. C. 288.

[n] (N. C. 1885) In an indictment for an affray, one codefendant may be examined as a state's witness against another when they are tried separately.—State v. Weaver, 93 N. C. 595.

[o] (Ohio, 1861) Where two are jointly indicted for an offense which may be committed by one alone, and they are tried separately, the one not on trial, and his wife, are competent witnesses for the other.—Matthews v. State, 2 Ohio Dec. 525.

[p] (Wyo. 1893) A co-defendant who has been jointly indicted with defendant, but whose trial has been severed, is a competent witness for defendant, as well as for the state.—McGinness v. State, 4 Wyo. 115, 31 Pac. 978, 53 Pac. 492.

§ 246. Before disposal of case against witness.

[a] Where a party is indicted jointly with another for felony, and he is on trial separately, his co-defendant is not a competent witness for him until discharged in some way from the record.
—(U. S. 1851) United States v. Reid, 53 U. S. (12 How.) 360, 13 L. Ed. 1023;
(Iowa, 1858) State v. Nash, 7 Iowa (7 Clarke) 347;
(Ky. 1866) Chandler v. Commonwealth, 64 Ky. (1 Bush) 41;
(N. Y. 1813) People v. Bill, 10 Johns. 95 (1852) Same v. McIntyre, 1 Parker, Cr. R. 371;
(Pa. 1860) Shay v. Commonwealth, 36 Pa. (12 Casey) 305.

[b] Generally, one of several jointly indicted for the same offense cannot be a witness for his codefendants until he has ceased to be a party to the proceedings, either by an entry of nolle prosequi as to him, a verdict of acquittal, or a judgment against him as guilty upon his confession, or otherwise, so that the suit is ended as to him by a judgment for or against him.
—(Ark. 1856) Moss v. State, 17 Ark. 327, 65 Am. Dec. 433; (1867) Brown v. Same, 24 Ark. 620;
(N. H. 1859) State v. Young, 39 N. H. 283;
(N. Y. 1813) People v. Bill, 10 Johns. 95; (1855) Same v. Donnelly, 1 Abb. Prac. 459;
(Tenn. 1830) State v. Mooney, 9 Tenn. (1 Yerg.) 431.

[c] One of two parties jointly indicted, who has not yet been acquitted or convicted, may be called as a witness for the government on the separate trial of the other.
—(La. 1883) State v. Hamilton, 35 La. Ann. 1043;
(Neb. 1876) Carroll v. State, 5 Neb. 31;
(N. J. 1868) State v. Brien, 32 N. J. Law (3 Vroom) 414.

[cc] Where separate trials are awarded to parties jointly indicted, one may be a competent witness against the other, although not first acquitted or convicted, and without an entry of nolle prosequi upon the indictment.
—(Ohio, 1869) Brown v. State, 18 Ohio St. 496.
CONTRA. see
(Mo. 1887) State v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704.

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[d] Whether the trial be joint or separate, one defendant in an indictment cannot, until finally discharged, be a witness on behalf of another.
—(N. C. 1842) State v. Smith, 24 N. C. 402;
(Or. 1854) Latshaw v. Territory, 1 Or. 140.

[e] (U. S. 1892) Under a joint indictment in a federal court, when a severance and separate trials have been ordered, one defendant, even though his case has not been disposed of, may testify on behalf of the government on the trial of his co-defendant.—Benson v. United States, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

[f] (U. S. 1850) In joint indictments, one of defendants is not a competent witness for another, unless he has been acquitted.—United States v. Clements, Fed. Cas. No. 14,817 [3 Hughes, 509].

[g] (Ga. 1855) The testimony of an accomplice, who has been joined in the same indictment with the principal, is admissible in behalf of his co-defendant only when he has been acquitted, or where the defendants are tried severally.—Armistead v. State, 18 Ga. 704.

[h] (Kan. 1893) Where two persons are charged as principals in the commission of a felony, and, at their request, separate trials are had, before the conviction of either, one defendant is a competent witness for the other.—State v. Bogue, 52 Kan. 79, 34 Pac. 410.

[i] (Miss. 1859) It seems, if the parties are indicted, not for the joint commission of one offense, but for separate offenses, as engaging in gaming, that they are competent witnesses for each other, even before the witness has been tried.—Strawhern v. State, 37 Miss. 422.

[j] (N. Y. 1855) One of several persons jointly indicted cannot be a witness in the case against his co-defendants until acquitted or convicted, whether they pleaded jointly or separately.—People v. Donnelly, 1 Abb. Prac. 459, 2 Parker, Cr. R. 182.

[k] (N. Y. 1877) An accused was tried alone on an indictment on which he was jointly indicted with another. His co-defendant had not been arrested, nor had a nolle prosequi been entered as to him. On the trial such co-defendant was called as a witness for the prosecution, and accused objected because he was not competent, having been jointly indicted with him for the offense with which he was charged. *Held*, that the objection was properly overruled and his testimony admitted.—Taylor v. People, 12 Hun, 212.

[l] (N. C. 1830) Co-defendants in an indictment cannot be witnesses for each other, unless they have been first acquitted or convicted, and this although their trials are to be had in different counties.—State v. Mills, 13 N. C. 420.

[m] (Pa. 1878) Where several persons are jointly indicted and separate trials granted, one who has not yet been tried is not a competent witness for either of the others on trial.—Kehoe v. Commonwealth, 85 Pa. 127.

[n] (Tex. 1872) One of two persons jointly indicted for an offense is not a competent witness for the other, unless he has been previously tried and acquitted under the indictment.—Warfield v. State, 35 Tex. 736.

§ 247. Persons separately indicted.

[a] An accomplice when separately indicted is a competent witness for or against the others.
—(U. S. 1824) United States v. Henry, Fed. Cas. No. 15,351 [4 Wash. C. C. 428];
(Mo. 1893) State v. Umble, 115 Mo. 452, 22 S. W. 378;
(N. Y. 1827) People v. Whipple, 9 Cow. 707;
(1855) Same v. Donnelly, 2 Parker, Cr. R. 182;
(Va. 1826) Byrd v. Commonwealth, 2 Va. Cas. 490.

[b] (U. S. 1851) A person who stands indicted of treason, along with the defendant in another indictment not now trying, is a competent witness for him in an indictment now trying, and in which such person is not included.—United States v. Hanway, Fed. Cas. No. 15,299 [2 Wall. Jr. 139].

[c] (Ark. 1867) One who had been jointly indicted for a felony, but discharged and separately indicted for the same offense, is a competent witness for his former co-defendant on his separate trial.—McKenzie v. State, 24 Ark. 636.

[d] (Cal. 1886) Under the law the state is not prohibited from calling a party proceeded against in one information to testify against a defendant charged in another and different information; the former, when so called as a witness, however, retaining his right to object to answering a question put to him by reason of its tendency to criminate him.—Ex parte Stice, 70 Cal. 51, 11 Pac. 459.

[e] (Mich. 1865) It is no objection to the competency of a witness in behalf of the government in a trial for larceny that he was jointly examined with the defendants before a justice, and committed to stand his trial for the same offense; the prosecuting officer having filed an information against him separately, omitting his name from the information filed against the defendants.—Annis v. People, 13 Mich. 511.

[f] (Ohio, 1850) Where one party is indicted for a crime, and another for aiding and abetting its commission, under section 36 of the act for the punishment of crimes, the former is a competent witness against the latter.—Noland v. State, 19 Ohio, 131.

[g] (Tenn. 1874) Where A. and B. have been found together in possession of a horse stolen from C., and of a horse stolen at the same time from D., the fact that A. is under indictment for stealing C.'s horse does not disqualify him from testifying for B. on B.'s trial for stealing D.'s horse.—Lucre v. State, 66 Tenn. (7 Baxt.) 148.

[h] (Tex. 1883) One indicted for the same murder for which defendant is on trial cannot testify in defendant's behalf.—Moore v. State, 15 Tex. App. 1.

[i] (Tex. 1885) Code Cr. Proc. art. 731, enacts that persons charged as principals, accomplices, or accessories, whether in the same or in different indictments, cannot be witnesses for one another. A. was indicted for a murder, and took the depositions of B. and C. Before the trial, B. and C. were indicted for the same murder. *Held*, that A. should not be deprived of their testimony.—Doughty v. State, 18 Tex. App. 179, 51 Am. Rep. 303.

[j] (Tex. 1887) Declarations of a person, afterwards indicted, exonerating defendant, are inadmissible, under Code Cr. Proc. art. 721, providing that persons charged as principals, accomplices, etc., cannot testify for each other.—Blain v. State, 24 Tex. App. 626, 7 S. W. 239.

[k] (Tex. 1888) A principal offender in the same crime with the defendant on trial, although indicted separately, is not a competent witness for his co-principal, unless he has been acquitted. Code Cr. Proc. art. 731.—Woods v. State, 26 Tex. App. 490, 10 S. W. 108.

[l] (Tex. 1889) Under Code Cr. Proc. art. 731, providing that "persons charged as principals, accomplices, or accessories, whether in the

same indictments or different indictments, cannot be introduced as witnesses for one another," one who is under indictment for the theft of a cow is not a competent witness for defendant on trial of another indictment for theft of the same cow.—Barnes v. State, 28 Tex. App. 29, 11 S. W. 679.

[m] (Tex. 1890) Defendant and his wife were charged by separate informations, under Pen. Code, art. 495a, with using violent, abusive language of and concerning J. The language charged in the two informations was different, and there was nothing identifying the transactions as the same, except the date of the offenses, and the name of the injured person. *Held* that, though charged with the same statutory offense, they were not charged with the same transaction, and it was therefore error to reject defendant's wife as an incompetent witness in his behalf.—Secker v. State, 28 Tex. App. 479, 13 S. W. 774.

[n] (Tex. 1893) In a prosecution for betting at dice, it is error for the court to reject a witness by whom defendant proposes to prove that he did not play or bet at the game, on a statement by the county attorney that the witness was indicted for playing in the same game and at the same time with defendant, without proof of this fact.—Traylor v. State (Cr. App.) 23 S. W. 798.

[o] (Tex. 1894) On a prosecution for adultery, the testimony of the woman with whom defendant was alleged to have committed the crime was rejected because she had also been indicted. *Held* not error, as the desire of defendant to use her evidence constituted no impediment to her indictment.—Parker v. State (Cr. App.) 24 S. W. 901.

[p] (Tex. 1894) A witness is not incompetent because subsequently indicted for the same crime.—Freeman v. State, 33 Tex. Cr. R. 568, 28 S. W. 471.

§ 248. —— Joint trial.

[a] (U. S. 1807) If persons jointly concerned in an assault and battery be separately indicted, but all tried together, one may be a witness for the others.—United States v. Hunter, Fed. Cas. No. 15,425 [1 Cranch, C. C. 446]; Same v. Davidson, Id.

[b] (Miss. 1818) Where two defendants are tried together on separate indictments for the same assault and battery, one of the defendants is not a good witness for the other upon the trial, unless no proof of guilt is offered against the defendant proposed as a witness.—State v. Blennerhassett, 1 Miss. (Walk.) 7.

3. INTEREST OF PERSONS OTHER THAN PARTIES IN GENERAL.

IN GENERAL, § 249.
NATURE AND EXTENT OF INTEREST IN GENERAL, § 250.
BELIEF AS TO INTEREST AND HONORARY OR MORAL OBLIGATION, § 251.
DIRECTNESS, CERTAINTY, AND LEGALITY OF INTEREST IN GENERAL, § 252.
NATURE OF ACTION OR ISSUE IN GENERAL, § 253.
PERSONS HAVING SIMILAR CLAIMS, § 254.
LIABILITIES IN GENERAL, § 255.
LIABILITY TO FUTURE ACTION, § 256.
PARTIES AGAINST WHOM SUIT IS PENDING, § 257.
INTEREST JOINTLY WITH PARTY IN GENERAL, § 258.
JOINT TORT-FEASORS, § 259.
PRIVITY OF ESTATE OR CONTRACT IN GENERAL, § 260.
INTEREST IN FUND, § 261.
PARTIES TO OR INTEREST IN GARNISHMENT PROCEEDINGS, § 262.
INTEREST IN RECORD AS EVIDENCE IN OTHER PROCEEDINGS IN GENERAL, § 263.
TIME AND MANNER OF ACQUIRING INTEREST, § 264.
TESTIMONY AGAINST INTEREST IN GENERAL, § 265.

Balance of interest as between adverse parties in general, see ante, § 210.
Interest of party in general, see ante, § 221.
Testimony admissible notwithstanding interest in general, see ante, §§ 211–213.

§ 249. In general.

[a] A witness interested in the event of a suit cannot be permitted to testify.
—(Tenn. 1816) Netherton v. Robertson, 4 Tenn. (3 Hayw.) 29;
(Tex. 1878) Osborn's Adm'x v. Cummings, 4 Tex. 10.

[b] A witness who has a direct and positive interest in the event of a suit is incompetent.
—(U. S. 1829) Reece v. Johnson, Fed. Cas. No. 11,633a [Hemp. 82];
(Ky. 1845) Athey v. McHenry, 45 Ky. (6 B. Mon.) 50.

[c] (N. C. 1801) Where a witness is offered, the adverse party may by other witnesses prove him interested, and he must then be rejected as incompetent.—Smallwood v. Mitchell, 3 N. C. 145.

[d] (Pa. 1790) If a person acknowledges an expectation that he shall gain or lose by the fate of the cause, he ought not to be admitted as a witness.—Innis v. Miller, 2 Dall. 50, 1 L. Ed. 284.

[e] (Tenn. 1870) Prior to Acts 1861–68, c. 75, allowing persons interested in causes to be witnesses, such persons were not competent.—Day v. McGinnis, 48 Tenn. (1 Heisk.) 310.

§ 250. Nature and extent of interest in general.

[a] The fact of interest, and not the amount of it, decides the question of competency.
—(Ky. 1827) Hunter v. Gatewood, 21 Ky. (5 T. B. Mon.) 268;
(La. 1866) Succession of Weigel, 18 La. Ann. 49;
(Tex. 1849) Osborn's Adm'x v. Cummings, 4 Tex. 10.

[b] A witness cannot be rejected in consequence of having been provoked to bet upon the event of the trial; such a wager being void.
—(U. S. 1837) United States v. Carrico, Fed. Cas. No. 14,734 [5 Cranch, C. C. 112];
(Wis. 1856) Kellogg v. Nelson, 5 Wis. 125.

[c] (U. S. 1816) The deposition of a witness, on the part of plaintiff, who had given certificates upon which a recovery was expected to be obtained, and who expected a commission of one per cent., on the amount to be recovered from defendant, but which certificates were not evidence in the cause, is admissible.—Willings v. Consequa, Fed. Cas. No. 17,767 [Pet. C. C. 301].

[d] (U. S. 1832) That a witness has a strong bias in favor of a party will not exclude him; such an objection not going to his competency but to his credibility.—Burroughs v. United States, Fed. Cas. No. 2,202 [2 Paine, 569].

[e] (Conn. 1807) Defendant in ejectment claimed title under B., to whom he had given his note for the purchase money. B. had indorsed said note to C., who, after the suit was commenced, applied to defendant for payment, which was made on condition that C. should refund the money if judgment in said suit should be against defendant, and should resort to B., who was a responsible man. *Held*, that

C. under such circumstances was rendered incompetent, by interest, to testify for defendant in said action.—Owen v. Mann, 2 Day, 399.

[f] (Conn. 1840) Where a person offered as a witness has a claim against plaintiff, but his right to recover does not depend on the issue of the suit then pending, he is a competent witness for plaintiff.—Stoddard v. Mix, 14 Conn. 12.

[g] (Ind. 1845) Defendant cannot introduce a witness to prove facts which, if true, would show that the witness, and not plaintiff, was entitled to the subject-matter of the suit.—Jacobs v. Finkel, 7 Blackf. 432.

[h] (La.) The interest which repels a witness must be a pecuniary one, affecting in some manner his property; it does not suffice that it affects his feelings, affections, or wishes.—(1825) Durnford v. Ayme, 3 Mart. (N. S.) 270; (1842) Debuys v. Connolly, 2 Rob. 338.

[i] (La. 1826) A witness is competent for plaintiff suing for money paid on a horse race, because fraudulent, though they bet on the same side.—Criswell v. Gaster, 5 Mart. (N. S.) 129.

[j] (Me. 1829) Where plaintiff had declared that he was indebted to one offered as a witness, to whom the money sued for, when recovered, was by agreement to be paid over, it was *held* that this agreement was no assignment of the debt, and therefore did not go to the competency of the witness, but only to his credibility.—Seaver v. Bradley, 6 Me. (6 Greenl.) 60.

[k] (Miss. 1854) If a witness can be in any event a gainer by the success of a suit, or a loser by the defeat of it, in that suit he is incompetent to testify for the party through whom such interest is involved.—Dunbar v. Chevalier, 28 Miss. (6 Cushm.) 161.

[l] (Mo. 1866) A witness testified to a parol agreement with plaintiff to the effect that if plaintiff recovered in that suit he was to hold the property in question for the benefit of witness on payment of a certain sum. *Held*, that the agreement did not render the witness a party in interest, as it was void under the statute of frauds.—Miltenberger v. Morrison, 39 Mo. 71.

[m] (N. J. 1835) A person signing a notice and application for a road is not incompetent on the ground of interest to prove the putting up of the notices.—In re Highway, 15 N. J. Law (3 J. S. Green) 39.

[n] (N. J. 1845) If the witness will gain or lose by the event of the suit, or if the record will be evidence for or against him in another action, he should be excluded.—Woodruff v. Daggett, 20 N. J. Law (Spencer) 526.

[o] (N. C. 1856) The interest which will disqualify a witness is any interest that can be asserted in a court of justice, whether a common-law court or a court of equity.—Blum v. Stafford, 49 N. C. 94.

[p] (Pa. 1825) It is no objection to a witness that his testimony will tend to clear him of a fraud charged on him by another witness.—Babb v. Clemson, 12 Serg. & R. 328.

[q] (S. C. 1845) An expectation of advantage, growing out of a corrupt and illegal agreement, though it may affect the credibility of the witness, does not destroy his competency.—City Council of Charleston v. Weikman, 1 Rich. Law, 240.

[r] (S. C. 1852) A witness who is promised by plaintiff a sum of money if he will attend as a witness and plaintiff should gain his case is incompetent to testify for plaintiff.—Holland v. Ingram, 6 Rich. Law, 50.

[s] (Tex. 1859) The ill feeling of a witness, caused by facts which had been properly proved as part of the res gestæ, is no reason for excluding the witness nor his statement as above of the cause of his ill feeling.—Cockrum v. State, 24 Tex. 394.

§ 251. Belief as to interest and honorary or moral obligation.

[a] The fact that a witness merely believes himself to be interested in the event of an action will not render him incompetent.

—(Ala. 1848) Gayle v. Bishop, 14 Ala. 552;
(Cal. 1861) McCabe v. Haud, 18 Cal. 496;
(Md. 1799) Peter v. Beall, 4 Har. & McH. 342; (1862) Washington & B. Turnpike Road v. State, 19 Md. 239;
(N. Y. 1837) Commercial Bank v. Hughes, 17 Wend. 94; (1837) Stall v. Catskill Bank, 18 Wend. 466;
(N. C. 1847) State v. Poteet, 29 N. C. 356;
(Pa. 1818) Long v. Baillie, 4 Serg. & R. 222; (1835) Dellone v. Rehmer, 4 Watts, 9; (1842) Cassiday v. McKenzie, 4 Watts & S. 282, 39 Am. Dec. 76;
(S. C. 1823) Havis v. Barkley, Harp. 63;
(Tenn. 1823) Rogers v. Burton, 7 Tenn. (Peck) 108.

CONTRA, see
(Ky. 1816) Sentney v. Overton, 7 Ky. (4 Bibb) 445;
(Mass. 1808) Plumb v. Whiting, 4 Mass. 518;
(Miss. 1822) Phebe v. Prince, Walk. 131;
(N. Y. 1811) Lansingburg v. Willard, 8 Johns. 428; (1830) Moore v. Hitchcock, 4 Wend. 292;
(Pa. 1781) McVeaugh v. Goods, 1 Dall. 62, 1 L. Ed. 37;
(Va. 1811) Richardson's Ex'r v. Hunt, 2 Munf. 148.

[b] An honorary or moral obligation merely will not render a witness incompetent.

—(Ill. 1847) Frink v. McClung, 9 Ill. (4 Gilman) 569;
(Miss. 1822) Phebe v. Prince, Walk. 131;
(N. Y. 1812) Gilpin v. Vincent, 9 Johns. 219; (1837) Commercial Bank v. Hughes, 17 Wend. 94;
(N. C. 1847) Bishop v. Poteet, 29 N. C. 356;
(Pa. 1818) Long v. Baillie, 4 Serg. & R. 222; (1831) Carman v. Foster, 1 Ashm. 133;
(Tenn. 1853) Hill v. Miller, 32 Tenn. (2 Swan) 659.

[c] If a witness states, on the voir dire, that he considers himself bound in honor, though not legally, to pay the judgment if it shall go against the party calling him, he is a competent witness.

—(U. S. 1834) Washington v. Fowler, Fed. Cas. No. 17,229 [4 Cranch, C. C. 458];
(Ark. 1842) Crary v. Carradine, 4 Ark. (4 Pike) 225;
(Conn. 1827) Smith v. Downs, 6 Conn. 365.

[d] (Conn. 1814) A witness, interested in the event of a suit on the ground of his being liable over to defendant, having been released by defendant, was asked if he did not expect to pay the judgment and all expenses providing a recovery should be had against defendant, to which he replied that he certainly did. *Held*, that the witness was incompetent to testify for defendant.—Skillenger v. Bolt, 1 Conn. 147.

[e] (Ga. 1858) A witness, declaring himself to be interested, but appearing, on disclosing the nature of his interest, to have been mistaken, is competent.—Stallings v. Carson, 24 Ga. 423.

[f] (La. 1855) Where the judgment creditor sued the sheriff for misfeasance in counseling the debtor to remove his property, and the debt-

or called to testify on behalf of the sheriff stated on his voir dire that he felt that he had an interest in the suit and that if the sheriff was compelled to pay he should feel in honor bound to help him, he was incompetent to testify.—Davis v. Barham, 10 La. Ann. 528.

[g] (N. H. 1850) The person who causes a suit to be brought for his own benefit is the party in interest, though not nominally a party; and though he may not have the interest which he supposes he has in the subject of the suit, he is not a competent witness.—Johnson v. Kendall, 20 N. H. 304.

[h] (N. C. 1805) If the verdict in the suit cannot be given in evidence against the witness, he is competent, though he may believe himself interested when in reality he is not.—Harrison v. Harrison, 3 N. C. 355.

[i] (Tenn. 1853) It cannot be left to the opinion or judgment of the witness to decide whether or not he is competent.—Hill v. Miller, 32 Tenn. (2 Swan) 659.

[j] (Vt. 1803) If a witness believes himself interested when he is not, he may be permitted to testify on being informed by the court that he has no interest, and the jury may allow for any possible bias in weighing his credibility.—State v. Clark, 2 Tyler, 277.

§ 252. Directness, certainty, and legality of interest in general.

[a] A witness should not be excluded merely on the ground that he had an interest in the subject-matter of the action, unless he has an interest in the event of the particular case.

—(Ala. 1834) McGee v. Estis, 5 Stew. & P. 426; (1835) Kennon v. McRea, 2 Port. 389; (1841) Williams v. Jones, 2 Ala. 314;

(Conn. 1804) Fairchild v. Beach, 1 Day, 266; (1804) Phelps v. Winchel, Id. 269;

(La. 1824) Broussard v. Duhamel, 3 Mart. (N. S.) 11; (1841) Moffatt v. Murray, 18 La. 357; (1843) Brooks v. Norris, 6 Rob. 175; (1845) Prevost v. Ellis, 11 Rob. 56;

(Me. 1845) Rollins v. Taber, 25 Me. (12 Shep.) 144;

(Mass. 1808) Bliss v. Thompson, 4 Mass. 488;

(Miss. 1840) Clapp v. Mandeville, 6 Miss. (5 How.) 197;

(Mo. 1841) Todd v. Boone County, 8 Mo. 431;

(N. Y. 1826) Gould v. James, 6 Cow. 369; (1828) McLaren v. Hopkins, 1 Paige, 18;

(Pa. 1857) Collier's Ex'rs v. Leech, 29 Pa. (5 Casey) 404; (1887) Broomall v. McCallion, 8 Atl. 413;

(S. C. 1827) Cotchet v. Dixon, 4 McCord, 311; (1858) Richardson v. Dingle, 11 Rich. Law, 405;

(Tex. 1858) Bass v. Peevey, 22 Tex. 295;

(Va. 1848) Masters v. Varner's Ex'rs, 5 Grat. 168, 50 Am. Dec. 114;

(Wis. 1845) Runey v. Thompson, 1 Pin. 506.

[b] The interest of a witness in the event of a suit must be direct, certain, and legal; otherwise the objection should go to his credibility, and not to his competency.

—(Ga. 1847) Adams v. Barrett, 3 Ga. (3 Kelly) 277; (1847) Howard v. Brown, Id. 523;

(Iowa, 1856) Cutter v. Fanning, 2 Iowa (2 Clarke) 580;

(Ky. 1807) Day v. Green, 3 Ky. (Hardin) 117; (1837) Smith v. White, 35 Ky. (5 Dana) 376; (1844) Clarke v. Robinson, 44 Ky. (5 B. Mon.) 55; (1852) Adams v. Gardiner, 52 Ky. (13 B. Mon.) 197; (1857) Easley's Ex'rs v. Easley, 57 Ky. (18 B. Mon.) 86; (1859) Millett v. Parker, 59 Ky. (2 Metc.) 608;

(Me. 1844) Frankfort Bank v. Johnson, 24 Me. (11 Shep.) 490;

(Md. 1831) Watts v. Garrett, 3 Gill & J. 355;

(N. J. 1845) Woodruff v. Daggett, 20 N. J. Law (Spencer) 526;

(N. Y. 1810) Stewart v. Kip, 5 Johns. 256; (1813) Stockham v. Jones, 10 Johns. 21;

(Pa. 1797) Lewis v. Manly, 2 Yeates, 200; (1841) Irvine v. Lumbermen's Bank, 2 Watts & S. 190;

(S. C. 1845) City Council of Charleston v. Weikman, 1 Rich. Law, 240; (1846) Ford v. McKibbon, 1 Strob. 33;

(Tenn. 1853) Hill v. Miller, 32 Tenn. (2 Swan) 659;

(Tex. 1849) Osborn's Adm'x v. Cummings, 4 Tex. 10.

[c] The interest which will disqualify a witness from testifying must be some legal, certain, and immediate interest in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims, or to protect him from an admitted liability.

—(Ala. 1852) Poe v. Dorrah, 20 Ala. 288, 56 Am. Dec. 196;

(La. 1826) Marburg v. Canfield, 4 Mart. (N. S.) 539; (1836) Russell v. Sprigg, 10 La. 421; (1838) Wallace v. Beauchamp, 12 La. 289; (1842) Debuys v. Connolly, 2 Rob. 338;

(Miss. 1853) Estice v. Cockerell, 26 Miss. (4 Cushm.) 127;

(Pa. 1801) Shirk's Lessee v. Vanneman, 3 Yeates, 196;

(S. C. 1846) Smith v. Asbill, 2 Rich. Law, 546;

(Tenn. 1853) Hill v. Miller, 32 Tenn. (2 Swan) 659.

[d] Interest, to disqualify a witness, must be a present, certain, and vested interest. If the interest be of a doubtful nature, the objection goes to his credit, and not to his competency.

—(Ga. 1847) Howard v. Brown, 3 Ga. (3 Kelly) 523; (1853) Jordan v. Pollock, 14 Ga. 145;

(Md. 1859) Andre v. Bodman, 13 Md. 241, 71 Am. Dec. 628;

(N. Y. 1847) Duel v. Fisher, 4 Denio, 515.

[e] The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be evidence for or against him in some other action.

—(Ala. 1846) Stewart v. Conner, 9 Ala. 803; (1850) Wright v. Lewis, 18 Ala. 194;

(Ga. 1852) Harvey v. Anderson, 12 Ga. 69;

(N. J. 1853) Bogert v. Chrystie, 24 N. J. Law (4 Zab.) 57;

(Tex. 1866) Tuttle v. Turner, 28 Tex. 759.

[f] The disqualifying interest is a prospect of some advantage immediately resulting from the judgment in the cause in which the witness is called.

—(Ga. 1847) Adams v. Barrett, 3 Ga. (3 Kelly) 277; (1847) Howard v. Brown, Id. 523;

(La. 1832) Coquet v. His Creditors, 4 La. 198; (1841) Moffatt v. Murray, 18 La. 357.

[g] (Ark. 1853) A mere expectation of the payment of a debt out of the proceeds of the judgment, however strong, if not amounting to a legal right, is insufficient to render a witness incompetent.—Scott v. Jester, 13 Ark. (8 Eng.) 437.

[h] (Cal. 1860) The mere expectation of deriving an advantage to which he is not legally entitled will not disqualify a witness.—Coghill v. Boring, 15 Cal. 213.

[i] (Conn. 1786) A person is not rendered incompetent as a witness by the fact that the

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party calling him has promised to pay him a debt he owes him out of what he may recover in the suit.—Benedict v. Brownson, Kirby, 70.

[j] (Fla. 1850) Where it was for the interest of a witness to establish a certain parol agreement in regard to a slave, which could not have given him title, and no direct interest was shown in the event of the suit, but only a strong bias, he was not thereby incompetent.—Summerall v. Thoms, 3 Fla. 298.

[k] (La. 1859) A witness is properly excluded on account of interest, where he has a hope of gain, although it be uncertain whether any advantage can arise to him, even if the decision be favorable.—Gilkinson v. The Scotland, 14 La. Ann. 417.

[l] (La. 1862) A witness must not be interested, either directly or indirectly, in the cause.—Kennedy v. Bossiere, 16 La. Ann. 445.

[m] (Me. 1841) The interest of a witness to render him incompetent must be legal and certain in the event of the suit or in the record. The fact that he expects benefit from a result in favor of the party calling him, if he has no legal claim, goes only to his credibility.—Marwick v. Georgia Lumber Co., 18 Me. (6 Shep.) 49.

[n] (Md. 1771) In an action the fifth son of defendant, though he stated that if his father lost the cause he must be a loser, otherwise not, was competent as a witness.—Belt's Lessee v. Miller, 4 Har. & McH. 536.

[o] (Md. 1854) A possible interest will not disqualify a witness, nor will a mere probability of benefit, where there is no legal right or interest in the fund in controversy.—Melvin v. Melvin, 6 Md. 541.

[p] (Mass. 1850) It is no objection to the competency of a witness that if the party prevails by whom he is called, a debtor of the witness will be better able to pay his debts.—Luke v. Leland, 60 Mass. (6 Cush.) 259.

[q] (Miss. 1850) A person interested for both parties, but on one side directly and certainly, and on the other indirectly and contingently, is incompetent as a witness for the party in whom he is directly interested.—Pool v. Myers, 21 Miss. (13 Smedes & M.) 466.

[r] (N. J. 1840) There must be a legal right or liability depending on the result of a suit to render a witness incompetent; and a declaration by a witness that he shall pay a sum depending in a suit rather than that the party should lose it will not render him incompetent.—Neville v. Demeritt, 2 N. J. Eq. (1 H. W. Green.) 321.

[s] (N. Y. 1830) Where a witness had the promise of an order for the amount in controversy when recovered, such promise did not render him incompetent to testify in the action.—Ten Eyck v. Bill, 5 Wend. 55.

[t] (N. C. 1847) Interest, to exclude a witness, must be a legal and beneficial one in the subject-matter for the recovery of which the suit is brought.—Bishop v. Poteet, 29 N. C. 356.

[u] (Ohio, 1817) To exclude a witness on the ground of interest, it must appear that he is directly interested in the event of the suit; standing in a similar situation with the party by whom he is called, and the possibility that a judgment may influence the minds of a jury in an action against him, goes to his credibility, and does not affect his competency.—Devinny v. Ankrim, Tapp. 111.

[v] (Pa. 1786) A person may be admitted as a witness whose interest is so very remote that it is presumed it will not prejudice his mind.—Galbraith's Lessee v. Scott, 2 Dall. 95, 1 L. Ed. 304.

[w] (Pa. 1814) It is no objection to the competency of a witness that he himself holds lands under the same title as the defendant holds those which are the subject of the suit. Provided he has no interest in the very lands which are the subject of the trial, he has no direct interest in the event of the suit, and is therefore competent. The objection is to his credibility alone.—Moody's Lessee v. Fulmer, 3 Grant, Cas. 17.

[x] (S. C. 1823) If a witness is to derive any advantage, even consequential, from the event of the suit, he is incompetent.—McCall v. Smith, 2 McCord, 375.

[y] (Tex. 1853) In order to render a witness incompetent on the ground of interest, his interest must be shown to be direct, and not remote or contingent. Hence the rule that, if the interest is not so clearly established as to justify the exclusion of the evidence, it should be admitted, and the doubt left to influence the credibility of the witness, with the jury.—Wentworth v. Crawford, 11 Tex. 127.

§ 253. Nature of action or issue in general.

[a] In an action for false representations respecting the credit of another, the party to whom the credit is given on the false representations is a competent witness for plaintiff or defendant.

—(Conn. 1802) Wise v. Wilcox, 1 Day, 22;
(Ga. 1848) Young v. Hall, 4 Ga. 95;
(Pa. 1847) Boyd's Ex'rs v. Browne, 6 Pa. (6 Barr) 310; (1850) Lee v. Pilgrim, 15 Pa. (3 Harris) 16.

[b] (U. S. 1867) There is no objection to one party in a collision cause calling as witnesses persons who were on board the vessel of the other party.—The Monticello, Fed. Cas. No. 9,739 [1 Low. 184], affirmed in (1870) Dolner v. The Monticello, Fed. Cas. No. 3,971 [1 Holmes, 7].

[c] (Conn. 1789) In an action for money had and received of a third person, such third person is a witness to prove the delivery.—Hyde v. Park, 1 Root, 55.

[d] (Conn. 1791) In an action for slander in charging plaintiff with perjury in testifying that a certain person had committed larceny, such person cannot testify because of his interest.—Merriman v. Way, 1 Root, 283.

[e] (Conn. 1791) In an action against defendant for stating that plaintiff had falsely sworn in a prosecution of H. for theft, by testifying that H. was the thief, H. was not a competent witness for defendant to prove the truth of the words, as a person interested is not a competent witness.—Merriman v. Way, 1 Root, 283.

[f] (Conn. 1792) In an action for entering plaintiff's house and debauching his daughter, the daughter is a competent witness.—Mott v. Goddard, 1 Root, 472.

[g] (Ky. 1830) A party whose debts complainant has paid is an incompetent witness for complainant to prove a mistake in such payment.—Wickliffe v. Mosely, 27 Ky. (4 J. J. Marsh.) 172.

[h] (Ky. 1844) One who sends bank notes to another is competent to prove delivery to him in an action against a third person for an unlawful detention of them.—Bonham v. Laird, 43 Ky. (4 B. Mon.) 403.

[i] (Me. 1849) In an action against defendant for bringing a suit against plaintiff, in the name of a third person, without any authority, that third person is a competent witness for plaintiff.—Foster v. Dow, 29 Me. (16 Shep.) 442.

[j] (Mass. 1815) In an action for fraudulently inducing plaintiff to enter into a partnership with defendant's insolvent debtor, and procuring an assumption of the debt by the firm, and

seizing plaintiff's property to satisfy the debt, the insolvent is a competent witness for plaintiff.—Bean v. Bean, 12 Mass. 20.

[k] (Mass. 1846) In a writ of entry to foreclose a mortgage conditioned to perform an obligation, entered into by the mortgagor, to pay all the mortgagee's debts, one alleged breach of the condition was that the obligor had omitted to pay a sum due from the mortgagee, by way of contribution to his co-contractors, in an agreement made by him and them with a third party before the mortgage was given. *Held*, that these co-contractors were competent witnesses for the mortgagee to prove their claims on him for contribution.—Stewart v. Clark, 52 Mass. (11 Metc.) 384.

[l] (Miss. 1849) In an action by A. against B. for money had and received, C. is not a competent witness to prove that he, C., had money in his hands belonging to A., which he handed to B., to be paid to A., without a release.—Jackson v. Crawford, 20 Miss. (12 Smedes & M.) 545.

[m] (N. J. 1827) Upon a certiorari to remove the proceedings in a matter of road, a person, whose land is not touched by the road, and who does not bear any part of the expense of defending said road on the certiorari, is a competent witness, though he was one of the parties who petitioned for the laying out of the road, and although he may have borne a part of the expense of laying it out.—State v. Woodward, 9 N. J. Law (4 Halst.) 21.

[n] (N. Y. 1827) In an action against the owners of a mill below for flowing backwater so as to injure plaintiff's mill, the miller who received half the tolls for attending the mill is a competent witness.—Stiles v. Hooker, 7 Cow. 266.

[o] (N. Y. 1839) Ex parte affidavits of abutting owners of property on a street proposed to be enlarged and altered on the question of damages are incompetent in a proceeding to assess such damages, as being testimony of persons interested.—In re John & Cherry Sts., 19 Wend. 659.

[p] (Pa. 1841) Where a witness is interested in the event of a suit on a note, expecting to receive part of the consideration, he is still admissible as a witness for the defendant, who is sued as the maker of the note.—Quinlan v. Davis, 6 Whart. 169.

[q] (Pa. 1845) The alleged wife is a competent witness to prove the contract of marriage, in a proceeding by the guardians of the poor, to compel the alleged husband to contribute to her support. She has no interest; for, in either event of the action, she must receive her support from the guardians. And her testimony does not change their obligation.—Guardians of the Poor v. Nathans, 2 Brewst. 149.

[r] (Pa. 1845) In an action of ejectment, to avoid the sale of land sold by an administrator under an order of the orphans' court, brought by all the heirs of the decedent (with the exception of the administrator, who was also an heir), against the purchaser, on the allegation that the administrator was a partner of the purchaser in the sale, the administrator is a competent witness to prove such fact; and whether the purchase money has been paid over or still remains in his hands is but a contingent advantage, which may affect his credibility, but not his competency.—Kifer v. Brenneman, 1 Pa. (1 Barr) 452.

[s] (Pa. 1846) In an action by A. against B., C. is an incompetent witness to prove that he had furnished goods to A. under a special agreement that B., who was a debtor of A. and a creditor of C., was to pay for them, for the purpose of using this debt as a set-off by B.—Armstrong v. Graham, 4 Pa. (4 Barr) 142.

[t] (Pa. 1849) In an action against A. for the debt of B., B. is a competent witness for plaintiff, if willing to testify, to prove a promise by A. to pay the debt in consideration of forbearance to sue; but he is not a competent witness to prove a promise by A. to pay the debt, in consideration of B.'s assignment and transfer of property to A. for that purpose.—Hayes v. Gudykunst, 11 Pa. (1 Jones) 221.

[u] (Pa. 1853) In a controversy as to which of two boards were the legal trustees of an incorporated religious society, a witness who was not a trustee stated on his voir dire that he had only a general interest in the event of the suit; that he had promised to contribute to pay counsel and the expenses of the suit, but that he had already paid what he had promised to pay. *Held*, that he was a competent witness.—Juker v. Commonwealth, 20 Pa. (8 Harris) 484.

[v] (Pa. 1865) A widow sued the estate of her second husband to recover payments of interest made to him, arising from the dower which she had derived from her first husband, and which had been valued, and the interest made a charge on certain land. *Held*, that the owner of the land was a competent witness to prove the circumstances attending such payments.—Appeal of Mann, 50 Pa. (14 Wright) 375.

[w] (Tex. 1857) Where the terms of a sale from A. to B. are that B. shall pay the purchase money to C. in discharge of a debt due him from A., C. is a competent witness to prove the sale, and the payment of the purchase money to himself.—Roberts v. Heffner, 19 Tex. 129.

[x] (Vt. 1836) In an action on the case against defendant for conspiring with A. to procure for him a fraudulent credit, and thereby obtaining property for the benefit of both, *held*, that A. is a competent witness for plaintiff; and this, although he have incurred a liability in contract, at plaintiff's election, for the value of the property.—Brown v. Marsh, 8 Vt. 310.

[y] (Va. 1800) In debt by the assignee of a bond, defendant offered a witness, who testified that he had paid the amount of the bond to an agent of the assignors, and received a receipt in full of the debt. *Held*, that such witness was not interested, and could testify.—Meade v. Tate, 2 Call, 231.

[z] (Va. 1856) A deposition which had been taken to be used in a case of caveat, between the ancestor of the caveators and the same caveatees, and which related to the location of an old survey, the deponent having an interest in the question, but not in the event of the suit, is competent evidence in this case.—Clements v. Kyles, 13 Grat. 468.

§ 254. Persons having similar claims.

[a] (Cal. 1894) The fact that plaintiff's witness also has a case of the same kind pending does not disqualify him from testifying.—Warren v. McGill, 103 Cal. 153, 37 Pac. 144.

[b] (Conn.) Persons having similar claims against defendant depending on the same state of facts cannot testify because of interest.—(1791) Pride v. Peters, 1 Root, 331; (1792) Talmadge v. Northrop, Id. 454.

[c] (Ky. 1883) A witness not interested in the particular suit on trial is not rendered incompetent by having an interest like that of the party by whom he is offered.—Woodard v. Spiller, 31 Ky. (1 Dana) 179, 25 Am. Dec. 139.

[d] (Ky. 1838) In a contest as to whether certain slaves were the property of a party as having been given to him by decedent or were assets in his hands as administrator of the estate, being insolvent, a witness was not incompetent to testify as to a similar covenant

by the decedent to the witness, it not appearing that the covenant was made after the estate became insolvent.—Stephens' Adm'r v. Barnett, 37 Ky. (7 Dana) 257.

[e] (Ky. 1850) Complainant in the bill for the second of two chancery attachments is a competent witness for complainant in the first.—Beall v. Barclay, 49 Ky. (10 B. Mon.) 261.

[f] (Ky. 1850) Where one of two covenantees, of the same part in a covenant, is entitled to a separate action on the covenant, the other covenantee is a competent witness for him.—Ford v. Bronaugh, 50 Ky. (11 B. Mon.) 14.

[g] (Ky. 1867) A witness not a party to the suit is not disqualified by interest because he has a similar cause of action against the same parties.—Jennings v. Crider, 65 Ky. (2 Bush) 322, 92 Am. Dec. 487.

[h] (La.) Where a witness holds under the same title as the party offering him, and with the latter's opponent has raised the same issues in another suit yet pending, he is still competent.—(1823) Broussard v. Duhamel, 3 Mart. (N. S.) 11; (1841) Moffatt v. Murray, 18 La. 357; (1843) Brooks v. Norris, 6 Rob. 175; (1845) Prevost v. Ellis, 11 Rob. 56.

[i] (Me. 1847) On the trial of a special action on the case against defendant, for a conspiracy between him and a deputy sheriff to defraud plaintiff by means of making a false return on a writ in defendant's favor, one who was injured equally with plaintiff by the fraud, if it existed, but who is not a party to the suit, is a competent witness.—Handly v. Call, 27 Me. (14 Shep.) 35.

[j] (N. H. 1843) Defendants covenanted with several lessors jointly that they would pay each of them severally a specified part of the rent reserved. In an action by one of the lessors to recover his part of the rent, it was *held* that another of the lessors was a competent witness for plaintiff.—Gray v. Johnson, 14 N. H. 414.

[k] (Ohio, 1848) A witness offered by plaintiff claimed to have been injured in the same manner as plaintiff, and defendant had informed him that if plaintiff's suit was successful defendant would pay the witness without suit. *Held*, that the witness was competent.—Rogers v. Turner, 1 Ohio Dec. 246.

[l] (Vt. 1853) That a witness has a suit pending for a similar claim is no legal objection to his competency.—Mathews v. Felch, 25 Vt. 536.

§ 255. Liabilities in general.

[a] If a witness is liable to a third party who is liable to the party summoning the witness, such circuity of interest is no ground of exclusion.

—(Ga. 1848) Matthews v. Poythress, 4 Ga. 287.

(Ky. 1867) Carbon v. Stout, 65 Ky. (2 Bush) 246.

[b] (U. S. 1816) The interest of a witness in the event of a suit is too remote to exclude his testimony, if, in case plaintiff should fail to recover sufficient damages to extinguish a claim defendant has on him, and should be unable to satisfy such claim out of his own funds, the witness might be liable for the debt.—Willings v. Consequa, Fed. Cas. No. 17,767 [Pet. C. C. 301].

[c] (U. S. 1874) In a suit in the court of claims against the United States, where a witness produced for plaintiff is so connected with the transaction in question that a verdict for plaintiff would entirely relieve him from all liability, he will be *held* incompetent as being directly "interested in the claim," within the meaning of the act of June 25, 1868.—Wood v. United States, 10 Ct. Cl. 395.

[d] (Ala. 1847) Where the testimony of a witness will have the effect to satisfy a judgment recovered against him by plaintiff and defendant jointly, by making both of them liable for the payment of an account which he has against plaintiff individually, he is an interested witness, and his testimony should be excluded if objected to.—Taylor v. Paullin, 11 Ala. 512.

[e] (Ala. 1857) A minor, to whom goods were furnished on the promise of defendant to pay for them, is a competent witness for the creditor to prove the amount and value of the goods, and the character of the promise of defendant.—Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101.

[f] (Ark. 1853) Where a witness for plaintiff is so connected with the transaction about which he is called to testify that a verdict for plaintiff would entirely relieve him from all liability, he will be incompetent, as being directly interested in the event of the suit; otherwise he is competent.—Scott v. Jester, 13 Ark. (8 Eng.) 437.

[g] (Ark. 1853) Defendants being indebted to plaintiff for the purchase price of land, a third party agreed that defendants should pay a portion of the debt and receive a part of the land therefor, and he gave defendants a horse to give to plaintiff, the value of which was to be applied by plaintiff in part satisfaction of the debt. In an action by plaintiff against defendants for deceit in the sale of the horse, it appeared that the third person was liable to defendants for the costs of the suit and the damages that might be recovered against them, and that they had not conveyed to him his part of the land, and did not intend to do so, unless he paid the judgment, if any was recovered against them. *Held*, that he was not competent as a witness in defendants' behalf.—Turner v. Huggins, 14 Ark. 21.

[h] (Cal. 1862) When the witness in a suit would be relieved from a liability to plaintiffs, in case they should get judgment against defendants, provided the judgment be satisfied, he has no such interest in the event of the action as will render him incompetent to testify.—Lockwood v. Canfield, 20 Cal. 126.

[i] (Conn. 1846) To exclude a witness on the ground that his testimony, if admitted, will tend to protect him from claims against him, it must first be shown that there is at least a prima facie case of liability against him, and that he is exposed to certain danger from such claims.—Carrington v. Holabird, 17 Conn. 530.

[j] (Ill. 1864) A witness who in the event of a judgment being rendered against defendant would be liable to her for nearly the amount of the judgment is incompetent as a witness for defendant on the ground of interest.—Mason v. Jones, 36 Ill. 212.

[k] (Ind. 1847) The mere fact that a witness was interested in having land sold under an execution for an amount sufficient to satisfy a judgment, for which he himself was liable, is not sufficient to render his testimony incompetent, because of interest, on the issue whether the sale made by the sheriff was fraudulent.—Martin v. Brown, 8 Blackf. 443.

[l] (Me. 1842) Where the verdict will necessarily charge one or will discharge him from a fixed liability, he is interested in the event of the suit, and incompetent to testify; but a contingent interest, a mere possibility of being charged, goes only to the credibility.—Blake v. Irish, 21 Me. (8 Shep.) 450.

[m] (Md. 1799) In an action on a note, A., a witness produced by plaintiff, was objected to by defendant on the ground of interest. To prove the nature of the interest, defendant introduced a witness who testified that plaintiff informed her that A. was answerable to him for his claim which he had against the payees of

said note in case he did not succeed in this suit against them, and that the goods furnished by plaintiff to the payees, for which his claim arose, were so furnished to them on the credit of A., who put the note into his hands. *Held*, that A. could not be examined as a witness.—Hoffman v. Boisneuf, 4 Har. & McH. 352.

[n] (Md. 1859) That a witness is liable for the debts of an insolvent plaintiff is not a sufficient interest in the event of the suit to exclude him.—Brooke v. Quynn, 13 Md. 379.

[o] (Mass. 1808) If the testimony of a witness produced by plaintiff would discharge the witness from plaintiff's demand, by establishing it against defendant, his testimony will not be received.—Emerton v. Andrews, 4 Mass. 653.

[p] (Mass. 1824) In an action against the sheriff for the escape of a person arrested for debt, the debtor is not a competent witness to show his inability to pay the debt.—Griffin v. Brown, 19 Mass. (2 Pick.) 304.

[q] (N. J. 1830) Where a witness is liable in respect to the subject-matter of the suit, but the result of the suit cannot affect his liability otherwise than to make him liable to a different person, he is not therefore incompetent.—Wilson v. Hillyer, 1 N. J. Eq. (Saxt.) 63.

[r] (N. J. 1831) A person who is so situated, in relation to the property in controversy, as to be liable to refund the money received by him from plaintiff for the property sold, in case of the failure of plaintiff to recover, is not a competent witness for plaintiff.—Lowrey v. Summers, 12 N. J. Law (7 Halst.) 240.

[s] (N. Y. 1836) If the decision of the cause, in which the witness is called, in one way would relieve such witness from further liability, and the contrary decision would leave him exposed to a suit, he is incompetent as a witness.—Woods v. Skinner, 6 Paige, 76.

[t] (N. Y. 1876) The rule that an interested witness is incompetent applies to the case of a witness for plaintiff, who, in case a judgment should be obtained in plaintiff's favor, would be relieved from liability to plaintiff for the conversion of the subject-matter of the action.—Andrews v. Nat. Bank of North America, 7 Hun, 20.

[u] (Pa. 1858) A person liable to a third person, who is liable over to defendant, in case of a recovery against him, is not an incompetent witness.—Commonwealth v. Allen, 30 Pa. (6 Casey) 49.

[v] (S. C. 1812) A mere doubt that a witness would be liable in equity, when not liable at law, is not sufficient to exclude him as incompetent.—Sims v. Sims, 3 Brev. 252.

[w] (S. C. 1837) The mere fact that a recovery by plaintiff will preclude a demand against a witness will not disqualify such witness from testifying in favor of plaintiff.—Heyward v. Glover, Riley, Eq. 53.

[x] (Tex. 1854) In an action on a note, defendant alleged that it was given to release a debtor from custody, on promise of the creditor that he would furnish evidence of indebtedness, and assign the same to defendant, and that the debtor was not indebted to the amount of the note. *Held*, that the debtor was not a competent witness, being interested; the original debt being barred by limitation.—Gillespie's Adm'r v. Redmond, 13 Tex. 9.

[y] (Vt. 1831) Where a creditor dissolved his attachment on another creditor's agreeing not to sue the debtor within a certain time, which he afterwards did, in an action against him by the first creditor for breach of the agreement, *held*, that the debtor was a competent witness, and that his liability to plaintiff creditor, being on a contract of indemnity, made no difference.—Boardman v. Wood, 3 Vt. 570.

[z] (Vt. 1837) In an action on a promise to pay the debt of a third person, in which plaintiff's right to recover rested on his ability to prove that the promise discharged the original debtor, he was not a competent witness for plaintiff.—Anderson v. Davis, 9 Vt. 136, 31 Am. Dec. 612.

§ 256. Liability to future action.

[a] (U. S. 1832) There ought to be a legal fixed interest in order to disqualify a witness. The bare possibility of an action being brought against him is no objection to his competency. There must be an actual existing interest at the time; not merely one that is expectant or contingent.—Burroughs v. United States, Fed. Cas. No. 2,202 [2 Paine, 569].

[b] (U. S. 1840) An officer of the customs who has assisted in the seizure of goods for violation of the revenue laws is a competent witness on a suit for the forfeiture of such goods; the contingency that an action of trespass will be brought against him, by the claimants, being too remote to constitute a valid objection to his testimony.—United States v. Twenty-Five Cases of Cloths, Fed. Cas. No. 16,563 [Crabbe, 356].

[c] (Ala. 1848) Where a stakeholder pays over the money to the supposed winner, after notice to him by the loser not to do so, the person so receiving it is a competent witness for the loser, in an action by him against the stakeholder to recover it, since a verdict against defendant would not give him a cause of action against the witness.—Ivey v. Phifer, 13 Ala. 821.

[cc] (Conn. 1810) A witness is not competent to prove a fact, the effect of which is to protect himself from a suit by subjecting the defendant.—Sheldon v. Ackley, 4 Day, 458.

[d] (Ga. 1849) A witness who is liable to an action by the party for whom he is called, in case that party should not recover, is incompetent to testify without a release.—Ray v. The Justices of Inferior Court, 6 Ga. 303.

[dd] (Mass. 1835) Where a loan was made by the cashier of a bank, and memorandum checks were received as security, he was a competent witness for the bank in an action against the drawer of such checks, although the transaction did not conform to banking principles and he might be sued on his bond.—Franklin Bank v. Freeman, 33 Mass. (16 Pick.) 535.

[e] (Mass. 1863) In an action against a sheriff for releasing one whom he had taken by attachment, the person who promised to be answerable for the debtor's appearance is a competent witness to prove that the debtor was released with plaintiff's consent, as if such promise were made the sheriff could maintain no action on it.—Barnes v. Greenleaf, Quincy, 41.

[f] (N. J. 1795) The liability of a witness to a future action is no objection to his competency.—State v. McDonald, 1 N. J. Law (Coxe) 332.

[g] (N. C. 1805) A witness whose testimony may prevent a suit against himself is not competent.—Hunter v. McAuslan, 3 N. C. 366.

[h] (Pa. 1826) In ejectment for a tract overflowed by a milldam, the owner of the mill situate on another tract is a competent witness, though it is alleged that defendant will sue such owner for a nuisance if he succeeds in his case.—Maus' Lessee v. Montgomery, 15 Serg. & R. 221.

[i] (Pa. 1862) Unless a witness has a direct, certain, and immediate interest in the result of a suit, he is competent, and a mere possibility of being sued by plaintiff in respect to the cause of action for which he sues will not disqualify him.—Scull v. Mason, 43 Pa. (7 Wright) 99.

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§ 257. Parties against whom suit is pending.

[a] (U. S. 1818) In an action for the infringement of a patent, a witness, who is made a defendant in another suit pending in court for the infringement of the same patent, and who agrees with other defendants in such suits to contribute to a fund to defray the expenses of witnesses in attending to the suits, is a competent witness for defendant; it appearing that there is between the contributors no agreement to participate in paying the damages or costs which may be recovered against either of them in the actions.—Evans v. Hettick, Fed. Cas. No. 4,562 [3 Wash. C. C. 408, 1 Robb, Pat. Cas. 166].

[b] (Conn. 1795) A person may testify to the truth of certain words alleged to be slanderous, though a suit is pending against him for slander in speaking the same words.—Fowler v. Collins, 2 Root, 231.

[c] (Me. 1839) In an action for a quantity of tinware, where defendant justified the taking, under the statute of 1821, against hawkers, the person from whom the property is taken, if not interested, is a competent witness for plaintiff, although a complaint is pending against him for the penalty.—Campbell v. Thompson, 16 Me. (4 Shep.) 117.

[d] (Pa. 1863) In an action of trover by a purchaser at a constable's sale, for an article sold, but which defendant refused to deliver, the constable to whom the execution was delivered, and the deputy who made the levy, are competent witnesses for plaintiff, though an action of trespass was pending against them for levying on and selling the goods for which trover was brought.—Hatch v. Bartle, 45 Pa. (9 Wright) 166, 84 Am. Dec. 484.

§ 258. Interest jointly with party in general.

[a] (Ark. 1855) A witness who testifies for plaintiff that he (the witness) "was to have half the amount to be paid by the defendant," for the making of certain bricks, now sued for, is incompetent.—Robinson v. Mace, 16 Ark. 97.

[b] (Del. 1856) In an action of replevin against a sheriff for goods attached by him under an execution against A. and B., the latter is not a competent witness for defendant to prove that the goods belonged to a partnership consisting of A. and plaintiff. B.'s interest is to make out the means of his co-debtor, which are subject to execution, as large as possible, as otherwise he may himself be obliged to pay the whole debt.—Davis v. White, 1 Houst. 228.

[c] (Fla. 1859) Where a witness has a joint interest with the party who calls him, either in the subject-matter to be recovered or in the contract as a general partner, joint or part owner or joint contractor, by which he has an interest in the very thing claimed, or in money to be recovered, or in the costs incidental to the suit, he is incompetent to give evidence for that party.—Hooker v. Johnson, 8 Fla. 453.

[d] (Ga. 1852) When one of several debtors is sued, plaintiff may call either of the others as a witness for him.—Thornton v. Lane, 11 Ga. 459.

[e] (Ind. 1841) In a suit against A. and B., alleged to be partners of the firm of B. & Co., on a note executed in the name of the firm, C. is a competent witness for plaintiff to prove that A. was a member of the firm, although a judgment has been previously obtained by plaintiff against C. on the same note.—Henderson v. Reeves, 6 Blackf. 101.

[f] (Mass. 1812) In assumpsit on a note it appeared that defendant had declared that a certain witness offered by him was as liable to pay the demand sued on as himself. *Held*, that the witness was thereby rendered incompetent.—Peirce v. Chase, 8 Mass. 487.

[g] (N. H. 1834) In an action against one joint promisor, another joint promisor is not a competent witness for defendant without a release.—Jewitt v. Davis, 6 N. H. 518.

[h] (N. H. 1848) In action against one joint and several promisor, the other, against whom plaintiff's action is barred by the statute, is not a competent witness for defendant.—Whipple v. Stevens, 19 N. H. 150.

[i] (N. Y. 1828) One of several joint debtors, who is not sued, is a competent witness for plaintiff against the debtors sued.—Gay v. Cary, 9 Cow. 44.

[j] (N. Y. 1856) A party jointly liable with defendant, but not made party to the suit, is competent to establish nonjoinder.—Sweet v. Tuttle, 14 N. Y. (4 Kern.) 465.

[k] (Ohio, 1843) In an action against one of several obligors or promisors, a co-obligor or co-promisor is not competent to prove the execution of the instrument by the defendant, since the interest of the witness is to charge defendant, and thus relieve himself of a part of the debt.—Marshall v. Thrailkill's Ex'r, 12 Ohio, 275.

[l] (Ohio, 1843) In a suit on a joint and several note, one of the makers, not served with process, is incompetent as a witness for defendants, on whom process was served.—Armstrong v. Deshler, 12 Ohio, 475.

§ 259. Joint tort-feasors.

[a] Where separate actions are brought against two for a joint trespass, one defendant may be a witness for the other.—(N. Y. 1827) Marsh v. Berry, 7 Cow. 344; (Va. 1793) Johnson v. Bourn, 1 Wash. 187.

[aa] (Conn. 1789) Persons with whom plaintiff was associated in a riot, and who were prosecuted along with him, and acquitted, cannot testify in his action for malicious prosecution, since they are interested in the questions involved.—Hall v. Dwight, 1 Root, 76.

[b] (La. 1815) Co-trespassers are competent for each other.—Harang v. Dauphin, 4 Mart. (O. S.) 27.

[c] (La. 1857) Alleged co-trespassers, who have been sued in another parish for the same cause of action, may be received to testify on behalf of a defendant charged also as a co-trespasser. Their position may possibly affect their credibility, but not their competency.—Clement v. Wafer, 12 La. Ann. 599.

[d] (La. 1866) A person accused of fraud with parties to the suit cannot be permitted to testify as a general witness on the ground of interest.—Collins v. His Creditors, 18 La. Ann. 235.

[e] (Me. 1853) Where two laborers committed a trespass on personal property, they are competent witnesses to prove that defendant directed them to do the act.—Jones v. Lowell, 35 Me. 538.

[f] (Pa. 1848) Where A. directed an act, complained of as a trespass, to be done, adopted it, and bound himself to be responsible for it, but was not joined in the action as a party defendant, he cannot be compelled by plaintiff to testify as a witness, and his declarations against his interest are evidence against his co-trespassers.—Welsh v. Cooper, 8 Pa. (8 Barr) 217

[g] (Pa. 1850) One of several joint trespassers is a competent witness for plaintiff in a suit against the others.—Kennedy v. Philipy, 13 Pa. (1 Harris) 408.

[h] (Pa. 1860) A co-trespasser, not joined as a defendant, is a competent witness for plaintiff to establish the trespass, in an action for

money had and received, in which the tort is waived.—Dundas v. Muhlenberg's Ex'rs, 35 Pa. (11 Casey) 351.

[i] (Vt. 1832) A co-trespasser is a competent witness for a defendant in trespass.—West v. Bolton, 4 Vt. 558.

[j] (Vt. 1836) In an action of tort, a joint tort-feasor is a competent witness for either party.—Brown v. Marsh, 8 Vt. 310.

[k] (Vt. 1848) Ordinarily, a joint tort-feasor is a competent witness for either party, if he be not sued, or be sued in a separate action, or, being joined, have suffered judgment to be rendered against himself.—Paine v. Tilden, 20 Vt. 554.

[l] (Va. 1733) Where two are concerned in a trespass, and one of them is indicted singly, the other may be a witness for or against him.—King v. Moore, Jeff. 8.

§ 260. Privity of estate or contract in general.

[a] (Cal. 1860) A party is not disqualified as a witness, by reason of his ownership of land to which title was made through the grant by which title was made to the premises in controversy.—Mott v. Smith, 16 Cal. 533.

[b] (Conn. 1845) A., under a license from B., the owner of land through which a watercourse flowed, erected a mill thereon, and ever afterwards A. used and occupied such mill as if it were his own; but it did not appear that there was any consideration for the license, or that it was to continue for any definite period, or that there was any agreement as to the nature of the occupation, or any stipulations whatever, by which the parties were mutually bound to each other. A. brought an action against C., the owner of a mill below, for setting the water back upon A.'s mill by means of a dam erected by C. *Held*, that such license did not amount to a lease from B. to A., nor create any privity of contract or estate between them; consequently, B. was not an incompetent witness for A.—Branch v. Doane, 17 Conn. 402.

[c] (Ill. 1862) Where A. and B. convey a right of way to a mill to C., and B. afterwards purchases one-half of the mill, B. cannot become a witness for C., who has filed a bill to restrain A. from obstructing the right of way; being an appurtenance to the mill, B. is therefore interested, and is disqualified.—Foulke v. Walker, 27 Ill. (17 Peck) 204.

[d] (Ky. 1809) A witness to a will, holding a covenant of warranty from the testator, is not therefore interested in a suit between the heir and the devisee.—Thompson v. Shoeman, 4 Ky. (1 Bibb) 401.

[e] (La. 1828) In a petitory action a witness through whose agency plaintiff's ancestor sold the land to defendant cannot destroy the authentic sale which is collaterally questioned to defendant's prejudice.—Sprigg's Ex'rs v. Herman, 6 Mart. (N. S.) 510.

[f] (La. 1857) Civ. Code, art. 2260, providing that ascendants cannot be witnesses for descendants, must be construed as applying to cases in which the interest of an ascendant or descendant of the witness is directly involved.—Porche v. Le Blanc, 12 La. Ann. 778.

[g] (La. 1866) Descendants cannot testify in civil cases for or against their ascendants.—Succession of Weigel, 18 La. Ann. 49.

[h] (N. H. 1854) A. let a wagon to B., and C., while riding in the same with B., was injured. In an action by C., against a town, to recover damages for an injury occasioned by a defect in the highway, while riding in the wagon, *held*, that there was no privity of contract between A. and C. as to the goodness of the wagon, and that A. was a competent witness for C. in his action against the town.—Patterson v. Colebrook, 29 N. H. (9 Fost.) 94.

[i] (Pa. 1835) One who is afterwards owner of land on which a nuisance exists cannot be a witness for the former owner in a suit to abate such nuisance.—Miller v. Frazier, 3 Watts, 456.

[j] (Pa. 1856) P. sold land to G., who agreed to pay certain judgments, which were liens on the land, as part of the purchase money. G. afterwards sold the land to C., who bound himself to pay the judgments, and by agreement a deed was made directly from P. to C. *Held*, that C. was a competent witness for P., in a contest between the latter and an attaching creditor of G., to establish G.'s liability under the agreement.—Carr v. Beck, 51 Pa. (1 P. F. Smith) 269.

[k] (Pa. 1859) A former owner of a coupon, payable to bearer, may be a witness to impeach it.—Columbia Coal & Iron Co. v. Fox, 33 Pa. (9 Casey) 239.

[l] (Vt. 1824) Merely being in the chain of title is not an interest that disqualifies a witness.—Myers v. Brownell, 1 D. Chip. 448.

§ 261. Interest in fund.

[a] Where the effect of a witness' testimony is to create or increase a fund from which he is to receive a benefit, he is incompetent.
—(Ga. 1853) City of Rome v. Dickerson, 13 Ga. 302; (1856) Governor v. Justices of Inferior Court, 20 Ga. 359; (1856) Foster v. Rutherford, Id. 676;
(Pa. 1863) Buchanan v. Buchanan, 46 Pa. (10 Wright) 186;
(S. C. 1834) Cleverly v. McCullough, 2 Hill, 445; (1845) Brown v. O'Brien, 1 Rich. Law, 268, 44 Am. Dec. 254;
(Tex. 1855) Johnson v. Alexander, 14 Tex. 382.

[b] (Conn. 1824) If the effect of a witness' testimony will be to prevent the diminution of a fund created for his benefit, he is incompetent; nor is it necessary that the interest of the witness in the fund should appear to be inevitable.—Stebbins v. Sackett, 5 Conn. 258.

[c] (Ga. 1855) The fact that certain sums in suit will, if recovered, go to the fund from which a salary is payable, does not render the recipient of such salary an incompetent witness in the case, unless it be shown that the payment of such salary is dependent on such recovery.—Janes v. Trustees of Mercer University, 17 Ga. 515.

[d] (La. 1851) Materialmen and workmen are not competent witnesses for each other, in a suit against the owner of a building, to testify that he paid the contractor by anticipation, and that consequently he is liable to them, as one cannot be a witness for others to create or increase a fund in which he has an interest.—Uzureau v. Mignolet, 6 La. Ann. 290.

[e] (Me. 1839) The person offered as a witness made the machines which were the subject of controversy, and were alleged to have been sold by plaintiff to defendant, from materials furnished by plaintiff, who made advances to the laborers employed, and where the machines, when made, were to be the property of plaintiff, and on the sale thereof, after deducting his disbursements and commissions, plaintiff was to account to the witness for the surplus. *Held*, that the witness was interested, and incompetent to testify in support of the action.—Earle v. Clark, 15 Me. (3 Shep.) 368.

[f] (Md. 1837) The purchaser of a decedent's lands is not a competent witness to prove that a conveyance by the deceased was made on a secret trust that the grantee should pay his debts, as a fund is thus provided for the payment of debts, and his own purchase so far exonerated.—Clagett v. Hall, 9 Gill & J. 80.

[g] (Mass. 1814) Where defendant borrowed of plaintiff a sum of money, which he promised

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to pay to plaintiff's daughter, she is a competent witness for plaintiff.—Jackson v. Mayo, 11 Mass. 147, 6 Am. Dec. 167.

[h] (Mass. 1830) Where a deponent for plaintiff, in replevin, stated that whatever plaintiff should recover would go to discharge a liability incurred by plaintiff for deponent, he was incompetent by reason of interest.—Wood v. Braynard, 26 Mass. (9 Pick.) 322.

[i] (Mo. 1860) The fact that plaintiff in a suit has engaged to pay over to another the sum sued for when recovered does not render such person an incompetent witness in behalf of plaintiff as being the person for whose benefit the suit is prosecuted.—Gott v. Williams, 29 Mo. 461.

§ 262. Parties to or interest in garnishment proceedings.

[a] (Ala. 1848) In a contest between the plaintiff in a garnishee process and the garnishee, the defendant is a competent witness to prove that he assigned the debt before the service of the garnishment to A., who assigned it to the garnishee for a valuable consideration.—Myatt v. Lockhart, 13 Ala. 338.

[b] (Ala. 1849) In a contest between the creditor and garnishee of a debtor, the debtor is, prima facie, an incompetent witness for the garnishee.—Marston v. Carr, 16 Ala. 325.

[c] (Ala. 1858) When the answer of a garnishee is contested by plaintiff, and the validity of a mortgage executed by defendant to the garnishee is controverted, defendant is a competent witness for the garnishee.—Price v. Mazange, 31 Ala. 701.

[d] (Ala. 1859) The garnishee plaintiff is competent in a suit brought by the defendant in the garnishee suit, against the garnishee, to prove payment of the garnishment judgment by the latter.—Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484.

[e] (Cal. 1857) Where a garnishee in defense avers acceptance of an order in favor of A. B., A. B. is an interested witness.—McEwen v. Johnson, 7 Cal. 258.

[f] (Ind. 1861) Where a person summoned as garnishee answers that he was indebted to the attachment defendant, but that before the service of the writ he was notified of the assignment of the note constituting such indebtedness, and plaintiff, desiring to dispute such assignment for want of consideration, brings the person claiming to hold as assignee before the court so that he may be bound by the judgment, the attachment defendant is a competent witness on the trial of the issue thus formed.—Cadwalader v. Hartley, 17 Ind. 520.

[g] (Iowa, 1859) In a case where the garnishees, who were bankers, answered that defendant had an account with them as agent, but they did not know who the unnamed principal was, and they offered defendant to show that the money was not his own but belonged to some principal, the witness was allowed to testify.—Tyler v. Coolbaugh, 7 Iowa (7 Clarke) 474.

[h] (Iowa, 1859) On an issue between a judgment plaintiff and a garnishee as to the ownership of money in the hands of the garnishee, the interest of the judgment defendant is in favor of the plaintiff, and he is therefore a competent witness for the garnishee.—Tyler v. Coolbaugh, 7 Iowa (7 Clarke) 474.

[i] (Iowa, 1861) A. sued B. and garnished C. D., claiming the property in the hands of C., interpleaded. *Held*, that B.'s evidence was admissible to prove an assignment to D. before the garnishment.—Randolph Bank v. Armstrong, 11 Iowa, 515.

[j] (La. 1857) The true owner of goods in a factor's hands on consignment did not present himself to make any claims, and the factor, without having received any communication from him, and being under advances to the agent on his drafts, passed the proceeds to the credit of the agent, by whom the goods were shipped, with instruction to that effect at the time of the shipment. *Held*, that when the goods under such circumstances were undisposed of at the time of the service of the interrogatories on the garnishees, the owner of the goods (defendant in the suit) was not a competent witness for plaintiffs, but that the agent was a competent witness for the garnishees.—Bullitt v. Walker, 12 La. Ann. 276.

[k] (Me. 1851) The rule that a party of record cannot be a witness does not extend to one summoned as a trustee, who has not yet disclosed or been defaulted.—White v. Means, 33 Me. 495.

[l] (Md. 1862) A party claiming the funds in the hands of the garnishee is not a competent witness for the garnishee, on account of his interest in the decision of the suit.—Leffler v. Allard, 18 Md. 545.

[m] (Miss. 1853) Where a person was summoned as the garnishee of A., and in his answer denied that he owed him anything, A. is not a competent witness to prove his indebtedness to himself.—Standefer v. Welby, 26 Miss. (4 Cushm.) 145.

[n] (Miss. 1856) The principal defendant in a garnishee process, who, before service of the attachment, has assigned the debt due from the garnishees, without retaining any liability to his assignee in case of nonpayment, is a competent witness for the garnishees.—Byars' Garnishees v. Griffin, 31 Miss. 603.

[o] (N. H. 1844) Upon trial of the issue between the plaintiff and one summoned as trustee, the principal defendant is a competent witness for the latter.—Lucas v. Cole, 16 N. H. 138.

[p] (N. H. 1845) A principal defendant is not necessarily so much a party in interest in the question between the plaintiff and one summoned as trustee, as to make him, prima facie, an incompetent witness for the trustee.—Bell v. Jones, 17 N. H. 307.

[q] (N. H. 1850) In foreign attachment, the debtor is a competent witness as between the plaintiff and one claiming by assignment the debt attached by the process, and who has brought an action against a trustee for its recovery.—Wilson v. Hanson, 20 N. H. 375.

[r] (N. H. 1850) In foreign attachment, the trustee is a competent witness as between the plaintiff and one claiming by assignment the debt attached, and who has brought an action against the trustee for its recovery; since, if the claimant prevails, he will maintain his action against the trustee, and if the plaintiff prevails, the judgment may be pleaded by the trustee in bar of the further maintenance of the action against himself.—Wilson v. Hanson, 20 N. H. 375.

[s] (N. H. 1854) Where an issue as to the title of property attached in a trustee process is tried by jury, the principal debtor is a competent witness.—Amoskeag Mfg. Co. v. Gibbs, 28 N. H. (8 Fost.) 316.

[t] (N. H. 1859) On a trial by jury on appeal by a trusteeing creditor from a decision of the commissioner disallowing the claim of the principal defendant against the estate of the deceased trustee, the principal defendant is a competent witness.—Clark v. Robinson, 37 N. H. 579.

[u] (N. Y. 1851) A. gave bond to B. on the discharge of a foreign attachment of the property of C. In a trial of an action on the bond, *held*, that C., the principal debtor, was not a competent witness for defendant, he being substantially the real party.—Thompson v. Dickerson, 12 Barb. 108, 1 Code Rep. (N. S.) 213.

[v] (Pa. 1845) In attachment proceedings against a garnishee, the original defendant is a competent witness for the garnishee; their interests being distinct.—McCormac v. Hancock, 2 Pa. (2 Barr) 310.

[w] (Pa. 1857) A defendant in an execution attachment is a competent witness for the garnishee.—Evans v. Sexton, 2 Phila. 300.

[x] (Pa. 1863) In an issue under attachment execution process, defendant in the original judgment is a competent witness for the garnishee.—Jones v. Bank of Northern Liberties, 44 Pa. (8 Wright) 253.

§ 263. Interest in record as evidence in other proceedings in general.

[a] (U. S. 1881) Under Rev. St. § 1079, providing that no claimant suing the United States in the court of claims, nor person from whom claimant claims title, nor any person interested in the title, shall be a competent witness to support the same, *held*, that the United States could use as a witness to defeat the claim one whose interest was adverse to claimant, although judgment against claimant might establish his own right to the same claim.—Bradley v. United States, 104 U. S. 442, 26 L. Ed. 824.

[b] (U. S. 1838) In a suit on a bottomry bond in rem, where the defense is that the repairs were not necessary, the master is not a competent witness for the libelant to establish the necessity of the repairs, as the decree would be evidence of this necessity in a suit brought against him by the owner for improper conduct in directing the repairs.—The Fortitude, Fed. Cas. No. 4,953 [3 Sumn. 228].

[c] (Ala. 1846) Where the judgment will not be evidence for or against the witness, to show his exemption from or liability to either party, or in any manner affect their rights in respect to the witness, he is competent to testify; and this although the judgment against defendant would be evidence in his favor, in an action at his instance, against the witness, to show that he had paid the money under legal coercion.—Stewart v. Conner, 9 Ala. 803.

[d] (Ala. 1847) A witness who has a certain, direct, and immediate interest in the event of a suit, cannot be examined as a witness, though the record itself of the suit would not be evidence either for or against him.—Bean v. Pearsall, 12 Ala. 592.

[e] (Ala. 1861) A witness is competent, unless the verdict and judgment would be evidence for or against him in another suit, according as they may be for or against the party calling him.—Coltart v. Laughinghouse, 38 Ala. 190.

[f] (Cal. 1862) An insolvent's discharge was opposed on the ground that he had fraudulently transferred his property to his brother. *Held*, that the record in this case could be in no way used to affect the brother's interest, so as to render him an incompetent witness for the insolvent.—Shawl v. His Creditors, 19 Cal. 597.

[g] (Ga. 1851) A witness had been a security on an administration bond for a short time, and was discharged from all future liability by the court of ordinary. *Held*, that such witness was competent in a suit by persons claiming to be distributees of the intestate, against the administratrix, to prove, in behalf of such administratrix, that complainants were not entitled to any share of the estate, and that the record of the judgment against such administratrix would not be even prima facie evidence of the liability of such discharged security, in a suit on the administration bond against him; there being no allegation in the record of any mal-administration by the administratrix, during the time the witness was such security.—Beall v. Beall, 10 Ga. 342.

[h] (Ga. 1851) A witness had been a surety on an administration bond for a short time, and was discharged from all future liability by the court of ordinary. *Held* that, in order to exclude the witness on the ground of interest, it must appear that the record would be legal evidence against him in some other action.—Beall v. Beall, 10 Ga. 342.

[i] (Ind. 1854) In a suit to recover damages for obstruction to plaintiff's mill by defendant's dam, one called as witness by defendant answered, as to his interest, that at the commencement of the suit he had none, but that subsequently he had acquired an interest in the profits of plaintiff's mill. *Held*, that said witness was incompetent, as the law stood in March, 1850, inasmuch as the record in this case might be used in any future action by the witness and plaintiff for similar damages.—Cory v. Silcox, 6 Ind. 39.

[j] (La. 1827) In testing competency, the main question is: "Can the judgment to be rendered be legal evidence, in any subsequent suit against the witness, as to the matter litigated in the action wherein he is to testify?"—Reeves v. Burton, 6 Mart. (N. S.) 283.

[k] (Me. 1841) Before a mortgagee had entered for condition broken, the right of the mortgagor to redeem had been sold to C., who released it to B., and after entry by the mortgagee both B. and C. executed releases to him. The mortgagor brought a bill against the mortgagee to redeem, alleging that the releases were made and received with a knowledge that he had an equitable right to the equity of redemption, and offered B. to prove the allegation. *Held*, that as the decree could not be evidence against B. in any action the mortgagor might bring against him, he was competent to testify, and the fact that if plaintiff fully recovered his rights he would be less interested to proceed against B. went to his credibility only.—Evans v. Chism, 18 Me. (6 Shep.) 220.

[l] (Mo. 1843) A person possessing a community of interest in the subject-matter is nevertheless competent, unless the record of the judgment would be evidence for or against him.—Cason v. White, 8 Mo. 216.

[m] (N. Y. 1817) In an action against the master of a vessel for negligently running foul of and injuring plaintiff's vessel, the owner of the vessel under the command of defendant was a competent witness for him, as the verdict could not be used in any action that might be brought against him as owner.—Case v. Reeve, 14 Johns. 79.

[n] (Tex. 1860) Pending a suit of K., against S., for malicious prosecution and false imprisonment, in having made affidavit for K.'s arrest, charging K. with swindling, by selling certain cotton to P., an action of P., against K.'s principal and others, to recover the same cotton, came on to be tried, and on such trial S. was excluded as a witness for the defendants, on the objection of plaintiff that the verdict and judgment in this case might be evidence in the suit for malicious prosecution. *Held*, that it was error to sustain the objection; the suits not being between the same parties, and the judgment not constituting a muniment of title.—Freeman v. Perry, 25 Tex. 611.

[o] (Va. 1823) A person against whom the record in a case cannot be used in a subsequent action is a competent witness therein.—Richardson v. Carey, 2 Rand. 87.

§ 264. Time and manner of acquiring interest.

[a] Interest, to incapacitate a witness for testifying, must exist at the time when his testimony is offered or deposition taken.

—(Ill. 1847) Frink v. McClung, 9 Ill. (4 Gilman) 569;

(Pa. 1810) Henry's Lessee v. Morgan, 2 Bin. 497.

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[b] If, after the event which a witness is called to prove, he becomes interested by his own act, without the interference of the party by whom he is called, such interest will not render him incompetent.
—(Ky. 1822) Baylor v. Smither's Heirs, 11 Ky. (1 Litt.) 105; (1829) In re McDaniel's Will, 25 Ky. (2 J. J. Marsh.) 331;
(Pa. 1818) Long v. Bailie, 4 Serg. & R. 222.

[c] Where the party objecting to a witness, on the ground of interest which was acquired by a contract entered into subsequently to his knowledge of the facts he is brought to prove, is himself a party to the agreement creating the interest, or had any agency in causing it to be created, the witness may be admitted to testify, notwithstanding such interest.
—(Me. 1824) Burgess v. Lane, 3 Me. (3 Greenl.) 165;
(N. Y. 1833) Manchester Iron Mfg. Co. v. Sweeting, 10 Wend. 162.

[d] (Ala. 1846) When a levy has been made by the sheriff on property, for which he was afterwards sued, by one claiming it under a deed of trust from the grantor, and which he subsequently sold and applied to the payment of one of the creditors of the grantor, thereby incapacitating him from being a witness in the suit, *held*, that this was not within the rule which prevents a party to the suit, by any act of his, from incapacitating one from being a witness against him.—Napier v. Cook, 9 Ala. 838.

[e] (Ala. 1848) Where, after a judgment has been assigned, it is reversed, and remanded for further proceedings, the assignee is an incompetent witness for plaintiff, on the ground of interest.—Stewart v. Conner, 13 Ala. 94.

[f] (Ala. 1848) A sheriff who sells land on execution, and afterwards acquires an interest therein by a contract, though within the statute of frauds, which he sells for a valuable consideration received by him, is not a competent witness for the purchaser to prove the levy.—McCollum v. Hubbert, 13 Ala. 282, 48 Am. Dec. 56.

[g] (Ala. 1850) If a witness becomes interested in the event of a pending suit by the act of one of the parties, without the assent of the other, he is not thereby rendered incompetent to testify in behalf of the latter, although the interest thus created is in his favor.—Jones' Ex'rs v. Hoskins, 18 Ala. 489.

[h] (Del. 1838) The fact that a witness had been made an executor will not deprive any one of his testimony concerning facts known to him before the will was made tending to show that testator had no title in certain bequeathed property.—Phillips v. Short, 2 Har. 339.

[i] (Ga. 1855) If a person be originally called as a witness to some transaction between the parties, thus creating in both a common interest in his testimony, it is not in his power, or in that of either party, to deprive the other of his testimony, by reason of an interest acquired subsequently, though without any such intention on the part of either.—Way v. Arnold, 18 Ga. 181.

[j] (Ga. 1856) A witness incompetent to testify on the ground of interest at the time of examination, is incompetent, notwithstanding he was competent at the time of commencing the suit.—Shannon v. Fuller, 20 Ga. 566.

[k] (Ga. 1860) A purchaser at a sheriff's sale of land belonging to the H. Company, which had a covenant in regard to the land from the W. Company, is a competent witness for the H. Company in an action for a breach of the covenant which occurred before the sale, although the sale carried the covenant to the purchaser, as he could only sue for a breach occurring after such sale.—Water Lot Co. v. Leonard, 30 Ga. 560.

[l] (Ky. 1828) A witness who becomes interested in the matter of a deed, after his attestation of it, cannot withhold his testimony.—Price v. Wood, 23 Ky. (7 T. B. Mon.) 223.

[m] (N. Y. 1832) On a bill to correct a mistake in a conveyance, and to restrain defendant from proceeding at law for the recovery of the land alleged to have been inserted in the deed by mistake, a person to whom an easement in the land in dispute was granted by the person from whom both plaintiff and defendant derived title subsequently to the conveyance to defendant, but prior to the conveyance to plaintiff, is incompetent as a witness for plaintiff.—Rogers v. Dibble, 3 Paige, 238.

[n] (N. Y. 1839) After a witness had been examined in chief, and while he was being cross-examined, he became interested in the suit by the death of a party, but the cross-examination was completed, and the witness was re-examined, before his interest was known either to him or to the other persons present. *Held*, that so much of the testimony as was taken after closing the cross-examination must be suppressed.—Fream v. Dickinson, 3 Edw. Ch. 301.

[o] (N. Y. 1847) A witness will not be allowed to disqualify himself, and thus deprive a party of the benefit of his testimony.—Clark v. Brown, 1 Barb. 215.

[p] (N. C. 1829) An interest in the event of a suit acquired after the commencement of it does not render the witness incompetent, unless it was acquired from the party offering him.—Rhem v. Jackson, 13 N. C. 187.

[q] (N. C. 1839) If the subscribing witness to an instrument becomes interested and a party to the case, even though he does so voluntarily, he cannot be examined as a witness.—Blackwelder v. Fisher, 20 N. C. 345.

[r] (N. C. 1844) A witness cannot deprive a party of his evidence, by creating a subsequent interest, by his own act, without the concurrence of the party calling him; much less can he do so by agreement with the opposite party.—Hafner v. Irwin, 26 N. C. 529.

[s] (N. C. 1851) Where a witness to a contract, subsequently to his attestation, acquires an interest in the contract, through or under one of the contracting parties, he is an incompetent witness for the party so creating the interest, unless the circumstances entirely negative any idea of fraud; as where the interest is thrown upon him by the act of the law, or where, after attestation of the instrument, the witness has married the party seeking to establish the instrument.—Overman v. Coble, 35 N. C. 1.

[t] (S. C. 1831) One is incompetent as a witness who has, by purchase, made himself quasi a party to the suit.—Jones v. McNeil, 2 Bailey, 466.

[u] (Wis. 1853) The fact that after the taking of a deposition, and after a decree in the court below, in the suit relating to which the deposition was taken, the deponent became interested in the result of the suit, will not prevent the use of the deposition in the appellate court.—Whiting v. Gould, 1 Wis. 195.

§ 265. Testimony against interest in general.

[a] Interest adverse to the party calling the witness is no ground of objection to the witness.
—(Ill. 1843) Stokes v. Kane, 5 Ill. (4 Scam.) 167;
(La. 1813) Rochelle v. Musson, 3 Mart. (O. S.) 73; (1816) White v. Holsten, 4 Mart. (O. S.) 471; (1819) Peytariu v. Hopkins, 6 Mart. (O. S.) 256; (1826) McMicken v. Fair, 4 Mart. (N. S.) 172; (1842) Travis v. January, 3 Rob. 227;

(Miss. 1843) Englehard v. Slater, 8 Miss. (7 How.) 538; (1843) Morton v. Jackson, 9 Miss. (1 Smedes & M.) 494, 40 Am. Dec. 107;

(Mo. 1850) Haile v. Hill, 13 Mo. 612;

(Pa. 1842) Ralph v. Brown, 3 Watts & S. 395; (1885) Strawn v. Shank, 110 Pa. 259, 20 Atl. 717;

(Tex. 1859) Loftin v. Nally, 24 Tex. 565.

[b] Interest in the subject-matter of the suit is not a ground of objection to a witness who is called to testify against his interest.

—(Ga. 1857) Brown v. Burke, 22 Ga. 574;

(Ind. 1836) Nooe v. Higdon, 4 Blackf. 184; (1849) Elliott v. Lewallen, 1 Ind. (1 Cart.) 534;

(Pa. 1844) Commercial Bank v. Wood, 7 Watts & S. 89;

(S. C. 1802) Sims v. Randal, 1 Brev. 85;

(Tex. 1866) Tuttle v. Turner, 28 Tex. 759.

[c] If a person called as a witness has a balance of interest against the party calling him, he is competent to testify.

—(Ind. 1836) Le Clair v. Peterson, 4 Blackf. 273; (1849) Elliott v. Lewallen, 1 Ind. (1 Cart.) 534;

(Ky. 1840) Turner v. Davis' Adm'r, 40 Ky. (1 B. Mon.) 151;

(Me. 1842) Darling v. March, 22 Me. (9 Shep.) 184;

(S. C. 1815) Alston v. Huggins, 3 Brev. 185; (1845) Brown v. O'Brien, 1 Rich. Law, 268, 44 Am. Dec. 254.

[d] (Ind. 1849) Where the interest of a witness in the event of a suit is such that, in case of a recovery by the party calling him, he will be liable for a considerably greater sum than if the adverse party succeeds, he is competent. —Elliott v. Lewallen, Smith, 284.

[e] (Ky. 1827) A witness cannot be excused from deposing because he has an interest in the matter in controversy which he may prejudice by his testimony.—Conover v. Bell, 22 Ky. (6 T. B. Mon. 157.

[f] (Ky. 1865) A person is not rendered incompetent as a witness for plaintiff in a case by the fact that plaintiff's success may render him responsible to defendant for negligence.—Cincinnati, H. & D. R. Co. v. Spratt, 63 Ky. (2 Duv.) 4.

[g] (Miss. 1822) Where the result of the suit may be used either for or against the rights of the witness in another suit, he is incompetent on that account, no matter whether he is called to testify for or against his rights.—Phebe v. Prince, 1 Miss. (1 Walk.) 131.

[h] (Pa. 1829) A party to a fraud is competent to prove it.—Langer v. Felton, 1 Rawle, 141.

[i] (S. C. 1817) If a witness is offered by the party against whom his interest preponderates, he is a competent witness, and the objection of interest goes rather to his credibility.—Smyth v. McDow, 1 Mill, Const. 277.

4. INTEREST IN PROPERTY IN GENERAL.

IN GENERAL, § 266.
JOINT OWNERS AND CO-TENANTS, § 267.
OWNERS OF VESSEL OR CARGO, § 268.
PERSONS ENTITLED TO OR IN POSSESSION, § 269.
COMPETENCY OF WITNESS TO PROVE TITLE IN HIMSELF, § 270.
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—— BALANCE OF INTEREST AS BETWEEN ADVERSE PARTIES, § 276.
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BAILOR OR BAILEE AND CONSIGNOR OR CONSIGNEE, § 278.
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AJOINING OWNERS, § 281.
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INTEREST IN PATENT, § 283.

Interest of husband or wife, see post, § 417.

—— *of owner of property stolen, see* post, § 407.

Transfer, release or extinguishment of interest, see post, § 434.

§ 266. In general.

[a] (U. S. 1849) A witness, at whose instance an ejectment is brought, and who is the assignee of a part of the consideration, for which the land was sold, and the suit being brought, on a failure to pay the consideration, is not a competent witness.—Baird v. Wolfe, Fed. Cas. No. 760 [4 McLean, 549].

[b] (Ala. 1847) In an action for forcible entry and detainer to recover the possession of premises, a witness who stated that he had made a contract with the claimant for the purchase of the premises in question, which he considered advantageous, and that the claimant was to put him in possession as soon as he could, is an incompetent witness for the claimant, on the ground of interest, although he swore also that he would not lose or gain by the event of the suit.—Carter v. Mundy, 12 Ala. 132.

[c] (Conn. 1807) In an action for a conspiracy in obtaining certain real estate, it is no objection, to the competency of a witness for plaintiff, that he claims the real estate alleged to have been fraudulently obtained by defendants.—Bulkley v. Storer, 2 Day, 531.

[d] (Ga. 1857) In a suit by a son-in-law, against his mother-in-law, for a slave claimed by him as a gift from her deceased husband, a son of the husband is not interested, and is a competent witness for defendant.—Aiken v. Cato, 23 Ga. 154.

[e] (Ga. 1860) A claimant of a portion of the property levied on under an execution is not a competent witness for a party who seeks to set aside the execution as satisfied.—Molyneaux v. Collier, 30 Ga. 731.

[f] (La. 1836) In an action to rescind a sale of land, to which a witness' judicial mortgage would attach if the sale were rescinded, he is competent for plaintiff.—Russell v. Sprigg, 10 La. 421.

[g] (La. 1857) In an action against a common carrier upon the penal statute for taking slaves out of the state without the consent of the owner, the ostensible owner in whose name the slave was shipped, and the vendor of such owner, have no interest in the suit, and are competent witnesses for defendant.—Farwell v. Harris, 12 La. Ann. 50.

[h] (La. 1859) The son-in-law of one of the parties to a suit is a competent witness. The interest of the mother of the witness in the property in dispute, as belonging to the marriage community, she not being a party to the suit, is too remote to exclude her son's testimony.—King v. Neely, 14 La. Ann. 165.

[i] (Md. 1856) A witness was called by defendant and the only objection to his competency was that he had taken on himself, without the authority or consent of defendant, to credit himself, as against defendant in an unsettled account between them, with the value of

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the goods for which this action was brought. *Held* that the witness was competent.—Heskett v. Borden Min. Co., 10 Md. 179.

[j] (Mass. 1763) In ejectment by the committee of the proprietors of certain lands, other proprietors who were not of the committee were not competent witnesses.—Wrentham Proprietors v. Metcalf, Quincy, 36.

[k] (N. H. 1846) One whom plaintiff had agreed to support, and to permit to have certain privileges in a house while plaintiff owned it, is not for that cause incompetent to testify for him in an action of trespass, involving a question of the boundaries of the farm on which the house is situated.—Bean v. Smith, 20 N. H. 461.

[l] (N. H. 1851) The owner of goods claimed by two creditors under different liens cannot be a witness to prove the value of the goods in the possession of one of them.—Edgerly v. Emerson, 23 N. H. (3 Fost.) 555, 55 Am. Dec. 207.

[m] (N. H. 1851) Landowners are admissible as witnesses, at hearing before road commissioners, if they have not made themselves parties.—In re Kennett, 24 N. H. (4 Fost.) 139.

[n] (N. Y. 1832) A tenant by the curtesy is a competent witness for plaintiff in an action of ejectment by the heir at law.—Jackson v. Brooks, 8 Wend. 426.

[o] (N. Y. 1858) Where A. undertakes to dispose of B.'s property, reimburse himself out of the proceeds, and pay the balance to C., B. is a competent witness for C. in an action brought by him to recover this balance, independent of any assignment to C.—Hale v. Boardman, 27 Barb. 82.

[p] (N. C. 1863) A person whose land has been sold at a sheriff's sale is a competent witness in an action of ejectment, against the purchaser, at such sale, to show that his own title was defective.—McDougald v. McLean, 60 N. C. 120.

[q] (Ohio, 1832) On a bill to enjoin a judgment at law, parties who have previously purchased land bound by the judgment, are competent witnesses.—Washburn v. Holmes, Wright, 67.

[r] (Tenn. 1812) The fact that one formerly held the equitable title to land and might possibly be held liable in equity for failure of title, though he did not join in the deed executed by the holder of the legal title, will not render him incompetent as a witness in a subsequent action concerning the title between the grantee of the legal title and others.—Sims v. Sims, 1 Tread. Const. 131.

[s] (Tenn. 1842) A., by virtue of an execution in favor of C., levied on a slave. B., another constable, immediately levied on it, took it out of A.'s possession, and sold it, and D. became the purchaser. In an action of trover by A. against D., *held*, that C. was a competent witness on behalf of A.—Thomas v. Lewis, 22 Tenn. (3 Humph.) 29.

§ 267. Joint owners and co-tenants.

[a] (Conn. 1815) In an action of disseisin by one tenant in common, who grounds his claim on the common title, his co-tenants are incompetent witnesses for him.—Barrett v. French, 1 Conn. 354, 6 Am. Dec. 241.

[b] (Me. 1836) One joint owner of personal property is, from interest, incompetent to testify for the other, where the title to such property is in issue.—Caldwell v. Cole, 13 Me. (1 Shep.) 120.

[c] (Mass. 1828) A. carried on business in a mill which he owned, in company with B., and agreed to make a deduction from the rent on account of backwater caused by C.'s dam. In an action by A., against C., to recover damages for the obstruction, B. was a competent witness.—Sumner v. Tileston, 24 Mass. (7 Pick.) 198.

[d] (N. H. 1857) A co-tenant is a competent witness for another co-tenant, in an action brought by the former to recover his share of the premises of a disseisor; he not being a party to the suit, and his interest being in the question only.—Cook v. Brown, 34 N. H. 460.

[e] (N. C. 1833) One tenant in common cannot be a witness for his co-tenant, to defend the possession.—Rogers v. Mabe, 15 N. C. 180.

[f] (Pa. 1827) A tenant in common is a competent witness for his co-tenant, in ejectment brought by the latter.—Bennett v. Hethington, 16 Serg. & R. 193.

[g] (Pa. 1840) Where tenants in common have made partition of land, they are not competent witnesses in ejectment brought by the one against the other for a part of the same land.—Patterson v. Lanning, 10 Watts, 135, 36 Am. Dec. 154.

[h] (Pa. 1840) In an action of account render, the declaration stated that plaintiff was possessed of an undivided third part of a certain limekiln, and that defendant had the care and management of the whole, and as bailiff of the plaintiff, to render an account to plaintiff of his share. It appeared that plaintiff and defendant, together with a third person, were tenants in common of the limekiln. *Held*, that the third tenant in common was a competent witness for plaintiff, and that his testimony was admissible to prove the tenancy in common, and the receipt of money by defendant.—Steffen v. Hartzell, 5 Whart. 448.

[i] (Pa. 1850) A tenant in common, to whom land has been set off on partition, is a competent witness to prove that an owelty awarded to his co-tenant remains unpaid, it being against his interest.—In re Darlington's Appropriation, 13 Pa. (1 Harris) 430.

[j] (Pa. 1886) One of several tenants in common, in whom an outstanding title is alleged to exist, is not a competent witness for a co-tenant asserting the title.—Swank v. Phillips, 113 Pa. 482, 6 Atl. 450.

[k] (S. C. 1840) A defendant in trespass for a fishery, under a plea of liberum tenementum, showed a title in common with G.; but plaintiff proved an elder title. The testimony of G. was then offered to prove defendant's right by prescription to fish. This was objected to on the ground of his interest, as tenant in common. *Held*, that he was competent.—Jackson v. Lewis, Cheves, 259.

[l] (Tenn. 1852) Tenants in common may be witnesses for each other in ejectment, as a judgment in favor of one cannot be used by the other.—Hammett v. Blount's Lessee, 31 Tenn. (1 Swan) 385.

[m] (Va. 1851) Defendant claiming under a deed to himself and another as joint tenants, that other person is not a competent witness for him to sustain his right of possession.—Adams v. Martin, 8 Grat. 107.

§ 268. Owners of vessel or cargo.

Transfer, release, or extinguishment of interest, see post, § 435.

[a] (U. S. 1804) In an action on a policy of insurance, one of the part owners of the vessel, not interested in the insurance, may be examined to prove the loss and other facts.—Ruan v. Gardner, Fed. Cas. No. 12,100 [1 Wash. C. C. 145].

[b] (Ala. 1855) The owner of the flatboat, who had charge of her at the time of the collision, is not a competent witness for the owner of the damaged goods, in an action against the steamboat for damages; nor is he made a competent witness by Code, § 2302.—Owners

of The Farmer v. McCraw, 26 Ala. 189, 72 Am. Dec. 718.

[c] (Ala. 1858) In a statutory action against a steamboat under the act of 1814, one of the part owners of the boat having intervened to defend, another part owner, who also joined in the replevy bond, is not a competent witness for defendant.—The Farmer v. McCraw, 31 Ala. 659.

[d] (Ind. 1853) Where one of several joint owners of a cargo effects an insurance of his interest, but the interests of the other joint owners are not covered by the policy, they are competent witnesses for plaintiff in a suit on the policy.—Madison Ins. Co. v. Lostutter, 4 Ind. 558.

[e] (La. 1822) In a question of barratry between the freighter and insurer, the reputed owner is a good witness to prove that the captain was proprietor of the vessel.—Barry v. Louisiana Ins. Co., 12 Mart. (O. S.) 493.

[f] (La. 1826) One part owner is competent for the other suing the master for negligence.—Jordan v. White, 4 Mart. (N. S.) 335.

[g] (Mo. 1848) A joint owner of a steamboat is a competent witness in an action ex delicto against the other joint owners.—Lee v. Murray, 12 Mo. 280.

[h] (N. H. 1854) A. had a lien on a boat, for labor done and materials furnished in repairing it. He brought a suit against defendant, and attached the boat. *Held*, that the owner of the boat was not a competent witness for defendant, on the ground that he had an interest to defeat the suit.—Green v. Pickering, 28 N. H. (8 Fost.) 360.

[i] (N. Y. 1817) In an action against a master of a vessel, for negligently running foul of and injuring the vessel of plaintiff, the owner of the vessel under the command of defendant is a competent witness for him.—Case v. Reeve, 14 Johns. 79.

[j] (N. Y. 1819) In an action, for repairs done to a vessel, against one part owner, who neglects to plead in abatement the nonjoinder of the others, another part owner is not an admissible witness for plaintiff to prove the ownership of defendant.—Marquand v. Webb, 16 Johns. 89.

[k] (S. C. 1840) In an action on a policy of insurance of freight lost in transitu, the patroon, who was also owner of the boat, was not a competent witness to show that the freight was lost by fire, so as to fix the liability of the insurers.—Frazier v. Fire & Marine Ins. Co., Cheves, 123.

§ 269. Persons entitled to or in possession.

[a] (Me. 1849) When the immediate effect of a judgment in favor of one of the parties to a suit would be to confirm a third person in the enjoyment of an interest in possession, such person is not a competent witness for that party.—Atkinson v. Snow, 30 Me. (17 Shep.) 364.

[b] (N. Y. 1828) One in possession of a part of the premises in ejectment is not a competent witness for defendant.—Jackson v. Hills, 8 Cow. 290.

[c] (N. C. 1862) An occupant is incompetent to give evidence for defendant in an action brought to recover the land, of which he is in possession.—Foust v. Trice, 53 N. C. 490.

[d] (Pa. 1843) One not a party or privy to an ejectment cannot be affected by the judgment in it, although a former occupier of the land in dispute, and he is therefore a competent witness in the ejectment.—Reid v. Stanley, 6 Watts & S. 369.

[e] (Pa. 1844) One who has been in possession of land during the existence of the title of plaintiff in ejectment to recover possession of the same is incompetent to testify for defendant.—Strawbridge v. Cartledge, 7 Watts & S. 394.

[f] (Pa. 1844) A terre-tenant is incompetent to testify on the trial of an issue which may affect the estate which he occupies.—Kuester v. Keck, 8 Watts & S. 16.

§ 270. Competency of witness to prove title in himself.

[a] (Ala. 1849) In an action against A. to charge him as a joint owner with B. of a steamboat, the latter is not a competent witness to prove the fact of joint ownership.—Aston v. Jemison, 17 Ala. 61.

[b] (Ind. 1851) It is no objection to the competency of a witness, in actions of replevin or trover, that he is called to prove the title of the property sued for to be in himself.—Ashby v. West, 3 Ind. 170.

[c] (Mass. 1816) Where a deputy sheriff in replevin for goods attached by him justified by alleging that the joint property was in the debtor and another, and that he had attached the debtor's interest therein, such other is not, as being interested in the event of the action, rendered incompetent to prove the property in himself and the debtor.—Page v. Weeks, 13 Mass. 199.

[d] (Miss. 1849) In replevin by the owner of a life estate in the property replevied, against one who has taken possession of the property at the instigation of the remainderman, the remainderman is not a competent witness to prove title in himself, by way of justifying the taking.—Lloyd v. Goodwin, 20 Miss. (12 Smedes & M.) 223.

[e] (N. H. 1844) It is no objection to the competency of a witness that his testimony is in favor of his own title, and therefore, in an action for breach of covenant of seisin in fee, an adverse claimant of the premises is admissible as a witness on the part of plaintiff.—Parker v. Brown, 15 N. H. 176.

[f] (N. J. 1817) In trespass for taking logs, defendant offered to prove by A. that the logs were cut on land owned jointly by A. and himself. *Held*, that A. was competent.—Wilson v. Clark, 4 N. J. Law (1 Southard) 385.

[g] (N. Y. 1828) In trover for a chattel, one who claims property in himself in the chattel is a competent witness for defendant, to show such property.—Bush v. Lyon, 9 Cow. 52.

[h] (Tex. 1870) In a suit enjoining an execution sale of personal property claimed to be exempt, plaintiff called a witness who stated that since the preliminary injunction was granted he had purchased the property levied on. Defendant objected, and the court ruled that the witness was disqualified by interest adverse to defendant. *Held*, that the ruling was erroneous; the witness had no interest in the result of the suit, as the injunction relieved the property from the levy, and restored it to the defendant in execution, substituting in its place the security of the injunction bond.—Turley v. Brewster, 33 Tex. 188.

[i] (Vt. 1843) In an action against a sheriff for refusing to attach property which did not belong to the defendant named in the writ, the real owner of the property is a competent witness; he having no interest in the result of the suit.—Hutchinson v. Lull, 17 Vt. 133.

[j] (Wis. 1845) One in whom defendant in replevin alleges title is a competent witness to sustain the plea.—Runey v. Thompson, 1 Pin. 506.

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§ 271. Grantee or vendee.

Parties to conveyance in general, see post, § 298.

[a] (Ala. 1834) In an action of trespass to try title, by a purchaser at a sheriff's sale, against tenants, one of whom is the defendant in the execution under which the purchase is made, a vendee to whom the defendant in execution has conveyed the premises is a competent witness on the part of defendants to prove that they are tenants under him.—McGee v. Eastis, 5 Stew. & P. 426.

[b] (Ala. 1840) A purchaser of real estate, after it appears that his vendor had no title, is a competent witness to prove the amount of rents and profits received by the vendor, and improvements made by him.—Hogan v. Stone, 1 Ala. 496, 35 Am. Dec. 39.

[c] (Ala. 1850) A., for himself and as the agent of B., purchased land on their joint account, and afterwards relinquished his interest therein to B. The vendor filed his bill against both, to subject the land to the payment of the purchase money, and A. having failed to answer, a decree pro confesso was rendered against him. *Held*, that A. was a competent witness for complainant to prove the price agreed to be paid; that if his interest was not balanced, it preponderated against the party by whom he was introduced.—Crawford v. Barkley, 18 Ala. 270.

[d] (Conn. 1827) The grantee of land by a quitclaim deed is a competent witness, in an action of ejectment between other persons, to establish such deed.—Kline v. Beebe, 6 Conn. 494.

[e] (Del. 1864) Where property sold at auction was seized under an execution against the purchaser, whereon the original owner brought replevin, alleging that title had never vested in the purchaser because of his failure to comply with the conditions of the sale, the purchaser was a competent witness for the original owner, as his interest would be unaffected by the result.—Williams v. Connowdy, 3 Houst. 63.

[f] (Ind. 1846) In a cross-bill by a wife, against her husband, for a divorce and alimony, the husband offered a witness whose competency was objected to because the husband had conveyed to the witness a tract of land which it was alleged might be reached by the wife if she should obtain alimony, and if the conveyance had been made to defraud her. *Held*, that the objection was untenable.—McCafferty v. McCafferty, 8 Blackf. 218.

[g] (Iowa, 1859) A person to whom plaintiff in replevin has sold the property in suit is a competent witness to show that according to the terms of sale plaintiff was entitled to the possession.—Mumma v. McKee, 10 Iowa, 107.

[h] (La. 1832) The vendee, though he have transferred the property by donation, is competent to testify for plaintiff in a revocatory action.—Brown's Syndics v. Ferguson, 4 La. 257.

[i] (Me. 1830) Defendant in a suit in which his lands were attached having sold the same lands pending the attachment, his grantee cannot be a witness for him in that suit, his title being directly affected by a verdict for defendant.—Schillinger v. McCann, 6 Me. (6 Greenl.) 364.

[j] (Me. 1843) The grantee in a deed is a competent witness to prove that the deed was delivered to a third person on a condition to be performed, and that it had never been delivered to him.—Jackson v. Sheldon, 22 Me. (9 Shep.) 569.

[k] (Me. 1850) Defendant's grantee of land attached on a writ is a competent witness for defendant, unless it appears that the conveyance to him was made subsequently to the attachment.—Johnson v. Whidden, 32 Me. 230.

[l] (Md. 1799) In trespass for taking a horse, plaintiff's witness was objected to as interested, and to prove him so defendant offered testimony that he (defendant) was collector of taxes, and had distrained and sold said horse for the payment of witness' taxes; that the witness had said that defendant had taken his horse; and that plaintiff had said that defendant ought not to be angry with him because the witness had brought the suit, and only made use of plaintiff's name. *Held*, that the witness was not interested in the event of the suit, but was a competent witness to give evidence of the facts proposed to be proved by him, viz., that the horse was the property of plaintiff, and that a conditional contract was made between plaintiff and the witness for said horse, which contract was afterwards canceled.—Belt v. Perry, 4 Har. & McH. 348.

[m] (N. H. 1841) A. delivered to B. a stove and furniture, and took his receipt, reciting that he was to pay a certain sum per month, or return the stove, etc., if he did not make payments. He made one payment, and plaintiffs made an entry in their books, charging him with the stove, and crediting him with the payment. B. failed to pay any more, and A. agreed to take the stove back, after which it was attached by C. on a writ against B. *Held*, that B. was a competent witness in a suit by A. to recover the value.—Porter v. Pettengill, 12 N. H. 299.

[n] (N. H. 1844) One claiming under a deed a part of the land conveyed by it is a competent witness for a tenant in a real action, claiming a different portion of the land under the same deed.—Cheswell v. Eastham, 16 N. H. 296.

[o] (N. H. 1852) In an action quare clausum, a subsequent grantee of the locus in quo is a competent witness for plaintiff, as he is entitled to no part of the damages which may be recovered.—Furbush v. Goodwin, 25 N. H. (5 Fost.) 425.

[p] (Ohio, 1850) In a suit in equity to enforce a vendor's lien, where the premises have been mortgaged by the vendee, after the sale, to a third person, and sold under a decree on the mortgage, after foreclosure, to the mortgagee, the original vendee is not a competent witness for complainant.—Messenger v. Armstrong, 19 Ohio, 41.

[q] (Pa. 1834) In an action to recover back purchase money paid for land on the ground that the vendor had no title, but had previously sold it to another, the first grantee was a competent witness for plaintiff to prove payment of the purchase money by him, and possession under his purchase.—Devere v. Loyd, 3 Watts, 94.

[r] (Pa. 1841) In ejectment by a vendor, against the purchaser of the land at a sale on execution as the property of the vendee, to enforce payment of the purchase money, the vendee is not a competent witness.—Jones v. Patterson, 1 Watts & S. 321.

[s] (Pa. 1846) A vendor retained title as security for unpaid purchase money. The vendee leased the premises under an agreement by the lessee to pay rent in goods manufactured on the premises. The vendee assigned his property in trust for creditors, and, the lessee becoming insolvent, his stock was sold to defendants, who took possession, agreeing to work up the stock and pay any sum in excess of cost and expenses to the vendor. *Held* that, in an action against defendants by the vendor, claiming a right to distrain for rent, the vendee was a competent witness for the vendor, his interest, if any, being adverse to the vendor, as tending to give rent to him which otherwise might come to the witness.—Helser v. Pott, 3 Pa. (3 Barr) 179.

[t] (Pa. 1848) Where A. bargains certain chattels to B., but the contract is rescinded, B. is a competent witness for A. in trover against

a third party for the chattels.—Stafford v. Ames, 9 Pa. (9 Barr) 348.

[u] (Pa. 1858) Plaintiff sold certain property which was in the possession of defendant, who claimed a lien thereon and refused to deliver it to the vendee. *Held*, in an action therefor by plaintiff, that the vendee was a competent witness, since if defendant had a lien the witness could not get the property according to the contract of sale, but he could get its legal equivalent in damages, and therefore was not interested.—Tremlett v. Nicholas, 15 Leg. Int. 117.

[v] (Pa. 1863) Where, in an action of trespass by the owner of cattle wrongfully sold by his bailee, there have been several sales of the cattle by successive owners, an intermediate purchaser is a competent witness in the action of trespass.—Chamberlain v. Smith, 44 Pa. (8 Wright) 431.

[w] (Pa. 1876) The assignee of defendant sued for ground rent as assignee of the land is not competent for plaintiff to prove nondelivery of the deed to him.—Leib v. Childs, 3 Clark, 70, 4 Pa. Law J. 415.

[x] (Vt. 1838) A grantee, by deed of warranty, of land previously attached, is not a competent witness against an attaching creditor in the suit in which such attachment is made.—Beach v. Packard, 10 Vt. 96, 33 Am. Dec. 185.

§ 272. Donor and donee.

[a] (Ala. 1848) A donor of property to his children is a competent witness as between them and his creditors, on the ground of interest, and is not disqualified by the act of 1845, rendering a mortgagor or defendant in execution incompetent in all cases of the trial of right of property, the action being detinue by the donees against the sheriff.—Easly v. Dye, 14 Ala. 158.

[b] (Ala. 1850) The donor of property is not liable to the donee on a failure of title, and has, therefore, no such interest in sustaining the title of the donee as will exclude him from testifying in his favor.—Jones' Ex'rs v. Hoskins, 18 Ala. 489.

[c] (Ala. 1861) The donor is a competent witness for the donee, or one holding under the latter, in a suit involving the title to the gift.—Humphries v. Dawson, 38 Ala. 199.

[d] (Ky. 1838) Where the question was whether certain slaves were the property of an individual, or assets in his hands as administrator, a person was offered as a witness to prove that they were assets to whom the intestate, when insolvent, had given a slave. *Held*, that as a verdict that the slaves were assets might prevent the slave of the witness from being subjected to the debts of the intestate, the witness was interested, and was incompetent without a release.—Stephens' Adm'r v. Barnett, 37 Ky. (7 Dana) 257.

[e] (Me. 1840) Where a defense to an action on a mortgage executed to decedent, but which had been transferred by decedent as a gift causa mortis, must necessarily be made for the benefit of the donees, they are incompetent to testify.—Borneman v. Sidlinger, 18 Me. 225.

[f] (Miss. 1845) A father who has made a deed of gift, with warranty, to his daughter, of slaves, for the consideration of love and affection and of $10 cash paid, is a competent witness in her behalf, in a trial of right of property between plaintiff in an execution, against his daughter's husband, who had levied on the slaves, and the daughter who was claiming them.—Moore v. McKie, 13 Miss. (5 Smedes & M.) 238.

[g] (N. Y. 1827) A father made a parol gift of a gristmill to his son, who sued the owners of a mill below for flowing backwater so as to injure his mill. *Held*, that the father was a competent witness.—Stiles v. Hooker, 7 Cow. 266.

[h] (N. Y. 1843) The donee of a gift mortis causa, who has received and distributed it to other participants, is not a competent witness, in behalf of himself or the others interested therein, to sustain it, in a suit by the executors of the donor against the recipients of the fund.—Thorp v. Amos, 1 Sandf. Ch. 26.

[i] (Tenn. 1855) The donor of a slave, who had made to the donee a voluntary warranty of title, is a competent witness to support the same against a conflicting title.—Gunn v. Mason, 34 Tenn. (2 Sneed) 637.

§ 273. Landlord.

Parties to lease in general, see post, § 299.
Transfer, release or extinguishment of interest, see post, § 437.

[a] (Ala. 1858) In an action for forcible entry and detainer, commenced before the Code was adopted, a party under whom complainant holds as tenant, and against whom defendant claims the possession adversely, is an incompetent witness, from interest.—House v. Camp, 32 Ala. 541.

[b] (Cal. 1858) The lessor of plaintiff in trespass is a competent witness for him, if the lease does not bind him to protect the tenant from trespasses.—McCormick v. Bailey, 10 Cal. 230.

[c] (Me. 1849) The tenant in a writ of entry set up in defense that he occupied the land as the servant of another person, to whom the possession belonged. *Held*, that such other person was not a competent witness for the tenant.—Atkinson v. Snow, 30 Me. (17 Shep.) 364.

[d] (N. Y. 1809) The lessor of plaintiff in ejectment cannot be a witness in the cause.—Jackson v. Ogden, 4 Johns. 140.

[e] (N. Y. 1841) In ejectment for dower, defendant, who holds a lease for years, with a covenant for quiet enjoyment, cannot call his landlord as a witness, though the landlord himself holds under a lease in fee, containing a like covenant, and reserving rent and a quarter sale.—Moak v. Johnson, 1 Hill, 99.

[f] (N. Y. 1848) In trespass brought against the sheriff by one whose goods have been taken on a distress warrant, the landlord is incompetent to testify on behalf of defendant, on account of interest; there being an implied contract on the part of the landlord to indemnify the person to whom he directs his warrant, if it should turn out that he had no authority to distrain.—Lord v. Brown, 5 Denio, 345.

[g] (N. C. 1858) A landlord who has leased his land to a tenant for a year, for a part of the crop, is a competent witness to prove a trespass on the land and damages by the destruction of the crop.—Sanderlin v. Shaw, 51 N. C. 225.

[h] (Pa. 1846) A lessor is an incompetent witness for the lessee in an action for obstructing him in using a right of way to repair a dam, part of the demised premises.—Dickson v. Boland, 4 Pa. (4 Barr) 112.

[i] (Pa. 1861) In an action of trespass by the tenant of two joint owners against certain others of the owners, for taking and carrying away certain ores which he had mined, *held*, that the interest of the lessor who testified on the part of defendant against the objection of plaintiff, that he was not aware, when on the mine hills where plaintiff was mining at the time, that he claimed to do so under authority from him, was so balanced that it was not error to admit him as a witness.—Blewett v. Coleman, 40 Pa. (4 Wright) 45.

[j] (S. C. 1847) The lessor of land is not a competent witness to prove his title, so as to

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enable his tenant to recover on his own demise, in an action of trespass.—Wilson v. Douglas, 2 Strob. 97.

§ 274. Tenant.

Parties to lease in general, see post, § 299.

Transfer, release, or extinguishment of interest, see post, § 437.

[a, b] (Ala. 1854) When the vendee files a bill to compel a conveyance, and to enjoin the vendor's action at law to recover possession of the land, the tenant in possession, being directly interested in perpetuating the injunction, is not a competent witness for complainant.—Bradford v. Harper, 25 Ala. 337.

[c] (Ala. 1855) A tenant, who is in possession of the premises sued for is not a competent witness for his landlord.—Kennedy's Heirs v. Reynolds, 27 Ala. 364.

[d] (Ind. 1856) A tenant in possession offered by his landlord as a witness in ejectment is incompetent.—Stump v. Town of Attica, 7 Ind. 641.

[e] (Iowa, 1846) In an action for forcible entry and detainer, a witness who was offered to prove that he was mining on the ground in dispute under a parol lease from defendant should not have been rejected for interest, as the right of property did not come into the question.—McDaniel v. Spencely, Morris, 493.

[f] (Me. 1842) Where a landlord levies a distress on goods stored in a common warehouse of his tenant, in replevin by the owner of such goods, the tenant is a competent witness.—Owen v. Boyle, 22 Me. (9 Shep.) 47.

[g] (Md. 1768) A tenant is a competent witness for his landlord, in an action for trespass committed on a part of the close, if occupied by the tenant.—Baker v. Pearce, 4 Har. & McH. 502.

[h] (Md. 1799) In assumpsit for use and occupation, one who disclosed by his own testimony that he was a tenant on the land of plaintiff, by virtue of an agreement between him and defendant, that he had paid all his rents to defendant and had receipts for the money paid, was a competent witness for plaintiff.—Grant v. Beall, 4 Har. & McH. 419.

[i] (N. Y. 1806) A tenant is a competent witness, as to interest, to disprove the title of his landlord.—Jackson v. Vredenbergh, 1 Johns. 159.

[j] (N. Y. 1814) In an action by a sheriff who has levied on the goods of a tenant, without notice of any rent being in arrear, against the landlord, who had distrained the same goods after the levy, the tenant is a competent witness.—Alexander v. Mahon, 11 Johns. 185.

[k] (N. Y. 1815) Where a defendant in ejectment sets up as a defense that he was not in possession when the declaration was served, his tenant, to whom he had leased the land, is not a competent witness to the fact, as he has an interest both in the question and the event.—Jackson v. Trusdell, 12 Johns. 246.

[l] (N. C. 1854) In an action by a lessor against a third person, for removing a building from the land by consent of lessee, the lessee is a competent witness for the lessor.—Forbes v. Williams, 46 N. C. 393.

[m] (Ohio, 1843) Where, in an action on the case for erecting a milldam and overflowing plaintiff's land, defendant having been a lessee and given up possession after the commencement of the suit, a subsequent lessee not holding under defendant was a competent witness for him.—Barlitt v. Woodside, 1 Ohio Dec. 15.

[n] (Pa. 1827) Where defendant in replevin avows the taking, in a house occupied by N., for rent due by N. to him, and plaintiff replies no rent in arrear, N. is not a witness for plaintiff.—Rush v. Flickwire, 17 Serg. & R. 82.

[o] (Pa. 1829) Where it does not appear how long defendant in an ejectment has been in possession of the land in dispute, a lessee of plaintiff under an old lease, who has been out of possession 20 years or more, and against whom no suit has been brought, is, in the absence of further evidence showing liability for mesne profits, not incompetent as a witness for plaintiff on the ground of interest.—Unger v. Wiggins, 1 Rawle, 331.

[p] (Pa. 1832) Where a stranger brings replevin against a landlord for his goods distrained, the tenant is a competent witness to prove that the goods belong to the landlord.—McConalhy v. Kessler, 3 Pen. & W. 467.

[q] (Pa. 1848) A lessee of a mine had agreed to take and pay for a certain number of loads of ore, sold out to a third person, and the latter made certain agreements with the lessor, which he performed. *Held* that, in an action by the lessor against the original lessee on his agreements, such assignee was a competent witness for defendant.—Fisher v. Milliken, 8 Pa. (8 Barr) 111, 49 Am. Dec. 497.

[r] (Pa. 1849) In case for a nuisance, by reason of the erection of a dam, the tenant of the mill, to which the dam is appurtenant, is a competent witness for defendant.—Detweiler v. Groff, 10 Pa. (10 Barr) 376.

[rr] (Pa. 1860) In a contest between the landlord and the execution creditor of the tenant, as to the distribution of the proceeds of a sheriff's sale of the tenant's goods, found on the demised premises, the tenant is a competent witness to prove the terms of the demise.—Appeal of Collins, 35 Pa. (11 Casey) 83.

[s] (Pa. 1867) In an action for injury to the reversion, involving title to coal and other minerals under the land, a lessee of the surface land has no interest in the subject-matter of the controversy, and is a competent witness.—Pennsylvania Salt Mfg. Co. v. Neel, 54 Pa. (4 P. F. Smith) 9.

[t] (S. C. 1834) A tenant is a competent witness, between his landlord and a third person, to prove the contract for rent.—O'Farrell v. Nance, 2 Hill, 484.

[u] (S. C. 1854) In an action qu. cl. fr. a cropper or overseer who was to receive for his services a share of the crop planted in the field where the trespass was committed is a competent witness for plaintiff.—Carter v. Pinchbeck, 7 Rich. Law, 356.

§ 275. Mortgagor.

Parties to mortgage in general, see post, § 299.

Statutory removal of incompetency, see post, § 507.

Transactions fraudulent as to creditors, see post, § 308.

Transfer, release or extinguishment of interest, see post, § 438.

Usurious transactions, see post, § 304.

[a] (U. S. 1819) In a suit between contending mortgagees, the mortgagor is not incompetent for interest as a witness for the first mortgagee to identify the goods described in the first mortgage.—Wagner v. Watts, Fed. Cas. No. 17,040 [2 Cranch, C. C. 169].

[b] (Ala. 1847) The grantor, in a deed of trust containing no reservation or condition for the benefit of the grantor, is not a mortgagor within the terms of the act of 1845, excluding mortgagors, or defendants in execution, from being witnesses in claim suits, the individual not being the defendant in execution, and the property being levied on as that of a third person.—Frow v. Downman, 11 Ala. 880.

[c] (Ala. 1867) If land is mortgaged with a power of sale to indemnify the mortgagee as

surety on a note of the mortgagor, and the mortgagee, having paid the note, sells the land under the power, and afterwards sues the vendor of the mortgagor for breach of covenant of warranty, the mortgagor has no interest in the suit and is a competent witness and not a necessary party.—Gunter v. Williams, 40 Ala. 561.

[d] (Conn. 1812) A., being insolvent, conveyed to B. a parcel of land with covenants of warranty and seisin; B., at the same time, executed to A. a deed of defeasance, stipulating that if A. should pay a certain debt, for the payment of which B. had become surety, the land should be reconveyed. The debt was discharged by A. and the defeasance was canceled. At the same time plaintiff became bound as surety for A. on a certain contract, and to indemnify him on account of his bond B., in pursuance of an agreement between A. and plaintiff, conveyed the land to plaintiff and entered into a written agreement to reconvey the land to A. on condition that he would indemnify him against his bond. A. failed to indemnify plaintiff, who was compelled to pay on account of his bond a larger sum than the value of the land. A. continued in the use and occupation of the land without paying rent, and some years after mortgaged the land. Plaintiff brought an action of disseisin against a creditor who claimed title to the land under a levy of an execution. *Held*, that as it appeared from the evidence that plaintiff had been compelled to pay him a larger sum than the value of the land, A. was not an incompetent witness in his behalf on account of any supposed right to the equity of redemption therein.—Clark v. Johnson, 5 Day, 373.

[e] (Ill. 1849) In an action on two notes, by the assignees thereof, plaintiffs introduced a witness, who stated that he had executed a mortgage of his real estate to plaintiffs, to secure a debt of the assignors of the notes to plaintiffs, which same debt was also secured by the assignment of the notes in suit, as collateral security, that the amount, if any, recovered on the notes, would go in payment of such debt, but that the assignors were liable to indemnify him in case he should be obliged to pay anything by reason of his mortgage, and that he was in no other way interested in the event of the suit. *Held*, that the witness was competent.—Curtenius v. Wheeler, 10 Ill. (5 Gilman) 462.

[f] (Ky. 1825) In an action by a mortgagee to recover the mortgaged property from the vendee of the mortgagor, the mortgagor is competent to prove the consideration of the mortgage, and that it remains unsatisfied.—Miller v. Dillon, 18 Ky. (2 T. B. Mon.) 73.

[g] (Me. 1825) The mortgagor, though not liable on any covenants in his deed, cannot be a witness for the mortgagee in an action brought to recover possession of the land, where the possession sought by the demandant would be a payment, pro tanto, of the debt.—Howard v. Chadbourne, 3 Me. (3 Greenl.) 461.

[h] (Mass. 1835) A mortgagee, being desirous of selling the mortgaged land, obtained from the mortgagor a quitclaim deed thereof, and the wife of the mortgagor released her dower. The mortgagee then executed a contract, by which he agreed that, if he should realize from a sale of the land the sum of $200 more than the amount due him from the mortgagor, he would pay the sum of $100 to the plaintiff, for the benefit of the wife and children of the mortgagor. In an action by plaintiff, on this contract, to recover the sum of $100, *held*, that the mortgagor was not an incompetent witness for plaintiff on the ground of interest, although the wife had died before the action was commenced.—Needham v. Sanger, 34 Mass. (17 Pick.) 500.

[i] (Mich. 1860) C. mortgaged to A., and afterwards sold his equity of redemption to D. A. brought a bill to foreclose, and D. filed a bill to restrain the foreclosure. *Held*, that C. was not a competent witness, since the object of his testimony was to subject the land to the payment of his personal liabilities.—Bassett v. Hathaway, 9 Mich. 28.

[j] (N. J. 1854) W., the mortgagee of S., assigned the bonds secured by the mortgage to B., and to secure them mortgaged the land conveyed in mortgage by S. to him, and certain other land; this mortgage was recorded in 1847, and in 1848 a prior warranty deed of part of the mortgaged land by W. to C., was recorded. *Held*, that W. was not a competent witness to prove that B. had notice of the sale to C.—Blair v. Ward, 10 N. J. Eq. (2 Stockt.) 119.

[k] (N. Y. 1827) In ejectment by mortgagee, against one claiming from the mortgagor under a quitclaim deed, the mortgagor is not a competent witness for plaintiff.—Jackson v. McChesney, 7 Cow. 360, 17 Am. Dec. 521.

[l] (N. Y. 1829) The mortgagor of a vessel is a competent witness for the mortgagee sued as owner thereof to show that the conveyance absolute on its face was in fact a mortgage.—Ring v. Franklin, 2 N. Y. Super. Ct. (2 Hall) 9.

[m] (Pa. 1809) The mortgagor is a competent witness to support title denied thereunder.—Gratz's Lessee v. Ewalt, 2 Bin. 95; Cain's Lessee v. Henderson, Id. 108.

[n] (Pa. 1840) A mortgagor is an incompetent witness in an action between the purchaser at sheriff's sale of the land mortgaged and an assignee of one bound by the mortgage, which involves the liability of the purchaser to pay the bond, or, having paid it by mistake, to recover it back.—Espy v. Allison, 9 Watts, 462.

[o] (Pa. 1848) A mortgagor, who has confessed judgment on a scl. fa., is not a competent witness for plaintiff in a sci. fa on the mortgage against a terre-tenant.—Hartz v. Woods, 8 Pa. (8 Barr) 471.

[p] (Pa. 1848) Where the assignee of a mortgage brings ejectment against a stranger, the mortgagor is a competent witness for defendant, to show that a part of the land did not belong to him, and was included in the mortgage by mistake.—Mott v. Clark, 9 Pa. (9 Barr) 399, 49 Am. Dec. 566.

[q] (Vt. 1826) The fact that a mortgagor, after granting to another the equity of redemption, has attached the same on mesne process, in an action still pending, as the property of his grantee, does not affect his competency as a witness for such grantee in a suit by the assignee of the mortgage against the grantee to foreclose the equity of redemption.—Nichols v. Holgate, 2 Aikens, 138.

[r] (Va. 1836) Land, being subject to two successive mortgages, the first being unrecorded, was sold under the provisions of the second mortgage, the second mortgagee becoming the purchaser. In a proceeding by the first mortgagee against the mortgagor and second mortgagee, to enforce his mortgage, the mortgagor is not a competent witness to prove notice of the first mortgage to the second mortgagee.—Sitlington v. Brown, 7 Leigh, 271.

§ 276. —— Balance of interest as between adverse parties.

[a] (Ala. 1847) The act of 1845, rendering mortgagors or defendants in execution incompetent witnesses in trials of the right of property, does not cover the case of a mortgagee suing a subsequent purchaser from the mortgagor.—Dearing v. Windham, 11 Ala. 204.

[b] (Ala. 1847) In a suit between the mortgagee of slaves and a subsequent vendee of the mortgagor, the latter is a competent witness,

enable his tenant to recover on his own demise, in an action of trespass.—Wilson v. Douglas, 2 Strob. 97.

§ 274. Tenant.

Parties to lease in general, see post, § 299.

Transfer, release, or extinguishment of interest, see post, § 437.

[a, b] (Ala. 1854) When the vendee files a bill to compel a conveyance, and to enjoin the vendor's action at law to recover possession of the land, the tenant in possession, being directly interested in perpetuating the injunction, is not a competent witness for complainant.—Bradford v. Harper, 25 Ala. 337.

[c] (Ala. 1855) A tenant, who is in possession of the premises sued for is not a competent witness for his landlord.—Kennedy's Heirs v. Reynolds, 27 Ala. 364.

[d] (Ind. 1856) A tenant in possession offered by his landlord as a witness in ejectment is incompetent.—Stump v. Town of Attica, 7 Ind. 641.

[e] (Iowa, 1846) In an action for forcible entry and detainer, a witness who was offered to prove that he was mining on the ground in dispute under a parol lease from defendant should not have been rejected for interest, as the right of property did not come into the question.—McDaniel v. Spencely, Morris, 493.

[f] (Me. 1842) Where a landlord levies a distress on goods stored in a common warehouse of his tenant, in replevin by the owner of such goods, the tenant is a competent witness.—Owen v. Boyle, 22 Me. (9 Shep.) 47.

[g] (Md. 1768) A tenant is a competent witness for his landlord, in an action for trespass committed on a part of the close, if occupied by the tenant.—Baker v. Pearce, 4 Har. & McH. 502.

[h] (Md. 1799) In assumpsit for use and occupation, one who disclosed by his own testimony that he was a tenant on the land of plaintiff, by virtue of an agreement between him and defendant, that he had paid all his rents to defendant and had receipts for the money paid, was a competent witness for plaintiff.—Grant v. Beall, 4 Har. & McH. 419.

[i] (N. Y. 1806) A tenant is a competent witness, as to interest, to disprove the title of his landlord.—Jackson v. Vredenbergh, 1 Johns. 159.

[j] (N. Y. 1814) In an action by a sheriff who has levied on the goods of a tenant, without notice of any rent being in arrear, against the landlord, who had distrained the same goods after the levy, the tenant is a competent witness.—Alexander v. Mahon, 11 Johns. 185.

[k] (N. Y. 1815) Where a defendant in ejectment sets up as a defense that he was not in possession when the declaration was served, his tenant, to whom he had leased the land, is not a competent witness to the fact, as he has an interest both in the question and the event.—Jackson v. Trusdell, 12 Johns. 246.

[l] (N. C. 1854) In an action by a lessor against a third person, for removing a building from the land by consent of lessee, the lessee is a competent witness for the lessor.—Forbes v. Williams, 46 N. C. 393.

[m] (Ohio, 1843) Where, in an action on the case for erecting a milldam and overflowing plaintiff's land, defendant having been a lessee and given up possession after the commencement of the suit, a subsequent lessee not holding under defendant was a competent witness for him.—Barlitt v. Woodside, 1 Ohio Dec. 15.

[n] (Pa. 1827) Where defendant in replevin avows the taking, in a house occupied by N., for rent due by N. to him, and plaintiff replies no rent in arrear, N. is not a witness for plaintiff.—Rush v. Flickwire, 17 Serg. & R. 82.

[o] (Pa. 1829) Where it does not appear how long defendant in an ejectment has been in possession of the land in dispute, a lessee of plaintiff under an old lease, who has been out of possession 20 years or more, and against whom no suit has been brought, is, in the absence of further evidence showing liability for mesne profits, not incompetent as a witness for plaintiff on the ground of interest.—Unger v. Wiggins, 1 Rawle, 331.

[p] (Pa. 1832) Where a stranger brings replevin against a landlord for his goods distrained, the tenant is a competent witness to prove that the goods belong to the landlord.—McConalhy v. Kessler, 3 Pen. & W. 467.

[q] (Pa. 1848) A lessee of a mine had agreed to take and pay for a certain number of loads of ore, sold out to a third person, and the latter made certain agreements with the lessor, which he performed. *Held* that, in an action by the lessor against the original lessee on his agreements, such assignee was a competent witness for defendant.—Fisher v. Milliken, 8 Pa. (8 Barr) 111, 49 Am. Dec. 497.

[r] (Pa. 1849) In case for a nuisance, by reason of the erection of a dam, the tenant of the mill, to which the dam is appurtenant, is a competent witness for defendant.—Detweiler v. Groff, 10 Pa. (10 Barr) 376.

[rr] (Pa. 1860) In a contest between the landlord and the execution creditor of the tenant, as to the distribution of the proceeds of a sheriff's sale of the tenant's goods, found on the demised premises, the tenant is a competent witness to prove the terms of the demise.—Appeal of Collins, 35 Pa. (11 Casey) 83.

[s] (Pa. 1867) In an action for injury to the reversion, involving title to coal and other minerals under the land, a lessee of the surface land has no interest in the subject-matter of the controversy, and is a competent witness.—Pennsylvania Salt Mfg. Co. v. Neel, 54 Pa. (4 P. F. Smith) 9.

[t] (S. C. 1834) A tenant is a competent witness, between his landlord and a third person, to prove the contract for rent.—O'Farrell v. Nance, 2 Hill, 484.

[u] (S. C. 1854) In an action qu. cl. fr. a cropper or overseer who was to receive for his services a share of the crop planted in the field where the trespass was committed is a competent witness for plaintiff.—Carter v. Pinchbeck, 7 Rich. Law, 356.

§ 275. Mortgagor.

Parties to mortgage in general, see post, § 299.

Statutory removal of incompetency, see post, § 507.

Transactions fraudulent as to creditors, see post, § 308.

Transfer, release or extinguishment of interest, see post, § 438.

Usurious transactions, see post, § 304.

[a] (U. S. 1819) In a suit between contending mortgagees, the mortgagor is not incompetent for interest as a witness for the first mortgagee to identify the goods described in the first mortgage.—Wagner v. Watts, Fed. Cas. No. 17,040 [2 Cranch, C. C. 169].

[b] (Ala. 1847) The grantor, in a deed of trust containing no reservation or condition for the benefit of the grantor, is not a mortgagor within the terms of the act of 1845, excluding mortgagors, or defendants in execution, from being witnesses in claim suits, the individual not being the defendant in execution, and the property being levied on as that of a third person.—Frow v. Downman, 11 Ala. 880.

[c] (Ala. 1867) If land is mortgaged with a power of sale to indemnify the mortgagee as

surety on a note of the mortgagor, and the mortgagee, having paid the note, sells the land under the power, and afterwards sues the vendor of the mortgagor for breach of covenant of warranty, the mortgagor has no interest in the suit and is a competent witness and not a necessary party.—Gunter v. Williams, 40 Ala. 561.

[d] (Conn. 1812) A., being insolvent, conveyed to B. a parcel of land with covenants of warranty and seisin; B., at the same time, executed to A. a deed of defeasance, stipulating that if A. should pay a certain debt, for the payment of which B. had become surety, the land should be reconveyed. The debt was discharged by A. and the defeasance was canceled. At the same time plaintiff became bound as surety for A. on a certain contract, and to indemnify him on account of his bond B., in pursuance of an agreement between A. and plaintiff, conveyed the land to plaintiff and entered into a written agreement to reconvey the land to A. on condition that he would indemnify him against his bond. A. failed to indemnify plaintiff, who was compelled to pay on account of his bond a larger sum than the value of the land. A. continued in the use and occupation of the land without paying rent, and some years after mortgaged the land. Plaintiff brought an action of disseisin against a creditor who claimed title to the land under a levy of an execution. *Held*, that as it appeared from the evidence that plaintiff had been compelled to pay him a larger sum than the value of the land, A. was not an incompetent witness in his behalf on account of any supposed right to the equity of redemption therein.—Clark v. Johnson, 5 Day, 373.

[e] (Ill. 1849) In an action on two notes, by the assignees thereof, plaintiffs introduced a witness, who stated that he had executed a mortgage of his real estate to plaintiffs, to secure a debt of the assignors of the notes to plaintiffs, which same debt was also secured by the assignment of the notes in suit, as collateral security, that the amount, if any, recovered on the notes, would go in payment of such debt, but that the assignors were liable to indemnify him in case he should be obliged to pay anything by reason of his mortgage, and that he was in no other way interested in the event of the suit. *Held*, that the witness was competent.—Curtenius v. Wheeler, 10 Ill. (5 Gilman) 462.

[f] (Ky. 1825) In an action by a mortgagee to recover the mortgaged property from the vendee of the mortgagor, the mortgagor is competent to prove the consideration of the mortgage, and that it remains unsatisfied.—Miller v. Dillon, 18 Ky. (2 T. B. Mon.) 73.

[g] (Me. 1825) The mortgagor, though not liable on any covenants in his deed, cannot be a witness for the mortgagee in an action brought to recover possession of the land, where the possession sought by the demandant would be a payment, pro tanto, of the debt.—Howard v. Chadbourne, 3 Me. (3 Greenl.) 461.

[h] (Mass. 1835) A mortgagee, being desirous of selling the mortgaged land, obtained from the mortgagor a quitclaim deed thereof, and the wife of the mortgagor released her dower. The mortgagee then executed a contract, by which he agreed that, if he should realize from a sale of the land the sum of $200 more than the amount due him from the mortgagor, he would pay the sum of $100 to the plaintiff, for the benefit of the wife and children of the mortgagor. In an action by plaintiff, on this contract, to recover the sum of $100, *held*, that the mortgagor was not an incompetent witness for plaintiff on the ground of interest, although the wife had died before the action was commenced.—Needham v. Sanger, 34 Mass. (17 Pick.) 500.

[i] (Mich. 1860) C. mortgaged to A., and afterwards sold his equity of redemption to D. A. brought a bill to foreclose, and D. filed a bill to restrain the foreclosure. *Held*, that C. was not a competent witness, since the object of his testimony was to subject the land to the payment of his personal liabilities.—Bassett v. Hathaway, 9 Mich. 28.

[j] (N. J. 1854) W., the mortgagee of S., assigned the bonds secured by the mortgage to B., and to secure them mortgaged the land conveyed in mortgage by S. to him, and certain other land; this mortgage was recorded in 1847, and in 1848 a prior warranty deed of part of the mortgaged land by W. to C., was recorded. *Held*, that W. was not a competent witness to prove that B. had notice of the sale to C.—Blair v. Ward, 10 N. J. Eq. (2 Stockt.) 119.

[k] (N. Y. 1827) In ejectment by mortgagee, against one claiming from the mortgagor under a quitclaim deed, the mortgagor is not a competent witness for plaintiff.—Jackson v. McChesney, 7 Cow. 360, 17 Am. Dec. 521.

[l] (N. Y. 1829) The mortgagor of a vessel is a competent witness for the mortgagee sued as owner thereof to show that the conveyance absolute on its face was in fact a mortgage.—Ring v. Franklin, 2 N. Y. Super. Ct. (2 Hall) 9.

[m] (Pa. 1809) The mortgagor is a competent witness to support title denied thereunder.—Gratz's Lessee v. Ewalt, 2 Bin. 95; Cain's Lessee v. Henderson, Id. 108.

[n] (Pa. 1840) A mortgagor is an incompetent witness in an action between the purchaser at sheriff's sale of the land mortgaged and an assignee of one bound by the mortgage, which involves the liability of the purchaser to pay the bond, or, having paid it by mistake, to recover it back.—Espy v. Allison, 9 Watts, 462.

[o] (Pa. 1848) A mortgagor, who has confessed judgment on a sci. fa., is not a competent witness for plaintiff in a sci. fa on the mortgage against a terre-tenant.—Hartz v. Woods, 8 Pa. (8 Barr) 471.

[p] (Pa. 1848) Where the assignee of a mortgage brings ejectment against a stranger, the mortgagor is a competent witness for defendant, to show that a part of the land did not belong to him, and was included in the mortgage by mistake.—Mott v. Clark, 9 Pa. (9 Barr) 399, 49 Am. Dec. 566.

[q] (Vt. 1826) The fact that a mortgagor, after granting to another the equity of redemption, has attached the same on mesne process, in an action still pending, as the property of his grantee, does not affect his competency as a witness for such grantee in a suit by the assignee of the mortgage against the grantee to foreclose the equity of redemption.—Nichols v. Holgate, 2 Aikens, 138.

[r] (Va. 1836) Land, being subject to two successive mortgages, the first being unrecorded, was sold under the provisions of the second mortgage, the second mortgagee becoming the purchaser. In a proceeding by the first mortgagee against the mortgagor and second mortgagee, to enforce his mortgage, the mortgagor is not a competent witness to prove notice of the first mortgage to the second mortgagee.—Sitlington v. Brown, 7 Leigh, 271.

§ 276. —— Balance of interest as between adverse parties.

[a] (Ala. 1847) The act of 1845, rendering mortgagors or defendants in execution incompetent witnesses in trials of the right of property, does not cover the case of a mortgagee suing a subsequent purchaser from the mortgagor.—Dearing v. Windham, 11 Ala. 204.

[b] (Ala. 1847) In a suit between the mortgagee of slaves and a subsequent vendee of the mortgagor, the latter is a competent witness,

as his interest is balanced.—Dearing v. Windham, 11 Ala. 204.

[c] (Md. 1864) Upon an issue to determine the respective rights of prior and subsequent mortgagees, the mortgagor is a competent witness.—Willard v. Ramsburg, 22 Md. 206.

[d] (Mich. 1863) In a contest between two mortgages, as to the priority of their respective mortgages, the mortgagor might have been a witness, as to the fact of notice, under Chancery Rule 55, before parties to suits were made generally competent by the act of 1861.—Wilcox v. Hill, 11 Mich. 256.

[e] (Mo. 1841) The grantor of property in trust to pay a debt due from him to a third person is not competent to identify the property in an action of trespass by the trustee against an attaching officer. He has a residuary interest in the property, so that his interest is not balanced.—Dameron v. Williams, 7 Mo. 138.

[f] (Mo. 1843) The mortgagor is a competent witness for the mortgagee in a suit against a purchaser of the mortgaged goods, by a sale on execution against the mortgagor, subsequent to the mortgage.—King v. Bailey, 8 Mo. 332.

[g] (N. H. 1861) On the question of the priority of mortgages of even date, the mortgagor is a competent witness.—Gilman v. Moody, 43 N. H. 239.

[h] (N. Y. 1829) The mortgagor of a vessel is a competent witness for the mortgagee, who is sued as owner, to show the nature of the transfer and to prove that a conveyance apparently absolute was in fact conditional, as the interest of the witness is balanced.—Ring v. Franklin, 2 N. Y. Super. Ct. (2 Hall) 9.

[i] (S. C. 1844) A mortgagor is a competent witness, as between the mortgagee and a judgment creditor, to prove the want of consideration for the mortgage.—Lamar's Ex'rs v. Simpson, 1 Rich. Eq. 71, 42 Am. Dec. 345.

§ 277. Mortgagee.

Parties to mortgage in general, see post, § 299.
Statutory removal of incompetency, see post, § 507.
Transactions fraudulent as to creditors, see post, § 308.
Transfer, release or extinguishment of interest, see post, § 438.
Usurious transactions, see post, § 304.

[a] (U. S. 1847) Where a part owner of a vessel mortgaged his share to A., he remaining in possession, and a suit was brought against the other part owners by persons who had furnished copper for fitting out the vessel, A. was a competent witness for defendants.—Macy v. De Wolf, Fed. Cas. No. 8,933 [3 Woodb. & M. 193].

[b] (Me. 1853) In a writ of entry by one who has mortgaged the land to secure a note, the mortgagee may be a witness for the mortgagor.—Woodman v. Skeetup, 35 Me. 464.

[c] (Md. 1861) A deed of trust was given by H. to secure the liability of M. and B. on certain notes. In an action brought against M. by the holder of a note drawn by H. and M. in favor of B., and by him indorsed, *held*, that B. had no such interest under the trust deed as would disqualify him from being a witness in M.'s favor.—Whiteford v. Munroe, 17 Md. 135; Walters v. Same, 17 Md. 154, 77 Am. Dec. 328.

[d] (Mass. 1832) In an action for use and occupation, brought by a mortgagor, the mortgagee is a competent witness to prove that he entered for condition broken, and then leased the land to defendant, and that the mortgage had been foreclosed.—Plympton v. Moore, 30 Mass. (13 Pick.) 191.

[e] (Mich. 1860) C. mortgaged to A. and afterwards conveyed to D. by quitclaim. A. filed a bill against C. to foreclose the mortgage given to him by C. D.'s assignee filed a bill to restrain the foreclosure, or to redeem, should the mortgage be upheld. *Held*, that A. was not a competent witness; since he claimed to own the mortgage in controversy, there was no part of the case in which he was not interested.—Bassett v. Hathaway, 9 Mich. 28.

[f] (N. H. 1845) A mortgagee of previously attached property is so far interested in the suit in which the attachment was made as to be incompetent as a witness therein.—Rideout v. Newton, 17 N. H. 71.

[g] (N. H. 1855) An action of trespass de bonis was brought by F. against R., who had taken personal property, mortgaged to S., by direction of the mortgagee. *Held*, that the mortgagee was a competent witness for R. and was not disqualified by reason of interest.—Fuller v. Rounceville, 31 N. H. (11 Fost.) 512.

[h] (N. Y. 1837) The mortgagee of a policy of insurance mortgaged as security for a debt was a competent witness to prove the mortgage, as against the agent who effected the policy, and who had a lien upon the amount which should be received by him on the policy, for a general balance of accounts.—Rogers v. Traders Ins. Co., 6 Paige, 583.

[i] (N. Y. 1850) A. applied to B. to obtain a loan from his father-in-law, C. B. negotiated a loan of $2,600, all of which was advanced by C.; but B. furnished his own notes for $600, as a part of the sum to A., and took from A. another mortgage for $300 for his trouble in doing the business. *Held* that, in a suit by C. to foreclose the mortgage, B. was a competent witness for C.—Hetfield v. Newton, 3 Sandf. Ch. 564.

[j] (Pa. 1840) A mortgagee is an incompetent witness in an action between the purchaser at sheriff's sale of the land mortgaged and an assignee of one bound by the mortgage, which involves the liability of the purchaser to pay the bond, or having paid it by mistake, to recover it back.—Espy v. Allison, 9 Watts, 462.

[k] (Pa. 1862) A mortgagee who is assignor of a mortgage is a competent witness, in an action on it, to prove that only part of the amount for which it was given was ever received by the mortgagor, and that the equitable plaintiff took it with knowledge of that fact; though the original mortgagee, the nominal plaintiff, was an indorsee of the note, which the mortgage had been given to secure.—Shrom v. Williams, 43 Pa. (7 Wright) 520.

§ 278. Bailor or bailee and consignor or consignee.

[a] (U. S. 1850) A. consigned certain goods to B., for the use of C., in payment of a pre-existing debt to C., and while they were in the hands of B. they were attached by another creditor of A. *Held*, that A. was a competent witness for C. in a suit between C. and such other creditor for the goods.—Grove v. Brien, 49 U. S. (8 How.) 429, 12 L. Ed. 1142.

[b] (U. S. 1802) Possession of the goods by a witness does not create such an interest in the witness as to render his testimony inadmissible in favor of the party under whom he holds the possession.—Hamilton v. Russell, Fed. Cas. No. 5,989 [1 Cranch, C. C. 97].

[c] (U. S. 1841) A consignee who has delivered goods to the owner without the payment of freight is not an incompetent witness, as being interested in a suit by the master against the owner of the goods to recover freight.—Bork v. Norton, Fed. Cas. No. 1,659 [2 McLean, 422].

[d] (Ala. 1852) A bailee, who is guilty of a conversion, by selling or exchanging the prop-

erty committed to him, is a competent witness for the bailor in detinue for its recovery, his interest being exactly balanced.—Oliver v. McClellan, 21 Ala. 675.

[e] (Iowa, 1849) The bailee of property is a competent witness for the bailor in an action to recover the property from one who took it forcibly from the bailee.—Wright v. Ross, 2 G. Greene, 266.

[f] (La. 1859) The oath of the party cannot be received to prove the deposit of his baggage or other articles of value at an inn.—Pope v. Hall, 14 La. Ann. 324.

[g] (Me. 1837) A bailor may be a witness for the bailee, if he has no interest in the event of the suit.—Maine Stage Co. v. Longley, 14 Me. (2 Shep.) 444.

[h] (Mass. 1807) A consignee of goods on his own account, refusing to receive them, and afterwards selling them as agent of the consignors, is a competent witness for the consignors, in an action by them against the purchasers for the price of the goods, although he had indorsed the bill of lading in blank.—Brown v. Babcock, 3 Mass. 29.

[i] (N. H. 1818) In an action of trover by the bailee of a chattel against a stranger, the bailor is not a competent witness for the bailee to prove the general property in himself.—Chesley v. St. Clair, 1 N. H. 189.

[j] (N. H. 1819) If a sheriff, by mistake, sell the property of A. on an execution against B., which property has been consigned to B., and then return the execution satisfied to the amount of the sale, B. is still a competent witness for A. in an action against the sheriff.—Whiting v. Bradley, 2 N. H. 79.

[k] (N. H. 1820) A commission merchant is not answerable to the owner for goods taken by an officer as his own property; and he is a competent witness for the owner in an action against the officer.—Jones v. Sinclair, 2 N. H. 319, 9 Am. Dec. 75.

[l] (N. J. 1795) A person to whom goods are delivered is not a competent witness to charge the person in whose name he received them.—Townley v. Wooly, 1 N. J. Law (Coxe) 377.

[m] (Pa. 1846) The bailee of horses, which are driven by one hired by him, is a competent witness for the owner, in an action for an injury to them while in his employ, though the question is whether the injury resulted from the negligence of the person driving them, or that of defendant, for negligence cannot be assumed to disqualify a witness.—Smith v. Seward, 3 Pa. (3 Barr) 342.

[n] (Pa. 1849) Where the title to a chattel is in issue between an alleged bailee of it for use without pay, and one who claims under a judicial sale of it as the property of the bailee, the bailor is not a competent witness for the bailee.—Heitzman v. Divil, 11 Pa. (1 Jones) 264.

[o] (S. C. 1807) In an action for goods sold, plaintiff's book of original entries was produced in evidence, from which it appeared that the goods were delivered to one W.; and W., being produced as a witness to prove that the goods which were charged to defendant were received by him on account of defendant, and were applied to defendant's use, *held*, that he was competent, though objected to by plaintiff on the ground of interest.—Taylor v. Dickey, 2 Brev. 131.

[p] (Tex. 1860) Where goods in the hands of a bailee have been levied on as the property of that bailee, he is a competent witness to prove the owner's title.—Walmsley v. Hubbard, 24 Tex. 612.

[q] (Vt. 1801) In trover for a chattel, plaintiff offered as a witness one to whom he lent the chattel, to prove that it was by him eloigned and sold to defendant's vendor. *Held*, that he was incompetent.—Pierce v. Hinsdall, 1 Tyler, 153.

[r] (Vt. 1833) Where A., a common carrier, received money to deliver to B., another carrier, for him to deliver to C., who sues A. for the loss, *held* that, after evidence by A. to show that he had delivered to B., C. could not call B. to disprove the delivery without a release.—Denison v. Hibbard, 5 Vt. 496.

§ 279. Pledgor and pledgee.

[a] (U. S. 1842) The owner of a ship, who has pledged her to two different parties to secure debts due each of them from him, stands indifferent in point of interest as between them, and is a competent witness in a suit involving their respective claims upon the vessel.—Stalker v. The Henry Kneeland, Fed. Cas. No. 13,282.

[b] (Ga. 1861) One who holds notes sued on as collateral for the payment of a debt due him from plaintiff is an interested witness, and incompetent to testify.—Harbin v. Roberts, 33 Ga. 45.

[c] (Mass. 1816) The assignee of a chose in action, which has been assigned as a pledge to secure a debt due from the assignor to the assignee, is a competent witness for the assignor, in an action in his name, to recover the debt assigned for the use of the assignee.—Locke v. North American Ins. Co., 13 Mass. 61.

[d] (Pa. 1858) The witness held a sawmill by lease to indemnify him against liability on paper signed with the lessor, but if taken up by the lessor then he was not to be the lessee of the mill, but to be paid for the amount of sawing done by the lessor. *Held*, that he was a competent witness for the lessor for lumber sawed by him, the pledge of the mill having been redeemed by the extinguishment of the liability for which it had been pledged.—Bolard v. Doughty, 2 Grant, Cas. 202.

§ 280. Hirer of slave.

[a] (Ala. 1846) One who had purchased a slave, paid the principal part of the purchase money, and afterwards rescinded the contract and retained possession by a contract of hire, is a competent witness for the vendor, in a suit by him against one who purchased the slave at a sale by execution, as the property of the witness. His competency does not depend upon the fact of the vendor having repaid the purchase money upon the rescission of the contract.—Babcock v. Huntington, 9 Ala. 869.

[b] (Ala. 1853) When detinue is brought against a bailee of a slave, his bailor is not a competent witness for him without a release; and the fact that the slave was hired for his victuals and clothes only does not affect the principle.—Nelson v. Iverson, 24 Ala. 9, 60 Am. Dec. 442.

[c] (Ala. 1855) Where the hirer of a slave lets him to another, and the slave dies while in the service of the second hirer, and the owner sues the first hirer for negligence, if the complaint is so framed as to authorize a recovery only for his negligence, the second hirer is a competent witness for him.—Alabama & T. R. R. Co. v. Burke, 27 Ala. 535.

[d] (Ala. 1861) Where separate actions of trover are brought against the hirer and subhirer of a slave, by the owner, for a conversion, by reason of the unauthorized subletting, the subhirer is a competent witness, in the suit against the hirer in behalf of the owner.—Gimon v. Baldwin, 38 Ala. 60.

[e] (Tex. 1849) A. let a slave to B. and C. Being wounded while in the possession of B. he was attended by D., a physician, who sued A. for his professional services, and offered C. as a witness to prove that it was agreed that A.

should pay for medical aid, if needed. *Held*, that C. was a competent witness.—McGee v. Currie, 4 Tex. 217.

§ 281. Adjoining owners.

[a] (Iowa, 1859) Plaintiff owned the north and L. the south part of a certain lot; plaintiff built a partition wall, one-half of which, with L.'s permission, was built on his land; L. afterwards sold his lot with full covenants. *Held*, in a suit against his vendee to recover half the expense of the wall, that the interest of L. was balanced, and that he was a competent witness in the suit as to the terms on which the wall was built.—Wickersham v. Orr, 9 Iowa, 253, 74 Am. Dec. 348.

[b] (La. 1849) On an appeal by a landholder from the report of a jury, appointed to lay out a road, assessing damages for the injury sustained, the members of the jury who laid out the road and assessed the damages were not incompetent as witnesses on the ground that being proprietors of adjoining lands they were interested, but the objection went to their credibility.—Frosard v. Police Jury of St. Landry, 3 La. Ann. 560.

[c] (Md. 1790) A witness is competent to establish the running of certain lines, as located on the plots filed in the action, though the same lines are the lines of his own land, and though the location he was called to prove would lessen his quantity of land.—King v. Tarlton, 2 Har. & McH. 473.

[d] (Pa. 1888) A person not a party to a suit, nor liable for the costs, nor claiming title to any of the land in controversy, nor having any interest in the result of the case, is not incompetent on the ground of interest, though he may be the owner of a tract which, with the one in suit, had formerly formed one tract, the division of which is one of the questions in controversy.—Berg v. McLafferty, 12 Atl. 460.

[e] (Va. 1848) A witness was called by demandant in a writ of right to testify as to the boundaries of the land in controversy. He held under a patent which called to adjoin the land embraced in the patent under which demandant claimed; and if that land should be located according to demandant's pretensions, the land of the witness would not be included; but if it should be located according to the pretensions of the tenant, it would cover a part of the witness' land. *Held*, that he was, nevertheless, a competent witness.—Masters v. Varner's Ex'rs, 5 Grat. 168, 50 Am. Dec. 114.

§ 282. Riparian owners.

[a] (Conn. 1845) Plaintiff, in an action for the diversion of a watercourse, offered as a witness for him the owner of land bordering on the same stream, and lying between the plaintiff's land and the place where the water so diverted was returned into its natural course, who was objected to on the ground of interest. *Held*, that such person was a competent witness, his interest being only in the question and not in the event of the suit.—Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739.

[b] (Me. 1827) In a prosecution by complaint against the owner of part of a milldam, for flowing lands, the owner of another part of the same dam, in severalty, is a competent witness for the respondent.—Clement v. Durgin, 5 Me. (5 Greenl.) 9.

[c] (Me. 1834) In an action of trespass on the case against one for an injury caused by the flowing of the waters of a certain pond, by a dam built by defendant at the head of a small stream forming the outlet of the pond, on which stream was a succession of mills, *held*, that the owners of the mills below were competent witnesses for defendant, though they participated, in common with him, in the benefit resulting from the erection of the dam.—Inhabitants of China v. Southwick, 11 Me. (2 Fairf.) 341.

[d] (Nev. 1865) In a suit to recover damages for the diversion of water, the complaint proceeded on the two grounds of a prior appropriation of the stream by plaintiff, and of defendant's diversion of the water from its natural channel. *Held*, that the owner of land on the stream above plaintiff was a competent witness for him, although the witness had an interest in the unobstructed running of the stream.—Geller v. Huffaker, 1 Nev. 22.

[e] (N. H. 1843) In an action for flowing land, defendant asserted a right to flow the land of plaintiff and others by means of a pond created by a dam attached to an ancient mill site. *Held*, that the owners of other lands, flowed in the same manner, were competent witnesses for plaintiff to rebut the evidence of defendant's right, as they were interested in the question only, and not in the event, of the suit, nor in the record.—Sargent v. Gutterson, 13 N. H. 467.

§ 283. Interest in patent.

Transfer, release or extinguishment of interest, see post, § 439.

[a] (U. S. 1822) In an action involving the validity of a patent, a witness who has in use a machine like that of plaintiff is not an incompetent witness merely because he would be entitled to continue the use of his machine if plaintiff's patent was declared void, as such interest is an interest in the question and not in the immediate event of the suit.—Evans v. Eaton, 20 U. S. (7 Wheat.) 356, 5 L. Ed. 472.

[b] (U. S. 1822) In a suit for infringement of a patent, a witness who uses a machine resembling that of plaintiff is not an incompetent witness for defendant because the patent of plaintiff may be defective, as the court cannot, in the case in which he is offered as a witness, declare the patent void so as to benefit a witness, though a verdict might be given for defendant on the ground that plaintiff was not the original inventor of the machine.—Evans v. Eaton, 20 U. S. (7 Wheat.) 356, 5 L. Ed. 472, affirming (1818) Fed. Cas. No. 4,560 [3 Wash. C. C. 443, 1 Robb, Pat. Cas. 193]; Same v. Hettick (1818) Fed. Cas. No. 4,562 [3 Wash. C. C. 408, 1 Robb, Pat. Cas. 166] affirmed (1822) 20 U. S. (7 Wheat.) 453, 5 L. Ed. 496.

[c] (U. S. 1818) In a suit for infringement of a patent, a witness who uses a machine resembling that of plaintiff is incompetent for defendant.—Evans v. Eaton. Fed. Cas. No. 4,560 [3 Wash. C. C. 443, 1 Robb, Pat. Cas. 193].

[d] (U. S. 1818) Where a verdict in a suit for infringement of a patent will not avoid the patent, a person using a machine similar to that used by defendant is not incompetent as a witness for defendant.—Evans v. Hettick, Fed. Cas. No. 4,562 [3 Wash. C. C. 408, 1 Robb, Pat. Cas. 166].

[e] (U. S. 1827) In an action for the infringement of a patent right, defendant, in order to prove that plaintiff was not the original inventor, gave in evidence a prior patent to A. for a machine alleged to have been the same in principle with plaintiff's, and his assignment of the same to defendant, and offered A. as a witness to prove the priority of the invention. *Held*, that A. was a competent witness, having no interest in the event of the suit.—Treadwell v. Bladen, Fed. Cas. No. 14,154 [4 Wash. C. C. 703, 1 Robb, Pat. Cas. 531].

[f] (U. S. 1848) An action for the infringement of a patent within the county of Albany, N. Y., was brought by parties claiming the exclusive right to the patent in that county. *Held*, that a party who was possessed of the ex-

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clusive right to the patent in several counties in the state of New York, but who had no interest in the patent in the county of Albany, and no interest in the suit in which he was called, was a competent witness for plaintiff.—Buck v. Hermance, Fed. Cas. No. 2,081 [1 Blatchf. 322, 1 Fish. Pat. Rep. 219].

[g] (U. S. 1853) An assignee of a patent, who understands that he has acquired the right to use an improvement thereto, is interested, and therefore incompetent to testify for the patentee on an interference to which the latter is a party, and which involves priority of invention of the improvement in question.—Cressler v. Custer, Fed. Cas. No. 3,388 [1 MacArthur, Pat. Cas. 216].

[h] (U. S. 1860) Upon the question of priority of invention in an interference case, one of the alleged inventors is not a competent witness in his own behalf, nor is another person, who is to have an interest in the patent if issued.—Appleton v. Chambers, Fed. Cas. No. 497a.

[i] (Conn. 1813) A., B., and C. were equally interested in certain inventions, as partners, for which they had severally obtained patents. A. through fraud and deceit induced one D. to purchase their right of using such inventions, the latter giving his notes in payment therefor, which were subsequently assigned by A. to one E., both D. and E. being ignorant of any fraud on the part of A. Afterwards one F. (who had previously bought of A., B., and C. the right of using these inventions within certain limits) made a contract with B., assigning to him one-half of his said interest, by which F. was to advance money to B. to enable him to introduce these inventions; B. was to give his personal services, and F. to bear B.'s expenses, in consideration of which B. assigned to F. one-half his interest in said inventions within certain other limits. Each party was to have full power; each was to account to the other; the profit, if any, after deducting F.'s advances, was to be divided; if none, F. was to bear the loss. F. received $2,000 as his share of the proceeds of the sale to D. D. brought a suit in chancery against E., praying for an injunction against suits brought at law against him by E. on said notes. E. offered to prove by F. that during the negotiation between E. and A. D. stated to A. that he believed the inventions to be original, and to be well secured by the patents, and that the notes might be safely bought, and promised E. to pay them when they became due. *Held*, that F. was directly interested in the event of the suit, and was incompetent as a witness.—Hillhouse v. Smith, 5 Day, 432.

5. GRANTOR OR VENDOR.

IN GENERAL, § 284.
TESTIMONY AS TO EXECUTION AND VALIDITY OF DEED, § 285.
FORMER GRANTOR OR VENDOR, § 286.
SALE BY PERSONAL REPRESENTATIVES OR TRUSTEES, § 287.
INTEREST OF WITNESS IN GENERAL, § 288.
TESTIMONY AS TO TITLE, § 289.
BALANCE OF INTEREST AS BETWEEN ADVERSE PARTIES, § 290.
LIABILITY ON COVENANT, § 291.
—— IMPLIED COVENANTS, § 292.
—— CHARACTER OF TESTIMONY, § 293.
—— BALANCE OF INTEREST AS BETWEEN ADVERSE PARTIES, § 294.

Parties to conveyance in general, see post, § 298.
Transactions fraudulent as to creditors, see post, § 307.
Transfer, release, or extinguishment of interest, see post, § 436.

§ 284. In general.

[a] The grantor of a quitclaim deed is a competent witness for plaintiff in ejectment.
—(Cal. 1858) Johnson v. Parks, 10 Cal. 446;
(N. Y. 1824) Jackson v. Hubble, 1 Cow. 613;
(Ohio, 1834) Swisher v. Williams, Wright, 754.

[b] (U. S. 1835) The grantors in deeds of release and quitclaim are competent witnesses to show that their estate was not absolute, but a mortgage, of which their grantees had notice at the time of the conveyance to them.—Taylor v. Luther, Fed. Cas. No. 13,796 [2 Sumn. 228].

[c] (Ala. 1848) A vendor of slaves, who sells without recourse against him for a defect of title, is a competent witness for his vendee.—Mahone v. Yancey, 14 Ala. 395.

[d] (Cal. 1859) In trespass, where the vendor's title does not come in question, he is a competent witness, though the price has not been paid.—Rowe v. Bradley, 12 Cal. 226.

[e] (Conn. 1805) In an action on the statute for receiving a deed of land while the grantor was out of possession and plaintiff was in, holding adversely, the grantor is a competent witness for defendant, to explain the character of plaintiff's possession at the time specified.—Nichols v. Hotchkiss, 2 Day, 121.

[f] (Ill. 1828) A grantor in a deed who has no interest in the suit and who has made no covenants is a competent witness.—Herbert v. Herbert, 1 Ill. (Breese) 354, 12 Am. Dec. 192.

[g] (Ind. 1847) A. conveyed a tract of land to B., by a deed, without covenants, which land was, at the time of the conveyance, in the adverse possession of C. The possession of the land was afterwards recovered by B. in an action of ejectment by the lessee of those heirs against B. for the premises, and defendant offered in evidence A.'s deposition, which was objected to on the ground that the deponent was interested. *Held*, that the objection was untenable.—Galbreath v. Zook, 8 Blackf. 366.

[h] (Ind. 1850) The simple fact that a person is a seller of property not in his possession at the time of sale does not disqualify him as a witness for the purchaser.—Lackey v. Stouder, 2 Ind. (2 Cart.) 376.

[i] (Ky. 1820) A vendor, selling without recourse, is a competent witness.—Connelly's Heirs v. Chiles, 9 Ky. (2 A. K. Marsh.) 242; Finlay v. Humble, Id. 569.

[j] (Ky. 1848) The vendor is a competent witness against his vendee.—Stemmons v. Duncan's Heirs, 48 Ky. (9 B. Mon.) 351.

[k] (La. 1833) The vendor is incompetent for his vendee, sued in a hypothecary action.—Sprigg v. Beaman, 6 La. 59.

[l] (La. 1861) When a sale is made without any warranty or recourse whatever, the purchaser buys at his own risk and peril, and cannot claim restitution; ergo, the vendor in such case is a good witness, and not interested in proceedings aliunde.—Cannon v. White, 16 La. Ann. 85.

[m] (Md. 1800) A bill of sale of personal property of which the vendor retained the possession, if for a bona fide consideration and duly executed, acknowledged, and recorded, passed such property absolutely to the vendee, and therefore the vendor was a competent witness to prove that, being in possession of said property, he gamed the same away at cards.—Fister v. Beall's Adm'rs, 1 Har. & J. 31.

[n] (Md. 1809) Where the acknowledgment of a feme covert, one of the grantors in a deed, is declared defective, she may be admitted to give evidence for defendant, in an action of ejectment for the same land conveyed by her deed, brought by a person claiming under her

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deed.—Hall v. Gittings' Lessee, 2 Har. & J. 380.

[o] (Md. 1826) In replevin, the former owner of the goods replevied is not a competent witness to prove that he had sold them to plaintiff, and that they had subsequently been sold under execution on the judgment of a third person, and purchased by defendant.—Giese v. Thomas, 7 Har. & J. 458.

[p] (Mass. 1825) In an action by one of two grantors, against the grantee, in which the construction of the deed came in question, *held*, that the other grantor was a competent witness to establish a collateral fact as to the situation of the premises at the time of the grant.—Baker v. Sanderson, 20 Mass. (3 Pick.) 348.

[q] (Mass. 1828) A. and B., joint owners of a chattel, sell it on a condition precedent, and make a delivery subject to the condition, which not being complied with, and the chattel being attached by a creditor of the vendee, A. sells his part to B., who replevies the chattel. *Held*, that A. is a competent witness.—Smith v. Dennie, 23 Mass. (6 Pick.) 262, 17 Am. Dec. 368.

[r] (Mass. 1829) In replevin by a purchaser of chattels against an attaching officer, it appeared that the seller of the chattels had taken a note for the price, and obtained money thereon, and that the chattels were thereafter attached as his property, but it was doubtful whether the note was in fact negotiable, or whether it still remained in the hands of the seller. *Held* that the seller was in such case a competent witness.—Bailey v. Foster, 26 Mass. (9 Pick.) 139.

[s] (Miss. 1843) The grantor in a deed, under which the lessor in ejectment claims, is a competent witness for defendant.—Doe v. Jackson, 9 Miss. (1 Smedes & M.) 494, 40 Am. Dec. 107.

[t] (N. Y. 1823) One who has delivered possession of premises to defendant in ejectment, upon his agreement to purchase, cannot be a witness for him.—Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514.

[u] (N. Y. 1858) The vendor of a personal chattel, or of a thing in action, was, before the Code, a competent witness for his vendee in a suit by the latter against a third person who had wrongfully converted such chattel or appropriated such thing in action to his own use.—Crosby v. Nichols, 16 Super. Ct. (3 Bosw.) 450.

[v] (N. C. 1857) In an action of trover for the conversion of a personal chattel, if defendant does not rely on a title in himself adverse to that of plaintiff's vendor, such vendor is a competent witness for plaintiff to prove the sale to him.—Wetmore v. Click, 50 N. C. 155.

[vv] (Pa. 1845) In a suit for damages occasioned by the erection of a dam, a stranger to the suit, whose land is thereby flooded, is not incompetent to testify, although he may have granted the right of erection to defendant, and defendant cannot avail himself of it except by thus swelling the water.—Riddle v. Dixon, 2 Pa. (2 Barr) 372, 44 Am. Dec. 207.

[w] (Pa. 1847) Where an assignor of land had previously failed in an ejectment suit to retain such land, he is a competent witness for his assignee.—Mix v. Smith, 7 Pa. (7 Barr) 75.

[ww] (Pa. 1851) In a suit against a sheriff for levying on goods of the plaintiff under an execution against a third person, who sold the goods to plaintiff, the vendor is a competent witness to prove that the sheriff levied on goods that never belonged to the vendor, and that had been bought from others by the vendee, since the sale which is charged with fraud, and to show the value of such goods.—Helfrich v. Stem, 17 Pa. (5 Harris) 143.

[x] (Pa. 1852) In ejectment by the former owner against the grantee of the purchaser at a tax sale, such purchaser is a competent witness to show that he did not give a bond for the surplus money, and that the land was seated when sold for taxes as unseated.—Trego v. Huzzard, 19 Pa. (7 Harris) 441.

[xx] (Pa. 1856) A vendor of goods is a competent witness for his vendee in an action against a party claiming as a bailee of the vendor prior to the sale.—Miller v. Pothier, 2 Phila. 163.

[y] (Pa. 1861) In trespass against a sheriff for seizing and selling plaintiff's piano under judgment and execution against her son, from whom she purchased it, the vendor is a competent witness on the part of plaintiff; for both plaintiff and defendant claim title through him, and the sale to the mother, whether fraudulent or not, implied no guaranty of title.—Graham v. McCreary, 40 Pa. (4 Wright) 515, 80 Am. Dec. 591.

[yy] (Pa. 1864) Where a father purchases land and has it conveyed to his son, he is not incompetent to testify in ejectment brought by the son for land alleged to be within the limits of the purchase.—Shaw v. Read, 47 Pa. (11 Wright) 96.

[z] (Pa. 1864) A vendor of a sawmill improvement erected by him on leased land, by assignment and quitclaim conveyance indorsed on the lease, without warranty, is a competent witness in an action brought by the vendee against a constable for levying on and selling a portion of the machinery, on an execution against the former owners; for, if the articles sold were fixtures, they passed by the assignment, without warranty; if detached and personalty, they were not embraced in the assignment, and there was no implied warranty.—McInroy v. Dyer, 47 Pa. (11 Wright) 118.

[zz] (Vt. 1835) Where the title to premises is not put in issue, it is no objection to the competency of a witness that he is the grantor of the party calling him.—Hull v. Fuller, 7 Vt. 100.

§ 285. Testimony as to execution and validity of deed.

[a] The grantor in a deed is a competent witness to impeach it.

—(Ala. 1851) Norton v. Linton, 18 Ala. 690;
(Mass. 1834) Hudson v. Hulbert, 32 Mass. (15 Pick.) 423;
(N. H. 1830) Hadduck v. Wilmarth, 5 N. H. 181, 20 Am. Dec. 570;
(Pa. 1814) McFerran v. Powers, 1 Serg. & R. 102; (1818) Brown v. Downing, 4 Serg. & R. 494;
(S. C. 1845) Schroter v. Holly, 2 Rich. Law, 15.

[b] (U. S. 1804) The grantor, in a deed collaterally introduced as evidence in a cause inter alios, may be a witness to prove that the deed was fraudulently obtained.—Bank of Columbia v. French, Fed. Cas. No. 867 [1 Cranch, C. C. 221].

[c] (U. S. 1837) The grantor, who quitclaimed land to plaintiff and defendant, is competent to testify in behalf of plaintiff that the conveyance was delivered as a deed, and not as an escrow.—Flagg v. Mann, Fed. Cas. No. 4,847 [2 Sumn. 486].

[d] (U. S. 1855) The grantor is a competent witness to prove that the certificate of acknowledgment and registration of a deed was fraudulently antedated.—Holbrook v. Worcester Bank, Fed. Cas. No. 6,597, [2 Curt. 244].

[e] (Ala. 1839) A witness who has executed a deed, the validity of which he denies, renouncing title to property, is competent to prove its

execution, although he may since have made a contract disposing of the property to one of the parties to the action.—Swift v. Fitzhugh, 9 Port. 39.

[f] (Ala. 1847) The grantor in a deed is a competent witness to impeach it for fraud, if he was not interested in some way so as to render him incompetent on that ground.—Sims v. Killen, 12 Ala. 497.

[g] (Ky. 1832) The grantor in a deed is competent to prove its execution so far as he was concerned.—Smith v. Morrow, 30 Ky. (7 J. J. Marsh.) 442.

[h] (N. Y. 1838) A person alleged to be the grantor in a deed of real estate is not estopped from proving the deed a forgery, in a question of title between third persons.—Jackson v. Leek, 19 Wend. 339.

[i] (N. Y. 1862) The grantor in a deed left it for record at the county clerk's office, and it was recorded. He subsequently brought an action to recover the land, and offered to prove that, in putting it upon record, he did not intend to deliver it, or that the record should operate as delivery, but he did it with a view to a delivery at a future day, if it should be necessary in order to secure debts due from him to the grantee, who was a creditor. *Held*, that this evidence was admissible, and plaintiff was a competent witness in this respect.—Van Valen v. Schemerhorn, 22 How. Prac. 416.

§ 286. Former grantor or vendor.

[a] (Ala. 1834) Where A. sells property to B., and B. sells the same to C., and the property is levied on and sold to D. under an execution against A., in a suit brought by C. to recover the property from D., A. is not a competent witness for C.—Pruit v. Lowry, 1 Port. 101.

[b] (La. 1845) Where the purchaser of succession property, sued for the price, only asks for security against eviction, the vendors of the deceased are competent to explain facts connected with the title and prove the extinction of their mortgage.—Skolfield v. Rhodes, 10 Rob. 128.

[c] (Mo. 1852) In an action to recover back the price of a cow sold by defendant to plaintiff, on the ground that defendant had no title to sell, the person of whom defendant purchased the cow is a competent witness in his behalf.—Fallon v. Murray, 16 Mo. 168.

§ 287. Sale by personal representatives or trustees.

[a] (Md. 1817) A debtor agreed with his creditors in order to obtain a release of their claims to sell to them at fixed prices certain land. Trustees were appointed by the creditors to whom the debtor executed his agreement, stipulating the sale of his property on certain terms. *Held*, in an action by the trustees to recover the purchase price of land sold pursuant to the agreement, that the debtor was a competent witness to prove the terms on which the purchase was made.—Lansdale's Ex'x v. Ghequiere, 4 Har. & J. 257.

[b] (Md. 1828) An administrator, since he is liable to a vendee of personal property of his intestate, sold by him as administrator, on failure of title only in case of express warranty, fraud or other facts creating a special liability, is a competent witness for the vendee in trover by him against a third person for the property, unless objected to on the ground of a special liability to the vendee, and the objection sustained by proof.—Mockbee's Adm'r v. Gardner, 2 Har. & G. 176.

[c] (N. J. 1820) A conveyance of the testator's right to land by his executors, without warranty, does not render them incompetent to testify in a case where the title to the land is brought in question.—Burroughs v. Thome, 5 N. J. Law (2 Southard) 777.

[d] (N. C. 1839) A trustee, who has acted by selling the trust property, and has retained his commission for so doing, may be a witness in support of the deed in trust, if he has conveyed the property without covenants or responsibility.—Norwood v. Marrow, 20 N. C. (3 & 4 Dev. & B.) 578.

[e] (Pa. 1837) The executors, who were also sons-in-law of the testator, sold lands that were overflowed by a dam. *Held*, that they were witnesses for their vendee in a suit brought by him against the owner of the mill for damages, there being no fraud nor warranty on the part of the executors.—Krause v. Reigel, 2 Whart. 385.

§ 288. Interest of witness in general.

[a] (Ala. 1854) In detinue for a slave, defendant introduced as a witness the father of his vendor, who testified that he held an order on defendant from said vendor for the balance of the purchase money, which was to be paid at the termination of the suit, and that said vendor had given this order as a present to his mother, who was the wife of the witness. *Held*, that the witness was incompetent, from interest, to testify for defendant.—Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

[b] (Cal. 1858) The parol promise of the vendor that he would make good certain boundaries of claims, as represented by him, is not binding, and he is not legally interested in a suit therefor by his vendee. To disqualify him as a witness, the liability must be legal, not merely moral, and the consequent interest present, certain, and vested.—Jones v. Love, 9 Cal. 68.

[c] (Cal. 1858) One interested in land at the time of the detention, but who has since released to his cotenants without warranty, is interested, and incompetent, in an action for the land and damages for its detention.—Packer v. Heaton, 9 Cal. 568.

[cc] (Cal. 1861) A vendee of land brought suit in ejectment and claimed for damages accruing while the land was held by his vendor. *Held*, that the vendor was not incompetent as a witness for the vendee, by reason of interest.—Grady v. Early, 18 Cal. 108.

[d] (Iowa, 1855) The question was as to the ownership of real estate, both parties deriving title from the same grantor, and defendant claimed that plaintiff's deed had never been delivered; that $200 was to be paid by plaintiff to a third person for the benefit of the grantor; that he took the deed without paying the money; that defendant was surety for this payment, and having paid the debt the said grantor had conveyed the estate to him, and offered the grantor to prove these facts. *Held*, that the witness was incompetent on the ground of interest.—Ayres v. Campbell, 1 Iowa (1 Clarke) 212

[e] (Me. 1850) In a writ of entry in which the tenant claimed for betterments, being certain buildings on the land, the demandant, claiming under a quitclaim deed to himself, offered the grantor in such deed as a witness, who testified on the voir dire that he sold both land and buildings by the deed. *Held*, that he was a competent witness and not interested.—Buller v. Arnold, 31 Me. 583.

[f] (N. H. 1842) Where A. and B. were interested in certain timber, and A. sold his interest to B., after which B. commenced an action of trover against C. to recover damages for the conversion of some of the timber, *held*, that A. had no interest in the suit, and was a competent witness for B.—Walker v. Sawyer, 13 N. H. 191.

[g] (N. H. 1853) A. sold to B. personal property as his own. Afterwards C. took away the property, claiming it under a mortgage from A. made prior to the sale. The amount paid by B. exceeded the amount of the mortgage. In an

action of trespass by B. against C. for the taking, *held*, that A. was not a competent witness to prove the trespass, by reason of his interest in the event of the suit.—Smith v. Fairbanks, 27 N. H. (7 Fost.) 521.

[h] (N. J. 1842) In an investigation to determine who is bound to support a pauper that has been a slave, a former owner is not a competent witness to prove that he had made to another an absolute sale of the negro as a slave for life.—Overseers of Poor of Perth Amboy Tp. v. Piscataway Tp., 19 N. J. Law (4 Har.) 173.

[i] (N. J. 1853) A sexton sold a hearse to his successor in office, subject to the right of certain subscribers to its use. *Held*, that the interest of such vendor, in the event of an action for said hearse between his vendee and a subsequent sexton, was not sufficient to destroy his competency as a witness.—Bogert v. Chrystie, 24 N. J. Law (4 Zab.) 57.

[j] (N. Y. 1818) A person who has fraudulently acquired land, and fraudulently conveyed it, though by quitclaim deed without covenants, is liable to his grantee for the fraud, and is not a competent witness for his grantee, in a suit for the land, by a person claiming it as a bona fide purchaser.—Roberts v. Anderson, 3 Johns. Ch. 371.

[k] (Pa. 1841) In ejectment by the purchaser of only the vendor's claim to land, taking it at his own risk, the vendor is a competent witness for plaintiff, although all the purchase money has not been paid.—Cleavinger v. Reimar, 3 Watts & S. 486.

[l] (S. C. 1836) In trover by the representative of a trustee to whom the property in question had been conveyed, against a purchaser at a sheriff's sale under an execution against the grantor, a daughter of the grantor to whom he had conveyed other property at the same time was a competent witness for defendant to impeach the deed, as there was no warranty by the grantor in such sale by the sheriff, and therefore failure to acquire title thereby did not render the property conveyed to the daughter liable to be seized.—Thompson v. Schmidt, 3 Hill, 156.

[m] (Tenn. 1815) In an action by a vendee for the unlawful seizure of the property by the sheriff on execution as the property of the vendor, the vendor is not precluded by interest from being a witness for plaintiff.—Alston v. Huggins, 2 Tread. Const. 688.

§ 289. Testimony as to title.

[a] A vendor of goods is not a competent witness to support the title of his vendee against third persons, claiming adversely to his own title.

—(Me. 1830) Hale v. Smith, 6 Me. (6 Greenl.) 416;

(N. Y. 1810) Heermance v. Vernoy, 6 Johns. 5;

(S. C. 1828) Saunders v. Addis, 1 Bailey, 49.

[b] (Ark. 1859) A vendor is a competent witness to impeach a title derived from himself by a bill of sale.—Clinton v. Estes, 20 Ark. 216.

[c] (Ark. 1866) A vendor of personal property is not a competent witness for his vendee in a suit where the title of such property is in question.—Lindsay v. Lamb, 24 Ark. 222; Dunnahoe v. Williams, Id. 264.

[d] (Ark. 1866) A vendor of personal property is a competent witness for a party contesting the title of his vendee.—Dickerson v. Johnson, 24 Ark. 251.

[e] (Conn. 1795) Proprietors are admitted to testify respecting the title to land which they have quitclaimed for a valuable consideration. —Lay v. Hayden, 2 Root, 317.

[f] (Conn. 1822) On a bill for foreclosure, plaintiff's grantor, who had conveyed the premises to a third person with covenants of seisin and warranty, was a competent witness to support plaintiff's title, as a decree in chancery taking away an equity of redemption can be no evidence, in a court of law and between other parties, of a breach of covenant.—Beers v. Broome, 4 Conn. 247.

[g] (Iowa, 1858) The grantor in a deed is a competent witness to show that he had no title to convey, in a suit between his grantee and his alleged cestui que trust.—Robb v. Lefevre, 7 Iowa (7 Clarke) 150.

[h] (La. 1845) A vendor is incompetent in an action against his vendee concerning the title. —Skolfield v. Rhodes, 10 Rob. 128.

[i] (La. 1858) The vendor of a steamboat is not a competent witness for his vendee, in a suit in which the title to the boat is involved. —Bennett v. Quirk, 13 La. Ann. 547.

[j] (La. 1860) A vendor, who is not bound in warranty, is a competent witness to testify in a case where the title of property sold by him is involved.—Hyman v. Bailey, 15 La. Ann. 500.

[k] (Mass. 1850) The vendor of personal property in possession is not a competent witness for the vendee, in an action against him, in which the title to the property is in controversy.—Whitney v. Heywood, 60 Mass. (6 Cush.) 82.

[l] (N. Y. 1825) The grantor in a quitclaim deed is a competent witness to support the grantee's title.—Jackson v. Delancey, 4 Cow. 427.

[m] (Pa. 1802) The vendor of an improvement right, without warranty, is a competent witness to the title in ejectment.—Johnson's Lessee v. Eckart, 3 Yeates, 427.

[n] (Pa. 1809) The grantor of a deed without warranty or fraud is a competent witness to support titles derived thereunder.—Gratz's Lessee v. Ewalt, 2 Bin. 95; Cain's Lessee v. Henderson, Id. 108.

[o] (Pa. 1860) The grantor in an instrument giving property to the separate use of a wife, as he has no lien on the property, nor present right to withdraw the fund so contributed, is a competent witness for the wife in an issue on the right of property as between her and her husband.—Gillespie v. Miller, 37 Pa. (1 Wright) 247.

[p] (Tenn. 1834) In a suit against the vendee of a slave to recover the slave, the vendor is a competent witness to prove that he had no title to the slave when he sold him.—Shropshire v. Shropshire, 15 Tenn. (7 Yerg.) 165.

[q] (Tex. 1857) The vendor of a cow is not a competent witness to prove property in his purchaser in a suit where the controversy is whether the vendor sold the same cow to another person, or a different cow, as this creates an interest in the result of the suit.—Wright v. Bonta, 19 Tex. 385.

[r] (Vt. 1841) The vendor of a chattel is not a competent witness for the vendee, to sustain his title, in an action between the vendee and one claiming under a third person.—Parker v. Hammond, 13 Vt. 242.

§ 290. Balance of interest as between adverse parties.

Liability on covenant, see post, § 294.

[a] In the question of title between the vendee of property and a creditor of the vendor, the interest of the vendor is balanced, and he is competent to testify.

—(Me. 1841) Cutter v. Copeland, 18 Me. (6 Shep.) 127; Nichols v. Patten, Id. 231, 36 Am. Dec. 713;

(Tex. 1852) McKay v. Treadwell, 8 Tex. 176.

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[b] (U. S. 1813) Where a son gave a bill of sale of property in his possession under loan from his father, to whom it belonged, the son is a competent witness in trover by the vendee against the father for the property to prove that the property was his father's, and that he sold it without authority, since a judgment for plaintiff or defendant will affect him equally. —Stump v. Roberts, Fed. Cas. No. 13,561 [3 Tenn. (Cooke) 350].

[c] (Ala. 1828) A vendor of property to two different persons is a competent witness, in an action between them for possession, his interest being equally balanced. And an indemnity given to one of the purchasers by the vendor only goes to his credit.—Jones v. Park, 1 Stew. 419.

[d] (Ala. 1832) A vendor is a competent witness for the vendee, in a suit involving the title, where it appears that his interest is equally balanced.—Garner v. Bridges, 38 Ala. 276.

[e] (Ill. 1844) A. sued B., in an action of replevin to recover the possession of certain goods. B. avowed the taking of the goods, as sheriff, by virtue of a writ of attachment in favor of C. and against D., and also pleaded property in D. A. replied property in himself, and not in D., and, on the trial, offered to prove by D. a sale from D. to him. *Held*, that D. was a competent witness.—Miller v. Dobson, 6 Ill. (1 Gilman) 572.

[f] (Ill. 1864) The vendor of property, which was subsequently replevied in the hands of an agent of the vendee, is a competent witness in the suit, in behalf of defendant, to prove title in his principal, although it should appear that the witness had purchased the property as the agent of plaintiff, and with his funds, and was not the owner of it at the time he sold it; in such case his interest would be equally balanced between the parties.—Goodrich v. Hanson, 33 Ill. 498.

[g] (Me. 1831) Where the owner of a vessel sold it to defendant, who promised in consideration thereof to pay plaintiff a debt due him from the owner, and plaintiff brought an action against defendant on this promise, the owner was a competent witness for plaintiff, his interest being equally balanced.—Brown v. Attwood, 7 Me. (7 Greenl.) 356.

[h] (Me. 1835) Where goods have been attached as the property of a witness and replevied by his vendee, the witness is competent to testify for the vendee, since, if the vendee prevails, the warranty, actual or implied, is satisfied, while if the creditor prevails, the value of the goods is applied to the payment of the witness' debt.—Eldridge v. Wadleigh, 12 Me. (3 Fairf.) 371.

[i] (Me. 1841) The vendor of goods may be a witness as well to defeat as to sustain the sale, his interest being balanced; and the balance would not be destroyed by the vendee taking a release from a subsequent purchaser of the vendor, as that fact would not furnish a defense to the vendor in an action by the vendee against him on the implied warranty of title.—Morrison v. Fowler, 18 Me. (6 Shep.) 402.

[j] (Me. 1850) When both parties to a replevin suit claim the property by purchase from the same vendor, his interest is balanced, and he is a competent witness, without a release to impeach one of the sales.—Nute v. Bryant, 31 Me. 553.

[k] (Me. 1855) In a real action, the demandant and tenant claimed under the same grantor, and the demandant sought to recover on the ground that the tenant, at the date of the delivery of his deed, had notice of the demandant's mortgage. *Held*, that the grantor's interest was so evenly balanced as to make him a competent witness in the case.—Paul v. Frost, 40 Me. 293.

[l] (Mass. 1838) Plaintiff sold goods to A. on a credit. A. immediately sold them again to defendant. Plaintiff brought replevin for them, on the ground that they had been obtained of him through the fraud of A. and defendant. *Held*, that A.'s interest in the suit was precisely balanced, and consequently that he was a competent witness for defendant.—Bucknam v. Goddard, 88 Mass. (21 Pick.) 70.

[m] (N. H. 1842) A fraudulent purchaser of a chattel is not a competent witness for his vendee of the same chattel, in an action brought by such vendee against the original vendor, who had repossessed himself of the chattel, to recover the value of the same. His interest is not equally balanced; he is liable to his vendor only for the value of the chattel; but he is liable to his vendee for the necessary expenses of the suit, in addition.—Kingsbury v. Smith, 13 N. H. 109.

[n] (N. Y. 1848) In trover, where the value of the property as well as the title to it is in question, one who had sold it to defendant is not a competent witness on his behalf, though he is so situated as to be liable to plaintiff if the sale were unauthorized as well as to defendant on the warranty of title; such witness having a pecuniary motive for undervaluing the property by his testimony.—Fuller v. Townsend, 5 Denio, 184.

[o] (Ohio, 1847) In replevin by the vendee for goods levied on as property of the vendor, the vendor is a competent witness for plaintiff.—Lewis v. Nugen, 1 Ohio Dec. 215.

[p] (Pa. 1791) In replevin for cattle claimed by both parties as vendee from a common vendor, such vendor, being equally liable to both parties, will be allowed to give evidence.—Miller v. Little, 1 Yeates, 26.

[q] (Pa. 1841) On the question of right of property to goods, where both parties claim as vendees of the same person, the vendor is not a competent witness to prove that he sold to one and not to the other.—McCabe v. Morehead, 1 Watts & S. 513.

[r] (Pa. 1844) The vendor of chattels, under whom both parties claim in an action of trover, is a competent witness for plaintiff.—Miller v. Fitch, 7 Watts & S. 366.

[s] (Pa. 1868) In an action to try the title to property between two parties claiming under the same vendor, he is a competent witness for either party.—Hill v. Canfield, 56 Pa. (6 P. F. Smith) 454.

[t] (S. C. 1824) Plaintiff and defendant claimed the same slaves under different bills of sale from A. *Held*, that A. was a competent witness to prove that the bill of sale of plaintiff had been obtained by fraud.—Willbourn v. Parham, Harp. 375.

[u] (Tenn. 1868) In an action of trover by the person claiming to be the owner of cotton against a defendant to whom the cotton was delivered to gin on shares, the original owners of the cotton are competent witnesses to prove their sale of it to plaintiff.—Waller v. Parker, 45 Tenn. (5 Cold.) 476.

§ 291. Liability on covenant.

[a] The warrantor of property, whether real or personal, is, in general, incompetent as a witness for his vendee or grantee, in an action concerning the title to such property.

—(Ark. 1856) McCarron v. Cassidy, 18 Ark. 34;
(Ky. 1853) Edwards v. Ballard, 53 Ky. (14 B. Mon.) 289;
(La. 1831) Baines v. Higgins, 2 La. 220; (1837) Gravier's Curator v. Cullion, 11 La. 269;
(Miss. 1845) Moore v. McKie, 13 Miss. (5 Smedes & M.) 238;
(Tenn. 1855) Elliott v. Boren, 34 Tenn. (2 Sneed) 662.

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[b] The grantor in a deed of conveyance, who covenants that he has good right to sell the land, and that he will warrant the same against all persons claiming under him, is a competent witness for the grantee, in an action brought by him against one who does not claim under the grantor, as he cannot be interested in the event of a suit.
—(Ky. 1820) McClain v. Gregg, 9 Ky. (2 A. K. Marsh.) 454;
(Mass. 1808) Twambly v. Henley, 4 Mass. 441;
(Pa. 1814) Sweitzer's Lessee v. Meese, 6 Bin. 500;
(Vt. 1833) Beach v. Sutton, 5 Vt. 209.

[c] (Ala. 1827) A vendor, with warranty, and his wife, are competent witnesses, in an action to recover the property, between a subsequent vendee claiming under him and a stranger, for such stranger.—Martin v. Kelly, 1 Stew. 198.

[d] (Ala. 1848) A vendor of slaves with warranty of title is a competent witness for a purchaser of the slaves from his vendee, it not being shown that the warranty of the first vendor covered the title by which the plaintiff sought a recovery. Whether a remote vendor of slaves can, by any proceeding, be charged on a warranty to his immediate vendee, the second vendee having purchased a mere quitclaim, and having no right of action against his immediate vendor, quære.—Mahone v. Yancey, 14 Ala. 395.

[e] (Ark. 1856) The vendor in a bill of sale of personal property, setting forth a money consideration, and containing a warranty of title against all claims, by or through the vendor, is an incompetent witness to sustain the title of his vendee, in an action between such vendee and other parties claiming under the vendor.—Arnold v. McNeill, 17 Ark. 179.

[f] (Ark. 1859) Where the title to property is in controversy, a person who is bound to make it good to one of the litigating parties against the claim of the other is identified in interest with that party, and cannot testify in his favor.—Meek v. Walthall, 20 Ark. 648.

[g] (Cal. 1859) One who gives a bill of sale of a mining claim, with warranty of title, thereby creating a warranty running with the land, is not a competent witness in a suit for the possession by his vendee's vendee.—Blackwell v. Atkinson, 14 Cal. 470.

[h] (Conn. 1823) A. conveyed land in fee to B. by a deed, with the usual covenants of seisin and warranty, after which no alienation of it was made by A. or B. Four years after, C., claiming such conveyance to have been fraudulent, levied execution on the land as the land of A., and had it set off to him. In ejectment by C. against B. for the land, *held*, that A. was a competent witness for B., a recovery and eviction by C. not subjecting him on his covenant of warranty.—Giddings v. Canfield, 4 Conn. 482.

[i] (Conn. 1846) In an action by an assignee in bankruptcy to set aside a fraudulent conveyance by the bankrupt, the bankrupt is not incompetent to testify by reason of the covenants in his deeds to defendant, since the title to the property conveyed was not in question.—Steene v. Aylesworth, 18 Conn. 244.

[j] (Ga. 1847) In a suit to set aside the sale of a lot of land, a witness offered was objected to on the ground of interest, he having covenanted to protect the title of the land against all incumbrances generally. *Held*, that he was competent unless it appeared affirmatively that there were incumbrances on the land at the time of sale.—Adams v. Barrett, 3 Ga. (3 Kelly) 277.

[k] (Ill. 1865) A grantor in a deed containing covenants for title is not a competent witness on behalf of plaintiff in ejectment, who relies on the deed to prove its execution, since he has a disqualifying interest in the result of the suit. —Hamilton v. Doolittle, 37 Ill. 473.

[l] (Ill. 1867) A grantor with covenants of general warranty is, without a release therefrom, an incompetent witness for his grantee in a suit involving in issue the validity of an adverse chain of title.—Lester v. White's Heirs, 44 Ill. 464.

[m] (Iowa, 1859) A grantor of real estate, who conveys by deed of general warranty, is a competent witness for the complainant in an action against his grantee, to show that the grantor conveyed, by mistake, a greater interest in the land than he possessed, and to enforce the trust against the grantee. In such a case he is called to testify against his interest. — Stewart v. Chadwick, 8 Iowa (8 Clarke) 463.

[n] (Ky. 1812) A vendor is responsible on a warranty against himself only in case of eviction by an adverse claim, and therefore is a competent witness in support of the vendee's title.—Manifee v. Conn's Heirs, 5 Ky. (2 Bibb) 623.

[o] (Ky. 1869) Where a debtor conveyed land to a trustee for the benefit of creditors, and the debtor and trustee sold the land and conveyed it to the purchaser with general warranty, the trustee, being personally liable thereon, was an incompetent witness in a suit by the purchaser against the debtor on the warranty. —Graves v. Mattingly, 69 Ky. (6 Bush) 361.

[p] (La. 1811) The daughter of defendant's warrantor is not competent for defendant.—Meunier v. Couet, 2 Mart. (O. S.) 56.

[q] (La. 1859) A witness cannot be objected to on the ground of interest because he is liable to the defendant as warrantor, if he has not been cited in warranty in the suit in which he is called to testify.—Arrowsmith v. Durell, 14 La. Ann. 849.

[r] (La. 1868) In an action to enforce a right of servitude attached to land, plaintiff's vendor and warrantor of the rights of servitude claimed is a competent witness for defendant.—Macheca v. Avegno, 20 La. Ann. 339.

[s] (Me. 1836) In an action in which land of defendant is attached on mesne process, and the same land is afterwards conveyed by him with warranty, his grantee, who has also conveyed the land with warranty, is not a competent witness for defendant on the ground of interest.—Kendall v. Field, 14 Me. (2 Shep.) 30, 30 Am. Dec. 728.

[t] (Md. 1839) A bill of sale of personal property, with a warranty of title, recited a mortgage of the same property previously executed by the grantor, and was made subject to its operation. *Held*, in an action by the grantee for a trespass on the property conveyed, that as he could not sustain an action for a breach of warranty, on the ground of a paramount title in the mortgagee, the grantor had no interest in the result of the suit, and might be called as a witness for the plaintiff.—Warfield v. Walter, 11 Gill & J. 80.

[tt] (Md. 1850) Where two coheirs, in a deed of partition, conveyed, each to the other, certain parcels thereof to be held in severalty, with a covenant that each should hold the parcels so conveyed free from any claim on the part of the other, but neither covenanted to assure the title of the other, either is a competent witness for the other.—Morris v. Harris, 9 Gill, 19, affirming Harris v. Morris (1847) 4 Md. Ch. 529.

[u] (N. H.) A grantor who has conveyed with warranty is admissible as a witness to support the title of his grantee, in an action where the title set up by the other party is not adverse to that which he has conveyed, aliter, where

the validity of the title which he has thus conveyed is in controversy.—(1838) Harris v. Fletcher, 10 N. H. 20; (1850) Prescott v. Hawkins, 22 N. H. (2 Fost.) 191.

[uu] (N. J. 1854) A trustee who has given a warranty deed of trust property is not a competent witness in a matter affecting such property.—Farley v. Woodburn, 10 N. J. Eq. (2 Stockt.) 96.

[v] (N. Y. 1802) The grantor of a deed with covenants of warranty is a witness against his grantee in a suit brought against him for trespass on the premises.—Van Nuys v. Terhune, 3 Johns. Cas. 82.

[vv] (N. Y. 1807) Where the same person conveys two adjoining parcels of land to different persons, by deeds of warranty, and in an action between the grantees, in which the question is whether the bounds of the land first conveyed do not include the premises conveyed by the subsequent deed, the grantor is not a competent witness, being interested to support the title of the subsequent grantee.—Jackson v. Hallenback, 2 Johns. 394.

[w] (N. Y. 1829) A grantor, with covenant of warranty, is a competent witness for his grantee, in an action of ejectment brought by him, although he could not be a competent witness to support his vendee's title in an action against him for the premises by a third person.—Jackson v. Rice, 3 Wend. 180, 20 Am. Dec. 688.

[ww] (Pa. 1835) A grantor with special warranty is a competent witness for his grantee, in an action of ejectment.—Burns v. Lyon, 4 Watts, 368.

[x] (Pa. 1842) A grantor with general warranty is not a competent witness in an action of ejectment in which the outstanding title granted by him is set up as a defense.—Goodman v. Losey, 3 Watts & S. 526.

[xx] (Pa. 1847) After the warranty in a land warrant has failed, in an ejectment suit, to recover the land, he is a competent witness in a subsequent suit by his assignee.—Mix v. Smith, 7 Pa. (7 Barr) 75.

[y] (Tenn. 1852) The vendor of a slave who sells with warranty of soundness and of title is an incompetent witness for his vendee in a suit involving the question of his soundness.—Burke v. Clarke, 32 Tenn. (2 Swan) 310.

[yy] (Tenn. 1856) A remote warrantor, where there have been several conveyances with warranty of the same piece of real estate, is not a competent witness in support of the title in an ejectment, he being liable on his warranty.—Lawrence v. Senter, 36 Tenn. (4 Sneed) 52.

[z] (Tex. 1859) The warrantor of a title, the validity of which cannot be affected by the suit, is not interested therein.—Loftin v. Nally, 24 Tex. 565.

[zz] (Vt. 1846) The vendor of personal property is a competent witness for the vendee, in an action of trespass brought by the latter, against a sheriff, for taking the property as the property of the vendor, notwithstanding the vendor had executed to the vendee a bill of sale of the property in which he covenanted that he was the owner of the property, and that he would warrant and defend the same to the vendee against all lawful claims and demands of all persons whatsoever.—Cox v. Hall, 18 Vt. 191.

§ 292. —— Implied covenants.

[a] (La. 1834) The vendor is incompetent to prove the vendee's possession so as to form the basis of title by prescription, though the deed contains no clause of warranty; the vendor being bound in warranty when the deed does not exclude it.—Green v. Hudson's Syndics, 7 La. 120.

[b] (Me. 1835) Where one turned out property as his own, to be taken by a collector for the payment of taxes, which property was afterwards replevied by a third person, who claimed to be the owner, *held*, that the first was not a competent witness in such suit for the collector, he being liable to the collector on his implied covenant of title.—Brewer v. Curtis, 12 Me. (3 Fairf.) 51.

[c] (Me. 1850) In a sale of personal property, there is an implied warranty of title on the part of the vendor, and he cannot be a witness for his vendee in a suit in which such vendee is attempting to recover for the value of the property against a third person.—Thompson v. Towle, 32 Me. 87.

[d] (Md. 1856) The vendor of personal property is not a competent witness to sustain the title of his vendee, there being an implied contract of warranty of title on his part.—Heskett v. Borden Min. Co., 10 Md. 179.

[e] (N. C. 1844) A vendor of a personal chattel is an incompetent witness to prove title in his vendee, unless on receiving from the vendee a release of his liability.—Freeman v. Lewis, 27 N. C. 91.

[f] (Pa. 1797) A vendor of lands with implied warranty cannot be a witness without a release.—Shields' Lessee v. Buchannan, 2 Yeates, 219.

[g] (Pa. 1801) The grantor of a deed, with words of general implied warranty, cannot be admitted to invalidate it, nor to show that he has not received consideration after signing a receipt.—Erb's Lessee v. Underwood, 3 Yeates, 172.

[h] (Pa. 1862) Coal belonging to one was, by mistake, deposited on the wharf of another, who after some time sold the coal to a third person, against whom the owner brought trover to recover its value; on the trial the vendor was offered as a witness for defendant, but was rejected. *Held*, on writ of error, that the witness, being the vendor in possession at the sale, and bound to the vendee on the implied warranty of title, was incompetent, unless released.—Kusenberg v. Browne, 42 Pa. (6 Wright) 173.

§ 293. —— Character of testimony.

[a] (Ill. 1865) A grantor by deed of warranty is incompetent by interest to prove that he gave notice to a subsequent purchaser that he had already sold and conveyed the land to another.—Hamilton v. Doolittle, 37 Ill. 473.

[b] (Iowa, 1858) A witness, interested by having warranted a title, is competent to impeach it; he then testifying against his interest.—Robb v. Lefevre, 7 Iowa (7 Clarke) 150.

[c] (Ky. 1808) A man who has conveyed land or sold slaves, and executed a writing to warrant the title, may be a witness to prove he had no title.—Wright v. Nichols, 4 Ky. (1 Bibb) 298.

[d] (Ky. 1820) A grantor by a deed with special warranty is competent to prove its execution, if the subscribing witnesses are out of the state and defendant does not claim through him.—McClain v. Gregg, 9 Ky. (2 A. K. Marsh.) 454.

[e] (Me. 1836) The grantor by deed of warranty to the demandant, and by deed of quitclaim of the same land to the tenant, is a competent witness for the latter on the question of title, as his interest would be to support the deed of warranty.—Wise v. Tripp, 13 Me. (1 Shep.) 9.

[f] (Mass. 1833) Where A. claimed land under a prior deed with covenants of seisin and warranty, and B. claimed by a subsequent deed, which was registered first, without any covenant, the grantor was a competent witness to prove notice of the prior conveyance to the subsequent grantee.—Adams v. Cuddy, 30 Mass. (13 Pick.) 460, 25 Am. Dec. 330.

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[g] (Mass. 1834) Where a wood lot was conveyed by defendant to plaintiff, with a covenant of warranty, in an action by plaintiff for the breach of such warranty, P., who had conveyed the same land to E. by a warranty deed, was a competent witness to prove that he entered on the land, as the agent of E., for the purpose of evicting plaintiff.—Burrage v. Smith, 33 Mass. (16 Pick.) 56.

[h] (Mass. 1845) A vendor of personal property, though he gives a bill of sale thereof, is a competent witness to prove that he had no title thereto; and, though he sells with warranty of title, he is a competent witness, for this purpose, when called by a third person, who claims the property and brings an action of trover therefor against the vendee.—Dickinson v. Dickinson, 50 Mass. (9 Metc.) 471.

[i] (N. Y. 1810) One of two partners executed a bond for a partnership debt, and a warrant of attorney to confess judgment, in the names and under the seals of both, and the other partner subsequently conveyed property, owned by him when the bond and warrant were executed, with warranty. *Held*, that such last-mentioned partner was not a competent witness to prove that his name and seal were affixed to the bond and warrant without his authority. —Swift v. Dean, 6 Johns. 522.

[j] (N. Y. 1810) If a person, whose lands are bound by a judgment, execute a deed with warranty of the same lands, and they are afterwards sold under a fi. fa. on that judgment, in an action between the vendee and the purchaser at the sheriff's sale, he is an incompetent witness to invalidate the judgment. — Swift v. Deane, 6 Johns. 523.

[k] (Pa. 1801) One who has executed a deed with general warranty is not competent as a witness to invalidate it, nor to prove that he has not received payment if he has signed a receipt therefor.—Erb's Lessee v. Underwood, 3 Yeates, 172.

[l] (Pa. 1820) One who has conveyed land subject to a right of way, with general warranty, is a competent witness for defendant, in an action for disturbing the right, to prove an agreement to remove the road in a certain event. —Greenwalt v. Horner, 6 Serg. & R. 71.

[m] (Pa. 1842) The grantor in a deed is a competent witness to prove that the grantee received the deed as trustee for himself for life, and for another for the remainder in fee; the result of the question could not affect the covenants of the grantor.—Kronk v. Kronk, 4 Watts & S. 127.

[n] (Pa. 1852) In an action on a warranty that a horse was sound in all respects, a person who sold the horse to defendant under a similar warranty was a competent witness for him that the horse was sound.—Mulvany v. Rosenberger, 18 Pa. (6 Harris) 203.

[o] (Tex. 1862) In an action of trespass, where the true boundary, not the title, of the land was in controversy, a surveyor, who by warranty deeds had conveyed the land to the plaintiffs, was a competent witness.—Robertson v. Mosson, 26 Tex. 248.

[p] (Tex. 1866) A warrantor of title is competent to testify to the invalidity of the title warranted by him, as his testimony is against his interest, and his competency is not destroyed because he testifies that the title was invalid on account of collusion between himself, the defendant (who had an interest in the land conveyed), and the grantee, to defraud the defendant's creditors. The judgment in this suit would not be evidence, in a suit against the warrantor, to prove the collusion so as to discharge his liability.—Tuttle v. Turner, 28 Tex. 759.

[q] (Va. 1810) A vendor of land according to certain lines is incompetent as a witness to establish the lines of the land sold, unless it appears that he conveyed without warranty of title.—Moon v. Campbell, 1 Munf. 600.

§ 294. —— Balance of interest as between adverse parties.

[a] (Ga. 1855) A witness was the common warrantor of both plaintiff and defendant, but defendant, in order to obtain the testimony of a third party, released that party and thereby discharged the warranty of the witness, so that he became liable over to plaintiff only, and plaintiff refused to release him. *Held*, that his testimony in behalf of plaintiff was incompetent without a release.—Way v. Arnold, 18 Ga. 181.

[b] (Ill. 1859) A vendor of goods with a warranty is a competent witness in an action between his vendee and a judgment creditor.—Warner v. Carlton, 22 Ill. (12 Peck) 415.

[c] (Ky. 1821) A man who has given a bond for the conveyance of land, with warranty against all persons claiming under himself, and afterwards conveys the same land to another person under a decree in chancery, is a competent witness for either party.—Porter's Heirs v. Robinson, 10 Ky. (3 A. K. Marsh.) 253, 13 Am. Dec. 153.

[d] (Me. 1836) If a person sell goods to two different persons as his own, he is liable to both on his implied warranty of title, and in an action between them, both claiming under him, he may be a witness for either. — Butler v. Tufts, 13 Me. (1 Shep.) 302.

[e] (Me. 1837) A grantor with warranty is a competent witness in an action, involving the question of title to the land, between his grantee and his creditor taking the land on execution.—Blaisdell v. Cowell, 14 Me. (2 Shep.) 370.

[f] (Me. 1850) Where in a sale of personal property there is an implied warranty of title on the part of the vendor, he cannot be a witness for his vendee in a suit in which such vendee is attempting to recover for the value of the property against a third person, since his interest is not balanced, although such third person, in a suit by himself against the witness, had, without the consent of the witness, given credit for the property, and taken judgment only for the balance of his claim.—Thompson v. Towle, 32 Me. 87.

[g] (Mass. 1819) In a real action, where both parties claim the land under the same title, the grantor from whom the title is originally derived will be a competent witness for either party, as both are equally interested in the covenants.—Roberts v. Whiting, 16 Mass. 186.

[h] (Mass. 1829) Where a debtor assigns property to a creditor in payment of a debt, with a covenant of general warranty, and the same property is attached by another creditor, the debtor is a competent witness to support the title of the assignee, in an action between him and the attaching creditor, the witness standing neutral as to interest.—Prince v. Shepard, 26 Mass. (9 Pick.) 176.

[i] (Mass. 1842) A grantor, who conveys land with warranty to A., bounding him on a certain line, and then conveys land to B. with warranty, bounding him on A.'s line, is a competent witness, in a suit between A. and B., to testify as to the situation of the monuments on their dividing line at the time of his conveyance, although those monuments do not exist at the time when he testifies.—Daggett v. Shaw, 46 Mass. (5 Metc.) 223.

[j] (Mass. 1844) These words in the habendum of a quitclaim deed from A. to B.: "To have and to hold the aforementioned premises to B., his heirs and assigns, forever, so that neither I, the said A., nor my heirs, nor any other person claiming from or under me, shall or will, by any way or means, have, claim, or

demand any right or title to the aforesaid premises"—constitute a covenant of warranty or quiet enjoyment against all persons claiming under or from A. If, therefore, A. had previously conveyed the land to C. by deed of warranty in the usual form, and B. brings a writ of entry to recover the land from C., A. is a competent witness for B. in the trial of the case, his interest on one side being counterbalanced by his interest on the other.—Newcomb v. Presbrey, 49 Mass. (8 Metc.) 406.

[k] (N. H. 1850) Where A. conveyed a tract of land to B. by metes and bounds, with warranty, and subsequently conveyed a tract of land to C. which was bounded southerly on the northerly line of the tract first conveyed, of which two tracts of land, at the time of conveyance, A. was the admitted owner, A. was a competent witness to give evidence in favor of the grantee of B., against the grantees of C., to establish the location of the northerly line of the tract conveyed to B.—Prescott v. Hawkins, 22 N. H. (2 Fost.) 191.

[l] (N. Y. 1829) A vendor of personal property, liable both to the vendor and the vendee on his warranty of title, is a competent witness for either, his interest being neutralized.—Frost v. Hill, 3 Wend. 386.

6. INTEREST ARISING FROM PARTICULAR OBLIGATIONS OR TRANSACTIONS IN GENERAL.

PARTIES TO INSTRUMENTS IN GENERAL, § 295.
PARTY TO CONTRACT IN GENERAL, § 296.
PROCEEDINGS TO ENFORCE MECHANIC'S LIEN, § 297.
PARTY TO CONVEYANCE, § 298.
PARTY TO MORTGAGE OR LEASE, § 299.
USURIOUS TRANSACTIONS, § 300.
— AGENTS, § 301.
— BILLS AND NOTES, § 302.
— BONDS, § 303.
— MORTGAGES, § 304.
TRANSACTIONS FRAUDULENT AS TO CREDITORS, § 305.
— COMPETENCY OF DEBTOR IN GENERAL, § 306.
— COMPETENCY OF GRANTOR OR VENDOR, § 307.
— MORTGAGES AND DEEDS OF TRUST, § 308.

§ 295. Parties to instruments in general.

[a] (Conn. 1804) A party to an instrument may be a witness to facts subsequent to the execution thereof which tend to invalidate it.—Webb v. Danforth, 1 Day, 301.

[b] (Ill. 1864) In a suit between the drawer and drawee of an order for goods upon a third person, the person on whom the order is drawn is a competent witness to prove the acceptance of the order.—Tarble v. Underwood, 34 Ill. 67.

[c] (Mass. 1814) The rule that a witness is incompetent to defeat by his testimony an instrument to which he is a party applies only to the parties to negotiable instruments.—Inhabitants of Worcester v. Eaton, 11 Mass. 368.

[d] (Miss. 1852) A. gave B. a writing which recited the receipt by him from C. of furniture which A. was to sell and pay the proceeds to B. At the foot of this was written a promise by other persons that the furniture should be sold and the proceeds paid to B., as recited in the receipt of A. In an action by B. against the signers of this writing, *held*, that A. had no interest in the result and was a competent witness.—Thornton v. Dabney, 23 Miss. (1 Cushm.) 559.

[e] (N. C. 1829) Where two persons sign a receipt for money, and jointly promise to refund it if not legally paid, in an action by one of them against the person to whom the receipt is given for money had and received, the other is a competent witness for plaintiff; there being no proof of the identity of the money sued for with that mentioned in the receipt.—Smith v. Roan, 13 N. C. 252.

[f] (Pa. 1836) In trespass against a purchaser at a sheriff's sale, where the question was whether the purchase included a certain piece of ground in possession of plaintiff, and defendant gave in evidence a receipt signed by the former owner of the land sold at the sheriff's sale by which he agreed to give up possession at a certain time, the person who gave such receipt may show that it was not his intention to include in the agreement the lot occupied by plaintiff.—Krider v. Lafferty, 1 Whart. 303.

§ 296. Party to contract in general.

Interest of agent, see post, § 387.
Transfer, release, or extinguishment of interest, see post, § 441.

[a] (Ala. 1842) A. agreed to do a piece of work for B. Before completing it he gave up the business and engaged C. to do it. In an action by C. to recover the price of the labor of B., A. is a competent witness, his interest being balanced, since, if C. recovers, he is liable to B. for the breach of his contract, and, if C. does not recover, then he is liable to C. for services performed.—Hallet v. O'Brien, 3 Ala. 455.

[b] (Ala. 1850) One whose debt, without request, has been assumed by a third person, does not thereby become his debtor, and is consequently a competent witness for him, when sued on his promise, to prove the consideration on which it was founded.—Beall v. Ridgeway, 18 Ala. 117.

[c] (Conn. 1835) In an action for breach of a contract, one who is a party to the same contract, but who is no party to the action, and who could not gain or lose anything by the decision thereon, is competent to testify.—Wadhams v. Litchfield & C. Turnpike Co., 10 Conn. 416.

[d] (Fla. 1859) Where two enter into an agreement to share the profits of an enterprise involving a contribution of labor, if a third party enter into a similar agreement with one of them to share in his portion of the profits, and a suit arises between the two involving the partition under the original agreement, this third party is incapacitated by interest from testifying as a witness in behalf of him with whom he has made the subcontract.—Hooker v. Johnson, 8 Fla. 453.

[e] (Ill. 1860) An interest under an agreement voidable by the statute of frauds may render a witness incompetent, for non constat that the statute will ever be pleaded.—Robbins v. Butler, 24 Ill. (14 Peck) 387.

[f] (Ill. 1861) C. contracted to furnish slops at his distillery to defendants, to be used in feeding cattle; but the pens for the cattle were not to be furnished by him, although he agreed to allow the cost of building them out of the price of the slops. C., however, furnished and paid for the lumber, and defendants hired plaintiff to build the pens. Afterwards C. refused to furnish anything toward certain changes which were made in the plan of the work, but agreed to allow the cost of making them out of the price of the slops. *Held*, that C. was a competent witness for plaintiff in a suit brought by him to recover for the labor done, as his interest was adverse to that of the party calling him.—Silsbury v. Blumb, 26 Ill. (16 Peck) 287.

[g] (La. 1841) In a suit for wages against the owner of a building, plaintiff may prove by the builder that defendant modified his contract

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with the latter, and agreed that plaintiff should be employed.—McIntosh v. Clannon, 18 La. 469.

[h] (La. 1860) Where a person not a party to a contract, but interested in showing that the consideration expressed therein was not the true one, offers a party to the contract to prove that fact, the objection that the witness is a party goes to his credibility, and not to his competency.—Smith v. Conrad, 15 La. Ann. 579.

[i] (Md. 1859) A contractor, who on his failure has transferred his workman to the service of his employer, is not disqualified by interest from testifying as to work done after this transfer, nor as to work done before, because he is liable to whichever party fails in the suit.—Andre v. Bodman, 13 Md. 241, 71 Am. Dec. 628.

[j] (Mass. 1763) Where an officer discharges a defendant from arrest in consideration of the parol promise of a third person for his appearance, such third person is a competent witness for the officer in an action against him for insufficient service, as the officer could maintain no action on such promise.—Barnes v. Greenleaf, Quincy, 41.

[k] (Mo. 1852) In an action by A. against B. for money advanced for C. on a contract made by C. in his own name, on behalf of B., from the purchase of a boat from D., *held* that, under the practice before the Code, C. was not a competent witness for A.—Winston v. Wales, 17 Mo. 370.

[l] (N. Y. 1820) Where two persons are jointly concerned in a contract of sale, they may sever their interest by a parol agreement on a good consideration; and after such dissolution one of them is a competent witness for the other in relation to a matter growing out of such contract.—Smith v. Allen, 18 Johns. 245.

[ll] (Pa. 1791) A witness cannot be introduced to disaffirm his own contract.—Clyde v. Clyde, 1 Yeates, 92.

[m] (Pa. 1831) A witness is competent to prove that he made personally and directly, and for his own exclusive benefit, a contract for the breach of which another, having no connection with it, is sued.—Carman v. Foster, 1 Ashm. 133.

[n] (Pa. 1845) It is no objection to a witness that he was a party to the contract, and ought to have been included in the suit by plaintiff.—Gould v. Crawford, 2 Pa. (2 Barr) 89.

[o] (Pa. 1848) A. sold goods to B., and B. afterwards delivered to A. an order for the delivery of goods, drawn on A. by C., which order was accepted by A.; and A. brought an action against B. for the goods, to which B. pleaded the order in set-off. *Held* that, the goods not having been delivered on the order, C. was a competent witness to prove that it was given without consideration, as he was not liable thereon until the goods were delivered.—Davis v. McGrath, 10 Pa. (10 Barr) 170.

[p, q] (Vt. 1846) In an action on a contract for labor, and on trial on the general issue, a person is incompetent as a witness for plaintiff who was jointly concerned with plaintiff in making the contract with defendant.—Smith v. Keeler, 19 Vt. 57.

[r] (Vt. 1851) In an action brought to recover the price of labor and materials furnished, one who claims that he is himself entitled, instead of plaintiff, to receive payment of the amount, is a competent witness for defendant; and so, also, is one who is called as a witness to prove facts showing that he is himself liable for the amount, instead of defendant.—Abbott v. Camp, 23 Vt. 650.

[s] (Va. 1808) Where A. is indebted to B., and B. to C., and A. promises to pay C. the amount due from him to B., at the request of B., B. is not a competent witness to prove A.'s promise to C.; B. not having been discharged by C.—Waggoner v. Gray's Adm'rs, 2 Hen. & M. 603.

§ 297. Proceedings to enforce mechanic's lien.

Transfer, release, or extinguishment of interest, see post, § 442.

[a] (N. Y. 1839) In an action by a workman or materialman, under the mechanic's lien law for the city of New York, against the owner, the contractor, to whom credit was originally given, is not a competent witness for plaintiff.—Collins v. Ellis, 21 Wend. 397.

[b] (N. Y. 1843) In proceedings to establish a mechanic's lien between the party who performed the labor and the owner, the plaintiff cannot use the builder as a witness, on the ground of interest.—Miner v. Hoyt, 4 Hill, 193, affirmed Hoyt v. Miner (1844) 7 Hill, 525.

[c] (N. Y. 1854) In proceedings under the lien law by an employé of a subcontractor to foreclose a lien against the owner, such subcontractor is a competent witness for the owner to defeat a recovery.—Cusack v. Tomlinson, 1 E. D. Smith, 716.

[d] (N. Y. 1855) In proceedings under the lien law, against the owner of the building and a contractor, for repairs, the contractor is a competent witness for plaintiff.—Cannon v. Van Wagner, 2 E. D. Smith, 590, 2 Abb. Prac. 106.

[e] (Pa. 1855) In a proceeding to enforce a lien on a building for lumber furnished to subcontractors and used thereon, the subcontractors are competent witnesses to prove the purchase of the lumber and its delivery for such use.—Odd Fellows' Hall v. Masser, 24 Pa. (12 Harris) 507, 64 Am. Dec. 675.

[f] (Pa. 1867) The contractor for a building is a competent witness to establish a materialman's lien against the owner.—Wolf v. Batchelder, 56 Pa. (6 P. F. Smith) 87.

[g] (Wis. 1853) A subcontractor brought scire facias under the statute to enforce a lien on a building for the amount due from the owner to the principal contractor, and offered the principal contractor as a witness as to the amount due. *Held*, that he was incompetent on the ground of interest.—Carpenter v. Moser, 1 Wis. 238.

§ 298. Party to conveyance.

Competency of grantee, see ante, § 271.
—— *of grantor, see* ante, §§ 284–294.

[a] (N. H. 1854) A party to a conveyance is competent to testify that it was obtained by fraud, if he has no interest.—Gage v. Gage, 29 N. H. (9 Fost.) 533.

[b] (N. C. 1805) One signing a deed as attorney is a competent witness for or against it.—Alston's Ex'rs v. Jones' Devisees, 5 N. C. 45.

[c] (S. C. 1828) A party to a deed is not an incompetent witness to invalidate it, in a suit between other persons.—Simmons v. Parsons, 1 Bailey, 62.

[d] (Va. 1810) One who is employed to bid off land for another at an auction sale, although he joined with the vendor in his deed thereof, conveying the land free from incumbrances, is a competent witness to prove notice of an incumbrance to the purchaser.—Blair v. Owles, 1 Munf. 38.

[e] (Va. 1810) In a bill to enforce an incumbrance on land against the vendee with notice, one who joined the vendor in his deed merely for the purpose of releasing some collateral interest is a competent witness to prove the notice.—Blair v. Owles, 1 Munf. 38.

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§ 299. Party to mortgage or lease.

Competency of landlord, see ante, § 273.
—— *of mortgagee, see* ante, § 277.
—— *of mortgagor, see* ante, § 275.
—— *of tenant, see* ante, § 274.
Transactions fraudulent as to creditors, see post, § 308.
Usurious transactions, see post, § 304.

[a] (Conn. 1802) One who has signed a lease is not a competent witness to impeach it.—Allen v. Holkins, 1 Day, 17.

[b] (Ill. 1864) In an equitable action to reform a mortgage on account of a mistake therein, a party to the instrument is a competent witness.—Shay v. Pettes, 35 Ill. 360.

[c] (Mass. 1861) A party to a mortgage of personal property is a competent witness to invalidate it.—Bigelow v. Smith, 84 Mass. (2 Allen) 264.

§ 300. Usurious transactions.

Competency of parties to action, see ante, § 238.
Determination of liability, see post, § 485.
Statutory removal of incompetency, see post, §§ 509–511.
Transfer, release, or extinguishment of interest, see post, § 447.

[a] (Ala. 1846) A borrower is not a competent witness to prove that usurious interest was reserved in another state.—Bazemore v. Wilder, 10 Ala. 773.

[b] (Va. 1857) The principal debtor is a competent witness for the sureties to prove an executed agreement for forbearance to sue, in consideration of the payment of a usurious premium between the creditor and himself.—Armistead v. Ward, 2 Pat. & H. 504.

§ 301. —— Agents.

[a] (N. Y. 1800) A broker, who has charged usurious interest on a note, is a competent witness to prove that the note had been afterwards sold at a legal rate to defendant.—Jones v. Hake, 2 Johns. Cas. 60.

[b] (N. Y. 1848) Where one delivers a negotiable note to another as his agent to negotiate it, and the agent pledges the note as security for a loan to himself at unlawful interest, in an action by the owner against the pledgee for the note, the agent is a competent witness for plaintiff.—Keutgen v. Parks, 4 N. Y. Super. Ct. (2 Sandf.) 60.

[c] (N. Y. 1848) The agent will not be liable for the costs in the action against the pledgee to the plaintiff therein, though he should be unsuccessful.—Keutgen v. Parks, 4 N. Y. Super. Ct. (2 Sandf.) 60.

[d] (N. Y. 1848) Nor will the record be evidence in a subsequent suit.—Keutgen v. Parks, 4 N. Y. Super. Ct. (2 Sandf.) 60.

[e] (S. C. 1796) The broker who negotiated between the borrower and lender is a competent witness to prove usury, though the payee of the note given.—Payne v. Trezevant, 2 Bay, 23.

[f] (Tex. 1857) The objection to the competency of one, who was plaintiff's agent in negotiating a usurious contract, to testify in behalf of his principal in a suit brought to enforce the contract, on the ground that he would be liable to his principal for the loss of legal interest through his misconduct, if the agreement was made without the principal's authority, is answered by the act of the principal in seeking to enforce the contract by judicial process, which is a ratification.—Ware's Adm'rs v. Bennett, 18 Tex. 794.

§ 302. —— Bills and notes.

[a] (U. S. 1813) In an action by the indorsee against the indorser of a note, the maker is a competent witness to prove the contract to be usurious, unless he is interested.—Knowles v. Parrott, Fed. Cas. No. 7,898 [2 Cranch, C. C. 93].

[b] (U. S. 1820) In an action by the indorsee against the acceptor of an inland bill of exchange, the indorser is a competent witness for defendant to prove usury in plaintiff's discounting of the bill.—Gaither v. Lee, Fed. Cas. No. 5,182 [2 Cranch, C. C. 205].

[c] (U. S. 1836) The drawer of an inland bill of exchange is not a competent witness, in an action against the acceptor, to prove that it was given for a usurious consideration.—Nicholls v. Wright, Fed. Cas. No. 10,236 [4 Cranch, C. C. 700].

[d] (U. S. 1838) A person who borrows checks payable to bearer to raise money on for his accommodation, but has not indorsed them, is a competent witness for defendant to prove usury, in an action on the checks.—Hill v. Scott, Fed. Cas. No. 6,498 [5 Cranch, C. C. 523].

[e] (Conn. 1808) In an action against the indorser of a note, the maker, for whose accommodation defendant indorsed the note, and who had executed a mortgage deed to defendant as security, was an incompetent witness, on account of his interest, for defendant, to sustain a defense of usury.—Cowles v. Wilcox, 4 Day, 108.

[f] (Ga. 1846) In an action by an indorsee against the maker of a note, an indorser without recourse to him is a competent witness to prove usury in the note.—Bailey v. Lumpkin, 1 Ga. (1 Kelly) 392.

[g] (Ky. 1823) The payee of a usurious note, who has assigned it without recourse, is a competent witness to prove the usury in an action by the holder of the note by a subsequent assignment against the maker.—Gorham v. Carroll, 13 Ky. (3 Litt.) 221.

[h] (Ky. 1842) A. executed several notes for the accommodation of B., who assigned them to C. as security for an alleged usurious loan. A. afterwards brought his bill to enjoin judgments which C. had obtained on the notes. *Held*, that B. was not a competent witness for A.—Mosely v. Armstrong, 19 Ky. (3 T. B. Mon.) 287.

[i] (Md. 1817) The drawer of a note is a competent witness, in an action on it by the holder against the payee, to prove a usurious consideration for the note.—Hunt v. Edwards, 4 Har. & J. 283.

[j] (Mass. 1810) A party to a usurious note cannot testify for the purpose of defeating the instrument on the ground of usury.—Widgery v. Munroe, 6 Mass. 449.

[k] (Mass. 1821) Where an indorsed note was made and discounted for the benefit of the maker at usurious interest, the maker is an incompetent witness to prove the usury.—Hartford Bank v. Barry, 17 Mass. 94.

[l] (Mass. 1825) Usury between the indorser and indorsee, in the transfer of a note, only affects the promise of the indorser, and cannot be set up in defense in an action by the indorsee against the maker. Consequently the indorser cannot be admitted as a witness to prove such usury.—Knights v. Putnam, 20 Mass. (3 Pick.) 184.

[m] (Mass. 1835) The indorser of a note is a competent witness to prove that it was given in renewal of a former note negotiated by the indorser for the maker, adding interest at a usurious rate, and that the indorsee knew these facts when he took the note and received un-

lawful interest thereon.—Bubier v. Pulsifer, 70 Mass. (4 Gray) 592.

[n] (Mass. 1858) In an action against the maker of an accommodation note, the party for whose accommodation it was made is a competent witness to prove that he negotiated it for a usurious consideration in another state, whose laws render usurious contracts void, to a party from whom plaintiff took it after maturity.—Newell v. Holton, 76 Mass. (10 Gray) 349.

[o] (N. J. 1838) A maker of a note is a competent witness to prove the note usurious, though the witness is the party ultimately liable for the amount of the note; the defendant objecting to the usury being only surety for him.—Howell's Ex'rs v. Auten, 2 N. J. Eq. (1 H. W. Green) 44.

[p] (N. J. 1839) An indorser of a note is a competent witness to prove that he obtained it at a discount exceeding legal interest, and that in doing so he acted as agent of plaintiff, the indorsee, and had no interest in the transaction. —Brittin v. Freeman, 17 N. J. Law (2 Har.) 191; Everson v. Heath, Id. 245.

[q] (N. Y. 1825) In an action by the holder of a note, the payee is a competent witness to prove that it was void in its inception for usury. —Stafford v. Rice, 5 Cow. 23.

[r] (N. Y. 1830) An indorser, not liable by notice of the dishonor of a note, and not called to prove its genuineness, is a competent witness, in an action against the maker by the indorsee, to show that the note is not usurious. —Barretto v. Snowden, 5 Wend. 181.

[s] (N. Y. 1840) The payee of a note cannot be examined by plaintiff, a third party, to show that it was given on a usurious consideration, though the note was made and transferred prior to Act May 15, 1837.—Burns v. Kempshall, 24 Wend. 360, affirmed Kempshall v. Burns (1842) 4 Hill, 468.

[t] (N. Y. 1842) One of two joint makers of a note cannot, by a bill in the chancery court, avail himself of the testimony of the other joint maker to prove the note usurious.—Savage v. Todd, 9 Paige, 578.

[u] (S. C. 1822) The maker of a note is a competent witness to prove the usury, as between two indorsers.—Flemming v. Mulligan, 2 McCord, 173, 13 Am. Dec. 707.

[v] (S. C. 1825) The indorser is a competent witness to prove the usury on a note, in an action between the indorsee and the drawer.— Knight v. Packard, 3 McCord, 71.

[w] (Vt. 1849) In an action brought to recover back money paid by plaintiff as usury to defendant, on a note signed by plaintiff and by several other persons as sureties for plaintiff, one of the sureties is a competent witness for plaintiff, notwithstanding he may have agreed to indemnify another surety against the note.—Nichols v. Bellows, 22 Vt. 581, 54 Am. Dec. 85.

§ 303. —— Bonds.

[a] (Del. 1835) The obligor in a bond given on an usurious contract is a competent witness to prove the usury in an action qui tam.—Banner v. Gregg, 1 Har. 523.

[b] (Del. 1860) In an action of debt qui tam, under the statute against usury, to recover the penalty by the surety on a bond given to secure the payment of the money borrowed, the principal is a competent witness to prove the usury.—Gardner v. Daniel, 2 Houst. 300.

[c] (Md. 1834) On a bill filed by a surety to obtain an injunction against and relief from a judgment against him on a bond, alleging that the bond was founded on a usurious consideration, the principal obligor is not a competent witness to prove the usury.—Jordan v. Trumbo, 6 Gill & J. 103.

[d] (S. C. 1844) The principal in a joint and several bond is not a competent witness, in a suit against the surety, to prove the bond usurious.—Cantey v. Blair, 1 Rich. Eq. 41.

[e] (Va. 1832) Where the obligee of a bond assigns it, he is not a competent witness for the obligor, in a suit against him by the assignee, to prove that the bond is founded on a usurious consideration. — Gilliam v. Clay, 3 Leigh, 590.

[f] (Va. 1845) A person who is a guarantor of a bond without consideration is a competent witness for the obligors to prove that it was given on a usurious consideration.—Caldwell's Ex'rs v. McCortney, 2 Grat. 187.

[g] (Va. 1852) In a suit between the assignee and obligor of a bond, the obligee is not a competent witness to prove that the bond was executed on a usurious consideration.—Wise v. Lamb, 9 Grat. 294.

§ 304. —— Mortgages.

[a] (Mass. 1812) In an action of entry sur disseisin, where the demandant derives his title from a mortgage, and a subsequent release made to him by the tenant, the latter will not be permitted to prove usury by his own oath. —Wheaton v. Tisdale, 9 Mass. 326.

[b] (N. Y. 1831) Where A. had executed a usurious mortgage with covenants of warranty, and subsequently sold and conveyed the mortgaged premises by deed with warranty to a third person, taking back a mortgage to secure the consideration money, and assigned the same, in an action of ejectment by the assignees of the second mortgage against a purchaser under a foreclosure of the usurious mortgage, A. is a competent witness to prove the usury.—Jackson v. Packard, 6 Wend. 415.

[c] (Va. 1830) In a contest between prior and subsequent mortgagees, the mortgagor is not a competent witness for the subsequent mortgagees to prove that the debt of the first mortgagee is usurious.—Beverley v. Brooke, 2 Leigh, 425.

[d] (Va. 1830) And his incompetency is not removed by his having taken the insolvent debtor's oath and surrendered his property, including his interest in the mortgaged premises, all which sold for less than the amount for which he was arrested, and his disclaiming all interest in the contest, since this did not remove his personal liability for the first mortgagee's debt. —Beverley v. Brooke, 2 Leigh, 425.

§ 305. Transactions fraudulent as to creditors.

Transfer, release, or extinguishment of interest, see post, § 448.

[a] (Conn. 1797) In ejectment, a creditor of the debtor, from whom plaintiff took the land by levy on execution, is a competent witness to prove the deed of defendant fraudulent, unless he has attached or levied on some portion of the land contained in defendant's deed.— Lillie v. Wilson, 2 Root, 517.

[b] (La. 1832) In a contest between a debtor, claiming the benefit of the insolvent laws, and his creditors, the vendee of a slave, alleged to have been fraudulently conveyed by the debtor, is a good witness.—Coquet v. His Creditors, 4 La. 198.

[c] (Me. 1845) In an action on a note, where the bankruptcy of the maker is alleged in his defense, and the certificate of discharge is attempted to be impeached on the ground of a prior fraudulent sale of goods to a third person, which he did not include in his schedule of effects, the purchaser is a competent witness. —Loud v. Pierce, 25 Me. (12 Shep.) 233.

[d] (Mass. 1801) The grantee of land is a competent witness to prove the grant made without consideration, and so fraudulent as to creditors.—Hill v. Payson, 3 Mass. 559.

[e] (Mass. 1841) In a suit against a person who is alleged to have conveyed all his property for the purpose of defeating his creditors, the grantee is a competent witness for defendant, if it be not shown that he participated in such fraudulent purpose, or was cognizant thereof, nor that the property, or the money received on the sale thereof, is still in his hands.—Johnson v. Johnson, 44 Mass. (3 Metc.) 63.

[f] (Pa. 1801) A creditor on a domestic attachment, wherein the auditors have sold and conveyed lands and signed a receipt for the consideration, may be a witness to show that a former sale of the same lands by the debtor was fraudulent.—Erb's Lessee v. Underwood, 3 Yeates, 172.

[g] (S. C. 1811) The grantee in a deed is competent to prove that the deed was made to defraud creditors.—Croft v. Arthur, 3 Desaus. 223.

[h] (S. C. 1895) Where two persons are threatened with a criminal prosecution, and one conveys his land to protect it from seizure, the other is not incompetent to testify as to the fraudulent purpose of the deed, on the ground that he is attempting to expose a fraud in which he is concerned.—Johnson v. Johnson, 44 S. C. 364, 22 S. E. 419.

§ 306. —— Competency of debtor in general.

[a] (Ala. 1847) Under the trial of an issue as to the validity of the transfer of a debt, between the transferee and the attaching creditor, under the statute of 1845, the debtor is not a competent witness.—Scott v. Stallsworth, 12 Ala. 25.

[b] (Iowa, 1860) In a suit by creditors against the debtor's vendee to defeat a sale alleged to have been made in fraud of creditors, the debtor is a competent witness for plaintiffs as to facts tending to prove the fraud.—Wisner v. Brady, 11 Iowa, 248.

[c] (La. 1856) A defendant in execution is not a competent witness to prove ownership in a third person of property seized as the debtor's, on trial of an issue of fraud in the debtor's transfer of such property.—Phoebe v. Vienne, 11 La. Ann. 688.

[d] (Me. 1847) On the trial of an action on the case, brought by a creditor under the provisions of Rev. St. c. 148, § 49, against a person for aiding the debtor in the fraudulent concealment or transfer of his property, to prevent it from being attached or seized on execution, such debtor is a competent witness for plaintiff.—Philbrook v. Handley, 27 Me. (14 Shep.) 53; Aiken v. Kilburne, Id. 252.

[e] (Me. 1847) And the debtor is not rendered incompetent by the fact that he has given an entirely different account of the transaction between himself and the defendant, under oath, in his petition to be declared a bankrupt; nor because he appeared to have been the principal actor in the fraudulent transfer of his property.—Aiken v. Kilburne, 27 Me. (14 Shep.) 252.

[f] (Miss. 1846) Where a bond for title to certain land was assigned, without covenants by the assignor, and the same land was afterwards sold on execution against the assignor, in a suit between the purchaser and the assignee to recover the land, the assignor is not competent to prove that the assignment was without consideration and in fraud of his creditors.—Ellis v. Ward, 15 Miss. (7 Smedes & M.) 651.

[g] (N. Y. 1859) In an action brought by a judgment creditor to reach and apply on his judgment moneys and property of the judgment debtors alleged to be in the hands of their attorney and another person, and to be by them fraudulently withheld from the judgment debtors and their creditors, one of the judgment debtors is not disqualified as a witness, as the action is not prosecuted for his immediate benefit.—Cowing v. Greene, 45 Barb. 585.

[h] (Pa. 1832) Where a judgment has been obtained fraudulently as against creditors, the defendant is a competent witness for the creditors in a suit to set it aside.—Sommer v. Sommer, 1 Watts, 303.

§ 307. —— Competency of grantor or vendor.

[a] (Ala. 1852) In trespass against the sheriff for attaching plaintiff's goods as the property of the vendor, the vendor is a competent witness for plaintiff to prove the fairness of the sale to him.—Zackowski v. Jones, 20 Ala. 189.

[b] (Cal. 1857) The vendor may be a witness to establish fraud in a sale on behalf of creditors.—Howe v. Scannell, 8 Cal. 325.

[c] (Cal. 1863) The vendor of personal property is not a competent witness for his creditors, to impeach a sale made by him, or to prove it fraudulent, in a contest respecting it, between his creditors and his vendee.—Waugenheim v. Childs, 23 Cal. 444.

[d] (Conn. 1795) A person who has sold his land for a valuable consideration, which land is afterwards taken by a creditor on an execution, cannot be a witness to prove that the debt in the execution, or the deed by him, was fraudulent.—Fowler v. Norton, 2 Root, 231.

[e] (Ill. 1863) In trespass against a sheriff and others, for taking and carrying away goods, the defense was that the goods were seized under an attachment against a third party, who owned the goods, and who had sold them in fraud of the rights of the attaching creditor, and that plaintiffs had purchased them from the fraudulent vendee with notice of the fraud. The purchaser from the attachment debtor had obtained a judgment against his vendor, on his implied warranty of the title to the goods. *Held*, that this rendered the attachment debtor incompetent as a witness on behalf of defendants in the action of trespass, to prove that he sold the goods fraudulently, as his interest would be in favor of the party calling him.—Babcock v. Smith, 31 Ill. 57.

[f] (Iowa, 1856) Certain goods were attached, and, judgment being rendered in favor of the attaching creditors, the property was sold under execution to satisfy the debts; and an action of trespass was thereupon brought against the sheriff and the said creditors, for the value of the goods, by one claiming that at the time of the levy of said attachments they belonged to him as the vendee of the debtor. *Held*, that the vendor was a competent witness for the creditors to prove facts tending to show that the sale was made with intent to defraud creditors.—Adams v. Foley, 4 Iowa, 44.

[g] (Ky. 1830) A grantor in a deed without warranty is a competent witness to testify that it was made in good faith.—Major v. Deer, 27 Ky. (4 J. J. Marsh.) 585.

[h] (Ky. 1856) Where the vendor has received a pecuniary benefit from the vendee on the sale of property, he is not a competent witness in favor of an attaching creditor to show fraud in the sale, although he is competent in favor of his vendee to sustain the sale.—Snead v. Williamson, 55 Ky. (16 B. Mon.) 492.

[i] (La. 1844) A vendor of movables, allowed occasionally to use them, cannot prove their sale and delivery, in a contest between his judgment creditor, who has seized them, and the vendee.—Webster v. Jenkins, 9 Rob. 179.

[j] (La. 1868) In an action to annul a sale on the ground that it was fraudulent against

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creditors, the vendor is an incompetent witness for the creditors.—Bushnell v. City Nat. Bank, 20 La. Ann. 464.

[k] (Me. 1853) A vendor of a horse is a competent witness, in a suit between the buyer and an attaching officer, on the question whether the sale was fraudulent against creditors; his interest being balanced.—Ward v. Chase, 35 Me. 515.

[l] (Md. 1828) On a bill to vacate a deed for fraud, the fraudulent grantor is not a competent witness against the grantee in behalf of the grantor's creditors.—Strike v. McDonald, 2 Har. & G. 191.

[m] (Mass. 1814) A grantor in a deed, who is not interested in the event of the suit, is a competent witness to show that the deed was fraudulent.—Loker v. Haynes, 11 Mass. 498.

[n] (Mass. 1829) Where a sale of chattels is made by A., who receives the purchaser's note for the price, and negotiates it, or obtains payment upon it, and the chattels are afterwards attached as the property of A., in an action of replevin, brought by the purchaser against the attaching officer, A. is not a competent witness to prove the sale fraudulent.—Bailey v. Foster, 26 Mass. (9 Pick.) 139.

[o] (Miss. 1843) Where a conveyance is attacked as fraudulent against creditors, the vendor, who has taken a deed of trust to secure the purchase money, is not a competent witness for the vendee.—Pope v. Andrews, Smedes & M. Ch. 135.

[p] (Miss. 1849) Defendant in an attachment suit is a competent witness for complainant in a bill claiming the property attached as belonging to him, and not to defendant in the attachment, although it is alleged that defendant fraudulently conveyed the property attached to complainant.—Mizell v. Herbert, 20 Miss. (12 Smedes & M.) 547.

[q] (N. H. 1842) A grantor may be a witness to show that his deed is invalid, even for fraud, if he have no interest in the case.—Stevenson v. Chapman, 12 N. H. 524.

[r] (N. Y. 1823) A person who has executed a deed, set up by a defendant in ejectment, is not a competent witness to prove it fraudulent, especially when, by avoiding the deed, the recovery of plaintiff would inure to the common benefit of plaintiff and the witness.—Jackson v. Eaton, 20 Johns. 478.

[s] (N. Y.) A vendor of personal property is not a competent witness to prove the sale fraudulent, in a contest respecting the same between his creditors and the vendee.—(1838) Rea v. Smith, 19 Wend. 293; (1839) Gardenier v. Tubbs, 21 Wend. 169.

[t] (Tenn. 1820) The grantor in a deed is a competent witness to prove the deed void, as having been executed to defraud his creditors.—Calloway v. Willie's Lessee, 10 Tenn. (2 Yerg.) 1.

[u] (Tenn. 1870) The maker of a deed is not precluded from giving evidence to impeach it for fraud against his creditors.—Greene v. Starnes, 48 Tenn. (1 Heisk.) 582.

[uu] (Tex. 1852) In an action by a vendee of cattle against a creditor, who had taken the same by execution against the vendor, the creditor alleged that the sale was fraudulent. *Held*, that the vendor was a competent witness in such action for the vendee.—McKay v. Treadwell, 8 Tex. 176.

[v] (Tex. 1855) A grantor, called to support his own alleged fraudulent conveyance, is competent if standing indifferent; but experience shows how seldom this is the case.—Hancock v. Horan, 15 Tex. 507.

[w] (Tex. 1873) The grantor in a deed, which is being attacked by a third party as fraudulent, is a competent witness to prove that no consideration passed for its execution.—Reeves v. Shry, 39 Tex. 634.

[x] (Vt. 1831) A grantor is a competent witness to show his deed fraudulent.—Seymour's Adm'r v. Beach, 4 Vt. 493.

[xx] (Vt. 1832) One who is supposed to have conveyed away his property with a view to defraud his creditors is a competent witness for the purchaser to show that the conveyance was not fraudulent.—Edgell v. Lowell, 4 Vt. 405.

[y] (Vt. 1845) One who has assigned and transferred personal property to his creditor in payment of a debt is a competent witness for the creditor, in an action of trespass brought by him against other creditors of the same person, who have attached and taken from plaintiff's possession the assigned property, notwithstanding the officer who served defendant's writs of attachment included in his fees, minuted on the writ, charges for taking and securing the property in question.—Ellis v. Howard, 17 Vt. 330.

[yy] (Vt. 1850) Where land is conveyed by a deed with covenants of warranty, and a creditor of the grantor, claiming that the deed is fraudulent, causes an execution in his favor to be levied upon the land as the property of the grantor, the grantor is a competent witness for the grantee to prove that the deed was not fraudulent, in an action of ejectment brought by the grantee against one who claims title under the levy.—Warner v. Percy, 22 Vt. 155.

[z] (Va. 1871) When a deed is assailed for fraud by a creditor of the makers, and one of these is called by plaintiff as a witness to prove the fraud, the rule that no person shall be heard to establish his own turpitude does not apply.—Brown v. Molineux, 21 Grat. 539.

[zz] (Wis. 1851) Goods and merchandise in the possession of the vendee were attached as the property of the vendor; the attaching creditor claiming that the contract of sale between the vendee and vendor was fraudulent and void as to the creditors of the latter. In an action by the vendee against the sheriff for the value of the goods, the vendor is a competent witness for plaintiff; but, if it appears that he is liable as an indorser on the note given for the goods, his testimony will be rejected.—Sterling v. Ripley, 3 Chand. 166.

§ 308. — Mortgages and deeds of trust.

[a] (Ala. 1845) A father, who has settled property on trustees for the benefit of his daughter, is a competent witness for the trustees in a controversy between them and the creditors of the husband, who are seeking to subject said property to the payment of the husband's debts.—O'Neil v. Teague, 8 Ala. 345.

[b] (Mo. 1851) The grantor in a deed of trust, under which a party interpleading claims property attached, is not a competent witness to prove the consideration of the deed of trust.—Keiser v. Moore, 14 Mo. 28.

[c] (Mo. 1868) Under Rev. Code 1855, c. 168, § 6, testimony of the maker of a deed of trust, in a suit by his creditors to set it aside, showing that the amount of his indebtedness to the beneficiaries in the deed was not correctly set out, that a large part of it was the amount of an order for goods never delivered to him, and that by the advice and direction of the parties for whose benefit the deed was executed the sum was falsely stated for the purpose of deterring other creditors from proceeding against the property, is not competent.—Byrne v. Becker, 42 Mo. 264.

[d] (N. Y. 1840) A mortgagor of personal property is not a competent witness for the mortgagee in a controversy between the latter and a purchaser under an execution issued sub-

sequent to the execution of the mortgage, where such instrument is void for want of possession accompanying delivery, and actual possession is not taken until after levy under the execution.—White v. Cole, 24 Wend. 116.

[e] (N. Y. 1844) A., being indebted to B., executed to him a mortgage of certain goods, which were soon afterwards seized on execution by one of A.'s creditors; the latter claiming that the mortgage was fraudulent. Whereupon B. brought replevin, and on the trial offered A. as a witness. *Held*, that he was competent; his interest being balanced.—Moak v. Guion, 7 Hill, 58.

7. PARTIES TO BILLS AND NOTES.

IN GENERAL, § 309.
MAKER OF NOTE, § 310.
—— FOR OR AGAINST GUARANTOR, § 311.
—— CO-MAKERS, § 312.
DRAWER OF BILL, § 313.
INDORSER OF BILL OR NOTE, § 314.
—— INDORSEMENT WITHOUT RECOURSE OR FOR COLLECTION, § 315.
—— ACCOMMODATION PAPER, § 316.
PAYEE OF BILL OR NOTE, § 317.
—— INDORSEMENT, § 318.
—— INDORSEMENT WITHOUT RECOURSE, § 319.
ACCEPTOR OF BILL, § 320.
ASSIGNOR AND ASSIGNEE OR INDORSEE, § 321.
TESTIMONY AS TO PAYMENT, § 322.

Determination of liability, see post, § 488.
Husband or wife of party to bill or note, see post, § 419.
Interest of agent, see post, § 390.
Liability for costs, see post, § 398.
Parties to action, see ante, §§ 234, 235.
—— *to usurious transactions, see* ante, § 302.
Partners, see post, § 354.
Principal and surety, see post, § 343.
Statutory removal of incompetency, see post, § 508.
Transfer, release, or extinguishment of interest, see post, § 443.

§ 309. In general.

[a] (Ga. 1843) A party to a negotiable instrument, who is not a party to a suit to it, is not, as a matter of course, so interested in the event as to be an incompetent witness.—Starr v. Johnson, Ga. Dec. 134, pt. 2.

[b] (La. 1843) The testimony of a witness under commission, declaring that he forged the check sued for, is admissible. The objection goes to his credit, rather than his competency.—Laborde v. Consolidated Ass'n of Planters, 4 Rob. 190, 39 Am. Dec. 517.

[c] (Mass. 1807) A party to a note may testify to any facts happening after he gave it currency, if he is not interested therein.—Warren v. Merry, 3 Mass. 27.

[d] (Mass. 1840) In the trial of an action brought by one of the makers of a note, who has paid it in full, to recover of the other a moiety of the amount so paid, individuals for whose use the note was given and paid are competent witnesses for plaintiff.—Packard v. Nye, 43 Mass. (2 Metc.) 47.

[e] (Mo. 1841) A party to a negotiable instrument may be permitted to testify, if not disqualified by interest.—Bank of Missouri v. Hull, 7 Mo. 273.

[f] (N. Y. 1813) A party to a negotiable instrument may be a witness to prove facts subsequent to its due execution, and which do not invalidate it in its inception, though they go to destroy the title of the holder.—Woodhull v. Holmes, 10 Johns. 231.

[g] (N. Y. 1825) The maker or other person whose name appears on a note is not disqualified on the ground of interest from testifying to show that it was void in its creation for usury or other cause.—Bank of Utica v. Hilliard, 5 Cow. 153.

[h] (Pa. 1834) A party to a negotiable note which has actually been negotiated is not a competent witness against its validity.—Gest v. Espy, 2 Watts, 265.

[i] (Pa. 1845) A party to a sealed note is competent to prove an extension of time to himself, thereby discharging another party, who was a surety, under a plea of payment and a special plea of the extension.—Miller v. Stem, 2 Pa. (2 Barr) 286.

[j] (Pa. 1859) It is the character of the testimony, rather than the relation of the party to the instrument, that governs the question of the admissibility of a witness.—Work v. Kase, 34 Pa. (10 Casey) 138.

[k] (Pa. 1859) If a witness be not involved in the immediate result of the suit, the policy of the law only holds him to silence in regard to acts which might invalidate the paper in its original concoction, or the consideration of the indorsement.—Work v. Kase, 34 Pa. (10 Casey) 138.

[l] (S. C. 1860) Parties to a negotiable instrument, in a controversy between other parties, are competent witnesses to invalidate the instrument, if they have no interest which disqualifies them.—Farrar v. Metts, 12 Rich. Law, 667.

[m] (Vt. 1840) In an action against one for money paid out on a note signed by defendant and another, such other signer is a competent witness for plaintiff to prove that he and defendant were the principals in the note.—Hopkinson's Adm'r v. Steel, 12 Vt. 582.

§ 310. Maker of note.

[a] In a suit by the indorsee against the indorser of a note, indorsed for the accommodation of the maker, the maker is not a competent witness for the indorser, without a release.
—(Me. 1842) Southard v. Wilson, 21 Me. (8 Shep.) 494;
(Mass. 1817) Peirce v. Butler, 14 Mass. 303; (1843) Bird v. Cole, 47 Mass. (6 Metc.) 326;
(N. Y. 1849) Bowne v. Hyde, 6 Barb. 392;
(S. C. 1830) Chur v. Keckeley, 1 Bailey, 479.

[b] In an action by the holder against the indorser of a note, the maker of the note is a competent witness, unless the note is an accommodation note.
—(Ala. 1839) Griffing v. Harris, 9 Port. 225; Adams v. Moore, Id. 406;
(Del. 1862) Cook v. Pierce, 2 Houst. 499;
(N. H. 1839) Woodman v. Eastman, 10 N. H. 359;
(N. Y. 1819) Hubbly v. Brown, 16 Johns. 70.

[c] (U. S. 1807) The maker of a note is a competent witness for an indorser.—French's Ex'x v. Bank of Columbia, 8 U. S. (4 Cranch) 141, 2 L. Ed. 576.

[d] (U. S. 1813) Where the maker of a note has obtained a discharge in insolvency, and subsequently an action is brought by an indorsee against an indorser of the note, the maker is not a competent witness in such action; for, in case of a recovery by the indorsee against the indorser, the maker is liable to the indorser, and such liability is a new cause of action which has arisen since the discharge of the maker.—Knowles v. Parrott, Fed. Cas. No. 7,898 [2 Cranch, C. C. 93].

[e] (U. S. 1837) The maker of a note is a competent witness, not to prove its original invalidity, but the improper use afterwards made

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of it, and that time was given him without the consent of the indorser.—Whitney v. Huntt, Fed. Cas. No. 17,589 [5 Cranch, C. C. 120].

[f] (U. S. 1840) The maker of a note, released from costs, is competent, in a suit against indorsers, to impeach the note by facts subsequent to its execution and negotiation by him.—Frazer v. Carpenter, Fed. Cas. No. 5,069 [2 McLean, 235].

[g] (Ala. 1849) The maker of a note is a competent witness for the indorsee, in an action against the indorser, for the purpose of proving that he has fully indemnified the latter.—Cockrill's Adm'r v. Hobson, 16 Ala. 391.

[h] (Cal. 1856) In an action against the indorser of a note, where demand and notice are not averred, but where it is averred that the maker paid the indorser the value of the note, and that the indorser agreed to pay it, the maker of the note is not a competent witness to prove those facts.—Palmer v. Tripp's Adm'r, 6 Cal. 82.

[i] (Conn. 1837) Defendant, in an action by the holder of a note, not negotiable, against the payee, alleging that defendant had assigned it to plaintiff, and had afterwards withdrawn a suit brought by plaintiff, in the name of the payee, against the maker, and had thereby defeated the collection of the note, offered the maker as a witness to prove that he had paid the note to the payee previous to the alleged assignment, and that it had never been in fact assigned to plaintiff. *Held*, that such witness had no interest in the event of the suit, and was therefore competent.—Fitch v. Boardman, 12 Conn. 345.

[j] (Del. 1833) The maker of a note is not a competent witness for the indorser in a suit in equity by the latter to enjoin the collection of a judgment against him on his contract of indorsement.—McDowell v. Bank of Wilmington & Brandywine, 2 Del. Ch. 1.

[k] (Ill. 1859) In an action by an indorsee against the indorser of a note, the drawer is a competent witness to prove protest and notice.—Eddy v. Peterson, 22 Ill. (12 Peck) 535.

[l] (Ill. 1865) As between the assignor and assignee of a note, for all purposes except to impeach the note or prove its payment, the maker is a competent witness.—Corgan v. Frew, 39 Ill. 31, 89 Am. Dec. 286.

[m] (Ind. 1837) The maker of a note is a competent witness for plaintiff in an action by the assignee against the assignor, involving the validity of the consideration of the note.—Fosdick v. Starbuck, 4 Blackf. 417.

[n] (Ky. 1822) The maker of a note is a competent witness to prove that the note was indorsed to the indorsee for collection, and not for the indorsee's benefit.—Gilman's Adm'rs v. Pugh, 11 Ky. (1 Litt.) 286.

[o] (Ky. 1843) In an action between the assignor and assignee, the maker of a note is a competent witness to prove the consideration and assignment.—Maxey v. Fore, 42 Ky. (3 B. Mon.) 475.

[p] (La. 1815) In a suit against the indorser, the maker of a note is competent to prove any fact affecting the indorser's rights, being himself ultimately responsible, whatever the result of the suit.—Abat v. Doliole, 3 Mart. (O. S.) 657.

[q] (La. 1821) A maker of a note may prove its execution, in a suit by the indorsee against the indorser.—Abat v. Rion, 9 Mart. (O. S.) 465, 13 Am. Dec. 313.

[r] (La. 1847) Plaintiff, having furnished goods to a minor at the request of her relative, accepted therefor a note executed by the relative, who then collected the amount from the defendant's guardian. The note remaining unpaid, plaintiff sued the minor. *Held*, that the relative was a competent witness, as he was responsible in either event.—Dowell v. Dawson, 2 La. Ann. 495.

[rr] (La. 1861) In a suit between accommodation indorsers of a note, the second indorser sought to make the maker and first indorser liable to him in solido after the payment of the note, and the first indorser alleged that he and the second indorser signed the note as co-securities. *Held*, that the maker was a competent witness to establish the contract of suretyship between the indorsers of his note for his own accommodation.—Hacket v. Lenares, 16 La. Ann. 204.

[s] (Me. 1841) In an action by an indorsee of a note against an indorser, it appeared that the maker held a bond for the conveyance of land to him by the payee on the payment of the note, and that the maker had made part payment for the land. *Held*, that he was not a competent witness for defendant; his interest not being balanced.—Weston v. Hight, 18 Me. (6 Shep.) 281.

[ss] (Md. 1846) In an action by an indorsee against the payee and indorser of a negotiable note, the maker is a competent witness to prove the execution of the note by himself and partners as makers, and the indorsement by defendant.—Crowley v. Barry, 4 Gill, 194.

[t] (Mo. 1847) In a suit against a boat to recover the amount of a note given by a former owner for services, the maker is a competent witness to show that the note was accepted on his individual credit.—The Resort v. Brooke, 10 Mo. 531.

[tt] (N. H. 1853) A. gave his note in part payment for the services of B. as pastor of the First Universalist Society. B. brought an action of assumpsit against the society, and declared on this note and for services rendered. *Held*, that A. was a competent witness for B. to support the count for services rendered; A. not being a member of the society, nor authorized to contract on their behalf.—Abbott v. First Universalist Soc., 28 N. H. (8 Fost.) 22.

[u] (N. J. 1822) In an action of trover for a note, the maker of the note is a competent witness for defendant.—Woodruff v. Smith, 6 N. J. Law (1 Halst.) 214.

[uu] (N. Y. 1833) Where a note for $800 is indorsed by the payee for the accommodation of the maker, and delivered to him by mistake, the words "hundred dollars" were omitted, but were afterwards filled in by the maker without the assent of the indorser, the maker is a competent witness to show what sum was intended to be inserted.—Boyd v. Brotherson, 10 Wend. 93.

[v] (N. C. 1857) In a suit brought to recover back the purchase money paid to the holder, without indorsement, of a note alleged to be forged, the ostensible maker of the note is a competent witness to prove the forgery, although he had given to the ostensible payee a bond to indemnify him against the consequences of refusing to let his name be used in the collection of it by suit.—White v. Green, 50 N. C. 47.

[vv] (Pa. 1829) A drawer is a competent witness for the indorser of a note, though he has given the indorser a judgment and mortgage to secure him.—Griffith v. Reford, 1 Rawle, 196.

[w] (Pa. 1835) In an action by the indorsee of a note against the indorser, the maker is not a competent witness for defendant to prove that, when the note was made, the indorsee had stipulated not to hold the indorser responsible, and that the note was for the accommodation of the indorser, unless there was proof aliunde that the indorsee was an original party to the note.—Harley v. Emerick, 1 Miles, 36.

[ww] (Pa. 1836) The indorser and drawer of a note payable to his own order is a competent witness, in a suit by the indorser, to prove the handwriting of the acceptor.—Reid v. Geoghegan, 1 Miles, 204.

[x] (Pa. 1846) The drawers of a note cannot be permitted by their own testimony to prove that they were not liable to the payee, as this would be to fix on him a liability which they had assumed as drawers.—Alexander v. Alexander, 3 Pa. (3 Barr) 56.

[xx] (Pa. 1850) In an action by the holder of a note against the payee, who also guarantied its payment, the drawer is a competent witness to prove that the note in suit was made payable to the payee at the request of one to whom the drawer was indebted.—Lewis v. Carsaw, 15 Pa. (3 Harris) 31.

[y] (Pa. 1857) In an action on a note of a third party, given as collateral security, the maker of the note, for the payment of which said collateral is held, is a competent witness to prove it paid.—Fry v. Coleman, 1 Grant, Cas. 445.

[yy] (Pa. 1859) In a suit against the indorser of a note indorsed for the accommodation of the maker, the latter is a competent witness to prove facts dehors the note, showing an agreement for satisfaction of it tantamount to payment.—Work v. Kase, 34 Pa. (10 Casey) 138.

[z] (Pa. 1862) In an action by an indorsee of a note against a prior indorser, the maker of the note is not a competent witness to prove an agreement between the indorsers, of whom plaintiff was one, that they would contribute equally to the payment of the note, if it was not paid by the maker.—Saurman's Ex'rs v. Bodey, 42 Pa. (6 Wright) 476.

[zz] (Vt. 1843) Notes of hand were delivered by A. to B. as an indemnity, which came into the hands of C. and were collected by him. In an action in favor of B. against C. to recover the amount thus collected, *held*, that A. was not a competent witness to prove that the notes had been obtained by him with the consent of the attorney holding them for collection, and had been sold by him to defendant for a valuable consideration.—Stimson v. Cummings, 15 Vt. 477.

§ 311. —— For or against guarantor.

[a] (Conn. 1831) In an action on the guaranty of a note not negotiable, the defense was that the maker had been taken on execution for the same debt and discharged out of custody. *Held*, that the maker was an incompetent witness for defendant.—Terrell v. Smith, 8 Conn. 426.

[b] (Ill. 1864) The payee of a note may call the maker to charge the guarantor.—Knoebel v. Kircher, 33 Ill. 308.

[c] (Mass. 1853) The maker of a note, who has paid a third person to guaranty it, is a competent witness for the payee against such guarantor, as his interest is equally balanced.—Perry v. Swasey, 66 Mass. (12 Cush.) 36.

[d] (Pa. 1849) In a suit against a person as the guarantor on a note, the maker of the note is a competent witness for plaintiff.—Taylor v. McCune, 11 Pa. (1 Jones) 460.

§ 312. —— Co-makers.

[a] (Ala. 1843) In an action against one of several joint and several makers of a note, a co-maker is a competent witness to impeach the consideration of the note.—Thompson v. Armstrong, 5 Ala. 383.

[b] (Ala. 1847) One joint maker of a note, not sued, is not a competent witness for his co-maker, without a release.—Kornegay v. Salle, 12 Ala. 534.

[c] (Ill. 1866) One of the principals to a note is not a competent witness for the other principal, unless he has been released from liability for contribution.—Marine Bank v. Ferry's Adm'rs, 40 Ill. 255.

[d] (Md. 1846) A., the indorser on a note signed by B. and C., agreed to pay the note when due. *Held*, that this agreement did not render B. an incompetent witness for the holder of the note in an action by him against A., the indorser.—Crowley v. Barry, 4 Gill, 194.

[e] (N. Y. 1818) Where a defense rested on matters arising subsequent to the execution of a note, one of the makers of it is a competent witness to defeat the recovery, even without a release, being indifferent between the parties.—Skilding v. Warren, 15 Johns. 270.

[f] (N. Y. 1855) The maker of a note is a competent witness for the indorser, but not in behalf of a co-maker.—Finn v. Gustin, 4 E. D. Smith, 382, 2 Abb. Prac. 191.

[g] (S. C. 1822) Where two gave their joint and several note, on which one was sued, the other cannot be a witness for defendant.—Kile v. Graham, 1 McCord, 552.

[h] (Tenn. 1844) A joint promisor in a note is not a competent witness to prove, in an action against the others, that they signed the note, or authorized another to sign it in their names.—Harvey v. Sweasy, 23 Tenn. (4 Humph.) 449.

[i] (Vt. 1841) Three persons gave their joint and several note as principals. *Held*, that one of them was not a competent witness for another of the makers, when sued severally on the note, being interested by being bound to contribute to the costs as well as to the debt.—Pinney v. Bugbee, 13 Vt. 623.

§ 313. Drawer of bill.

[a] (Ga. 1854) A copartnership consisted of A. and B. A. owed C. a private debt, and C. made a draft on the firm for the amount, which was accepted by A. in the name of the firm, and was then indorsed by C. A. died, and suit was then brought on the draft by an indorsee against B., the surviving partner. *Held*, that C. was a competent witness for defendant to show the consideration.—Freeman v. Ross, 15 Ga. 252.

[b] (Me. 1823) The drawer of a bill of exchange is not a competent witness for the indorsee, in an action against the acceptor, because of his liability to damages, interest, and costs if the party calling him should not prevail.—Scott v. McLellan, 2 Me. (2 Greenl.) 199.

[c] (Mass. 1812) The drawer of a bill is a competent witness, in an action against the acceptor, to show that the acceptance was conditional.—Storer v. Logan, 9 Mass. 55.

[d] (Mass. 1857) In an action by the purchaser of a bill of exchange in New York against the drawee in Massachusetts for nonacceptance, the drawer, who also resides in New York, is a competent witness for plaintiff; his liability in damages to plaintiff, under the laws of New York, in the event of the failure of plaintiff to maintain the action, being too remote and contingent an interest to exclude him.—Barney v. Newcomb, 63 Mass. (9 Cush.) 46.

[e] (Pa. 1839) In a suit by the holder against the acceptor of a bill, the drawer is not competent to prove that the bill was drawn for his accommodation.—Smith v. Thorne, 9 Watts, 144.

[f] (Pa. 1848) The drawer of a foreign bill is not a competent witness, in an action against the acceptor, to prove his authority to draw it, nor facts tending to show such authority, as he is liable for re-exchange or statutory damages to the holder.—Dennistoun v. Fleming, 7 Pa. (7 Barr) 528.

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[g] (Va. 1846) A drawer of a bill, for whose accommodation it has been accepted, is not a competent witness for the acceptors, in an action thereon by the holder against them.—Ford v. Nichols, 3 Grat. 88.

§ 314. Indorser of bill or note.

Payee, see post, § 318.

[a] The indorser of a note is a competent witness in a suit against the maker.
—(U. S. 1838) Mason v. Masi, Fed. Cas. No. 9,244 [5 Cranch, C. C. 397];
(Cal. 1861) Smith v. Richmond, 19 Cal. 476;
(Me. 1851) Berry v. Hall, 33 Me. 493.

[b] (U. S. 1811) In an action on a bill of exchange, plaintiff's indorser cannot be a witness to prove that the bill belongs to him, as a witness will not be allowed to swear himself into an interest.—Cropper v. Nelson, Fed. Cas. No. 3,417 [3 Wash. C. C. 125].

[c] (U. S. 1812) An indorser is a competent witness for the maker of a note, to prove that the indorsement was without consideration and to give credit to the note.—Gilman v. King, Fed. Cas. No. 5,444 [2 Cranch, C. C. 48].

[d] (U. S. 1824) In an action by the indorsee of a note against the maker, the indorser is a competent witness for plaintiff to prove an acknowledgment of the debt, so as to take the case out of the statute of limitations.—Bank of Alexandria v. Clarke, Fed. Cas. No. 844 [2 Cranch, C. C. 464].

[e] (Ala. 1835) An indorser of a note or bill is incompetent, in respect to his interest, as a witness in favor of a subsequent indorsee, to charge any party to the instrument whose liability is anterior to his own.—Kennon v. McRea, 2 Port. 389.

[f] (Ala. 1848) An indorser is not a competent witness for his indorsee, in a suit by him against the maker, unless it be shown that by a release, by negligence, or in some other mode his liability as indorser has been discharged.—Briggs v. Moore, 14 Ala. 433.

[g] (Cal. 1855) In a suit by an indorsee against the maker of a note, the indorser may testify for plaintiff, not being a party, and where it does not appear that the action is prosecuted for his immediate benefit.—Tomlinson v. Spencer, 5 Cal. 291.

[h] (Cal. 1856) An indorser of a note is incompetent as a witness to establish the lien of the holder thereof on the property of the maker, being interested to have the lien established.—Soule v. Dawes, 6 Cal. 473.

[i] (Cal. 1859) The indorser is a competent witness for either party in a suit against an acceptor or a maker of a note.—Bryant v. Watriss, 13 Cal. 85.

[j] (Cal. 1864) An indorser of a note is not rendered incompetent as a witness for either party, in an action against the maker, by interest, or by the provisions of section 4 or section 393 of the practice act.—Priest v. Bounds, 25 Cal. 188.

[k] (Ill. 1840) In an action by an indorsee against an indorser, a subsequent indorser is not a competent witness for plaintiff, although he has before recovered judgment against such subsequent indorser in an action on the note.—Hayes v. Gorham, 3 Ill. (2 Scam.) 429.

[l] (Ill. 1873) An indorser of negotiable paper, having given it the sanction of his own name, will not be permitted by his own testimony to impeach its consideration.—Dewey v. Warriner, 71 Ill. 198, 22 Am. Rep. 91.

[m] (Iowa, 1858) An indorser of a note, who may be liable if the maker is not, is not a competent witness against the maker.—Craig v. Andrews, 7 Iowa (7 Clarke) 17.

[mm] (La. 1842) A witness is not incompetent, because an indorser on the note on which the original suit was based, when his testimony can in no way affect his liability.—Debuys v. Connolly, 2 Rob. 338.

[n] (La. 1844) The indorser, where the facts he is to prove do not tend to affect his liability, nor to change as to him the ultimate result of the suit, is competent for the makef.—Macarty v. Roach, 7 Rob. 357.

[nn] (La. 1861) In an action on a note, the defense was that plaintiff was not a bona fide holder of the note, but that it belonged to the indorser, and had been transferred to plaintiff for the purpose of depriving defendant of a defense which he had against the indorser; that the note was without consideration, and given merely for accommodation. *Held* that, if the defense was true, the indorser would be liable to defendant for whatever amount defendant might be compelled to pay on the note, and the indorser was not a competent witness.—Price v. Emerson, 16 La. Ann. 95.

[o] (Me. 1837) The indorser of a note is a competent witness, if without interest, to prove any fact that does not go to show the note void in its inception.—Buck v. Appleton, 14 Me. (2 Shep.) 284.

[oo] (Me. 1853) In an action, indorsee against maker, the indorser, not being interested, may testify to the execution of the note.—Goodwin v. Chadwick, 35 Me. 198.

[p] (Md. 1857) The indorser of a note protested for nonpayment is not a competent witness to prove the existence of a claim, to be used for the purpose of authorizing a decree by which a voluntary deed of the maker would be declared void, thereby creating a fund and rendering property liable to pay the note which but for this decree he must pay, without prospect of repayment.—Williams v. Banks, 11 Md. 198.

[pp] (Md. 1861) In a suit by the holder against the maker of a note, the indorser is a competent witness in favor of the maker, because, though his testimony may defeat the action and discharge the maker, he may nevertheless be liable on the indorsement and lose the benefit of a judgment against the maker.—Whiteford v. Munroe, 17 Md. 135.

[q] (Md. 1866) In an action on a bill of exchange against the drawer, an indorser of the bill to plaintiff is not a competent witness for the latter, when such indorser received notice of the dishonor of the bill and failed to notify defendant, and when plaintiff has secured by attachment the payment of any judgment that he may recover, as by enabling plaintiff to recover the indorser would effectually shield himself from liability to plaintiff.—Williams v. Brailsford, 25 Md. 126.

[qq] (Mass. 1842) In an action by an indorsee against one who signed a note on the back thereof, the indorser is a competent witness to prove that defendant signed the note at the same time with the promisor, whose signature was on the face of the note.—Richardson v. Lincoln, 46 Mass. (5 Metc.) 201.

[r] (Mass. 1850) The indorser of a note, being called as a witness by the holder in an action thereon against the maker, stated on his voir dire that he sold the note for less than half the sum due thereon for the purpose of becoming a witness; that if plaintiff prevailed, and recovered the full amount of the note, he expected plaintiff would make him some allowance, though there was no such agreement between them; and that if plaintiff should not prevail, he should probably make some return of the money received by him, though he did not consider himself under any legal liability to that effect. *Held*, that the witness was com-

petent.—Williams v. Bugbee, 60 Mass. (6 Cush.) 418.

[rr] (Miss. 1832) The doctrine that a party to a negotiable instrument is not a competent witness to affect it does not apply where the indorser is offered to prove some fact transpiring after the paper has passed out of his hands.—Drake v. Henly, Walk. 541.

[s] (Miss. 1870) Where the indorser of a note has been notified of its dishonor, he is incompetent as a witness.—Partee v. Silliman, 44 Miss. 272.

[ss] (Mo. 1822) An intermediate indorser of a bill of exchange is a competent witness in an action against the payee; the witness not being benefited or injured by the event of the suit, nor the verdict evidence either for or against him.—Little's Adm'r v. Pratte, 1 Mo. 201.

[t] (N. H. 1839) Where a note is indorsed after maturity, the indorser is a competent witness to show payment of the note before indorsement, or any other legal defense to the note.—Odiorne v. Howard, 10 N. H. 343.

[tt] (N. J. 1845) An indorser of a note is a competent witness for the holder in a suit against a prior indorser.—Woodruff v. Daggett, 20 N. J. Law (Spencer) 526.

[u] (N. Y. 1855) The indorser of a note is a competent witness for the maker, but not in behalf of a co-indorser.—Finn v. Gustin, 4 E. D. Smith, 382, 2 Abb. Prac. 191.

[uu] (N. C. 1882) The effect of Acts 1879, c. 183, amending Code, § 343, is to restore all the common-law rules of evidence applicable to a suit on a bond executed prior to August, 1868; and as, by the common law, all parties to an action and those having a direct legal interest in the event were excluded, except where such interest was equally balanced, an indorser of a note comes within the exception, and is a competent witness for either party in a suit between his indorsee and the maker. —Pugh v. Grant, 86 N. C. 39.

[v] (Ohio, 1818) In an action by the indorsee against the maker of a note, the indorser is not a competent witness to prove the handwriting of the maker.—Bank of St. Clairsville v. Glasener, Tapp. 288.

[vv] (Ohio, 1846) Where the interest of an indorser is equally balanced, as where the recovery of either party will subject him to a suit, in which the recovery by either against him will be for the same account, he is a competent witness to prove a prior indorsement, claimed to have been forged.—Ellis v. Bervellier, 15 Ohio, 489.

[w] (Pa. 1824) In an action by the indorsee against the maker, the indorser is a competent witness to prove that defendant had notice of the indorsement before he acquired a claim on the indorser, which he offers to set off.—Zeigler v. Gray, 12 Serg. & R. 42.

[ww] (Pa. 1837) In a suit by the holder against the drawer of a note, the indorser cannot prove the drawer's handwriting.—Geoghegan v. Reid, 2 Whart. 152.

[x] (Pa. 1841) Defendant, who was a subcontractor for carrying mail, on becoming indebted to plaintiff and others, who were subcontractors, drew a bill on the postmaster general, which he indorsed and delivered to M., one of the subcontractors, and plaintiff and M. indorsed the bill for discount, and plaintiff, who received the proceeds, paid part of the subcontractors, including M., and retained the balance for the payment of the others. Payment of the bill was refused, and plaintiff was compelled to pay it. *Held* that, in an action by him against defendant to recover the amount, M. was a competent witness for plaintiff, as he had no further interest in the bill. —Horback v. Reeside, 6 Whart. 47.

[xx] (Pa. 1861) If negotiation after maturity be first proved aliunde, the indorser of a note is competent to prove that it had been fraudulently negotiated.—Barton v. Fetherolf, 39 Pa. (3 Wright) 279.

[y] (Pa. 1864) The indorser of a bill or note, pledged by him as collateral security to indorsees, is a competent witness for the maker in an action against him by the holders, where his interest is equally poised between the parties, and his testimony relates to matters arising subsequently to the original making of the note and its indorsement.—Girard Fire & Marine Ins. Co. v. Marr, 46 Pa. (10 Wright) 504.

[yy] (Tenn. 1850) The indorser of a bill of exchange is a competent witness for either party, in an action by the indorsee against the drawer.—Oliver v. Bank of Tennessee, 30 Tenn. (11 Humph.) 74.

[z] (Tenn. 1853) In an action on negotiable paper by the indorsee against the maker, the indorser (not being otherwise disqualified) is a competent witness for either party, if he has indorsed it when overdue, or if by the laws of the state in which the paper was negotiated the maker may, in an action against him on the paper, resist a recovery by an indorsee on the ground of want of consideration or fraud in making the paper.—Smithwick v. Anderson, 32 Tenn. (2 Swan) 573.

[zz] (Vt. 1852) The indorser of a note is a competent witness to prove the note void in its inception, when he is not shown to be directly interested in the event of the suit.—Pecker v. Sawyer, 24 Vt. 459.

§ 315. —— Indorsement without recourse or for collection.

Payee, see post, § 319.

[a] (Ala. 1848) An indorser, who has assigned a note without recourse, which was made payable to him as the agent of the indorsee, for a debt due the indorsee, is a competent witness for the latter in a suit on the note.—Boyd v. McIvor, 14 Ala. 593.

[b] (Ill. 1841) An indorser of a bill or note "without recourse" is a competent witness to show that the bill or note was void in its inception; he having no interest in any event.—Bradley v. Morris, 4 Ill. (3 Scam.) 182.

[c] (Ill. 1858) Where one has indorsed a note without recourse to himself, he may be called to prove a promise of the maker, to prevent the bar of the statute of limitations.—Merritt v. Merritt, 20 Ill. (10 Peck) 65.

[d] (Me. 1841) The indorser of a note "without recourse" is a competent witness for the indorsee, in an action against the maker, to prove that a material alteration was made by the promisor at the time it was signed, and before its delivery to the payee.—Abbott v. Mitchell, 18 Me. (6 Shep.) 354.

[e] (Mo. 1866) Rev. Code 1855, p. 1578, § 6, which provides that no grantor, vendor, or assignor in any deed, instrument, or writing affecting property, real, personal, or mixed, or any claim or right therein or therefrom, shall be a competent witness to alter, change, or qualify the proper effect and operation of the words and terms of such deed, instrument, or writing, does not prevent an indorser of a note in blank for collection only from being a witness to prove that it was so indorsed.—Perry v. Siter, 37 Mo. 273.

[f] (N. Y. 1808) The indorser of a note is not competent to testify to an agreement between him and the maker to the effect that there shall be no recourse over, although he may show the agreement by other evidence.—Cummings v. Fisher, Anth. N. P. 1.

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[g] (N. C. 1801) A subscribing witness to a note, to whom it is afterwards indorsed, and who then indorses it without recourse, is a competent witness to prove its execution.—Billingsly v. Knight, 4 N. C. 540.

[h] (Pa. 1851) An indorser of a note cannot be a witness to prove that it was indorsed to him merely for collection; the presumption of law being that he was the owner, and he is not a proper witness to rebut that presumption.—Miley v. Todd, 17 Pa. (5 Harris) 101.

§ 316. —— Accommodation paper.

[a] (Conn. 1831) The first indorser of a note is competent, without a release, to prove, in a suit by the holder against a subsequent indorser, that defendant indorsed the note merely for the accommodation of the maker, and that the maker negotiated it fraudulently.—Hall v. Hale, 8 Conn. 336.

[b] (Pa. 1823) The indorser of a note given for his own accommodation cannot be a witness for the maker, to prove it an accommodation note, when it has been discounted by the holder, if such indorser has given the maker a bond of indemnity.—Bank of Montgomery County v. Walker, 9 Serg. & R. 229, 11 Am. Dec. 709.

[c] (Pa. 1823) An indorser of a note, who made an assignment before its maturity, is a competent witness, as between the holder of the note and the assignee, to testify that the note was in fact made for his accommodation, and to state any fact explaining the transaction which did not go to prejudice the holder of the note.—Bank of Pennsylvania v. Strawbridge, 11 Haz. Reg. 237.

[d] (Pa. 1833) Where a note was made and indorsed for the indorser's accommodation, and by him discounted at a bank, the bank, in an action against the indorser's assignee in insolvency to recover dividends declared, may prove by the indorser that the note was made for his accommodation and that he was in fact primarily liable thereon.—Bank of Pennsylvania v. McCalmont, 4 Rawle, 307.

[e] (Va. 1856) The last of several indorsers of an accommodation note, being obliged to take it up at maturity, sues his immediate indorser, who at the trial offers as a witness the indorser immediately preceding him on the note, to prove that all the indorsers had agreed at the time of executing the note to be liable as joint securities only. The court below ruled that, whether plaintiff recovered or not, the witness' interest would be the same, except as to costs of the action, and that a release by defendant for costs only would render him competent. While the release was preparing, it was discovered that, in consequence of the time elapsed since the payment of the money on the note by plaintiff, the witness was protected by the statute of limitations against any recovery on his part, and the witness was not permitted to testify. *Held*, the right of the witness to plead the statute in such an event disturbed his equality of interest in this suit and rendered him incompetent to testify.—Chapman v. Hiden, 2 Pat. & H. 91.

§ 317. Payee of bill or note.

[a] (U. S. 1847) In an action between the indorsers of a note, the payee was a competent witness to prove a contract between the two indorsers that they would divide the loss between them.—Phillips v. Preston, 46 U. S. (5 How.) 278, 12 L. Ed. 152.

[b] (U. S. 1812) The payee is not a competent witness in an action on the note.—Gilman v. King, Fed. Cas. No. 5,444 [2 Cranch, C. C. 48].

[c] (Ala. 1827) The payee is a competent witness to impeach the consideration of the note.—Todd v. Stafford, 1 Stew. 199.

[d] (Ala. 1840) The payee of a note payable to himself or bearer is a competent witness, in a suit by the bearer against the maker, to impeach the consideration. The objection is to his credibility merely.—Davidson v. Love, 1 Ala. 133.

[e] (Cal. 1861) The payee of a note is a competent witness in a suit against the maker.—Smith v. Richmond, 19 Cal. 476.

[f] (Del. 1869) The payee of a note negotiated before maturity, and still in the hands of an innocent indorsee without notice, is not a competent witness to prove the conditional delivery or failure of consideration. — Wilson v. Walker, 4 Houst. 96.

[g] (Ga. 1832) The payee of a note is a competent witness, under some circumstances, to prove its consideration.—Slack v. Moss, Dud. 161.

[h] (Ga. 1854) When the action is on a note payable to bearer, such bearer is not necessarily so interested as to render him an incompetent witness.—Rich v. Dupree, 14 Ga. 661.

[i] (Iowa, 1840) The payee of a note is competent, when not interested, to prove facts arising after the execution of the note, but not to prove anything affecting the original liability of the maker.—Strang v. Wilson, Morris, 84.

[j] (Ky. 1827) A. recovered a judgment at law on a note given by B. to C., and assigned by the latter to A. C. became insolvent, and B. filed his bill, with injunction, claiming demands due him from C. at the time of the assignment of the note, and prayed that they might be set off against the judgment. *Held*, that C. was an incompetent witness for A.—Brown v. Vance's Ex'rs, 20 Ky. (4 T. B. Mon.) 418.

[k] (La. 1830) A payee, who has transferred the note without indorsement or recourse, may prove its consideration.—Hughes v. Harrison, 2 La. 89.

[l] (Mass. 1807) The payee of a note, payable to him or bearer, is incompetent to prove the making of the note; otherwise, if indorsed without recourse.—Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129.

[m] (Mo. 1862) The payee and assignor of a note is not a competent witness for the maker to prove a defense that avoids the note. Rev. Code 1855, p. 1577.—Kobbe v. Landecker, 32 Mo. 170.

[n] (N. Y. 1818) The payee of a note is not a competent witness for the holder in an action against the maker, although the holder took it at his own risk as to the solvency of the maker.—Herrick v. Whitney, 15 Johns. 240.

[o] (N. Y. 1832) In an action by the assignee of a note payable to A. B., or bearer, evidence of declarations made by the payee while he was holder of the note, in discharge of the maker, is inadmissible; the payee himself being a competent witness in such case.—Whitaker v. Brown, 8 Wend. 490.

[p] (Pa. 1833) The payee of a note is a competent witness to prove it an accommodation note, though the maker was indebted to the payee of the note at the time it was made.—Bank of Pennsylvania v. McCalmont, 4 Rawle, 307.

[q] (Pa. 1852) The payee of a note, who has negotiated it, is not a competent witness for a subsequent holder in an action against the maker.—Bailey v. Knapp, 19 Pa. (7 Harris) 192.

[r] (Pa. 1861) The rule laid down in Walton v. Shelly, 1 Term R. 296, extends only to negotiable paper actually negotiated and in the

hands of an innocent holder, who took it without any previous notice of any original defect in it; and it excludes only those parties whose names were on the paper when it was transferred to the holder.—Hawkins v. Cree, 37 Pa. (1 Wright) 494.

[s] (Pa. 1861) Where a note is not indorsed, but assigned to the holder, with a general warranty by the assignor and a third party, and there is evidence in the cause to the effect that the holder had admitted that he thought there was something wrong about it, and did not want to take it unless the assignor would guaranty it, which he was for a long time unwilling to do, *held*, that the payee of the note is not incompetent as a witness for the maker. —Hawkins v. Cree, 37 Pa. (1 Wright) 494.

[t] (S. C. 1833) The payee of a note is a competent witness to prove the want of consideration and that the note has been altered in a material part.—Smith v. Cheney's Adm'r, 1 Hill, 148.

[u] (S. C. 1859) Where, in an action by the bearer on a note payable to A., or bearer, the defense is a discount for demands due by A. to defendant, A. is a competent witness for plaintiff to prove that the note was transferred before it was due and for a valuable consideration.—Strickland v. Stevens, 12 Rich. Law, 78.

§ 318. —— Indorsement.

[a] (Ala. 1845) The payee of a gaming note, who has transferred it to another, is a competent witness for the maker, and may be compelled to testify as to the consideration of the note, on a bill in chancery filed by the maker against the indorsee.—Manning v. Manning, 8 Ala. 138.

[b] (Cal. 1864) S. made a note to A. & B., partners. A. indorsed the note to B., the partnership being dissolved, and B. sued the note, attaching property. The property attached was bought at a sheriff's sale by B., and he sold a portion of it to A. P. brought an action against B. and the sheriff to recover the property as belonging to himself. *Held*, that A. was not inadmissible as a witness in behalf of the defendants in this suit, under Prac. Act, § 422, as an "assignor," nor under section 391, as having a "present, certain, and vested interest in the suit."—Peterie v. Bugbey, 24 Cal. 419.

[c] (Del. 1863) In an action by the innocent holder of a note negotiated before maturity against the maker, the payee and indorser is a competent witness for defendant to prove that it had been altered in a material manner and fraudulently put in circulation, contrary to his intention, after he had indorsed and delivered it for a special purpose.—Sudler v. Collins, 2 Houst. 538.

[d] (Ill. 1840) In an action by an indorsee against the maker of a note, the indorser, who received the note as payee merely as agent of the indorsee, is a competent witness for defendant to impeach the consideration of the note.—Webster v. Vickers, 3 Ill. (2 Scam.) 295.

[e] (Ill. 1861) The payee and first indorser is a competent witness, in a suit on a bill against a subsequent indorser, to prove any fact which does not impeach the genuineness of the bill or go to its discharge before or at the time when he parted with it.—Rives v. Marrs, 25 Ill. (15 Peck) 315.

[f] (Ill. 1862) The payee and indorser of a note is not a competent witness to prove that an assignee had not paid any consideration for a note, or that it had not been delivered to the assignee.—Coon v. Nock, 27 Ill. (17 Peck) 235.

[g] (Iowa. 1840) In a suit by the indorsee against the maker of a note indorsed before it was due, the payee is, if not interested, competent to prove that the indorsee paid full consideration for the note.—Strang v. Wilson, Morris, 84.

[h] (La. 1861) When the defense against a note was that the note belonged to the indorser and had been transferred for the purpose of depriving defendant of the defense of want of consideration, and merely for the accommodation of indorser, who was merely payee, *held* that, if this plea be true, the indorser would be liable to defendant for the reimbursement of whatever defendant was obliged to pay on the note, and that, at least until defendant released the indorser from liability over to himself, he could not be allowed to testify in the cause.—Price v. Emerson, 16 La. Ann. 95.

[i] (La. 1867) In a suit on a note by a third holder against the maker, the payee and indorser is a competent witness for the maker to prove a subsequent agreement between the maker and payee, he being then the holder, by which the note was to be extinguished.—Nash v. East, 19 La. Ann. 165.

[j] (Mass. 1831) In an action by the indorsee against the maker of a note, the payee is a competent witness to prove the time of indorsement.—Spring v. Lovett, 28 Mass. (11 Pick.) 417.

[k] (Mass. 1846) A note, signed by A. as principal, and by B. and C. as sureties, was made payable to the order of M., and placed in his hands for a special purpose, which was not effected. M. afterwards, with the consent of A., but without the consent or knowledge of B. and C., indorsed the note to an officer as security for property attached by him as the property of a corporation of which M. was the treasurer and agent. *Held*, in a suit on a note, brought by the officer against A., B., and C., that M. was a competent witness for defendants.—Strong v. Buck, 52 Mass. (11 Metc.) 279.

[l] (Mass. 1860) The payee of a note is a competent witness to prove that it was given without consideration, and that after it had been paid and given up to the promisor it was again placed in the hands of the payee for another purpose than that of being paid, and that a subsequent indorser took it with notice of all these facts.—Fish v. French, 81 Mass. (15 Gray) 520.

[m] (N. J. 1810) The payee of a note, who had indorsed it to plaintiff, was a competent witness in an action thereon to testify that the note was executed to him, subject to conditions of which he had informed plaintiff at the time of making the indorsement, and that by a fulfillment of the conditions there was nothing due on the note.—Rosevelt v. Gardener, 3 N. J. Law (2 Penning.) 694.

[n] (N. J. 1834) In an action brought by the indorsee against the maker on a note, the payee and indorser is not a competent witness, if it appear that he was the real debtor, and had borrowed the note of defendants for the purpose of raising money on it.—Letson v. Dunham, 14 N. J. Law (2 J. S. Green) 307.

[o] (N. Y. 1841) Defendants were indorsees of a draft, having received the same through several successive indorsements; the name of the payee appearing as the first. Plaintiff bank paid the draft to defendants, and afterwards sued to recover back the payment, on the ground that the payee's indorsement was a forgery. *Held*, that the payee was not incompetent, from interest, to testify in behalf of plaintiff.—Canal Bank v. Bank of Albany, 1 Hill, 287.

[p] (Ohio, 1833) The payee of a note, in a suit between the indorsee and the maker, is a competent witness to prove the terms of the indorsement, if called to the stand by the maker; their interests being adverse.—Stone v. Vance, 6 Ohio (6 Ham.) 246.

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[q] (Pa. 1834) Where a note in blank, payable to the order of the first indorser, was produced, and a certain amount of it was then paid by the second indorser, who afterwards received the amount from the drawer, the first indorser was not a competent witness to prove that such payment by the drawer was on account of the note, and not on account of a distinct claim on which suit was brought by the second indorser against a firm of which the drawer was a member.—Rhodes v. Lent, 3 Watts, 364.

[r] (Pa. 1856) The payee cannot be a witness for his indorsee in a suit by the latter against the maker.—Hatz v. Snyder, 26 Pa. (2 Casey) 511.

[s] (Pa. 1867) The payee, who has indorsed a note, cannot testify in a suit proceeding on the consideration of a note, because, if not in strictness an indorser, he is the assignor of a chose in action, who comes in on the record as plaintiff to recover it.—Foreman v. Ahl, 55 Pa. (5 P. F. Smith) 325.

§ 319. —— Indorsement without recourse.

[a] (Me. 1834) The payee of a note, having indorsed it without recourse, is a competent witness for the indorsee, in an action against the maker, to prove a new promise within six years.—Howe v. Thompson, 11 Me. (2 Fairf.) 152.

[b] (Me. 1849) In a suit by the indorsee against the maker on a note indorsed by the payee without recourse, the payee is a competent witness for defendant to prove the time of the indorsement, that a bond had been executed by defendant to plaintiff, and that the surrender of the bond was the consideration of the note.—Davis v. Sawtelle, 30 Me. (17 Shep.) 389.

[c] (N. H. 1852) The payee of a note, which he has indorsed, "without recourse," is a competent witness for the indorsee, in an action on the note against the maker.—Edgerly v. Shaw, 25 N. H. (5 Fost.) 514, 57 Am. Dec. 349.

§ 320. Acceptor of bill.

[a] (U. S. 1824) In an action by the drawee against the drawer of a bill of exchange, where the acceptor is offered as a witness to prove that the bill was drawn by defendant for the accommodation of plaintiff, the circumstance that the act of limitations would be a bar to plaintiff's action against the witness on his acceptance if plaintiff fails in this action against the drawer, but would be no bar to an action which this defendant might bring against the witness on his acceptance in case this defendant should be compelled by this suit to pay the money, does not render the witness incompetent by reason of interest.—Knowles v. Stewart, Fed. Cas. No. 7,900 [2 Cranch, C. C. 457].

[b] (Conn. 1819) One having funds in the hands of his correspondent drew a bill on him for the amount, which the latter accepted, but failed to pay. *Held*, in an action brought by the payee against the drawer, that the acceptor was a competent witness for the drawer.—Barnwell v. Mitchell, 3 Conn. 101.

[c] (La. 1841) A statute which excludes the drawer of a bill from being a witness in a suit by the holder against the indorser, being in derogation of the settled rules of evidence, will not be extended beyond its letter, and will not be construed to apply to the acceptor.—Buckner v. Watt, 19 La. 216, 36 Am. Dec. 671.

[d] (La. 1841) An acceptor of a bill, who is without interest in the suit by the holder against the indorser, is a competent witness.—Buckner v. Watt, 19 La. 216, 36 Am. Dec. 671.

[e] (Mass. 1838) In an action by the indorsee against the drawer of a bill of exchange, the acceptor is a competent witness to prove that he has not had in his hands any funds of the drawer.—Kinsley v. Robinson, 38 Mass. (21 Pick.) 327.

[f] (N. Y. 1859) A debtor assigned his property in trust for the benefit of creditors, giving a preference to persons who had accepted paper for his accommodation. *Held*, that the acceptor of a draft was a competent witness to prove that the acceptance was for the accommodation of the drawer, in order to entitle the holder of the draft to preference in payment out of the estate of the drawer under the assignment.—Pratt v. Adams, 7 Paige, 615.

§ 321. Assignor and assignee or indorsee.

[a] (U. S. 1815) Plaintiff, being sole owner of a bill of exchange, indorsed it in blank and delivered it to B., to deliver to defendant for collection; and, when collected, the amount was to be placed to the credit of plaintiff and B. on account. Defendant collected the amount, but refused to place it to the credit of plaintiff and B., who settled their account with defendant and paid him the balance. *Held* that, in an action by plaintiff against defendant for the amount received on the bills, B. was a competent witness for plaintiff.—Taber v. Perrott, 13 U. S. (9 Cranch) 39, 3 L. Ed. 649.

[b] (Ala. 1833) Evidence of the handwriting of the subscribing witness to a note, or of the signature of the maker, and his admission of its execution, is not admissible in an action against the maker, brought by the subscribing witness, who, after attesting the note, became the assignee thereof.—Bennet v. Robinson's Adm'r, 3 Stew. & P. 227.

[c] (Ala. 1848) In an action on a note by an indorsee against the first indorser, the indorsee of defendant is a competent witness for plaintiff to disprove an agreement set up by defendant, in defense, by which certain claims against the witness were in a certain contingency to be set off against the note, the claims of defendant against the witness not being disputed, as his interest is balanced, and he is not rendered incompetent by a release from plaintiff.—Isbell v. Brown, 13 Ala. 383.

[d] (Ala. 1859) The assignor of a note is not competent to prove the cause of action, but is to disprove payment, release, or matter in discharge.—Eaton v. Kirkman, 35 Ala. 272.

[e] (Conn. 1836) It is no objection to the competency of a witness, called to impeach the validity of a note, that he had assigned it and thereby given it currency.—Johnson v. Blackmar, 11 Conn. 342.

[f] (Ga. 1854) Where A. assigns a note to B., on the question whether an indorsement on it is a forgery, A.'s testimony to prove the genuineness of the note is inadmissible from interest.—Sneed v. Hughes, 14 Ga. 542.

[g] (Ky. 1840) An assignor of a note, who assigns it without recourse, stating the defense which would be made to it, but assuring the assignee that it was unpaid, will be liable, if it turns out that the note was in fact paid before the assignment. He is not, therefore, a competent witness for the assignee without a release.—Woolfolk v. McDowell, 39 Ky. (9 Dana) 268.

[h] (Ky. 1841) The assignee of a note, which was not in the mercantile sense negotiable paper, but assignable merely under the statute authorizing the assignment of notes, so as to invest in the assignee the legal right of the obligee, and no other or greater right as against the obligor, was a competent witness to prove that the note was executed without any good or valuable consideration.—Bement v. McClaren, 40 Ky. (1 B. Mon.) 296.

[i] (Me. 1841) Where one having in his hands a draft, void as to him for want of consideration, passes it over in payment of a pre-existing

debt, he is a competent witness in a suit between the holder and the parties to the draft; his interest being balanced.—Norton v. Waite, 20 Me. (2 App.) 175.

[j] (Me. 1845) Where a note secured by a mortgage has been indorsed by the payee, and the mortgage assigned, and the indorsee, without indorsing the note, by an instrument in writing on the mortgage, conveys "all his right, title, and interest in and to the within mortgage, and the premises described therein, and also the mortgaged note named therein," to A., the assignor is a competent witness for A. in an action by him upon the note.—Fuller v. Hodgdon, 25 Me. (12 Shep.) 243.

[k] (Miss. 1850) The fraudulent assignor of a note is not a competent witness for the assignee, in an action against the maker, to support the consideration.—Brodnax v. Brodnax, 21 Miss. (13 Smedes & M.) 369.

[l] (Mo. 1865) The assignor of a note is an incompetent witness as to facts occurring before the assignment.—Hendricks v. Ebbitt, 37 Mo. 24.

[m] (Mo. 1866) An assignor of a note, the principal defendant in a prior garnishment suit, is a competent witness to prove that at the date of the garnishment he was the owner of the note, the subject of the garnishment, and that there was no consideration for the assignment.—Weil v. Tyler, 38 Mo. 558, 90 Am. Dec. 441.

[n] (N. Y. 1819) Where the holder of a note payable to bearer transfers it to another person for a valuable consideration, under an agreement that the person to whom it is transferred shall collect it at his own risk, he is not a competent witness for such person, in an action by him on the note, as he is still responsible if the note should prove to be a forgery.—Shaver v. Ehle, 16 Johns. 201.

[o] (N. Y. 1824) One who held a note indorsed in blank, and sold it to another without indorsing it, is, after the execution of the note is proved, a competent witness for the holder, in an action by him against an indorser.—Williams v. Matthews, 3 Cow. 252.

[p] (N. Y. 1838) Since a transfer of a note at the risk of the party receiving it leaves the implied warranty that the note is genuine, a party to the transfer is not a competent witness in an action upon it, if its genuineness is disputed.—Watson's Ex'rs v. McLaren, 19 Wend. 557.

[q] (N. Y. 1852) A former holder of a note, who has transferred it without recourse or guaranty, is a competent witness for plaintiff in a suit thereon.—James v. Chalmers, 1 Code R. (N. S.) 413.

[r] (Pa. 1852) The former owner of a note, who has transferred it by delivery without indorsement, is a witness for the maker to prove that plaintiff holds it in trust for the use of the witness, and that the maker has paid the amount in full to the party entitled in equity to receive it.—Wallace v. McElevy, 2 Grant, Cas. 44.

[s] (Pa. 1853) In a scire facias against a garnishee in a foreign attachment, who had possession of a note, he pleaded nulla bona, on which issue was joined. *Held* that one who appeared on the note as second and last assignee thereof was incompetent to prove that the first assignment was made for value before the attachment was issued, and that the assignment to him was made solely for the purpose of collection.—Anderson v. Young's Ex'rs, 21 Pa. (9 Harris) 443.

[t] (Pa. 1859) The former holder of a note, who had parted with it before maturity, is a competent witness for plaintiff in a suit on the note.—Dela v. Evans, 3 Phila. 397.

[u] (Pa. 1865) One who sells a note or bill of exchange, although not indorsing it himself, is incompetent to testify for his vendee in an action on the note.—Swanzey v. Parker, 50 Pa. (14 Wright) 441, 88 Am. Dec. 549.

[v] (S. C. 1832) A. gave a note to B., of which note C. obtained possession fraudulently and transferred it to D. B. gave notice to A. of the fraud, and directed him not to pay it to D.; but he did pay it to him, and B. brought this suit against A. to obtain the amount of the note. *Held*, that D. was an incompetent witness for A.; he being liable to D. in case of B.'s recovery.—Proctor v. McCall, 8 Rich. Law, 425.

[w] (Vt. 1848) The holder of a note transferred it for a valuable consideration and without any express contract of warranty or guaranty, and the purchaser commenced an action on the note in the name of the payee, and the maker, on trial, conceded his original and continued indebtedness on the note. *Held*, that the vendor was a competent witness for plaintiff.—Hough v. Barton, 20 Vt. 455.

[x] (Va. 1827) Previous to the act of 1807, a remote assignor of a note was a competent witness, in a suit between the last assignee and his immediate assignor, to prove that the latter was not liable.—Caton v. Lenox, 5 Rand. 31.

§ 322. Testimony as to payment.

[a] (Ala. 1850) In an action against an attorney for money collected by him on a note, the principal in the note is an incompetent witness to prove that he has paid it to defendant, since the principal is interested in effecting a recovery by plaintiff.—Moore v. Henderson, 18 Ala. 232.

[b] (Ark. 1843) A. brought his bill, alleging that he had executed his note to B., who indorsed the note to C.; that a payment was made to C., who failed to give credit for it on the note, and indorsed the note to D., who had recovered judgment on it; that he and defendants were partners, and that he was retained by them as counsel, and that, if defendants should account with him, there would be nothing due on said note; and that C. was further indebted to him for fees as counsel in another suit. *Held*, that C. was a competent witness at law, in a suit between complainant and D., to establish the fact of payment alleged to have been made on the note, and that on that ground A. could not be relieved in equity.—Cummins v. Bentley, 5 Ark. (5 Pike) 9.

[c] (Conn. 1786) In an action on a note, defendant offered as a witness the drawer of an order, to prove that plaintiff accepted such order in payment of the note. *Held*, that he was incompetent.—Huntington v. Champlin, Kirby, 166.

[d] (Conn. 1836) The assignee of a note not negotiable is not precluded, by St. 1822, § 1, from giving testimony to prove the payment of the note to him.—Johnson v. Blackman, 11 Conn. 342.

[e] (Ga. 1846) In an action against an attorney to recover money collected by him on a note, an indorser on the note is incompetent to testify that he paid the amount to the attorney, unless released.—Nisbet v. Lawson, 1 Ga. (1 Kelly) 275.

[f] (Ga. 1856) The answer, payment having been pleaded, "The note was paid off by defendant to myself, in harness, when I had it in possession," does not prove a witness to be interested for defendant.—McNeill v. Rousseau, 20 Ga. 593.

[g] (Iowa, 1846) The drawer of a bill on one person, payable to the order of plaintiff, was, in an action brought by plaintiff against such other person, an incompetent witness to prove payment.—Webb v. Mauro, Morris, 488.

[h] (La. 1815) In a suit against the indorser, the maker of a note is incompetent to prove the

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extinguishment of the note.—Abat v. Dollole, 3 Mart. (O. S.) 657.

[i] (La. 1850) The payee of a note is a good witness for the holder against the drawers, where the defense is payment.—McCraw v. Tomkins, 5 La. Ann. 183.

[j] (Me. 1853) The payee may testify that the maker paid to him the amount of a note which plaintiff received after its maturity.—Smith v. Morgan, 38 Me. 468.

[k] (Mass. 1814) In an action by the indorsee against the maker of a note, the payee is a competent witness to prove that the note was paid before he indorsed it.—Fitch v. Hill, 11 Mass. 286.

[l] (Pa. 1850) A. sold B. a note, the indorsement on which was forged, and signed a receipt for the purchase-money. B., on discovering the forgery, sued A. on the receipt. *Held*, that the maker of the note was a competent witness to show that the money was paid to himself, and not to A., as stated in the receipt.—Dutton v. Tilden, 13 Pa. (1 Harris) 46.

[m] (Pa. 1861) The indorser of a note may testify to facts amounting to subsequent payment.—Barton v. Fetherolf, 39 Pa. (3 Wright) 279.

[n] (S. C. 1824) In an action against the maker of a note, an indorser on the same is competent to testify that it has been paid.—Nichols v. Artman, Harp. 285.

[o] (S. C. 1831) The payee of a note, if not actually interested, is a competent witness, in an action by the holder against the maker, to prove that it has been paid.—Bobo v. Bostick, 2 Bailey, 106.

8. INTEREST ARISING FROM STATUS OR RELATION OF PARTIES IN GENERAL.

(a) IN GENERAL, §§ 323-327.
(b) DEBTOR, BANKRUPT OR INSOLVENT, ASSIGNOR AND ASSIGNEE FOR CREDITORS, AND CREDITORS, §§ 328-337.
(c) PRINCIPAL OR OBLIGEE AND SURETY, GUARANTOR, OR INDEMNITOR, §§ 338-348.
(d) PARTNERS, §§ 349-355.
(e) EXECUTORS OR ADMINISTRATORS, AND LEGATEES, DEVISEES, OR HEIRS, §§ 356-362.
(f) PUBLIC AND JUDICIAL OFFICERS, §§ 363-370.

(a) IN GENERAL.

GUARDIAN AND WARD, § 323.
GRANTOR, TRUSTEE, AND BENEFICIARY, § 324.
ASSIGNOR, § 325.
—— LIABILITY ON COVENANT, § 326.
ASSIGNEE, § 327.

§ 323. Guardian and ward.

Parties to action, see ante, § 242.
Statutory removal of incompetency, see post, § 512.

[a] (Ala. 1857) A guardian, who has invested his ward's funds in a partnership, is not a competent witness for the ward, when the latter seeks, while still an infant, to enforce the partnership for his benefit.—Stein v. Robertson, 30 Ala. 286.

[b] (Ga. 1862) In an action by a guardian, charging that defendant had purchased a note from the former guardian and seeking to enforce the same, such former guardian is not incompetent on the score of interest.—Fountain v. Anderson, 33 Ga. 372.

[c] (Ill. 1859) A guardian of infant children is not a competent witness to establish a claim by their mother for their maintenance.—Ex parte Guernsey's Estate, 21 Ill. (11 Peck) 443.

[d] (Ky. 1847) A guardian of a testatrix is a competent witness to prove her competency to make a will.—Howard v. Coke, 46 Ky. (7 B. Mon.) 655.

[e] (La. 1828) A curator, the legality of whose conduct is at issue, is not competent. He is not within the rule making agents witnesses ex necessitate.—Barbineau's Heirs v. Castille, 7 Mart. (N. S.) 186.

[f] (Md. 1831) Upon a bill for an account of the rents and profits of an infant's estate against an alleged intruder, the infant's guardian is not a competent witness to prove an agreement between himself and defendant that the latter should keep the estate and pay the rents to the infant and another party, who were jointly interested.—Hungerford v. Bourne, 3 Gill & J. 133.

[g] (Md. 1831) In replevin for a slave, plaintiff proposed to prove by his former guardian that the negro in controversy was plaintiff's property. *Held*, that the mere fact that the negro constituted a part of plaintiff's estate during his minority, and during one period thereof had been in the witness' possession, did not render the witness incompetent.—Watts v. Garrett, 3 Gill & J. 355.

[h] (Miss. 1849) Whether a prochein ami is a competent witness for the infant, or not, yet, where his testimony is addressed to the court, and is adverse to the interests of the infant, the validity of the decree will not be affected by its admission.—Quinn v. Moss, 20 Miss. (12 Smedes & M.) 365.

[i] (Mo. 1863) In a suit by a guardian to recover money of an intestate estate in the hands of an administrator, the wards are competent witnesses to show his indebtedness to their guardian, as they have no right to the particular sum due as their own absolute property.—Bowman v. Stiles, 34 Mo. 141.

[j] (N. C. 1842) In a suit by an executor on a bond for rent of lands belonging to the testator's estate, the guardian of wards, who are in equity entitled to the rent, is a competent witness for plaintiff.—Waddell v. Moore, 24 N. C. 261.

[k] (Pa. 1833) In account rendered by a legatee against the trustee in the will, the legatee's guardian is a competent witness.—Bredin v. Dwen, 2 Watts, 95.

[l] (Tex. 1852) In a suit on behalf of the heirs against an administrator, a person who has been guardian of a minor is a competent witness to prove that he had never received any money from the administrator, as guardian. The objection would, at most, affect his credibility.—Givens' Adm'r v. Davenport, 8 Tex. 451.

[m] (Tex. 1859) The guardian of a defendant to a suit, not himself a party to it, is not incompetent because of interest to testify in such suit at the call of plaintiff.—Todd v. Dysart, 23 Tex. 590.

§ 324. Grantor, trustee, and beneficiary

Parties to action, see ante, § 241.
Transfer, release, or extinguishment of interest, see post, § 449.

[a, b] A naked trustee, without interest, is a competent witness.
—(Ala. 1840) Johnson v. Cunningham, 1 Ala 249;
(Ga. 1850) Hardwick v. Hook, 8 Ga. 354;
(N. Y. 1808) Main v. Newson, Anth. N. P. 11;
(N. C. 1836) Jones v. Sasser, 18 N. C. 452.

[c] (Ala. 1837) A cestui que trust is not a competent witness for the party sustaining the

deed of trust, in an action against the grantor in which the trust property is attached.—Bank of Alabama v. McDade, 4 Port. 252.

[d] (Ala. 1840) Where a trustee has done no act which affirms the fairness and validity of the deed of trust, he may be examined to show it fraudulent.—Johnson v. Cunningham, 1 Ala. 249.

[e] (Ala. 1840) The mere possibility that a trustee, while acting as such, may have subjected himself to liability for a breach of trust, and may therefore be interested to defeat the deed, will not make him an incompetent witness. The interest is too remote and uncertain.—Johnson v. Cunningham, 1 Ala. 249.

[f] (Ala. 1842) The grantor in a deed of trust of personal property, who has the interest of a resulting trust therein, is not a competent witness for the grantee to show the consideration for the deed.—Stewart v. Fowler, 3 Ala. 629.

[g] (Ark. 1854) A bill was brought to redeem a slave, and exceptions taken by defendant, on a decree for complainant, that a witness had an interest in the event of the suit. *Held*, that as the witness acted as trustee for the benefit of others, and had therefore no direct, certain, and vested interest, he was competent.—Folsom v. Fowler, 15 Ark. 280.

[h] (Cal. 1856) On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness by holding lands devised therein in trust for a devisee, and without having any interest himself therein.—Peralta v. Castro, 6 Cal. 354.

[i] (Del. 1855) A trustee under a will giving a compensation for his services is not a competent witness in support of the will.—Davis v. Rogers, 1 Houst. 44.

[j] (Ill. 1867) A trustee, who has misapplied a portion of the trust fund, is not a competent witness by whom to show the purposes for which the trust was created.—Heartrunft v. Daniels, 43 Ill. 369.

[k] (Ky. 1851) A testator devised certain property to B., to be held in trust for the benefit of B.'s wife. *Held*, that B., after his wife's death, was not a competent witness in a suit to invalidate the will.—Allen v. Everett, 51 Ky. (12 B. Mon.) 371.

[l] (Ky. 1859) One who is constituted by a will a mere trustee for one of the devisees is a competent witness to prove facts necessary to establish the instrument.—Montgomery v. Perkins, 59 Ky. (2 Metc.) 448, 74 Am. Dec. 419.

[m] (Me. 1840) If the depositary of papers assume the execution of the trust, he becomes responsible to any party who may suffer by the violation of it. His interest is therefore balanced, and he is a competent witness for either party.—Lewis v. Hodgdon, 17 Me. (5 Shep.) 267.

[n] (Md. 1831) A trustee, whose liability cannot be altered by opening the decree, is a competent witness on an application for a bill of review.—Hodges v. Mullikin, 1 Bland, 503.

[o] (Md. 1846) An assignor of an account for medical services rendered, the assignment being made in consideration of love and affection to a third person, in trust for the assignor's children, is, under Acts 1829, c. 51, a competent witness for the assignee to prove the services and defendant's promise to pay therefor within three years before the institution of the suit.—Crawford v. Brooke, 4 Gill, 213.

[p] (Mo. 1849) Where one of several trustees is interested to keep the trust as large as possible, he is incompetent to testify in an action against the other trustees.—Hayden v. Cornelius, 12 Mo. 321.

[q] (N. Y. 1816) Where land was held in trust for A. for life, with power of appointment to her among her children, her son was a competent witness for plaintiff in a suit to recover land sold in violation of the trust.—Murray v. Finster, 2 Johns. Ch. 155.

[r] (N. Y. 1853) A sole cestui que trust, having an immediate right, if not to the whole, yet to a definite portion, of the sum sought to be recovered, is not a competent witness for plaintiff.—St. John v. American Mut. Life Ins. Co., 9 N. Y. Super. Ct. (2 Duer) 419.

[s] (N. C. 1854) On a bill to convert a purchaser, who has taken a conveyance to himself absolute on its face, into a trustee, alleging as part of the parol trust that a part of the property was to be reconveyed to plaintiff's daughters on their marriage, no consideration moving between the daughters and defendant, neither they nor their husbands are incompetent to testify for the plaintiff by reason of interest.—Lamb v. Pigford, 54 N. C. 195.

[t] (Pa. 1814) A trustee, who is lessor of plaintiff in ejectment, is a good witness for defendant to show that the real interest is different from that declared in the conveyance, as, though he has the legal title, he is considered as having no interest.—Drum v. Simpson's Lessee, 6 Bin. 478, 6 Am. Dec. 490.

[u] (Pa. 1834) A person for whom a tract of land was conveyed in trust, and who paid a small part of the purchase money, and who afterwards was present and made no objection to a conveyance by the trustee to another, was a competent witness in ejectment by the grantee of the trustee against one who claimed under the same trust.—Taylor v. Taylor, 2 Watts, 357.

[v] (Pa. 1836) A cestui que trust is not competent as a witness, in a cause affecting the trust fund, by the trustee having made an assignment to a third person without a valuable consideration.—Hoak v. Hoak, 5 Watts, 80.

[w] (Pa. 1836) A cestui que trust cannot be a witness, in an action of ejectment brought in the name of his trustee, unless he actually pay all costs into court, due and to become due, as well as assign his interest in the land.—Campbell v. Galbreath, 5 Watts, 423.

[ww] (Pa. 1861) In an issue between a trustee and an attaching creditor of the cestui que trust, the latter being interested for both plaintiff and defendant, and no certain and preponderating interest being shown for plaintiff, is a competent witness; the jury being instructed that, if they find his interest in favor of plaintiff greater than in favor of defendant, they should reject his testimony altogether.—Rees v. Livingston, 41 Pa. (5 Wright) 113.

[x] (Pa. 1861) Where property, raised by the contributions of friends and conveyed in trust to a trustee, for the benefit of the family of one who has failed in business, is attached by a former creditor of the cestui que trust, in an interpleader process between the trustee and the attaching creditor, one of the original contributors to the trust fund, having no interest in the suit, is a competent witness for the trustee.—Rees v. Livingston, 41 Pa. (5 Wright) 113.

[xx] (Pa. 1863) A cestui que trust is incompetent to testify in support of the title of the trustee.—Buchanan v. Buchanan, 46 Pa. (10 Wright) 186.

[y] (Pa. 1867) In an action of assumpsit by an administrator, claiming money which had been placed by the decedent in the hands of

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defendant in trust for the use of the children of the decedent, one of the children is not a competent witness for defendant.—Cox v. McKean, 56 Pa. (6 P. F. Smith) 243.

[yy] (S. C. 1791) A trustee is not competent to prove that the trust deed was never intended to have any operation for the purposes expressed therein.—Wilson v. Wilson, 1 Desaus. 219.

[z] (Va.) A mere naked trustee is a competent witness in a suit by a creditor to set aside the deed of trust on the ground of fraud.—(1822) Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519; (1824) Taylor v. Moore, 2 Rand. 563.

[zz] (Va. 1835) In an action by a purchaser from a trustee to recover the property, the cestui que trust is a competent witness for plaintiff.—Petermans v. Laus, 6 Leigh, 523.

§ 325. Assignor.

Assignor for benefit of creditors, see post, § 333.
—— *of bill or note, see* ante, § 321.
Effect of calling assignor, see post, § 531.
Statutory removal of incompetency, see post, §§ 503–505.

[a] The transferror of a chose in action is an incompetent witness for the transferee in a suit brought by him for its recovery.
—(Ala. 1846) Houston v. Prewitt, 8 Ala. 846; (1849) Clifton v. Sharpe, 15 Ala. 618;
(Pa. 1844) Reading R. Co. v. Johnson, 7 Watts & S. 317.

[b] (Ark. 1861) An assignor of a certificate of swamp lands containing no warranty of title is a competent witness for his assignee in a suit against a third person for the purchase money due upon a sale of the lands.—Alexander v. McCauley, 22 Ark. 553.

[c] (Conn. 1793) On an action of account by the assignees of certain debts against the attorney who received them to collect, the assignor may be a witness for defendant.—Cobb v. Baldwin, 1 Root, 534.

[d] (Conn. 1809) A sum of money was awarded by the commissioners under the British treaty to A. for a vessel and cargo which had been captured and condemned, and for the expenses of B., his agent, in endeavoring to prevent a condemnation. A. for a valuable consideration assigned his right in the award to C. B. then brought an action against C. to recover the sum allowed in the award for his expenses, and offered A. as a witness to prove the whole transaction. *Held*, that A. was inadmissible, as a recovery by B. would discharge his liability to him for the expenses.—Alsop v. Magill, 4 Day, 42.

[e] (Iowa, 1859) In an action on an open account, in the name of an assignee, where the assignment is bona fide and without recourse, and where no set-off or cross-claim against the assignor is pleaded, the assignor is a competent witness to prove the account.—Platt v. Hedge, 8 Iowa (8 Clarke) 386, 392.

[f] (Ky. 1825) Where an obligor brings his bill to enjoin a judgment at law obtained by the assignee, the assignor is not competent to prove the discharge of the obligation on himself, unless he is released from his liability on the assignment.—Brown v. Vance's Ex'rs, 18 Ky. (2 T. B. Mon.) 136.

[g] (Mo. 1856) An assignor of a chose in action is a competent witness in a suit brought by his assignee, and does not fall within the rule of practice excluding as witnesses those who have assigned for the purpose of being made witnesses; this rule not embracing such as have effectually assigned, so as to have no interest in the event of the suit.—McKinley v. Williamson, 23 Mo. 65.

[h] (Mo. 1862) An assignor of a chose in action is not a competent witness for the assignee, to prove facts about the claim which occurred anterior to the assignment. Rev. Code 1855, p. 1577, § 3.—Parish v. Frampton, 32 Mo. 396.

[i] (Mo. 1867) In an action brought by the assignee of a policy of insurance against the insurers, the assignor is a competent witness to prove that there was no consideration, either for the policy or for the assignment.—Bidwell v. St. Louis Floating Dock & Ins. Co., 40 Mo. 42.

[j] (N. Y. 1834) The assignor of a chose in action is a competent witness for an attorney, who commences a suit on the same for the assignee and subsequently sues such assignee for the costs of such suit.—Watson v. Smith, 13 Wend. 51.

[k] (N. Y. 1840) A party to an instrument, who has transferred it for good consideration, is competent to impeach it, where he is not interested, or is released, except in cases where a party to negotiable paper is prevented from impeaching it.—Topping v. Van Pelt, 1 Hoff. Ch. 545.

[l] (Pa. 1796) Where A. has written a letter for an aged person, directing certain rents to be paid to himself, he is competent to testify.—Buchanan v. Montgomery, 2 Yeates, 72.

[m] (Pa. 1809) The assignor of a bond is a competent witness to prove that he obtained it fraudulently.—Baring v. Shippen, 2 Bin. 154.

[n] (Pa. 1822) The assignor of a chose in action, equitably assigned, is a witness in a suit brought by the assignee, if he has no interest.—Fetterman v. Plummer's Adm'r, 9 Serg. & R. 20.

[o] (Pa. 1840) The assignor of a claim alleged to be due him as heir of an intestate, is not a competent witness in behalf of the assignee in a suit on the claim, since, in case of a judgment for defendant on the ground that there was nothing due at the time of the assignment, the assignor would be liable to refund the money paid him by the assignee, and hence is interested in the suit.—Stecker v. Shimer, 5 Whart. 452.

[p] (Pa. 1844) The assignor of a chose in action is not a competent witness for the assignee, in an action by him to recover the claim assigned, at least where the assignor pledges himself, before the assignment, to testify for plaintiff as to the liability of defendant.—Patterson v. Reed, 7 Watts & S. 144.

[q] (Pa. 1845) A legal plaintiff, who before suit brought had bona fide assigned for a valuable consideration, and without expectation of gain from a recovery or responsibility of failure, a claim for professional services alleged by him to have been admitted by defendants at a general settlement of their accounts is not allowed to sustain it by his testimony.—McClelland v. Mahon, 1 Pa. (1 Barr) 364.

[r] (Pa. 1846) The assignor of a debt is incompetent to prove it, when offered as a set-off by his assignee.—Muirhead v. Kirkpatrick, 2 Pa. (2 Barr) 425.

[s] (Pa. 1847) Where the assignee of a chose in action also assigns it, neither he nor his assignor is a competent witness to support it.—Appeal of Grayson, 5 Pa. (5 Barr) 395.

[t] (Pa. 1847) The assignor of a judgment is not a competent witness for the assignee on the trial of a feigned issue to try the validity of a judgment in which the assignee, by reason of being such, is a party plaintiff.—Burrows v. Shultz, 6 Pa. (6 Barr) 325.

[u] (Pa. 1854) The payment of a claim by an executor can have no greater effect than that of purchasing a claim and making it his own, in relation to qualifying the vendor as a witness

to support it.—Appeal of Hottenstein, 2 Grant, Cas. 301.

[v] (Pa. 1854) In an action on an assigned claim for money paid out and expended by the assignor for the use of defendant, the assignor is not a competent witness for plaintiff.—Broker v. De Hamm, 1 Phila. 517.

[w] (Pa. 1855) There is no rule of policy which prohibits the assignor of a judgment from testifying when called by defendant. His interest, if he has any, must be against the party calling him.—Himblewright v. Armstrong, 25 Pa. (1 Casey) 428.

[x] (Pa. 1860) In an action on a certificate of deposit by an assignee, the assignor is not a competent witness for plaintiff.—Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. (12 Casey) 498, 78 Am. Dec. 390.

[y] (Pa. 1870) The assignor of an insurance policy was not a competent witness for the assignee, in an action thereon, against the company, prior to Act 1869.—Spring Garden Ins. Co. v. Scott, 27 Leg. Int. 76.

§ 326. —— Liability on covenant.

[a] (La. 1831) The transferror of a mortgage, who warrants only its existence, may prove transferee's possession.—Orillon v. Nerault, 2 La. 292.

[b] (La. 1857) The assignor of a claim, being bound to warrant the existence of the debt assigned, is not a competent witness to prove the debt, without a previous release, and cannot establish such release by his own testimony.—Delee v. Sandel, 12 La. Ann. 208.

[c] (Md. 1847) A party who has assigned a judgment, without recourse, except as to his right to assign and transfer the same, is a competent witness for the assignee, in a suit to enforce the judgment, the warranty extending only to the right to make the assignment.—Doub v. Barnes, 1 Md. Ch. 127.

[d] (Pa. 1843) In an action by the assignee of a debt, the assignor is incompetent to rebut a defense to the original cause of action, unless released from the implied warranty, which arises in all cases of assignment for a valuable consideration, that the debt is due.—Ludwig v. Meyre, 5 Watts & S. 435.

§ 327. Assignee.

Assignee for benefit of creditors, see post, § 333.
—— *of bill or note, see* ante, § 321.
Statutory removal of incompetency, see post, §§ 503–505.

[a] (U. S. 1806) The assignee of a pre-emption warrant is a competent witness, if his testimony does not tend to support the title of the party producing him.—Wilson v. Speed, 7 U. S. (3 Cranch) 283, 2 L. Ed. 441.

[b] (Mo. 1848) Where an action is brought by the assignee of a bankrupt on a claim which has been assigned by him to another for the use of such other party, the assignee of the claim is not a competent witness.—Benoist v. Darby, 12 Mo. 196.

(b) DEBTOR, BANKRUPT OR INSOLVENT, ASSIGNOR AND ASSIGNEE FOR CREDITORS, AND CREDITORS.

DEBTORS IN GENERAL, § 328.
DEFENDANTS IN EXECUTION OR ATTACHMENT, § 329.
—— ACTION BY OR AGAINST OFFICER, § 330.
TESTIMONY AS TO PAYMENT, § 331.
BANKRUPT OR INSOLVENT IN GENERAL, § 332.
ASSIGNOR AND ASSIGNEE OR TRUSTEE FOR BENEFIT OF CREDITORS, § 333.
CREDITORS, § 334.
—— DIRECTNESS AND CERTAINTY OF INTEREST, § 335.
—— OF BANKRUPT OR INSOLVENT, § 336.
—— OF DECEDENT, § 337.

§ 328. Debtors in general.

Transactions fraudulent as to creditors, see ante, § 306.

[a] (Ky. 1827) A debtor is not a competent witness for a creditor seeking to make his debt out of property claimed by a third person.—Paul v. Rogers' Adm'r, 21 Ky. (5 T. B. Mon.) 164.

[b] (Md. 1848) Where a fund is to be applied to one of two sets of creditors, a party liable to both, and who has been relieved from the costs of the suit, is a competent witness in the case.—Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25.

[c] (Mass. 1821) In an action between creditors, where the issue is as to their respective rights to hold property of the debtor for the payment of their respective debts, the debtor is a competent witness for either.—Rice v. Austin, 17 Mass. 197.

[d] (Pa. 1865) In an action to try the title to goods attached between the execution creditor and one claiming by assignment from the debtor, the debtor is a competent witness for such creditor.—Clark v. Watson, 50 Pa. (14 Wright) 317.

[e] (Pa. 1868) A debtor delivered a certificate of stock with a power of attorney to transfer to one of his creditors. Another creditor having levied on the stock, *held*, in a contest between the creditors, that the debtor was competent to prove an error in the date of the power of attorney.—Appeal of Finney, 59 Pa. (9 P. F. Smith) 398.

§ 329. Defendants in execution or attachment.

[a] The execution defendant is a competent witness on a trial of the right of property.
—(Ala. 1860) Durden v. McWilliams, 36 Ala. 345;
(Ill. 1832) Clifton v. Bogardus, 2 Ill. (1 Scam.) 32;
(Ind. 1835) Hankins v. Ingols, 4 Blackf. 35; (1845) Bradbury v. Dougherty, 7 Blackf. 467;
(Pa. 1865) Allentown Bank v. Beck, 49 Pa. (13 Wright) 394;
(Tex. 1855) Converse v. McKee, 14 Tex. 20.
CONTRA, see
(Ga. 1831) Edwards v. Musgrove, Dud. 219; (1849) Williams v. Kelsey, 6 Ga. 365.

[b] (Ala. 1832) When the interest of a defendant in execution is perfectly balanced between the claimant and plaintiff, he is a competent witness for either party, and must be produced, and evidence of his declarations is not admissible.—Standefer v. Chisholm, 1 Stew. & P. 449.

[c] (Ala. 1836) In an action between plaintiff in execution and the claimant of property levied on under it, to try the right of property, defendant in execution, at any time before the sale on execution, is a competent witness to show that he had sold the property to the claimant before the levy.—Holman v. Arnett, 4 Port. 63.

[d] (Ala. 1843) In the case of a claimant of property taken on execution, in order that the execution debtor may be a witness, it must appear that the claimant deduces his title from the debtor, otherwise his interest is not balanced.—Yarborough's Ex'r v. Scott's Ex'r, 5 Ala. 221.

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[e] (Ala. 1852) The act of 1845, which renders the defendant in execution an incompetent witness on a trial of the right of property under the statute, allowing a claim to be put into property levied on, is in derogation of the common law, and will not be extended to the ordinary common-law actions, or causes in equity, for the recovery of damages, or the specific property, in which the title may be put in issue.—Kirksey v. Dubose, 19 Ala. 43; Zackowski v. Jones, 20 Ala. 180.

[f] (Conn. 1831) On a bill of foreclosure, by a mortgagee, against a levying creditor, the original debtor is a competent witness for plaintiff.—Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695.

[g] (Ill. 1863) An execution was levied on personal property, when a third party, claiming the property, took it from the officer making the levy, by a writ of replevin. In an action on the replevin bond, in which the title to the property came in question, *held*, that the defendant in execution was not a competent witness, in regard to the question of title, in behalf of plaintiff in the action, the latter being the plaintiff in execution, because he would have a direct interest in subjecting the property to the payment of his debt, thus having a disqualifying interest in the result of the suit, and in favor of the party calling him.—James v. Stratton, 32 Ill. 202.

[h] (Ill. 1863) But he would have been competent to testify in behalf of defendant in the action on the replevin bond, who was the claimant of the property, as against the plaintiff in the execution, because in that case the interest of the witness would have been adverse to the party in whose behalf he would be called to testify.—James v. Stratton, 32 Ill. 202.

[i] (Ky. 1822) The defendant, on whose property an execution was levied, and the property sold, is a competent witness to prove the extent of his title to the property, in a controversy arising between the purchaser at such sale and a person claiming the same property by title adverse to that of the defendant.—Baylor v. Smithers' Heirs, 11 Ky. (1 Litt.) 105.

[j] (Me. 1828) A judgment debtor, whose goods have been seized and sold on execution, does not stand in the relation of vendor to the purchaser; and, therefore, not being liable on any implied warranty, he is a competent witness in any suit between other persons, respecting the goods.—Lathrop v. Muzzy, 5 Me. (5 Greenl.) 450.

[k] (Md. 1797) A person whose land was sold under a fieri facias cannot be received as a witness to impeach his title to the land.—Plummer v. Lane, 4 Har. & McH. 72, 1 Am. Dec. 395.

[l] (Miss. 1849) In a trial of right of property levied on execution, the defendant in execution is a competent witness for the claimant, who claims under purchase from the trustees in a deed of trust in which the same defendant was grantor.—Ewing v. Cargill, 21 Miss. (13 Smedes & M.) 79.

[m] (Mo. 1863) In an action on a bond given by the execution creditor to the claimant of property taken under execution, where the plaintiff claims under a bill of sale from the execution debtor, the debtor is not a competent witness to testify to facts changing or qualifying the effect of the bill of sale, under the provisions of the statutes declaring that any grantor, vendor, or assignor in a deed, instrument, or writing, shall not be a competent witness to alter, change, or qualify the proper effect and operation of the words and terms of such deed, instrument, or writing.—Bruce v. Sims, 34 Mo. 246.

[n] (Mo. 1866) A defendant in an execution is a competent witness for plaintiff in a proceeding against a garnishee on the execution.—Scales v. Southern Hotel Co., 37 Mo. 520.

[o] (N. J. 1830) In ejectment brought by the purchaser under a decree of the court of chancery, and a fi. fa., and a sale thereon, to recover possession of the premises, the defendant in execution, whose property was sold, may be a witness for plaintiff.—Sharp v. Hamilton, 12 N. J. Law (7 Halst.) 109.

[p] (N. Y. 1830) A debtor whose title to lands, acquired under a judgment and execution against him, is sought to be recovered by a purchaser, is not a competent witness for such purchaser, in an action of ejectment to recover the lands.—Jackson v. Peek, 4 Wend. 300.

[q] (N. Y. 1839) The defendant in the execution is not a competent witness against the plaintiff in a subsequent controversy between him and other creditors, though it seems he would be competent for the plaintiff.—Gardenier v. Tubbs, 21 Wend. 169.

[r] (N. Y. 1854) A. recovered two judgments against B. and resorted to proceedings supplementary to the execution, had plaintiff appointed as receiver, and an order that the property of the debtor, not exempt, be applied to the judgments. B. made the assignment to the receiver in the usual form. The receiver brought an action against defendant to recover a debt due B., and B. was made the principal witness to establish the debt. *Held*, that the action was for the immediate benefit of B., and therefore B. was not a competent witness. Code. §§ 398, 399.—Vanduzen v. Worrell, 18 Barb. 409.

[s] (N. C. 1845) One, the title to whose land, as alleged by a creditor, has been sold by this creditor at execution sale, is an incompetent witness, in a suit between other parties, to prove that the title was really in him.—Quinn v. Rippey, 39 N. C. 181.

[t] (N. C. 1861) Where land has been sold, as the property of A., under execution, and he has received a portion of the sum raised, which was over and above the call of the execution, he cannot be a witness for the purchaser, in an action for the recovery of the land.—Brown v. Smith, 53 N. C. 331.

[u] (Pa.) Where the proceeds of the property of a defendant in execution are in court for distribution, he may be examined as a witness on the trial of a feigned issue, since his interest as regards the plaintiff and defendant in such issue is equal.—(1832) Stewart v. Stocker, 1 Watts, 135; (1845) Guillou v. Healy, 9 Leg. Int. 50.

[v] (Tex. 1852) In a suit to try the right to property levied on, the defendant in execution is a competent witness for the claimant, to prove that a previous sale by him to the claimant was bona fide.—McQuinnay v. Hitchcock, 8 Tex. 33.

[w] (Va. 1845) In an action on an indemnifying bond, at the relation of parties who claim under a deed of trust from the debtor in the execution, on the levy of which the bond was taken, the debtor is a competent witness for plaintiff.—Patteson v. Ford, 2 Grat. 18.

§ 330. —— Action by or against officer.

[a] In an action against an officer for the escape of a defendant in execution, the defendant is a competent witness for the officer.
—(Ind. 1843) Bond v. Brady, 7 Blackf. 39;
(N. Y. 1817) Waters v. Burnet, 14 Johns. 362.

[b] (Ala. 1836) In an action against a sheriff for wrongfully taking his goods on execution, defendant in the execution is not a competent witness to prove that he had sold the goods to plaintiff before the levy.—Burns v. Taylor, 3 Port, 187.

[c] (Ala. 1845) In detinue against a sheriff for a slave seized under execution as belonging

to the defendant in execution, the latter is not a competent witness for the sheriff to prove property in himself.—Leiper v. Gewin, 8 Ala. 326.

[d] (Ala. 1853) The defendant in attachment is a competent witness for his commission merchant, in a suit brought by the latter against the sheriff to recover certain bales of cotton, which he had seized under attachment, as the property of defendant therein, and which defendant had previously assigned to his commission merchant.—Bryan v. Smith, 22 Ala. 534.

[e] (Conn. 1831) In an action by an execution creditor against a sheriff for not assigning the bail bond taken by him on mesne process, the execution debtor, who is the principal in the bond, is a competent witness for defendant.—Newell v. Hoadley, 8 Conn. 381.

[f] (Ind. 1843) In debt against a constable for a false return of a fieri facias, the execution debtor is a competent witness for the constable.—Limpus v. State, 7 Blackf. 43.

[g] (Ky. 1814) In an action against a sheriff for a false return on an execution, defendant in the execution is a competent witness to prove that he had sufficient property to satisfy the execution at the time it was delivered to the sheriff.—Taylor v. Commonwealth, 6 Ky. (3 Bibb) 356.

[h] (Mass. 1835) In an action of replevin of goods, attached by defendant as an officer, on a writ against a stranger, such stranger is an incompetent witness, by reason of interest, to prove that the property was in himself.—Pratt v. Stephenson, 33 Mass. (16 Pick.) 325.

[i] (N. J. 1834) The vendor, who was defendant on execution, is a competent witness for the vendee, in an action of trespass by him against a constable for taking the property sold, since the vendor's interest is balanced as between the parties.—Sherron v. Humphreys, 14 N. J. Law (2 J. S. Green) 217.

[j] (Pa. 1850) In trespass against a sheriff for selling the goods of A., on an execution against B., returned satisfied, B. is a competent witness to show that the goods belonged to A.—Forsyth v. Palmer, 14 Pa. (2 Harris) 96, 53 Am. Dec. 519.

[k] (S. C. 1849) The defendant in execution is a competent witness for the sheriff, in an action to recover from a purchaser the amount of his bid, at a sale of the defendant's property.—Yongue v. Aiken, 3 Strob. 533.

§ 331. Testimony as to payment.

[a] (Ga. 1858) The rule that a party having no direct interest in the suit, and not bound by the judgment in respect of his liability over, is a competent witness, applies to the case of a debtor who swore to payment in a suit against an agent for not paying over.—Edwards v. McKinnon, 25 Ga. 337.

[b] (Ind. 1842) An attorney brought suit on a note delivered to him for collection and obtained judgment, which did not appear by the record to have been satisfied. The judgment creditor sued the administrator of the attorney for the amount of the judgment, in an action for money had and received. *Held*, that plaintiff could not introduce the judgment debtor as a witness, to prove that the latter had paid to the attorney the money due by the judgment.—Jenners v. Oldham, 6 Blackf. 235.

[c] (Ind. 1846) In a suit on a justice's bond, the breach assigned was the justice's failure to pay over money collected on a judgment. *Held*, that the judgment debtor was not a competent witness to prove his payment of the money to the justice.—Parker v. State, 8 Blackf. 292.

[d] (Mass. 1827) In an action against an attorney to recover money collected by him of plaintiff's debtor, the debtor is a competent witness to prove that he paid the money to the attorney.—Gifford v. Coffin, 22 Mass. (5 Pick.) 447.

[e] (Mo. 1848) In an action against an administrator for money alleged to have been received by him from a debtor of his intestate, such debtor is not a competent witness, without a release, to prove the payment of such debt.—Horine v. Horine, 11 Mo. 649.

[f] (Pa. 1848) Where a debtor has deposited goods with the agent of his creditor in satisfaction, or as a security for his debt, he is a competent witness for the creditor in an action of trover against the agent for the value of the goods, sold by the agent without authority.—Etter v. Bailey, 8 Pa. (8 Barr) 442.

[g] (Pa. 1853) Upon an issue between creditors to determine whether a judgment has been paid, the debtor or defendant in the judgment, not being a party to the issue, is a competent witness.—Smith's Ex'rs v. Wagonseller, 21 Pa. (9 Harris) 491.

[h] (Pa. 1859) In a proceeding before an auditor for distribution among lien creditors of a fund which is insufficient for the payment of all the liens upon it, the debtor is a competent witness for a junior lien creditor to prove payment in part of an elder lien; as the auditor's distribution is a proceeding between the lien creditors, and is an estoppel only to them, and the debtor is not by such testimony discharging himself from any liability.—Appeal of Galway, 34 Pa. (10 Casey) 242.

§ 332. Bankrupt or insolvent in general.

Transfer, release, or extinguishment of interest, see post, § 462.

[a] (U. S. 1847) Where the event of the suit may increase the effects of the bankrupt in the hands of his assignee, and thus increase the surplus which will belong to him, he is an incompetent witness.—Bridges v. Armour, 46 U. S. (5 How.) 91, 12 L. Ed. 64.

[b] (U. S. 1810) In an action against a sheriff for an escape upon mesne process, the escaped prisoner is not a competent witness to prove his bankruptcy at the time of his escape.—Duryee v. Webb, Fed. Cas. No. 4,198 [16 Conn. 558, note].

[c] (U. S. 1810) The interest of the witness is not balanced so as to make him competent because, while liable for the debt to both parties, he is further liable to the sheriff for the cost and expense consequent upon the escape and defense of the action.—Duryee v. Webb, Fed. Cas. No. 4,198 [16 Conn. 558, note].

[d] (U. S. 1843) The bankrupt is a competent witness where his assignee is a party, as he can have no legal interest in the decision of the case.—Wright v. Rogers, Fed. Cas. No. 18,090 [3 McLean, 229].

[e] (Ala. 1845) A voluntary bankrupt is not a competent witness for the assignee in bankruptcy, to establish a debt due the bankrupt.—Cromwell v. Comegys, 7 Ala. 498.

[f] (Ala. 1846) A bankrupt who had transferred bills of exchange, as collateral security, to one of his scheduled creditors, is an incompetent witness for the creditor, because the discharge of the debt by the bills would release the estate of the bankrupt from its payment, and increase the surplus.—Houston v. Prewitt, 8 Ala. 846.

[g] (Ala. 1852) A bankrupt is not a competent witness to testify for his assignee, for the purpose of increasing the fund in his hands; but when his testimony tends to decrease that fund, he is considered as swearing against his interest, and is competent.—Colgin v. Redman, 20 Ala. 650.

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[h] (La.) In a contest between creditors, neither the insolvent's declarations, though in writing, nor his books of account, can be received. Such admissions are presumed to be fraudulent.—(1814) Menendez v. Larionda's Syndics, 3 Mart. (O. S.) 256; (1815) Id. 705; (1822) Planters' Bank v. Lanusse, 12 Mart. (O. S.) 157.

[i] (La. 1814) In a contest between creditors of an insolvent, he is incompetent for any.—Menendez v. Larionda's Syndics, 3 Mart. (O. S.) 256.

[j] (La. 1822) Claims against an insolvent cannot be established by his testimony, as it is presumed to be fictitious and made with a deliberate intent to elude the rights of creditors.—Planters' Bank v. Lanusse, 12 Mart. (O. S.) 157.

[k] (Md. 1792) In a suit by an assignee of an insolvent for property belonging to the insolvent's estate, the insolvent is an incompetent witness to prove the property in himself, though he appears by his schedule to be entitled to no surplus.—Bussy v. Ady, 3 Har. & McH. 97.

[l] (Md. 1847) Where the rights of an insolvent debtor are identically the same, whichever way the decision passes, he is a competent witness for either party.—Glenn v. Baker, 1 Md. Ch. 73.

[m] (Mass. 1847) In an action brought by the assignees of an insolvent debtor to try the validity of a sale of chattels made by him shortly before proceedings in insolvency were instituted against him, he is a competent witness for the purchaser to prove that the sale was not made for such purpose, or with such intent and knowledge, as rendered it void against his creditors.—Clark v. Gordon, 54 Mass. (13 Metc.) 434.

[n] (N. H. 1845) In an action by an assignee of a bankrupt, the latter is not a competent witness for plaintiff, by reason of his interest in the surplus.—Coleman v. Tebbetts, 20 N. H. 408.

[o] (S. C. 1810) The testimony of a bankrupt in England, offered to prove a debt due in this country, will be rejected on the ground that he may have an interest in the surplus.—Coit v. Owen, 3 Desaus. 175.

[p] (S. C. 1831) An insolvent debtor is a competent witness in a suit between his assignee and a creditor, to defeat a lien claimed by the creditor.—Gilchrist v. Martin, Bailey, Eq. 492.

§ 333. Assignor and assignee or trustee for benefit of creditors.

Transfer, release, or extinguishment of interest, see post, § 464.

[a] (Ala. 1835) Where a conveyance of a slave was absolute on its face, the assignee of the grantor is not a competent witness to prove a defeasance.—Hatfield v. Montgomery, 2 Port. 58.

[b] (Ala. 1846) The grantor in a deed of trust, by which property is conveyed to a trustee for the benefit of creditors, is not a competent witness for the trustee, in a suit by him to recover the trust property from a purchaser claiming through a sheriff's sale, by virtue of an execution against the grantor.—Hodge v. Thompson, 9 Ala. 131.

[c] (Ala. 1856) A. having become insolvent, and being about to make an assignment for the benefit of his creditors, indorsers, and sureties, refused to make any assignment which was not approved by B., who was his indorser and surety, unless B. and the debts on which he was bound were placed in the preferred class of creditors. C. was also indorser and surety for A., and in consideration that B. would consent that A. might make a deed which would prefer C., and postpone B., promised to pay a certain sum, and in pursuance of this contract A. made an assignment. In an action on the contract, it was *held* that A. was a competent witness for B.—Hatton's Adm'rs v. Jordan, 29 Ala. 266.

[d] (Cal. 1854) Where, after a voluntary assignment for the benefit of creditors, the assignee seeks to recover goods belonging to the assignor from consignees, holding them under a claim for advances and commissions, the assignor is incompetent as a witness for the assignee.—Griffin v. Alsop, 4 Cal. 406.

[e] (Cal. 1862) Where a debtor assigns his property for the benefit of creditors to one creditor, against whom suit is brought by another for his share of the funds, the assignor is a competent witness to prove that the defendant creditor, in consideration of the assignment, promised to give priority to plaintiff's debt.—Lockwood v. Canfield, 20 Cal. 126.

[f] (Conn. 1850) In an action of trespass against B., an officer who had attached the property by direction of C., defendant offered D. as a witness. It appeared that C., being insolvent, had assigned his estate, under the statute of 1828 against fraudulent conveyances, to D., he being a creditor of that estate, and that D. had executed the trust, distributed the estate assigned to him, and settled with the court of probate; no claim having been presented by B., against such estate, on account of said attachment. *Held*, that D. had no interest in the event of the suit, and was, therefore, a competent witness.—Patch v. Hoyt, 20 Conn. 334.

[g] (Ill. 1844) A. transferred to B. certain personal property in trust to pay certain debts. C. and D., whose tenant A. was, subsequently distrained said property for rent. B. brought an action against C. for taking the same, and, at the trial, called A. to prove the value of the property taken. *Held*, that he was incompetent from interest.—Favor v. Marlett, 6 Ill. (1 Gilman) 385.

[h] (Ky. 1867) The grantor in a deed of trust for the payment of his debts, in a suit by his creditors against the trustee, is not a competent witness for the creditors unless they release him from all liability, and he releases the trustee.—Smith's Ex'r v. Vertress, 65 Ky. (2 Bush) 63.

[i] (Mass. 1837) A bond having been assigned by the obligee to trustees for the benefit of his creditors, and the trustees having brought an action on it, but in the name of the obligee, and attached property supposed to belong to the obligor, *held*, that the trustees were incompetent, by reason of interest, to testify in an action of replevin brought by a stranger, claiming the property, against the attaching officer.—George v. Kimball, 41 Mass. (24 Pick.) 234.

[j] (Mo. 1862) One who has made an assignment of his property for the benefit of his creditors is a competent witness to support the title of his assignees. He is not a party for whose immediate benefit the suit is instituted by the assignee.—Krum v. Beard, 31 Mo. 505.

[k] (N. Y. 1844) Where A., B., and C. were sued, as partners, for goods sold A. alone, it appeared that they had assigned their property to pay debts due from them "jointly and severally, or where either was indorser or surety for the other." The assignees had debts against the assignors jointly and severally, and the property was not sufficient to pay the debts charged on the fund. *Held*, that the assignees were not competent witnesses for plaintiff to prove the alleged partnership.—Carpenter v. Creal, 6 Hill, 556.

[l] (N. Y. 1854) One who has made an assignment for the benefit of creditors is a competent witness in an action by the assignee, and in an action by one to whom he has assigned a

policy of insurance to secure a debt, and no notice of an intention to examine the assignor is necessary.—Allen v. Hudson River Mut. Ins. Co., 19 Barb. 442.

[m] (N. Y. 1854) The assignor is a competent witness for the assignee in an action brought by the assignee to recover on a demand belonging to the assigned estate, as the assignor, though interested, can receive no immediate benefit from the prosecution of the action.—Allen v. Franklin Fire Ins. Co., 9 How. Prac. 501.

[n] (N. Y. 1854) Where an assignment has been made in trust to pay creditors, the assignor has no interest in property applied to payment of his debts to render him incompetent as a witness for his assignee.—Legee v. Burbank, 2 E. D. Smith, 419.

[o] (N. Y. 1855) One who assigns property for the benefit of his creditors is a competent witness in an action relating to the property by the assignee, the suit not being for the immediate benefit of the assignor.—Jones v. Church of Rochester, 21 Barb. 161.

[p] (Pa. 1820) One who has made an assignment of all his estate in trust to pay his debts and to return the surplus, if any, to himself, is a competent witness, without a release, in trover by his assignees against one of his creditors, who claims to hold the goods as security for the debt due by the assignor, because the interest which the witness has in the surplus is balanced by his interest in the application of the property in the hands of the defendant to the extinguishment of the debt to him.—Jacoby v. Laussatt, 6 Serg. & R. 300.

[q] (S. C. 1856) An assignor who has made an assignment for the benefit of his creditors is a competent witness for defendant, if he consents to be sworn, in an action brought in his name for the benefit of the assignee.—Pinchback v. Killian, 9 Rich. Law, 413.

[r] (Tex. 1857) One to whom property is conveyed in trust for the benefit of creditors, with power to sell, is a competent witness in a suit by the creditor to recover the debt secured and asking for a sale of the trust property.—Ware's Adm'rs v. Bennett, 18 Tex. 794.

[s] (Tex. 1859) In an action brought by an assignee against a sheriff for levying an execution on the property assigned, the assignor, because of interest, is inadmissible as a witness for the assignee when the property has been appropriated in satisfaction of the execution.—Howerton v. Holt, 23 Tex. 51.

[t] (Va. 1812) The trustee, in a deed of trust, conveying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and is therefore a competent witness in ejectment against the debtor by a purchaser from himself, under a quitclaim deed, to prove that the sale of the property was advertised according to the terms of the deed of trust.—Ross v. Norvell, 3 Munf. 170.

[u] (Va. 1844) The grantor in a deed of trust for the benefit of his creditors is a competent witness for the claimant under the deed to prove that the property levied on by the officer, under an execution against the grantor, is the same conveyed in the deed.—Kevan v. Branch, 1 Grat. 274.

§ 334. Creditors.

Transactions fraudulent as to creditors, see ante, § 305.

Transfer, release, or extinguishment of interest, see post, § 465.

[a] (U. S. 1809) In an action on a note signed by one person only, where plaintiff seeks to charge another person as a secret partner and liable on the note, the creditor of the former is a competent witness for plaintiff to prove the existence of the partnership.—Bank of Alexandria v. Mandeville, Fed. Cas. No. 851 [1 Cranch, C. C. 573].

[b] (U. S. 1809) In an action for the recovery of a debt, said to be due by the defendant, as the dormant partner of a firm, a person who is a creditor of the partnership is not a competent witness to prove the defendant a dormant partner in the firm indebted to him.—Corps v. Robinson, Fed. Cas. No. 3,252 [2 Wash. C. C. 388].

[c] (Ala. 1840) A creditor who is secured by the provisions of a trust deed is not a competent witness to support the deed, in a suit between the trustee and an execution creditor.—Stone v. Stone, 1 Ala. 582.

[d] (Ala. 1854) Where a deed of trust is attacked for fraud, a general creditor of the grantor, whose debt is not secured by the deed, is a competent witness to prove the bona fides of any secured debt, although he may have another security.—Alabama Life Ins. & Trust Co. v. Pettway, 24 Ala. 544.

[e] (Cal. 1855) In an action by a claimant of property attached against the sheriff, a subsequent attaching creditor, who had given a bond to the sheriff to save him harmless in holding the identical property which was the subject of the action, was not a competent witness.—Landsberger v. Gorham, 5 Cal. 450.

[f] (Conn. 1787) A constable took certain property by attachment on the suits of A. and B., and by execution in favor of C. He acted by order of all three of the creditors. C.'s execution, however, was satisfied out of the estate, so that the whole of the property was finally applied to the demand of A. and B. *Held*, that C. was not a competent witness in an action against the constable by one who claims title in the property.—Bulkley v. Richards, Kirby, 203.

[g] (Ky. 1835) In a suit by a surety for relief, on the ground of a new agreement between the principal and creditor, the latter is a competent witness.—Bartlow v. Boude, 33 Ky. (3 Dana) 591.

[h] (Ky. 1842) A witness whose debt would be extinguished by a recovery in the suit is not a competent witness for plaintiff.—Richardson v. Bartley, 41 Ky. (2 B. Mon.) 328.

[i] (Ky. 1843) In an action by a vendor against the vendee to recover the goods on the ground that the sale was procured by fraud, a creditor of defendant is a competent witness, where it appears that the goods are in boxes which formerly belong to defendant's agent and have his private marks on them, to explain the facts as to the boxes and marks thereon, if he neither has nor sets up any claim to the goods.—Morrow v. Smith, 43 Ky. (4 B. Mon.) 99.

[j] (La. 1819) The creditor of one, who, though an absconder, is not shown to be insolvent, and as whose surety defendant is sued, is competent for plaintiff.—Hewes v. Lauve, 6 Mart. (O. S.) 502.

[k] (La. 1828) A creditor who swears he believes defendant amply solvent is competent for him.—Thompson v. Chauveau, 6 Mart. (N. S.) 460.

[l] (La. 1843) A creditor may testify for his debtor.—Lard v. Strother, 4 Rob. 95.

[m] (Me. 1841) A creditor of plaintiff is competent to testify for him, although plaintiff has no other means of paying than the proceeds of the suit.—Noyes v. Sturdivant, 18 Me. (6 Shep.) 104.

[n] (Me. 1841) Where the result of a trial determines only which creditor of a witness will be paid, he is competent; but where, if the party calling him prevail, his debt is paid,

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while, if the other party prevail, his creditor is unpaid, and the witness is left with a claim to the same amount against an insolvent man, the interest is not balanced, and he is not a competent witness.—Danforth v. Roberts, 20 Me. 307.

[o] (Mo. 1824) Where A. has a claim against B. for a sum of money, and C. pays it, A. is not a competent witness for C. to prove that it was paid at the request of B.—Rector v. McNair, 1 Mo. 471.

[p] (N. Y. 1827) One to whom the master of a ship is liable for advances on account of the ship is a competent witness for the master, in an action by him to enforce a lien in his favor on account of such liability.—Ingersoll v. Van Bokkelin, 7 Cow. 670.

[q] (Pa. 1842) A judgment creditor is not a competent witness for plaintiff, in an action by the judgment debtor to recover all the lands to which he pretends to claim title, the judgment being a lien on the debtor's lands.—Seltzinger v. Ridgway, 4 Watts & S. 472.

[r] (Pa. 1865) In an action to ascertain the validity of a judgment bond given by a husband to his wife's trustee for money received from her, the testimony of a subsequent judgment creditor of the husband, who was not a party to the issue, and whose lien cannot be paid out of the fund for distribution, is competent.—Gicker's Adm'rs v. Martin, 50 Pa. (14 Wright) 138.

[s] (Pa. 1866) Several execution attachments were issued and served the same day against the same defendant and garnishees. *Held*, that a plaintiff in one of them was a competent witness for the plaintiff in another on the trial of the latter against the garnishees.—King v. Faber, 51 Pa. (1 P. F. Smith) 387.

[t] (Pa. 1866) In a contest between creditors as to a certain fund of the debtor's, a creditor whose claim is secured on the fund is competent as a witness when plaintiff's claim, if it prevails, will leave enough of the fund to satisfy the secured debt.—Updegraff v. Rowland, 52 Pa. (2 P. F. Smith) 317.

[u] (Pa. 1868) On an issue between two judgment creditors to try the validity of a judgment in favor of one of them, a third judgment creditor is a competent witness.—Brown v. Parkinson, 56 Pa. (6 P. F. Smith) 336.

[v] (S. C. 1830) Where property has been sold on execution, the execution creditor is a competent witness to support the title of the execution debtor where the property is claimed by a third person.—Rowe v. Cockrell, Bailey, Eq. 126.

[w] (S. C. 1844) A judgment creditor of the petitioner for the benefit of the prison bounds act is not a competent witness in behalf of the actors in the suggestion of fraud.—Clerry v. Spears, 2 Speers, 686.

[x] (S. C. 1858) In a creditor's bill filed for the purpose of setting aside a judgment confessed by the debtor, and certain sales of property made by the debtor to plaintiff in that judgment, and praying for an account of all moneys received by said plaintiff on account of such property, through sales of the same, *held*, that neither judgment, nor simple contract creditors of such debtor, were competent witnesses for complainant.—Guignard v. Aldrich, 10 Rich. Eq. 253.

[y] (S. C. 1858) Where the object of a bill is to subject equitable assets to the demand of a judgment creditor, simple contract creditors are incompetent witnesses for complainant, being interested in the event; equitable assets being always distributed pro rata among all creditors.—Guignard v. Aldrich, 10 Rich. Eq. 253.

[z] (Vt. 1851) An attachment had been dissolved by a judgment in favor of the defendant in the suit in which the attachment was made, and the defendant then brought trover against the officer for the property attached, which had been sold upon the mesne process, under the provisions of the statute. *Held*, that the original attaching creditor was a competent witness for the officer upon the trial of the action of trover, notwithstanding it appeared he had executed to the officer a bond, conditioned to indemnify him from all costs, losses, and damages, which the officer might sustain in consequence of selling the attached property upon the writ.—Abbott v. Kimball, 23 Vt. 542.

§ 335. —— Directness and certainty of interest.

[a] (U. S. 1879) A creditor of one of the parties to a suit before the court of claims has no such legal and immediate interest in the event of the suit as to render him incompetent as a witness in favor of his debtor.—Merchants' Exch. Co. v. United States, 15 Ct. Cl. 270.

[b] (Ill. 1844) A general creditor will be a competent witness, although he swears that he expects that his prospects for the recovery of his debt will be increased by the recovery of a judgment in the particular suit.—Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co., 6 Ill. (1 Gilman) 236.

[c] (Mo. 1845) A creditor of the plaintiff is not an incompetent witness for him, because he expects to be paid out of the money which may be recovered, unless he has some legal interest in a right to the fund on recovery.—Warne v. Prentiss, 9 Mo. 544.

[d] (N. Y. 1831) Creditors of the obligor, where the defense is lunacy, are competent witnesses to prove the obligor incapable of managing his concerns at the time of the execution of the bond; but if a direct and certain interest appears, they will not be competent.—Hart v. Deamer, 6 Wend. 497.

[e] (Pa. 1854) Where a witness was shown to be a creditor of one who was surety for another for a debt which the latter would recover, if the insolvent's assignee, plaintiff, recovered in the suit pending, and that otherwise the witness's debtor would be compelled to pay the debt, whereby her property would be rendered insufficient to satisfy the claim of the witness, the interest of the witness was too remote to exclude him.—McCaskey v. Graff, 23 Pa. (11 Harris) 321, 62 Am. Dec. 336.

[f] (Pa. 1862) A judgment creditor of defendant in execution may be a witness in a feigned issue, under the sheriff's interpleader act, where he has no direct interest in the event of the suit.—Lothrop v. Wightman, 41 Pa. (5 Wright) 297.

[g] (Tex. 1858) The interest in a suit which disqualifies a witness must be a legal, fixed, and certain benefit, and although a creditor has a substantial interest in a recovery by a debtor, if he looks to the proceeds of the judgment to be recovered for the payment of his debt, he is not disqualified as a witness, unless he has a specific lien on the judgment when recovered, and a promise to give him an order for the amount of the judgment when recovered does not render him incompetent; but otherwise, if the order has been given.—Bigham v. Carr, 21 Tex. 142.

§ 336. —— Of bankrupt or insolvent.

[a] (U. S. 1810) In a suit by the trustee of an insolvent debtor, where the purpose of the suit is to enlarge the assets of such debtor, a creditor of the insolvent is not a competent witness.—Herbert v. Bannatyne, Fed. Cas. No. 6,396 [2 Cranch, C. C. 12].

[b] (U. S. 1853) A creditor of a bankrupt is not a competent witness for the assignee, in a

suit to increase the estate.—Carr v. Hilton, Fed. Cas. No. 2,437 [1 Curt. 390].

[c] (Conn. 1834) A., an insolvent, mortgaged his estate to B., C., and D. to secure them, and then on the same day made a general assignment of his property, including the mortgaged premises, to B. and C., in trust for all his creditors, under St. 1828, c. 3. This property was afterwards attached by E., one of A.'s creditors, and, in an action by the mortgagees against the officer for the taking, F., another of A.'s creditors, who had proved his debt under the assignment, was offered by the defendant as a witness to prove the mortgage deed and assignment fraudulent and void. *Held* that, as the effect of defeating the mortgage would be to augment the fund in the hands of the assignees, F. was thus far interested and incompetent, and that as the facts which F. was called to disclose were not stated, it did not appear that his interest was balanced by the effect of his testimony upon the assignment.—Bates v. Coe, 10 Conn. 280.

[d] (La. 1832) In a contest between an insolvent and his creditors, one of the latter is incompetent for either party.—Coquet v. His Creditors, 4 La. 201.

[e] (Me. 1832) Where an officer had attached partnership property in a suit against an individual partner, and afterwards, with the consent of the partnership, which was insolvent, permitted the goods to be applied to pay a partnership debt, whereon the creditor of the individual partner brought an action against the officer for not having retained the goods under the first attachment, the partnership creditor was a competent witness for the officer, having no interest in either event of the suit.—Commercial Bank v. Wilkins, 9 Me. (9 Greenl.) 28.

[f] (Mass. 1808) A petitioning creditor is a competent witness to prove his debt, in an action where the validity of an assignee's sale of the bankrupt's land is in question, if he have no interest in the event of the suit.—Farrington v. Farrington, 4 Mass. 237.

[g] (Mass. 1808) In an action between other parties, the petitioning creditor is a competent witness to prove his own debt, on which a commission of bankruptcy was awarded.—Farrington v. Farrington, 4 Mass. 237.

[h] (N. J. 1852) It is no objection to a witness, offered by an insolvent company in support of a money claim, that he is a creditor of the company, and that a recovery would increase the fund out of which he is to be paid.—Delaware & A. R. Co. v. Irick, 23 N. J. Law (3 Zab.) 321.

[i] (N. Y. 1846) In a suit to avoid an assignment for the benefit of creditors, a creditor provided for in the assignment is not a competent witness for the assignee.—Jacks v. Nichols, 3 Sandf. Ch. 313.

[j] (N. Y. 1847) In replevin, brought by the trustees under an assignment for the payment of the debts of the assignor, against one who had taken a part of the assigned property, one of the preferred creditors is a competent witness for plaintiffs, unless it is shown that the remaining property assigned is insufficient to pay the preferred debts.—Duel v. Fisher, 4 Denio, 515.

[k] (N. Y. 1848) A creditor of the bankrupt is a competent witness against the latter, in favor of another creditor, on an issue impeaching the discharge.—Cutter v. Taylor, 3 N. Y. Super Ct. (1 Sandf.) 593.

[l] (N. Y. 1850) In an action by trustees appointed against a nonresident debtor, an attaching creditor is not competent for the trustees.—Graves v. Blanchard, 4 How. Prac. 300, 3 Code Rep. 25.

[m] (N. Y. 1852) A creditor of an insolvent estate is not a competent witness to swell the fund out of which he is to be paid.—Marre v. Ginochio, 2 Bradf. Sur. 165.

[n] (N. C. 1803) In an action by an assignee to recover a debt due to his separate estate, a creditor of a firm of which the bankrupt was a member, is a competent witness for plaintiff.—Barclay's Assignees v. Carson, 3 N. C. 243.

[o] (Pa. 1796) A creditor is a competent witness to prove fraud in the petitioner, on an application to be discharged under the insolvent laws.—In re Greene's Case, 2 Dall. 268, 1 L. Ed. 376.

[p] (Pa. 1845) A judgment creditor of one who may be insolvent is a competent witness for him, in a suit for a recovery of land.—Jones v. Brownfield, 2 Pa. (2 Barr) 55.

[q] (Pa. 1845) In a suit by the assignee of a bankrupt, plaintiff offered as a witness a person who was a creditor of the bankrupt to a small amount, but was also an indorser to a much larger amount on certain notes of bankrupt. *Held*, that having a direct interest in the event of the suit he was not a competent witness, although his contingent liability as indorser rendered the balance of interest against him.—Atkinson v. Purdy, 4 Pa. Law J. 96.

[r] (Pa. 1862) On the question of the acceptance by the company, of an amendment to the charter, a creditor was competent, the company being insolvent.—Fell v. McHenry, 42 Pa. (6 Wright) 41.

§ 337. —— Of decedent.

[a] A creditor is a competent witness to increase a solvent estate of a deceased person.
—(Mo. 1830) Foster v. Wallace, 2 Mo. 231;
(Pa. 1826) Boyer v. Kendall, 14 Serg. & R. 178.

[b] (U. S. 1804) Creditors of the plaintiff's intestate are competent witnesses to support a claim by plaintiff as administrator against defendant.—Robertson v. Selby, Fed. Cas. No. 11,929 [1 Cranch, C. C. 211].

[c] (U. S. 1804) In an action by an administrator of an insolvent estate, it is not a good objection to the plaintiff's witness that he is a creditor of the intestate, although that circumstance may affect his credit.—Talbot v. Selby, Fed. Cas. No. 13,729 [1 Cranch, C. C. 181].

[d] (U. S. 1847) A creditor with no specific lien is not incompetent to testify so as to increase the amount of his debtor's estate.—Macy v. De Wolf, Fed. Cas. No. 8,933 [3 Woodb. & M. 193].

[e] (Del. 1844) A judgment creditor, fully secured by the real estate of an intestate, and who has no specific lien on the personal property, is a competent witness for the administrator, in an action to recover a debt due the intestate.—Nicholson v. Frazier, 4 Har. 206.

[f] (Ind. 1852) In assumpsit by an administrator a person having a claim against the intestate's estate is competent as a witness for plaintiff if the estate is not insolvent.—Martin v. Barlow, 3 Ind. 367.

[g] (Ind. 1856) Part of the heirs of A. sued the heir and legatee of A.'s administrator for an account of administration, charging a failure on the part of the administrator to account for assets and to make final settlement, and alleging the amount of assets to be greater than the debts. Plaintiffs offered one B. a creditor of the estate, to show that A. had failed to account for all the assets received. *Held* that, as the effect of his testimony, as apparent from the facts, would be to make an estate on which he had a claim solvent, when, unless the fact to which he testified were proved, it would be

insolvent, B. was incompetent.—Lapreese v. Falls, 7 Ind. 692.

[h] (N. H. 1825) In a writ of entry brought against the administrator of an intestate, where the demandant claimed under an instrument purporting to be the deed of the intestate, and one of the subscribing witnesses was dead, and the other was a creditor of the intestate's estate, which was insolvent, *held*, that the creditor had no interest in the event of the suit, and that the demandant was bound to call him, although his interest would incline him to testify against the demandant.—Barns v. Hatch, 3 N. H. 304, 14 Am. Dec. 369.

[i] (N. Y. 1867) In an action by an administrator to recover a debt due to the intestate, where the estate is proved to be insolvent, a creditor of the estate is not a competent witness for the administrator.—Flinn v. Chase, 4 Denio, 85.

[j] (Pa. 1817) A witness was competent, in ejectment, who had a judgment against the testator whose title was in dispute, but who had left abundant personal property to satisfy the judgment, and whose administrator had given ample bonds.—Youst v. Martin, 3 Serg. & R. 423.

[k] (S. C. 1853) Where one is sued as a surviving partner, a creditor of the deceased partner who died insolvent, and whose estate will be liable for the entire demand in suit unless the fact of partnership be made out, is a competent witness for plaintiff to prove the existence of the partnership, since his interest is not direct and certain.—Haseltine v. Madden, 7 Rich. Law, 16.

[l] (S. C. 1853) Where a party is sued as a surviving partner, a creditor of an alleged deceased partner, who holds by assignment from him effects of the alleged partnership to secure the payment of his own and other's claims, is a competent witness for defendant to disprove the existence of a partnership. — Chamberlain v. Madden, 7 Rich. Law, 20.

[m] (Tex. 1853) A witness in behalf of an estate of which he was a creditor, testified upon his voir dire that he did not know whether the estate was solvent or not, but that he understood, from rumor, that it would be insolvent unless the administrator gained that suit. *Held*, that the witness was incompetent.—Dial v. Crain, 10 Tex. 444.

[n] (Va. 1849) When land charged with payment of debts is sold on application of a creditor of the testator, such creditor is a competent witness for the purchaser to prove that the debt for which it was sold was a just one.—Hudgin v. Hudgin's Ex'r, 6 Grat. 320, 52 Am. Dec. 124.

(c) PRINCIPAL OR OBLIGEE AND SURETY, GUARANTOR, OR INDEMNITOR.

PRINCIPAL, § 338.
CO-OBLIGORS, § 339.
SURETY IN GENERAL, § 340.
SURETY ON REPLEVIN OR ATTACHMENT BOND, § 341.
SURETY ON ADMINISTRATION BOND, § 342.
PARTIES TO BILLS AND NOTES, § 343.
CO-SURETIES, § 344.
OBLIGEE, § 345.
PRINCIPAL AND GUARANTOR, § 346.
INDEMNITOR, § 347.
RECEIPTOR, § 348.

Determination of liability, see post, § 484.
Liability for costs, see post, § 399.
Statutory removal of incompetency, see post, § 513.
Transfer, release, or extinguishment of interest, see post, §§ 466–471.

§ 338. Principal.

[a] The principal in a bond is not a competent witness for his surety.
—(Pa. 1853) Commonwealth v. McKee's Ex'r, 2 Grant, Cas. 27;
(Va. 1826) Jones v. Raine, 4 Rand. 386.
CONTRA, see
(U. S. 1808) Harper v. Smith, Fed. Cas. No. 6,092 [1 Cranch, C. C. 495].

[b] In an action against a surety, the principal is an incompetent witness for defendant.
—(Ky. 1827) Hunter v. Gatewood, 21 Ky. (5 T. B. Mon.) 268;
(S. C. 1853) Vandiver v. Glaspy, 7 Rich. Law, 14.

[c] (U. S. 1809) The principal obligor is a competent witness for the surety on a collateral issue where defendants plead separately in an action on a bond with a collateral condition.—Virginia v. Evans, Fed. Cas. No. 16,969 [1 Cranch, C. C. 581].

[d] (U. S. 1836) The principal in a bond is competent to prove a change in his relation to his obligee, which would release the surety from liability, in a suit between the surety and the obligee, in which the surety sought relief from his bond, and an injunction on a suit, for if the plaintiff had succeeded, the principal would not have been discharged from his liability, and if he failed, he must have borne his own costs.—Gass v. Stinson, Fed. Cas. No. 5,260 [2 Sumn. 453].

[e] (Ala. 1832) The obligor in an attachment bond, conditioned for the payment of the property attached, or for the satisfaction of any judgment, is an incompetent witness in the attachment cause.—Stowe v. Sewall, 3 Stew. & P. 67.

[f] (Ill. 1863) Where a judgment at law has been rendered against a principal and his surety, and the surety seeks relief in equity against the judgment, on the ground of an extension of the time of payment of the debt having been given to the principal debtor, before the judgment, the principal defendant in the judgment is a competent witness on behalf of his surety.—Kennedy v. Evans, 31 Ill. 258.

[g] (Ky. 1830) On a bill filed by sureties, to be released on account of indulgence granted to their principal, the deposition of the principal ought to be admitted in evidence.—Reid v. Watts, 27 Ky. (4 J. J. Marsh.) 440.

[h] (Md. 1846) The principal obligor in a bond is a competent witness to prove its execution by his surety therein, in an action on such bond, under the plea of non est factum by the surety.—Buckingham v. Clary, 4 Gill, 223.

[i] (Mass. 1836) In an action against the surety of a vendee for the purchase money, the vendee is a competent witness to show that the sale was fraudulent, and has been rescinded.—Hazard v. Irwin, 35 Mass. (18 Pick.) 95.

[j] (N. Y. 1839) The principal debtor is competent to prove that the surety has been discharged by the creditor, by giving time to such principal debtor, without the knowledge of the surety.—Holmes v. Dole, 1 Clarke, Ch. 71.

[k] (N. Y. 1851) Where an attachment against a nonresident is issued and the property attached has been discharged on a bond given by sureties for the defendant in the attachment, such defendant is a competent witness for the makers of the bond in a suit on it, if not nominally a party to the action.—Mitchell v. Weed, 6 How. Prac. 128, 1 Code R. (N. S.) 196.

[l] (N. C. 1813) The acknowledgment of the principal that he had given the bond in suit is not admissible.—Johnson v. Knight, 6 N. C. 237.

[m] (N. C. 1826) A creditor recovered a joint judgment against his principal debtor and his

surety. On a bill by the surety to be relieved against the judgment, on the ground that he was discharged by laches of the creditor, the principal is not a competent witness for complainant.—Cannon v. Jones, 11 N. C. 368.

[n] (N. C. 1841) A. and B. were co-sureties, but A. became surety, in consideration of a guaranty of the debt by B. A. paid the debt, and recovered judgment therefor against B.; whereupon B. filed a bill alleging that the principal debtor had paid A. the whole or a part of the debt before the recovery of A.'s judgment. *Held*, that the principal debtor was not a competent witness to prove the facts charged in such bill.—Davidson v. Woodruff, 36 N. C. 467.

[o] (Pa. 1823) In a suit against the surety of a recognizance given for a stay of execution, the defendant in the original suit is not a competent witness for the surety.—Milliken v. Brown, 10 Serg. & R. 188.

[p] (Pa. 1846) In a scire facias on a recognizance of bail for stay of execution, the defendant in the judgment in the original suit, who had subsequently became a certificated bankrupt, is a competent witness to prove that the original debt, for payment of which he had been sued, was satisfied; he not being a party to the scire facias, and not having any interest in the event of the issue tried therein.—Boas v. Hetzel, 3 Pa. (3 Barr) 298.

[q] (Pa. 1850) In scire facias, on a recognizance for stay of execution, the principal debtor is not a competent witness for defendant. —Morrison v. Hartman, 14 Pa. (2 Harris) 55.

[r] (Pa. 1855) A principal debtor, though not sued, is not a competent witness to prove payment of the debt, being liable to his surety in the event of a recovery against the latter.—Marshall v. Franklin Bank, 25 Pa. (1 Casey) 384.

[s] (S. C. 1844) The principal to a bond is not a competent witness for his surety to prove that he had made payments thereon.—Cantey v. Blair, 1 Rich. Eq. 41.

[t] (S. C. 1845) A principal is not a competent witness to diminish the amount of his demand against his surety.—Cantey v. Blair, 2 Rich. Eq. 46.

[u] (S. C. 1851) A sheriff attached property and delivered it to the creditor to be taken out of the district for sale; an agent of the creditor having given a bond of indemnity to the sheriff. In an action of trover by the creditor against one who took the property out of his possession, *held*, that the obligor was a competent witness.—Bank of Kentucky v. Shier, 4 Rich. Law, 233.

[v] (Tenn. 1836) A judgment was rendered by a justice of the peace against A. and B., on which execution was stayed for nine months, and C. was entered by the justice as security for the stay of the execution. C. alleged that the justice had no authority to enter him as security, and removed the judgment and execution, by certiorari into the circuit court. On the trial before the jury, C. offered A. as a witness to prove that his name was entered as security for the stay of the execution without proper authority. *Held*, that he was a competent witness.—Barnes v. Dick, 17 Tenn. (9 Yerg.) 430.

[w] (Tenn. 1859) The principal in a joint and several bond, or in a judgment against several, is not a competent witness, on behalf of the surety, to prove payment of the debt or judgment.—Hurst v. Word, 40 Tenn. (3 Head) 564.

[x] (Va. 1835) The principal is a proper witness for the surety to prove an agreement between the creditor and himself, and an indulgence given for the debt, by which the surety is released.—Steele v. Boyd, 6 Leigh, 547, 29 Am. Dec. 218.

§ 339. Co-obligors.

[a] (Ky. 1827) In an action against one of two co-obligors, the other is a competent witness for the obligee.—Williams v. Cummins, 22 Ky. (6 T. B. Mon.) 157.

[b] (Ky. 1833) A co-obligor who is not sued is a competent witness, unless it be shown that he is interested in the event of the pending trial. —Long v. Ray, 31 Ky. (1 Dana) 430.

[c] (Ky. 1834) In a suit against an officer for not levying an execution issued upon a replevin bond, an obligor in the bond is a competent witness to show that it was not acknowledged according to law.—Williams v. Hall, 32 Ky. (2 Dana) 97.

[d] (Ky. 1847) The deposition of one of several obligors in a bond given for the performance of a decree which might be rendered upon an attachment levied upon a steamboat, or the deposition of one of the owners of such boat, is incompetent evidence for defendant.—Strader v. Graham, 46 Ky. (7 B. Mon.) 633.

[e] (Mo. 1846) In an action against one of two obligors in a bond, his co-obligor is not a competent witness for defendant; the statute of 1845 not applying to such case.—Callaway County Court v. Craig, 9 Mo. 846.

[f] (N. Y. 1829) A co-obligor not sued is a competent witness to prove the terms on which a joint and several bond has been executed; the suit being commenced against a part only of the obligors.—Lovett v. Adams, 3 Wend. 380.

[g] (Pa. 1846) In an action on a bond against one of two joint and several obligors, the obligor not sued is a competent witness for defendant under the plea of non est factum; but if his testimony do not sustain the plea, the judgment will not be reversed, although the witness was rejected.—Ely v. Hager, 3 Pa. (3 Barr) 154.

§ 340. Surety in general.

[a] (U. S. 1809) A surety is not a competent witness for his principal.—Virginia v. Evans, Fed. Cas. No. 16,969 [1 Cranch, C. C. 581].

[b] (U. S. 1879) In a contractor's action in the court of claims, his surety is incompetent to testify under Rev. St. § 1077 [U. S. Comp. St. 1901, p. 742], if the government has set up a breach; otherwise, where the contract has been performed, and the demand is for extra work, and no breach of the contract is alleged. —Merchants' Exchange Co. v. United States, 15 Ct. Cl. 270.

[c] (Ark. 1854) A. sold lands to B., and took his obligation for the purchase money, giving him a bond to make title when the obligation should be paid. A mistake in the description of the land being discovered, additional security for the purchase money was required by A., and C., with others, gave his obligation to A. for the amount as collateral to A.'s obligation. A bill in equity was filed, asking to have the mistake in the description corrected, but the bill prayed for no rescission of the contract or other relief. *Held* that, B.'s obligation being unpaid at the time of the hearing, C. was interested in the result of the suit, and was not a competent witness for B.—Carnall v. Wilson, 14 Ark. 482.

[d] (Conn. 1837) An execution, issued on a judgment recovered by A., on a probate bond, against B. (the principal) and C. (the surety), was levied on land as the estate of B., whose sole duty it was to pay the debt, and the land was duly set off to A. in satisfaction of the execution. A. then brought ejectment for the land against B. and D. On the trial defendants showed a deed of the same land from B. to A., executed before the judgment on the probate bond, and a subsequent conveyance from A. to D. A. claimed that the deed from B. to him was fraudulent and void, and in sup-

port of this claim offered C. as a witness. *Held*, that he was inadmissible for this purpose, being interested to show a satisfaction of the judgment against B. and himself.—Leeds v. Leeds, 12 Conn. 176.

[e] (Del. 1857) A person is not incompetent as a witness for defendant in an action of replevin against a sheriff to recover goods taken on execution, by reason of his being surety for the defendant in execution on a judgment against him in another case. The surety might have something to pay thereon if the sheriff's claim to the goods should not be sustained, as the defendant in execution might not be able to satisfy the judgments in both cases, but such interest is too slight to be regarded.—Cleaver v. Ogle, 1 Houst. 453.

[f] (Ga. 1852) The fact that a witness is security for the party calling him on another and distinct debt does not disqualify him to testify.—Riggins' Ex'rs v. Brown, 12 Ga. 271.

[g] (Ga. 1853) A surety called to testify against his interest is competent, if consenting to testify.—Molyneaux v. Collier, 13 Ga. 406.

[h] (Ky. 1811) A person who is bound as surety for a title sold by the heirs is incompetent as a witness against the devisee.—Collett v. Wiley's Heirs, 5 Ky. (2 Bibb) 466.

[i] (Ky. 1820) The security of a complainant in an original bond for the purchase of land, on which the judgment at law enjoined by complainant's bill was formed, is not a competent witness for his principal.—Shelby v. Smith's Heirs, 9 Ky. (2 A. K. Marsh.) 504.

[j] (Ky. 1855) The fact that a witness is bound as surety for the party calling him to depose, in liabilities unconnected with the matter in controversy, does not render him incompetent.—Covington & L. R. Co. v. Ingles, 54 Ky. (15 B. Mon.) 637.

[k] (La. 1829) A surety on a bond to release property sequestered is incompetent for his principal.—Lane v. De Peyster, 7 Mart. (N. S.) 372.

[l] (La. 1829) A surety is not competent for his principal, even to prove a novation by which the surety became the principal debtor.—Lesassier v. Hertzel, 8 Mart. (N. S.) 265.

[m] (La. 1842) On an opposition by a purchaser at an execution sale to the homologation, under Monition Acts 1834, No. 91, of a second sale at his risk, the surety tendered on his 12-month bond having been rejected as insufficient, such surety may prove his own solvency.—Debuys v. Connolly, 2 Rob. 338.

[n] (Me. 1830) A member of a corporation, who is its surety for the payment of a debt not in controversy in the suit on trial, is not on that account an incompetent witness for the corporation.—Miller v. Mariners' Church, 7 Me (7 Greenl.) 51, 20 Am. Dec. 341.

[o] (Me. 1851) A surety on a bond, given by one of two joint debtors, arrested on mesne process, to procure his release, is not competent as a witness for defendants on the trial of the suit.—Cates v. Noble, 33 Me. 258.

[p] (Md. 1854) The interest of a witness who is surety on a bond given to the administrator of a testator by one of the heirs, who would be a distributee in case the will should be vacated, is too remote and contingent to disqualify him from testifying in a suit to test the validity of the will.—Townshend v. Townshend, 6 Md. 295.

[q] (Mass. 1819) One who has become bail for defendant in an action of assumpsit is so far interested in the event of the suit as to be incompetent as a witness for defendant.—Niles v. Brackett, 15 Mass. 378.

[r] (Mass. 1849) The surety in a bastardy bond is not a competent witness for the principal; nor can he be made so by offering the complainant another bond, with sufficient sureties.—Chapel v. White, 57 Mass. (3 Cush.) 537.

[s] (Mich. 1862) A surety in an appeal bond is a competent witness at the trial on the appeal.—White v. Bailey, 10 Mich. 155.

[ss] (Miss. 1845) In a trial of right of property, the sureties in the claimant's bond are incompetent witnesses in his behalf.—Moore v. McKie, 13 Miss. (5 Smedes & M.) 238.

[t] (N. H. 1839) Where an individual was surety on a bond, with a condition to pay plaintiff the amount due on a judgment recovered in his favor, unless the judgment was reversed on the review of the action, *held*, that he was incompetent as a witness, on such review, until he had received money sufficient to respond to the amount of such judgment, with interest on the same up to such period as there was any probability the action might be pending.—Dearborn v. Dearborn, 10 N. H. 478.

[tt] (N. H. 1840) The court ordered a new indorser to be furnished, in a suit appealed from a justice, and the indorsement was made on the certified copy of the writ brought up with the papers. *Held*, that such indorsement bound the individual to liability as indorser, and disqualified him as a witness in the suit.—Amerisco-gin Bridge v. Bragg, 11 N. H. 102.

[u] (N. J. 1794) Bail may testify against the principal, but are not compellable to do so.—Shotwell v. Morris, 1 N. J. Law (Coxe) 224.

[uu] (N. J. 1840) A surety in an insolvent's bond is not a competent witness to prove a compliance by the insolvent with the requirements of law.—Browning v. Cooper, 18 N. J. Law (3 Har.) 196.

[v] (N. J. 1841) A surety in the official bond of the assignee of an insolvent's estate is a competent witness to testify relative to a claim against the estate, when offered for proof.—Mann v. Drost, 18 N. J. Law (3 Har.) 336.

[vv] (N. Y. 1822) One of two lessees, after the lease has expired, is a competent witness to show that he had no beneficial interest in the lease, and joined in the execution of it merely as a surety for the payment of the rent by the co-lessee.—Jones v. Clark, 20 Johns. 51.

[w] (N. Y. 1836) On dissolution of a partnership, the property was assigned to A., one of the partners, who gave B., another partner, a bond to save him harmless against the partnership debts, in which the witness joined as surety. In a suit by B., against a pretended creditor of the firm, for the purpose of barring such claim, *held*, that the witness was incompetent to prove that the debt of defendant was the separate debt of C., another partner.—Woods v. Skinner, 6 Paige, 76.

[ww] (N. Y. 1864) The surety in the undertaking given to obtain a provisional remedy in an action is not incompetent as a witness, for he is not a person for whose benefit the action is prosecuted or defended.—Jessop v. Miller, 2 Abb. Dec. 449.

[x] (N. C. 1805) A surety of an appeal bond is an incompetent witness for appellant.—Lavender v. Pritchard, 3 N. C. 337.

[xx] (N. C. 1830) A surety for a delinquent cashier is not a competent witness in an action brought to recover money improperly paid by his principal, and for which the latter is chargeable.—State Bank v. Littlejohn, 13 N. C. 381.

[y] (Ohio, 1817) Bail cannot be witnesses for their principals, because they have a direct interest in the event of the suit; but when this interest is put an end to, by the condition of the bond or recognizance being complied with, bail become competent witnesses.—Bail may also be called as witnesses against the principals, for a man shall not, by his own act, deprive another, without his consent, of his testimony.—Ohio v. Gardner, Tapp. 124.

[yy] (Pa. 1826) A surety who is directly interested in the event of the suit cannot be a witness.—Reigart v. Hix, 14 Serg. & R. 134.

[z] (S. C. 1830) A surety of a deceased debtor is a competent witness to disprove a demand against the estate of his principal, though he believed the estate to be insolvent, and that the demand which he is called to disprove is a preferred claim and will exhaust the assets.—Ogier v. Holmes, 1 Bailey, 473.

[zz] (S. C. 1846) In a proceeding to prevent the discharge of a debtor under the prison bonds act, a surety of the debtor for a debt on which judgment has been recovered against both is not therefore incompetent to testify for plaintiff.—Ex parte Hinton, 3 Rich. Law, 97.

§ 341. Surety on replevin or attachment bond.

[a] (Ala. 1845) The sureties to a bond for attachment are competent witnesses to prove that an affidavit therefor was made and is lost, so that another may be substituted.—Ex parte Simpson, 7 Ala. 842.

[b] (Ala. 1852) The surety on a replevin bond, which has been returned forfeited, is a competent witness for the plaintiff in an action against the sheriff for failing to make the money on the execution.—Poe v. Dorrah, 20 Ala. 288, 56 Am. Dec. 196.

[c] (Ark. 1860) A security on an attachment bond is not disqualified, on the ground of interest, to testify in favor of his principal in a proceeding brought by the defendant for an injunction against the attachment suit.—Atkins v. Guice, 21 Ark. 164.

[d] (Iowa, 1860) In a replevin suit, a surety on the bond is a competent witness for plaintiff.—Cook v. Lyon, 10 Iowa, 433.

[e] (La. 1839) Where an attachment bond is signed by a firm as surety, in the absence and so far as appears without the authority of a partner, he is prima facie a good witness.—Denton v. Commercial & R. Bank, 13 La. 488.

[f] (Me. 1850) On the trial of an action, in which there has been an attachment of property, a surety on a replevin bond, by virtue of which the same property was replevied from the attaching officer, is a competent witness for defendant.—Johnson v. Whidden, 32 Me. 230.

[g] (Md.) A surety in a replevin bond is not a competent witness for the plaintiff in replevin.—(1827) Sanderson's Ex'rs v. Marks, 1 Har. & G. 252; (1828) Morton v. Beall's Adm'r, 2 Har. & G. 136.

[h] (Mass. 1849) Where several actions of replevin are tried together before the same jury, by order of the judge, a surety in one of the replevin bonds is a competent witness to testify in the cases in which he is not interested, in the same manner as if the actions had been separately tried.—Kimball v. Thompson, 58 Mass. (4 Cush.) 441.

[i] (Miss. 1843) On the trial of an issue taken between the plaintiff in an attachment and the garnishee on his answer, the surety in the attachment bond is a competent witness for plaintiff.—Peters v. Moss, 9 Miss. (1 Smedes & M.) 331.

[j] (Pa. 1848) In an action of replevin, the surety of a defendant in the replevin bond is an incompetent witness for defendant.—Dannels v. Fitch, 8 Pa. (8 Barr) 495.

§ 342. Surety on administration bond.

[a] A surety in an administration bond is a competent witness for the executor or administrator.

—(U. S. 1812) Thompson v. Affick, Fed. Cas. No. 13,940 [2 Cranch, C. C. 67]; (1814) Davies v. Davies, Fed. Cas. No. 3,612 [2 Cranch, C. C. 105]; (1816) Craig v. Reintzel, Fed. Cas. No. 3,336 [2 Cranch, C. C. 128; (1823) Burch v. Spaulding, Fed. Cas. No. 2,140 [2 Cranch, C. C. 422];

(Md. 1825) Ferguson v. Cappeau, 6 Har. & J. 394;

(Ohio, 1833) Spencer v. Brooks, Wright, 178;

(Pa. 1848) Reeme v. Parthemere, 8 Pa. (8 Barr) 460.

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(Md. 1801) Bean's Ex'r v. Jenkins' Adm'r, 1 Har. & J. 135.

[b] (U. S. 1811) On the issue of plene administravit, a surety in the administration bond is a competent witness for defendant.—Fairfax v. Fairfax, Fed. Cas. No. 4,613 [2 Cranch, C. C. 25].

[c] (Ala. 1861) In an action by an administrator, an obligor in a bond given under the statutes of Alabama, when administration is given to the general administrator, sheriff, or coroner, conditioned for the payment of the fees, and allowances made by the court on such administration, "if the property of the estate is insufficient therefor," is a competent witness for the plaintiff under the statutes of that state.—Coate v. Coate's Adm'r, 37 Ala. 695.

[d] (Ala. 1850) A surety on the administration bond is not a competent witness for the administrator on the settlement of his accounts.—McCreeliss' Distributees v. Hinkle, 17 Ala. 459.

[e] (Ala. 1858) The surety of an administrator is not a competent witness to prove a credit on the final settlement.—Henderson v. Simmons, 33 Ala. 291, 70 Am. Dec. 590.

[f] (Ala. 1861) A person is not incompetent as a witness for an administrator under section 2302 of the Code, in consequence of being an obligor in a bond given under section 1691 of the Code, conditioned to pay the fees and allowances made by the probate court on the administration, if the property of the estate is insufficient therefor.—Coate v. Coate's Adm'r, 37 Ala. 695.

[g] (Del. 1832) The surety on an administration bond is a competent witness in an action against the administrator, if there is no suggestion of a devastavit.—Bennington v. Parkin's Adm'r, 1 Har. 128.

[h] (Ky. 1854) In a will one of the executors was also a legatee. The will was proved in the county court, and the executors entered on the performance of their duties. Nearly a year afterwards a bill was filed in chancery to set aside the will, and a surety on the executor's bond was offered as a witness to prove it. *Held*, that as the property bequeathed to the executor was not made subject to the payment of the debts, but the testator directed his debts to be paid out of his other estate, it was a reasonable presumption that the property was in the possession of the person to whom it was bequeathed, and that he held and used it as legatee before the commencement of the present suit; therefore, the surety would not be liable for it, if the will should be annulled, and had no interest in the result of the suit.—Jones' Ex'r v. Jones' Widow, 53 Ky. (14 B. Mon.) 464.

[i] (Md. 1830) The sureties in an administration bond are not competent witnesses in a suit brought by the distributee, against the administrator, to prove that the assets of the deceased have been consumed in the payment of his debts.—Owens v. Collinson, 3 Gill & J. 25.

[j] (Md. 1841) The surety of a defendant executrix is not competent to prove the payment of plaintiff's demand by the testator of defendant.—Mitchell v. Mitchell, 11 Gill & J. 388.

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[k] (Md. 1841) Plaintiff's intestate died in September, 1830, in possession of claims due on the 1st of June of that year, and his administrator did not commence his action until the claims were barred by the statute of limitations. *Held*, that the surety of such administrator was an incompetent witness to prove a new acknowledgment of the debt.—Mitchell v. Mitchell, 11 Gill & J. 388.

[l] (Mass. 1847) In a suit by heirs, to recover land of which their ancestor died seised, upon the alleged ground that the sale thereof by his administrator, under a license, was fraudulent and voidable, the surety of the administrator, on his administration bond, and also on the bond given by him on his obtaining license to sell it, is a competent witness.—Blood v. Hayman, 54 Mass. (13 Metc.) 231.

[m] (N. H. 1852) The sureties on an administrator's bond, not being liable for breach of covenant in his deed of the real estate of the deceased, are not therefore incompetent witnesses for the administrator.—Merrill v. Harris, 26 N. H. (6 Fost.) 142, 57 Am. Dec. 359.

[n] (N. C. 1823) On an issue devisavit vel non, the security to the administration which had been granted pendente lite is admissible as a witness to support the will.—Martin v. Hough, 9 N. C. 368.

[o] (N. C. 1838) In a petition against an administrator, on an issue made up to try whether the petitioners are the next of kin of the intestate, the sureties to the administration bond are competent witnesses for defendant; they being neither parties nor privies to the record.—Kaywood v. Barnett, 20 N. C. 88.

[p] (Pa. 1859) In an action by a widow against an administrator, for refusing to set apart $300 of the property of the intestate, which she claimed as her portion, one who signed the administration bond as surety may be a witness, as the judgment must be de bonis propriis.—Hill v. Hill's Adm'r, 32 Pa. (8 Casey) 511.

[q] (S. C. 1846) On a bill by the remainderman, against the administrator of the tenant for life of a slave, for a specific delivery and an account for the hire, the surety of the administrator, on his bond, is a competent witness for him on the question of the value of the hire.—Anderson v. Smoot, 2 Rich. Eq. 285.

§ 343. Parties to bills and notes.

Competency in general, see ante, §§ 309–322.

[a] (Ala. 1848) One co-maker of a note, not sued, who is a surety for the other, is an incompetent witness for plaintiff, in a suit on the note; and the case is not varied by the fact that he was the agent of the principal debtor in signing his name.—McCall v. Sinclair, 14 Ala. 764.

[b] (Ala. 1854) When the sureties of a principal debtor are sued on a note, their principal is not a competent witness for them without a release.—Garrett v. Holloway, 24 Ala. 376.

[c] (Ala. 1856) In a suit against the principal, founded on a note executed by him in this state jointly with sureties, a surety who is not sued is a competent witness for his principal.—Atwood's Adm'r v. Wright, 29 Ala. 346.

[d] (Ark. 1842) A. and B. as principal, and C. as surety, made a note, which C. was compelled to pay. *Held*, in an action by C. against B. to recover the amount paid, that A. was an incompetent witness for plaintiff to prove a partnership between A. and B., or the liability of B.—Williams v. Brummel, 4 Ark. (4 Pike) 129.

[e] (Conn. 1826) A. owed a debt to B., and C. became the surety of A. on notes given for such debt, and also mortgaged land to B. as collateral security; A. being one of the subscribing witnesses to such deed. B., on a bill of foreclosure brought by him, called A. to prove the execution of the deed. *Held*, that A. was a competent witness for B., as his interest was either balanced, or against the party calling him.—Bigelow v. Benedict, 6 Conn. 116.

[f] (Ga. 1857) The maker of a note is not a competent witness for the surety.—McGinnes v. McGinnes, 23 Ga. 613.

[g] (La. 1852) In an action on a note the surety is not a competent witness for his principal.—Rousseau v. Lovering, 7 La. Ann. 616.

[h] (Me. 1836) In an action by the payee of a note against the surety, the principal is a competent witness for the surety, as the principal's interest is balanced.—Freeman's Bank v. Rollins, 13 Me. (1 Shep.) 202.

[i] (Me. 1851) A surety on a note made a partial payment thereon before six years had expired, and thereby prevented the statute of limitations from attaching, as against him, for six years longer. After the expiration of six years from the date of the note, but within six years from the date of the partial payment, a suit was brought against the surety for the balance, and he offered the principal as a witness. *Held*, that the principal was liable over to the surety, in case of a recovery against the latter, and therefore was disqualified as a witness in his favor, by reason of interest.—Odell v. Dana, 33 Me. 182.

[j] (Mass. 1840) In an action by the payee against one of the sureties on a note, the principal promisor, and also the other surety, are competent witnesses for defendant to prove that the sureties have been discharged by plaintiff.—Greely v. Dow, 43 Mass. (2 Metc.) 176.

[k] (Miss. 1846) In a suit by one surety on a note against another for contribution, the principal, being equally liable to both, is a competent witness.—Hunt v. Chambliss, 15 Miss. (7 Smedes & M.) 532.

[l] (Mo. 1845) A principal in a note is not a competent witness in an action against his sureties, to show that they are sureties, and to release them, as his liability would be increased by a recovery against them.—Garrett v. Ferguson's Adm'rs, 9 Mo. 125.

[m] (N. H. 1830) In an action by a payee against one who has signed a note as surety, the principal on the note is a competent witness for the defendant when released from liability to costs; his interest being balanced.—Hill v. Sweetser, 5 N. H. 168.

[n] (N. H. 1842) If a note be signed by a principal and surety, and an action be brought thereon by the payee against the surety, the principal will be a competent witness for plaintiff.—Morse v. Green, 13 N. H. 32, 38 Am. Dec. 471.

[o] (N. Y. 1814) Where A. and B. sign a joint note, which is delivered to C., for goods sold by him to A., and A. brings an action against C. for an alleged deficiency in the goods, B. is a competent witness to prove that he signed the note as security only, and not as partner, he having no interest in the event of the suit, the note not being in question.—Hopkins v. Smith, 11 Johns. 161.

[p] (N. C. 1858) A co-obligor, who is a surety in a sealed note, and who is not sued, is a competent witness to prove the execution of the instrument as to the principal, because his interest is as much on one side as on the other.—Gilliam v. Henneberry, 51 N. C. 223.

[q] (Pa. 1824) One who has given a bond and judgment, as collateral security for a note indorsed by defendant, is not a witness for defendant to prove that the note is paid.—Sterling v. Marietta & S. Trading Co., 11 Serg. & R. 179.

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[r] (Tenn. 1868) W. brought an action against the maker and security on a note, and judgment was rendered against both parties, from which judgment H., the surety, alone appealed to the circuit court. Upon the trial of the appeal *held* that the maker was not a competent witness for H. to prove that he had been discharged from liability on the note, as he was liable to H. for the amount of the judgment which might be rendered against him including costs.—Holt v. Winstead, 45 Tenn. (5 Cold.) 568.

[s] (Tex. 1862) In a trial of a suit for breach of a contract, wherein C. had bought of H. certain cattle, on condition of C.'s being able to find 33 head thereof in a certain range, within three days of search, giving in part payment a note with N. as security, the condition being unfulfilled, and the note being unpaid, *held*, that N. was a competent witness for C. to the contract.—Hudson v. Clark, 26 Tex. 291.

[t] (Vt. 1848) In an action in favor of the payee of a note against one who signed it as surety for the principal signer, the principal, having received from defendant a release of all liability for the costs and expenses of the suit, is a competent witness for defendant; for he will be liable to plaintiff for the damages, if defendant recover, to the same extent that he would be liable to defendant if plaintiff should recover; and, therefore, his liability for costs and expenses being released, his interest is equally balanced.—Austin v. Dorwin, 21 Vt. 38.

[u] (Vt. 1848) And it makes no difference that the testimony of the principal tends to reduce the amount of plaintiff's recovery against the surety. The judgment in favor of plaintiff transfers the principal's liability to the surety only to the extent of that judgment, leaving the principal still liable to plaintiff for the balance of the debt, if justly due. The record would be no defense to the principal, for the purpose of limiting the amount of recovery in a suit against him by plaintiff.—Austin v. Dorwin, 21 Vt. 38.

§ 344. Co-sureties.

[a] (U. S. 1809) One surety is a competent witness for another surety.—Virginia v. Evans, Fed. Cas. No. 16,969 [1 Cranch, C. C. 581].

[b] (Ga. 1860) A surety on a bond is not a competent witness against his co-sureties on an issue of non est factum.—Rowe v. Ware, 30 Ga. 278.

[c] (Mo. 1848) A co-surety, who is not a party to the suit, is a competent witness in an action on a bond in which he is surety.—Craig v. Callaway County Court, 12 Mo. 94.

[d] (N. H. 1831) Where a suit is brought on a note transferred to a surety for his indemnity, a co-surety is not a competent witness for plaintiff.—Low v. Smart, 5 N. H. 353.

[e] (N. Y. 1837) Where two persons are sureties for a third, the maker of a note, and payment of the note is enforced from one of the sureties, in an action by him against the principal, to recover the amount of money so advanced, the other surety is a competent witness for plaintiff.—Benedict v. Hecox, 18 Wend. 490.

[f] (S. C. 1849) One co-surety to a single bill is a competent witness to prove the handwriting of the other surety, the latter alone being sued.—Leech v. Kennedy, 3 Strob. 488.

[g] (S. C. 1850) A witness was offered in a suit by a surety in an administrator's bond, who was co-surety with him on a bond in which there were three sureties, and the object of the suit was to establish a bond on which the witness was co-surety, with but one other surety. *Held*, that the witness was incompetent from interest.—Glenn v. Wallace, 4 Strob. Eq. 149, 53 Am. Dec. 657.

[h] (Vt. 1833) Where five sureties of an insolvent principal confess a joint judgment, execution issues, and four are committed to prison and give separate bonds to the keeper, in an action by the fifth, whose property has been taken to pay the judgment, against one of the four, for the one-fifth part of the amount paid, another one of the four is a competent witness for plaintiff.—Foster v. Johnson, 5 Vt. 60.

§ 345. Obligee.

[a] (Ind. 1832) In an action by a road commissioner on a bond, his predecessor, to whom the bond was given, not being interested, is a competent witness for plaintiff.—Cox v. Way, 3 Blackf. 143.

[b] (Ky. 1842) In a suit by one surety against another, the original obligee, to whom the debt has been paid, is a competent witness.—McNeil v. Sanford, 42 Ky. (3 B. Mon.) 11.

[c] (S. C. 1796) In an action on a bond, brought by an assignee, in the name of the obligee, the latter is incompetent as a witness to prove a partial payment to him by the obligor.—Cantey v. Sumter, 1 Brev. 17.

§ 346. Principal and guarantor.

[a] (Cal. 1861) A guarantor of a note, the effect of whose testimony would be to render himself liable thereon, is a competent witness for defendant in a suit against the maker, to prove payment of the debt for which the note had been pledged.—Mayo v. Avery, 18 Cal. 309.

[b] (Ind. 1841) In a suit against a guarantor for the price of goods sold to another on defendant's letter of credit, the person to whom the goods were sold is a competent witness for plaintiff.—Smith v. Bainbridge, 6 Blackf. 12.

[c] (Ind. 1852) In a suit on a note, a guarantor of the solvency of the maker is not a competent witness to prove that the note was given without consideration.—Hanna v. Spencer, 3 Ind. 351.

[d] (Me. 1840) A guarantor "to pay the execution which may be recovered on" a certain note, "in the lifetime of said execution," is interested to lessen the amount to be recovered, and is not competent to prove a partial failure of consideration.—Paine v. Hussey, 17 Me. (5 Shep.) 274.

[e] (Miss. 1850) A guarantor of a note is not a competent witness for the assignee in an action against the maker to support the consideration.—Brodnax v. Brodnax, 21 Miss. (13 Smedes & M.) 369.

[f] (N. Y. 1857) The assignor and guarantor of a mortgage and the bond secured by it, who has also, upon a subsequent foreclosure, purchased the mortgaged premises, is not such a party for whose "immediate benefit" a suit on a policy of insurance on the mortgaged premises, which have been burned, is prosecuted by his assignee, as to be an incompetent witness for plaintiff.—Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn, 14 N. Y. Super. Ct. (1 Bosw.) 469.

[g] (Pa. 1824) An assignor of a bond guarantying the payment thereof has such an interest therein that he would be an incompetent witness, in an action by a subsequent assignee thereon, to prove that the bond had been discharged.—Reed v. Garvin, 12 Serg. & R. 100.

[h] (Pa. 1845) A guaranty, without the request of the debtor, has no consideration as to him so as to incapacitate him as a witness in an action on the guaranty.—Kean v. McKinsey, 2 Pa. (2 Barr) 30.

[i] (Pa. 1848) In a suit by a creditor against a guarantor, where the principal debtor has been discharged in bankruptcy, such principal is not a competent witness for the guarantor; being liable to the guarantor, in case of a com-

pulsory payment by the latter, after the discharge.—Cake v. Lewis, 8 Pa. (8 Barr) 493.

[j] (S. C. 1824) One who had guarantied the ultimate payment of a bond was an incompetent witness to prove that it had not been paid to himself, while in his possession, assigned in blank.—Stoney v. McNeill, Harp. 156.

[k] (Tenn. 1849) A. was indebted to B. for materials furnished for the steamboat Bolivar. Subsequently to the contraction of the debt, A. sold the boat to C., and took his guaranty against all debts contracted for the boat. B. sued A. for the materials, and introduced C. as a witness. *Held*, that he was incompetent, for he was liable on the covenant of indemnity to the extent of the recovery against A.—Weller v. Gilbert, 29 Tenn. (10 Humph.) 357.

[l] (Va. 1866) Although one who, in transferring a bond, verbally undertook with the transferee to guaranty it, provided the transferee should call on him to do so, to enable the latter to transfer it, yet the latter having disposed of it without calling for the guaranty, the former was not disqualified by interest from testifying, on behalf of the holder, against the obligors.—Fant v. Fant, 17 Grat. 11.

§ 347. Indemnitor.

[a] (Ala. 1846) One who has indemnified the sheriff for seizing goods conveyed to a trustee for the benefit of creditors is not a competent witness to sustain the title of the purchaser from the sheriff, when the suit is by the trustee, because, when the sheriff is indemnified, the purchaser, if evicted, may sue him as a warrantor of the goods purchased.—Hodge v. Thompson, 9 Ala. 131.

[b] (Ark. 1853) In an action for deceit in the sale of a horse, a third person, who furnished defendant with the horse for the purpose of his being sold to plaintiff, under an agreement to indemnify him for any damages and costs that plaintiff might recover against defendant, is not a competent witness for defendant to prove that the horse was sound at the time of sale to plaintiff; but having been admitted to testify without objection, the jury are the judges of his credibility.—Turner v. Huggins, 14 Ark. 21.

[c] (Conn. 1845) A., being appointed sheriff, gave bond with sureties for the faithful discharge of his official duties, and B. executed a bond to the sureties to indemnify them. A. afterwards brought an action against C. on a receipt given by him for property attached by A., as sheriff, in a suit between D. and E. On the trial of such action, A. offered B. as a witness to prove a demand of the property. The bond given by B. was then outstanding, but it did not appear that any suit had ever been brought against A. for any default in his office. *Held*, that B. was a competent witness.—Allen v. Adams, 17 Conn. 67.

[d] (Me. 1851) A. recovered judgment against B. for an installment of the purchase money for land, and C., D., and E. were interested in the purchase money and liable to indemnify B. to the extent of their proportions in the same. *Held*, that they were not competent witnesses for B. on a petition to recover the judgment.—Hobbs v. Burns, 33 Me. 233.

[e] (N. Y. 1848) Where two persons claimed title to a note, and the one having possession brought suit thereon, the fact that the other notified the maker not to pay it, and indemnified him against the expense of defending the suit, did not bring him within Code, § 352, making incompetent as a witness one for whose immediate benefit an action is prosecuted.—Farmers' & Mechanics' Bank v. Paddock, 1 Code Rep. 81.

§ 348. Receiptor.

[a] (Ga. 1852) In an action of trover, a party who has sued out a possessory warrant against plaintiff for the property, and given a bond under the statute for the forthcoming of the property to answer a judgment for the same, is incompetent to testify for defendant.—Harper v. Scott, 12 Ga. 125.

[b] (Me. 1841) In a suit against a sheriff for neglecting to satisfy an execution upon goods which had been attached and receipted for, on the original writ, a judgment debtor, who is likewise a receiptor, is a competent witness for the sheriff.—Pillsbury v. Small, 19 Me. (1 App.) 435.

[c] (Me. 1855) One who had signed a receipt given to the sheriff for goods attached on mesne process in which was a clause as follows: "They are not to be demanded except on the executions which may be recovered in such suits"—was properly excluded, when offered as a witness at the trial.—Oxnard v. Swanton, 39 Me. 125.

[d] (Mass. 1839) Where personal property was attached by a deputy sheriff, and, at the request of defendant, a third person receipted therefor, and agreed to indemnify the officer against the consequences of intrusting the property to him, and the property was delivered by the receiptor to defendant, the receiptor was interested in the event of the suit, and was therefore incompetent as a witness for defendant.—Pollard v. Graves, 40 Mass. (23 Pick.) 86.

[e] (N. H. 1844) A receiptor for attached property, whatever he may have done with it, is not a competent witness for defendant in the suit.—Woolcott v. Clifford, 16 N. H. 457.

[f] (Vt. 1845) The receiptor of property attached is not a competent witness for defendant in the same suit, where the property attached has been, by the receiptor, suffered to remain in defendant's possession.—Haskins v. Smith, 17 Vt. 263.

[g] (Va. 1819) Where, in an action against a constable and his sureties on his official bond for not delivering attached property, the constable pleads that the plaintiff in the attachment, having taken from a certain person a bond for the delivery of the attached effects, afterwards directed him to give them up to the debtor, with which direction he complied, he cannot introduce such person as a witness to prove it, since he was interested in the controversy.—Smith v. Cooper, 6 Munf. 401.

(d) PARTNERS.

IN GENERAL, § 349.
ACTIONS BETWEEN PARTNERS, § 350.
TESTIMONY AS TO EXISTENCE OF PARTNERSHIP, § 351.
DORMANT OR SECRET PARTNER, § 352.
SURVIVING PARTNER, § 353.
ACTIONS ON NOTES, § 354.
AFTER DISSOLUTION OR ASSIGNMENT, § 355.

Determination of liability, see post, § 486.
Parties to action, see ante, § 236.
Statutory removal of incompetency, see post, § 514.
Transfer, release, or extinguishment of interest, see post, § 450.

§ 349. In general.

[a] One partner may be a witness for the other in a matter in which they have no joint interest.

—(N. J. 1818) Ward v. Coulter, 4 N. J. Law (1 Southard) 208;

(S. C. 1818) Mooreman v. De Graffenread, 2 Mill, Const. 195.

[b] (Ala. 1845) A partner who is not sued is a competent witness for his copartner, where he is required to testify against his interest

and where such evidence is within the scope of the issue, the court should not assume his incompetency, and reject him in limine.—Anderson v. Snow, 8 Ala. 504.

[c] (Ala. 1849) Where money is received to the use of a firm, and suit is instituted for its recovery against one of the partners alone, the other, being liable to his copartner for contribution in the event of a recovery, is an incompetent witness for him.—Cochran v. Cunningham's Ex'r, 16 Ala. 448, 50 Am. Dec. 186.

[d] (Ala. 1850) In an action against A. to charge him as a partner for goods sold to the firm of B. & Co., B., whose liability is admitted, is not a competent witness to prove the sale and delivery of the goods, unless it be first shown by aliunde proof that A. was a member of said firm.—Dickson v. Collins, 17 Ala. 635.

[e] (Ala. 1850) A partner who is still liable to the creditor for the demand in controversy is not a competent witness for him to prove that, as between him and his copartner, the latter has, by agreement, made the debt several and assumed its payment.—Hoyt v. Murphy, 18 Ala. 316.

[f] (Ala. 1850) Where one partner, in a matter connected with the business of the partnership, does an act to the injury of a third person, which is a tort by construction or inference of law merely, his copartner is equally liable with him for the consequences of the act, and, being so liable, is an incompetent witness for him when sued alone by such third person to recover damages for the tort.—Myers v. Gilbert, 18 Ala. 467.

[g] (Ala. 1854) When a witness testifies, on his voir dire, that he was a partner of the firm which is shown by other evidence to have been defendant's vendor of the goods in suit, he may testify to the further fact that said firm was also plaintiff's vendor, thus balancing his interest, and restoring his competency.—Tarleton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515.

[h] (Ark. 1851) A. sued B. for work. C. was offered as a witness by A. It appeared that B. and C. agreed to cultivate a farm in partnership. B. was to furnish a hand on his part, and thereupon hired A., who labored on the partnership farm, and sued B. for his wages. *Held*, that C. was not liable for A.'s wages, and was a competent witness.—Rapley v. Brown, 12 Ark. (7 Eng.) 80.

[hh] (Conn. 1831) In an action against a partnership, one partner, who is not sued, is an incompetent witness for those who are sued.—Bill v. Porter, 9 Conn. 23.

[i] (Conn. 1842) H., an officer, attached the goods of B., in a suit against him by A., and C. subsequently attached the same goods, then in the custody of H., in a suit brought by another creditor against B.; after which H. brought trespass against C., and, on the trial, H. offered a partner of A. as a witness. *Held*, that such witness was not incompetent by reason of interest in the event of the suit, as that event would not affect H.'s liability over to A., and as the judgment in this suit would not furnish evidence of the rights of A., in a suit by him against H., nor constitute a fund for the benefit of A.—Huntley v. Bacon, 15 Conn. 267.

[ii] (Del. 1850) One of the partners is competent, not to prove the existence of the partnership, but, that being proved, to prove anything in which his declarations could bind it.—Little v. Hazzard, 5 Har. 291.

[j] (Ga. 1853) Where partners agree that real estate owned by the firm shall be leased, and that each partner shall be entitled to his proportion of the rent, and shall collect and may discharge it, and the lessee rents with the knowledge of that agreement, in an action by one partner for his proportion of the rent, the other partner is not disqualified as a witness for plaintiff by reason of interest.—McDougald v. Banks, 13 Ga. 451.

[jj] (Ill. 1851) A partner who is not joined as a defendant may be called as a witness by plaintiff to prove the cause of action against the partner sued.—Crook v. Taylor, 12 Ill. (2 Peck) 353.

[k] (Iowa, 1856) In an action against a partnership, it was proposed by defendants that judgment should be taken against one of them, and that he should then be called as witness to prove that a codefendant was not a member of the partnership, which judgment plaintiffs refused to take. *Held* that, having no interest except that which was against the party calling him, he was a competent witness for such purpose, and plaintiffs could not debar his testimony by refusing to take the judgment offered.—Danforth v. Carter, 4 Iowa, 230.

[kk] (Ky. 1832) A partner may testify as to the rectitude of an account set up by another partner against the firm; but the witness cannot testify to his own account against the firm.—Garner v. Beaty, 30 Ky. (7 J. J. Marsh.) 225.

[l] (La. 1813) One partner cannot be a witness for or against his copartner in any partnership matter.—Rochelle v. Musson, 3 Mart. (O. S.) 73.

[ll] (La. 1826) In a firm, not commercial, one partner is competent for the other.—Castleman v. Stone, 5 Mart. (N. S.) 282.

[m] (La. 1834) A partner is a good witness for his copartner in a matter which occurred before the partnership.—Kellar v. Banks, 6 La. 529.

[mm] (La. 1857) A partner cannot be a witness to prove a debt to the firm.—Porche v. Le Blanc, 12 La. Ann. 778.

[n] (Me. 1853) The buyer of a horse sued an officer who had attached it in a suit against the seller and his copartner. *Held*, that the copartner was a competent witness for the officer; his interest in the event of the suit not being a legal interest, but uncertain and contingent.—Ward v. Chase, 35 Me. 515.

[nn] (Md. 1852) A grantor was indebted to a firm, which was indebted to A., a member. A. was the grantee, and it was agreed that the purchase money should be charged on the books of the firm to A., and credited to the grantor, which was done. *Held*, that another member of the firm was a competent witness for A. in a suit by which other creditors of the grantor attacked the validity of the deed.—Falconer v. Clark, 3 Md. Ch. 151, affirmed (1854) 7 Md. 177.

[o] (Mass. 1815) In an action for fraudulently inducing plaintiff to become a copartner with defendant's insolvent debtor, and afterwards inducing the firm to assume all his debts, such debtor is a competent witness for plaintiff.—Bean v. Bean, 12 Mass. 20.

[oo] (Miss. 1846) A. and B. being partners in a race course, A. sold out his interest to C., who assumed to pay A.'s share of the debts due on account of the course. In an action by D., against A. and B., for work done on the course, *held*, that C. was an incompetent witness to prove payment by A. to D. for the work done by D., and for the value of which he was suing.—Perry v. Randolph, 14 Miss. (6 Smedes & M.) 335.

[p] (Mo. 1854) On a suit against one partner for a claim on the firm, copartners are competent to testify in behalf of defendant.—Weston v. Hunt, 19 Mo. 505.

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[pp] (N. Y. 1828) A partner with plaintiff's attorney, who is interested in the costs, and probably expects higher fees as counsel in case of success, is not therefore an incompetent witness.—Griswold v. Sedgwick, 1 Wend. 126.

[q] (N. Y. 1829) Where the allotted share of one partner was taken under an execution against the original owner of the goods, the other partner is an incompetent witness to prove the title of his partner to the goods, without a release.—Chapman v. Andrews, 3 Wend. 240.

[qq] (N. C. 1840) A., B., and C. entered into a copartnership in the name of A. & Co., for the purchase and sale of negroes, and it was afterwards agreed between them that A. and B. should alone be interested in the negroes purchased with cash, but all three should be equally interested in the negroes purchased on a credit. *Held* that, though C. might be held responsible on all contracts by third persons dealing with the firm of A. & Co., yet, that he would be a competent witness to testify for the firm in an action on the warranty of soundness contained in a bill of sale for a negro purchased in the name of the firm for cash.—Williamson v. Canaday, 23 N. C. 113.

[r] (N. C. 1844) In an action seeking to charge defendant as a partner in a certain firm, it is competent for him to introduce as a witness in his behalf a person who was an acknowledged member of that firm, unless it is admitted by the pleadings, or sworn by the witness on his voir dire, that defendant was also a member.—Hunn v. McKee, 26 N. C. 475.

[rr] (N. C. 1847) In a suit against part of the members of a partnership, a partner not a party to the record is not a competent witness for defendants, because in a suit for contribution he would be bound for his part of the debt recovered, and also for his proportion of the costs.—Cummins v. Coffin, 29 N. C. 196.

[s] (N. C. 1847) Where two of three partners are sued, the one not sued may testify for plaintiff, but he cannot be compelled to do so.—Cummins v. Coffin, 29 N. C. 196.

[ss] (N. C. 1847) A person not a party to the record may be introduced as a witness by plaintiff in a suit against another member of the firm, for goods sold to the firm.—Washing v. Wright, 30 N. C. 1.

[t] (N. C. 1850) Where it was claimed that a firm was liable for the board of one of the partners, one of the firm was an incompetent witness to prove that fact.—Street v. Meadows, 33 N. C. 130.

[tt] (Ohio, 1851) In the prosecution of a partnership claim, as a general rule, all the partners are necessary parties, and if one of the partners has been omitted, he is not a competent witness for plaintiffs, although the counsel for defendants may have stipulated before the trial that the omission to make the proper party shall not defeat the action.—Choteau v. Raitt, 20 Ohio, 132.

[u] (Pa. 1796) In a suit against two partners, one of them who has not been arrested is competent to prove the amount of the demand on the part of plaintiff.—Norman v. Norman, 2 Yeates, 154.

[uu] (Pa. 1797) A partner is not a competent witness to prove the payment of a partnership debt.—Gardiner v. Levaud, 2 Yeates, 185.

[v] (Pa. 1817) A member of a firm cannot be a witness to prove that one of his copartners used firm money to pay his private debts.—Purviance v. Dryden, 3 Serg. & R. 402.

[vv] (Pa. 1840) Where one who is partner in a business carried on in premises held under lease is not a party to the lease, still he is not a competent witness in an action on the lease.—Lomis v. Ruetter, 9 Watts, 516.

[w] (Pa. 1848) Where a partnership receives goods on consignment, and one of the firm, alleging that he had instructions to retain the proceeds, to secure the claim of a third person, without the knowledge of his partner, paid over the proceeds in satisfaction of that claim, under a promise of indemnity to himself, after which he was compelled to pay the value of the goods to the rightful owner, the other partner, not being liable to contribute to the loss, is a competent witness for his copartner in an action on the indemnity.—Thomas v. Brady, 10 Pa. (10 Barr) 164.

[ww] (Pa. 1862) It must appear affirmatively that the interest of a partner offered as a witness is real, and the cause of action must be one for which he is answerable, in order to render his testimony inadmissible for his copartners in a suit in which he is not joined with them as a defendant.—Dunlap v. Smith, 5 Phila. 69.

[x] (S. C. 1857) In a suit on a contract made solely with one member of a firm, and on which he alone is liable, his copartner is a competent witness.—Sloan v. Bangs, 11 Rich. Law, 97.

[xx] (Tenn. 1825) Partners are not competent witnesses for a copartner, unless released.—Wilson v. Smith, 13 Tenn. (5 Yerg.) 379.

[y] (Tenn. 1858) A partner is not a competent witness to prove the existence of the partnership; but, when proven, he is competent to prove the justice of the demand against the firm. This principle does not render a partner competent to prove that an obligation, not within the scope of the partnership business, was authorized, or adopted, by the other members, so as to render the firm liable.—Scott v. Bandy, 39 Tenn. (2 Head) 197.

[yy] (Tex. 1860) In a suit by a firm a partner is himself a competent witness for defendant, on the issue whether he had the authority of the firm to pay his individual debt, his interest in the matter being balanced.—Young v. Read, 25 Tex. Supp. 113.

[z] (Tex. 1866) A partner, in an action by the firm on an open account, testified on his voir dire that he was entitled to one-third of the profits of the business, but that he considered there were none, that he had an account with the firm, which he would have to pay if the other assets of the firm should be insufficient to pay the whole liabilities of the firm except $10,000, placed in the firm by his partner, who would not call upon him therefor, etc., but that the other assets would be sufficient. *Held*, that the objection to interest was well taken.—Wade v. Eckford, 28 Tex. 520.

§ 350. Actions between partners.

[a] (Ky. 1832) In a dispute between partners, one of the firm is a competent witness to prove the claims of the other members of the firm who call him as a witness, but is not competent to diminish claims set up against the firm by partners who did not call for his testimony.—Garner v. Beaty, 30 Ky. (7 J. J. Marsh.) 223.

[b] (Mo. 1847) On a settlement between partners, one may be a witness for another against a third, to recover the amount to be paid by him.—Cinnamond v. Greenlee, 10 Mo. 578.

[c] (Mo. 1847) Where A., B., and C. enter into copartnership, and A. lends B. money to enable him to furnish his share of the partnership fund, the money thus advanced constitutes no part of the partnership fund, and, in an action by A. against B. to recover the same, C. is a competent witness.—Cinnamond v. Greenlee, 10 Mo. 578.

[d] (N. Y. 1852) In a suit for the dissolution of a partnership, and for a sum of money, a member who has withdrawn since the liability accrued is not a competent witness for defend

ants, where the effect of a judgment in their favor would be to discharge a claim for which he remains jointly liable.—Kapp v. Barthan, 1 E. D. Smith, 622.

[e] (Pa. 1870) K., C., and M. entered into an agreement to purchase land in partnership. *Held*, in an action by K. against M. for one-third the purchase money paid on his account, that C. was not a competent witness, on the ground of interest.—Meason v. Kaine, 63 Pa. (13 P. F. Smith) 335.

[f] (Va. 1808) In a bill to settle the concerns of a partnership, all the partners ought to be made parties; and if one be omitted, he cannot be a witness for another partner to charge a third in relation to the partnership.—Waggoner v. Gray's Adm'rs, 2 Hen. & M. 603.

§ 351. Testimony as to existence of partnership.

[a] (U. S. 1802) In assumpsit for goods sold and delivered, the defendant may prove a partnership between plaintiff and the witness by the witness.—Lovejoy v. Wilson, Fed. Cas. No. 8,551 [1 Cranch, C. C. 102].

[b] (Ala. 1840) In an action against L., charging him as the partner of B., the latter is not a competent witness to prove the partnership.—Lewis v. Post, 1 Ala. 65.

[c] (Del. 1874) In an action of replevin, a third person in whom property is pleaded is not competent to testify for defendant that he and plaintiff were partners in business, and that the property belonged to them as partners and was seized on execution at the suit of another person against him individually.—Lalley v. Truitt, 4 Houst. 578.

[d] (La. 1860) Where a defendant is sued as partner of a commercial firm, on an obligation not signed by him or with his name, the members of the firm are competent witnesses for him to prove that he was not a partner.—James v. Brooke, 15 La. Ann. 541.

[e] (Me. 1833) Where defendant pleads in abatement the nonjoinder of his copartner, such copartner is not a competent witness for defendant to prove the fact of partnership.—Spaulding v. Smith, 10 Me. (1 Fairf.) 363.

[f] (Miss. 1850) Where the partnership has been proved in respect to the subject-matter of a suit against one of the partners, his copartner is not a competent witness to disprove the partnership.—Randolph v. Govan, 22 Miss. (14 Smedes & M.) 9.

[g] (N. Y. 1857) When the insured described the property in his application as his own, and in his affidavit of loss states that he is the principal member of a firm which possesses such property, that he furnished all the capital, and his interest covers all the assets of the firm, the other partner is competent to testify, in a suit brought by the insured on the policy, that although ostensibly a partner and sharing the profits, he yet practically had no interest whatever in the property.—Irving v. Excelsior Fire Ins. Co., 14 N. Y. Super. Ct. (1 Bosw.) 507.

[h] (Pa. 1850) In a suit against one alleged partner, another person who admits himself to be a partner is not a competent witness to testify as to the articles of partnership alleged to have existed between himself and a defendant, and now lost.—Porter v. Wilson, 13 Pa. (1 Harris) 641.

[i] (R. I. 1853) In a suit against two as copartners of a firm, the testimony of the person who contracted the debt for which the suit is brought, testifying that it was contracted by him as a third copartner of the same firm, is not admissible to charge the defendants.—Sherman v. Kelton, 2 R. I. 532.

§ 352. Dormant or secret partner.

[a] (Cal. 1855) An agent may testify as to his authority in the performance of acts for his reputed principal; and that the agent should appear, by his own testimony, to be a secret partner in business with the party for whom he acted, would make no difference.—Tomlinson v. Spencer, 5 Cal. 291.

[b] (Pa. 1837) A dormant partner, though he is not a party to a suit, cannot be a witness for the partnership.—Wood v. Connell, 2 Whart. 542.

§ 353. Surviving partner.

[a] (Ala. 1836) A surviving partner, who contracts debts in the name of the dissolved partnership, is a competent witness in a proceeding by the creditor to subject the estate of the deceased partner in the hands of the distributees to the payment of such debts, as his interest is balanced.—Pyke v. Searcy, 4 Port. 52.

[b] (N. Y. 1828) In assumpsit against the administrators of a deceased partner, the surviving partner is competent to prove the partnership.—Grant v. Shurter, 1 Wend. 148.

[c] (Pa. 1858) In an action against an administrator of a deceased partner to recover a partnership debt, the surviving partner is a competent witness.—Brewster's Adm'x v. Sterrett, 32 Pa. 115.

§ 354. Actions on notes.

[a] (Ala. 1852) A partner who executes a note in the name of the partnership is not a competent witness against his copartner, when the latter is sued alone on the note.—Barney v. Earle, 20 Ala. 405.

[b] (Ga. 1855) S. brought suit against D. & M. on a note, purporting to be signed by them as partners. D. filed a plea of non est factum. A verdict was rendered against the defendants, from which D. only appealed. *Held*, that plaintiff could not be permitted to use M. as a witness for the purpose of proving a fact, which would cast a liability on D. which was previously sustained by the witness.—Davis v. Stanford, 18 Ga. 289.

[c] (Ill. 1861) In an action against one partner, on a firm note, the copartners are not competent witnesses.—Hurd v. Brown, 25 Ill. (15 Peck) 616.

[d] (La. 1813) One partner cannot invalidate a note of the firm on which another partner is sued.—Rochelle v. Musson, 3 Mart. (O. S.) 73.

[e] (Md. 1827) In an action against one partner, by the payee of a partnership note, to recover the amount thereof, the other partner is a competent witness for defendant to prove that the consideration of said note was for the witness' exclusive benefit, given to secure a debt due by him on his own account; and that, when he signed the note, he informed plaintiff that he was not authorized to sign defendant's name to it.—Robertson v. Mills, 2 Har. & G. 98.

[f] (N. Y. 1829) The maker of a firm note is competent to prove that the note was given by him for his individual debt without the assent of his copartner.—Williams v. Walbridge, 3 Wend. 415.

[g] (Pa. 1847) A. and B. being partners, A. assigned a note payable to himself to C., to indemnify him against certain liabilities for A., and for the firm of A. & B. In an action on the note by C. against the makers, *held*, that B. was an incompetent witness for plaintiff.—Martin v. Jones, 6 Pa. (6 Barr) 82.

[h] (Pa. 1848) The maker of a negotiable note is not a competent witness to prove that the note was drawn for the benefit of a firm composed of the plaintiff and another partner

and himself, and that it was indorsed by defendant for his particular accommodation when there is no evidence that the note was taken after it was past maturity.—Snyder v. Wagonseller, 1 Am. Law J. (N. S.) 170.

[i] (Pa. 1862) One of a firm to whom a note payable at a banking house has been indorsed for collection is a competent witness to prove demand of payment at the maturity of the note, though demand and protest was not regularly made by a notary until the next day.—Scull v. Mason, 43 Pa. (7 Wright) 99.

[j] (Tenn. 1840) In an action against A. as the maker of a note signed by A. and B. and made by B., plaintiff introduced B. as a witness. *Held*, that he was incompetent to prove that he and A. were partners at the time of the execution of the note; but that he was competent, the partnership being proved, to prove the justice of plaintiff's demand.—Vanzant v. Kay, 21 Tenn. (2 Humph.) 106.

[k] (Tenn. 1843) Where one member of a firm executes his individual note to obtain money, he is not a competent witness to prove that the money was obtained on the credit of the firm, and went into the business of the firm.—Foster v. Hall, 23 Tenn. (4 Humph.) 346.

[l] (W. Va. 1873) A note under seal was executed in favor of plaintiff by a partner, for himself and copartner (but without authority of the copartner), in the partnership name, for money loaned the partnership, and with the name of A. C. signed thereto, also with a seal annexed. In an action of debt thereon against A. C. by plaintiff, A. C. pleaded non est factum. *Held*, that the partner who did not sign was a competent witness, because his interest was equal between the plaintiff and defendant, defendant by deed having released him from all liability for costs of that suit.—Black v. Campbell, 6 W. Va. 51.

§ 355. After dissolution or assignment.

[a] (Ky. 1855) Where one member of a firm, after dissolution, executes a note for the payment of a partnership debt, on which the statute of limitations has run, he binds himself for the payment of the debt, and is, therefore, incompetent to testify in favor of the payee of the note, as his testimony would tend to make his former copartner liable to contribution.—Merrit v. Pollys, 55 Ky. (16 B. Mon.) 355.

[b] (Miss. 1845) In an action against some of the members of an unincorporated banking company, after its dissolution, one not a party, who was a member during the whole period of the company's existence, is a competent witness for plaintiff.—Lake v. Munford, 12 Miss. (4 Smedes & M.) 312.

[c] (N. H. 1842) A person, who was indebted to a firm at its dissolution, settled the debt by giving his notes to the two partners separately, each for a part of the debt. In an action on one of the notes against the maker, *held*, that the other partner was a competent witness for plaintiff.—Morse v. Green, 13 N. H. 32, 38 Am. Dec. 471.

[d] (Pa. 1868) In an action on a note to which was signed the name of a firm of which defendant had been a member, a witness offered for defendant stated that the firm whose name was attached to the note had been dissolved and a new firm, consisting of witness and defendant, had been established, at which time witness was shown a list of liabilities of the firm, which he had agreed to assume, and that the note in suit was not among them. *Held*, that the witness had shown that he had no interest, and that he was competent; his credibility being for the jury.—Weisel v. Marr, 25 Leg. Int. 181.

[e] (S. C. 1859) On the dissolution of the partnership of G. & R., G. released R. from all the liabilities of the firm, and R. released to G. all his interest in the goods and choses of the firm. G., having been arrested on writs of ca. sa. at the suits of sundry judgment creditors, applied for the benefit of the insolvent debtors' act. The creditors filed suggestions, and on the trial of the issues it was held that R. was an incompetent witness, as he had an interest to increase the fund by which his own liability would be discharged.—Yeakle v. George, 12 Rich. Law, 153.

[f] (Tex. 1860) Defendant's partner (after dissolution) is a competent witness for the plaintiff.—White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126.

[g] (Vt. 1841) Two partners assigned their joint and separate property to an assignee, to pay their joint and separate debts, and a suit was brought by the assignee to recover a debt due to one of the partners. *Held*, that the other partner was interested, and could not be a witness.—Cummings v. Fullam, 13 Vt. 441.

(e) EXECUTORS OR ADMINISTRATORS, AND LEGATEES, DEVISEES, OR HEIRS.

EXECUTORS AND ADMINISTRATORS, § 356.
— COEXECUTORS OR ADMINISTRATORS AND SUCCESSIVE OR SURVIVING EXECUTORS OR ADMINISTRATORS, § 357.
— PROCEEDINGS TO ESTABLISH WILL, § 358.
— EXECUTOR WHO IS LEGATEE OR DEVISEE, § 359.
LEGATEES AND DEVISEES, § 360.
— PROCEEDINGS TO ESTABLISH WILL, § 361.
HEIRS, DISTRIBUTEES, AND NEXT OF KIN, § 362.

Husband of legatee or heir, see post, § 418.
Statutory removal of incompetency, see post, § 515.
Transfer, release, or extinguishment of interest, see post, §§ 472–475.

§ 356. Executors and administrators.

Liability for costs, see post, § 400.
Parties to action, see ante, § 240.

[a] (Ala. 1838) In an action by the administrators of A., against the administrators of B., for money received by B. of the estate of C., the administrator of C. is competent to prove the payment of the money to B. by him.—Wiggins' Adm'rs v. Pryor's Adm'r, 3 Port. 430.

[b] (Ala. 1856) An executor, administrator, or other trustee, in the absence of any proof of an express warranty, or fraud, or gross negligence, is a competent witness for a person to whom he has sold or hired a slave, in an action against the hirer to recover the same, although it is shown that he, as executor, is the real party in interest.—Walden v. Smith, 29 Ala. 417.

[c] (Ark. 1856) In a bill in equity by a widow for dower, against the heirs and executors of her husband, an executor is incompetent to testify for complainant, on account of his interest in being discharged from liability, and charging the estate in the hands of heirs, and his liability for costs.—Price v. Notrebe's Heir, 17 Ark. 45.

[d] (Ark. 1857) An administrator is a competent witness to prove the existence, loss, and contents of a bond for title, given by his intestate, for an interest in land sold by him in his lifetime; though the administrator has, in pursuance of law, executed a deed, with warranty, to the purchaser, in accordance with the bond.—Moore v. Maxwell, 18 Ark. 469.

[e] (Ga. 1856) An administrator is not a competent witness to prove failure of consideration

of a draft drawn by his intestate, even when having no personal interest in the case, and when the estate in his hands is sufficient to pay the debt and costs, if recovered, and when the estate is liable to him for reimbursement thereof.—Shannon v. Fuller, 20 Ga. 566.

[f] (Ga. 1857) The administrator of the owner of one third of a lot of land in dispute is not incompetent to testify merely from that fact, unless the objector shows a certain and fixed interest sufficient to disqualify.—Hester v. Coats, 22 Ga. 56.

[g] (Ind. 1835) In a suit against the administrator of a guardian to recover money received by the guardian for the distributive share of the ward in the estate of his father, the administrator of the father is not a competent witness to prove that the guardian received the money.—Raymond v. Simonson, 4 Blackf. 77.

[h] (La. 1857) As a general rule, an executor who indorses a bill or note, although he does so as executor, is personally bound; he is, therefore, incompetent as a witness to fix a liability on a prior party to it.—Leverich v. Bossier, 12 La. Ann. 583.

[i] (La. 1860) The commission allowed an executor does not constitute such an interest as disqualifies him from testifying on behalf of the estate which he represents.—Smith v. Lambeth's Ex'r, 15 La. Ann. 566.

[j] (Md. 1804) A second husband, surviving his wife, who was administratrix of the first husband, is a competent witness for her surety in an action on the administration bond.—Wallis' Ex'r v. Britton, 1 Har. & J. 478.

[k] (Md. 1848) An executor, who, relying on his own knowledge, admits that lands charged with the payment of debts are sufficient to satisfy the creditors, and permits manumitted slaves belonging to testator to go free, and assents to their legacy of freedom, while the personal estate was insufficient to pay the debts, is incompetent to testify in justification of his acts.—Cornish v. Willson, 6 Gill, 299.

[l] (Mass. 1815) An executor or administrator is incompetent to testify in an action against or in favor of the estate he represents.—Sears v. Dillingham, 12 Mass. 358.

[m] (Miss. 1851) An administrator who has been guilty of an actual devastavit, and is liable to a suit therefor on his bond, is incompetent as a witness for a distributee who sues for the recovery of the property of the decedent from a stranger, where the property in litigation has been converted by the administrator.—Kilpatrick v. Bush, 23 Miss. (1 Cushm.) 199.

[n] (Mo. 1822) An administrator, not interested in an estate further than the per centum to be allowed him, is a competent witness to prove a debt or demand due the intestate.—Graves v. Priest, 1 Mo. 214.

[o] (N. H. 1838) An executor who has delivered a note, payable to his testator and indorsed in blank, to a third person, on a supposition that it is included in a legacy to such person, is a competent witness for such third person in an action on the note.—Lock v. Noyes, 9 N. H. 430.

[p] (Pa. 1843) An administrator who voluntarily pays money on account of a claim against the estate which he represents is not thereby rendered an incompetent witness in an issue between the claimant and another creditor of the estate to try the validity of the claim.—Christman v. Siegfried, 5 Watts & S. 400.

[q] (Pa. 1845) In an action by heirs against a purchaser at the administration sale, alleging that the sale was fraudulent, the contingency that the purchase money not having been paid over, if the heirs succeed the administrator will be able to keep it himself, is an advantage affecting his credibility as a witness but not his competency.—Kifer v. Brenneman, 1 Pa. (1 Barr) 452.

[r] (Pa. 1848) An administrator is a competent witness to prove the facts connected with an apparent sale, by order of court, of real estate, to pay debts, being a sale of one-third to the husband of one of the heirs, and of the other two thirds to the guardian of the other two heirs, in order to show that it was, in fact, merely a partition between the heirs, and not an actual sale, and also to prove that no money was paid.—Kinzer v. Mitchell, 8 Pa. (8 Barr) 64.

[s] (Pa. 1854) The executor of plaintiff's grantor is a competent witness in ejectment for plaintiff, though the assets of the estate in his hands consist of a bond from defendant for the payment of purchase money for part of the subject-matter of the suit, which price defendant has declared his intention of procuring to be abated in the event of his losing in the pending suit.—Turner v. Reynolds, 23 Pa. (11 Harris) 199.

[t] (Tex. 1853) An administrator is a competent witness, in a suit between other persons, to prove that a conveyance made by his intestate, which appeared on its face to be absolute, was, in fact, in trust to reimburse both contending parties for money paid by them as the intestate's sureties.—Miller v. Thatcher, 9 Tex. 482, 60 Am. Dec. 172.

[u] (Tex. 1860) Defendant's executor is a competent witness for plaintiff.—White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126.

[v] (Va. 1810) An administrator to whom a credit has been allowed by final decree in chancery for a sum of money paid by him to the guardian of one of the distributees is a competent witness for the ward to prove the payment of the money to the guardian, though the guardian was not a party to such final decree.—Hooper v. Royster, 1 Munf. 119.

[w] (Va. 1814) In detinue for a legacy, plaintiff may show by the executor, if he is willing to testify, his assent to the legacy; but he cannot prove by him that the testator had title to the slave, and could bequeath it.—Smith v. Townes' Adm'r, 4 Munf. 191.

[x] (Va. 1842) In an action brought by keepers of a boarding school against a guardian, for board, tuition, and other necessaries furnished to the ward, the administrator of a previous guardian is a competent witness for plaintiffs.—Young v. Warne, 2 Rob. 420.

§ 357. —— Coexecutors or administrators and successive or surviving executors or administrators.

[a] (Ala. 1846) A former executor, who has resigned his trust, may be a witness against the administrator subsequently appointed.—McLaughlin v. Nelms' Creditors, 9 Ala. 925.

[b] (Ala. 1857) In an action by a special administrator, who is superseded, during the pendency of the suit, by the appointment of an administrator in chief, if the latter is thereupon substituted as the plaintiff of record, the former is a competent witness for plaintiff.—Farrow v. Bragg's Adm'r, 30 Ala. 261.

[c] (Ala. 1865) In an action by the administrator de bonis non, to recover money paid by the administrator in chief through a mistake in fact, the latter is a competent witness for the former.—Walker v. Mock's Adm'r, 39 Ala. 568.

[d] (Ky. 1846) An administrator who has been removed is a competent witness for the administrator de bonis non, in a suit against him, where it does not appear that he has committed a devastavit.—Anderson's Adm'r v. Irvine, 46 Ky. (7 B. Mon.) 209.

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[e] (La. 1827) One coexecutor is competent for plaintiff who sues the other.—Taylor v. Hollander, 5 Mart. (N. S.) 295.

[f] (N. H. 1855) If an administrator is removed, pending a suit against him as such, and his successor appears and assumes the defense, he becomes a competent witness in the case, as he is no longer a party, nor liable for the costs. —Wiggin v. Plumer, 31 N. H. (11 Fost.) 251.

[g] (N. M. 1871) A former administrator de bonis non is a competent witness for one subsequently appointed, in a suit relating to the estate, where such witness is not shown to be interested in the event of the suit.—Beall v. Territory, 1 N. M. 507.

[h] (Pa. 1836) In an action for a legacy, brought against the personal representatives of a deceased coexecutor, on the ground of funds coming into the hands of the deceased after the accounts were settled, the surviving executor is not a witness for plaintiff.—Doebler v. Snavely, 5 Watts, 225.

[i] (Pa. 1856) In an action against one administrator on an award made subsequent to his appointment, a coadministrator is a competent witness to show that the amount of the award is in the administrator's hands, but not to prove the original liability of the estate.—Lobb v. Lobb, 26 Pa. (2 Casey) 327.

[j] (Pa. 1857) A discharged administrator is a competent witness to support the claims of an estate, in an action brought for their recovery by his successor.—Burd's Ex'rs v. McGregor's Adm'r, 2 Grant, Cas. 353.

[k] (Tex. 1857) An executor who has been removed from his office is a competent witness in behalf of the estate in an action by an administrator pro. tem., notwithstanding proceedings are pending to reverse the action of the court removing him.—Saunders v. Duval's Adm'r, 19 Tex. 467.

[l] (Va. 1854) Where a slave was bequeathed to A. for life, he being one of two administrators, and then over to B., in an action by B. against A. and a purchaser, the other administrator is a competent witness for B. to prove the assent of the administrators to the legacy.—Frazer's Adm'r v. Bevill, 11 Grat. 9.

§ 358. —— Proceedings to establish will.

[a] (Ala. 1859) A special administrator is a competent witness for the proponent of a will, as although the decree in favor of the proponent might affect his liability, yet it would not be competent evidence for or against him.—Blakey's Heirs v. Blakey's Ex'x, 33 Ala. 611.

[b] (Conn. 1796) An executor is not a competent witness to prove the sanity of the testator.—Hayden v. Loomiss, 2 Root, 350.

[c] (Conn. 1830) An executor who has accepted the trust and acted under the will, but derives no beneficial interest under it, is a competent witness to establish it; his remuneration for his services and expenses not depending upon the establishment of the will.—Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100.

[d] (Fla. 1857) An executor is not an incompetent witness to a will or devise, unless he is a legatee or devisee, or has an interest in the estate bequeathed to him; commissions to which he may be entitled as executor will not exclude him under our laws.—Meyer v. Fogg, 7 Fla. 292, 68 Am. Dec. 441.

[e] (Md. 1854) A person named in a will as executor, who never acted as such, but renounced the executorship and took no interest under the will, is a competent witness to sustain the probate of the will against a caveat.—Dorsey v. Warfield, 7 Md. 65.

[f] (Md. 1870) Upon the hearing of a caveat to a will, an executor who is not a party to the proceeding as such is competent to testify on his own offer, and in his own behalf as caveatee.—Schull v. Murray, 32 Md. 9.

[g] (Mass. 1814) On appeal from a decree of the probate court disallowing an instrument purporting to be the will of a decedent, the executor named in the instrument is incompetent as a witness on the trial of the sanity of the decedent.—Durant v. Starr, 11 Mass. 527.

[h] (N. J. 1806) An executor who is not a subscribing witness may be a witness to prove a will, unless he takes an interest under it.—Snedeker v. Allen, 2 N. J. Law (1 Penning.) 35.

[i] (Pa. 1846) An executor who has paid a legacy is an incompetent witness to establish a will on an issue of devisavit vel non.—Hinkle v. Eichelberger, 2 Pa. (2 Barr) 483.

§ 359. —— Executor who is legatee or devisee.

[a] (Del. 1854) An executor, largely interested in a codicil, is not a competent witness to prove the circumstances under which a will was found.—Sutton v. Sutton, 5 Har. 459.

[b] (Miss. 1860) The executor of a will, who is also the principal legatee and devisee under the will, is a competent witness to sustain the will.—Kelly v. Miller, 39 Miss. 17.

[c] (N. J. 1829) Where defendant in a suit on his duebill pleaded payment and gave notice of his intention to prove on the trial that a third person, since deceased, paid the bill, the executor and residuary legatee of such third person is a competent witness to prove that his testator promised to pay, and in fact paid, the amount of the bill to plaintiff.—Henarie v. Maxwell, 10 N. J. Law (5 Halst.) 297.

[d] (Tenn. 1867) On the trial of an issue of devisavit vel non, an executor under the will, who is not a party to the record, but who has accepted a legacy and transferred it for value after notice of the issue, is not a competent witness in support of the will.—Barbee v. Mason, 45 Tenn. (5 Cold.) 108.

§ 360. Legatees and devisees.

[a] A legatee is not a competent witness for the executor, so long as his legacy is subject to abatement.

—(Ala. 1824) Strong's Ex'rs v. Finch, Minor, 256;

(N. J. 1818) La Rue v. Boughaner, 4 N. J. Law (1 Southard) 104;

(Va. 1811) Temple's Ex'r v. Ellett's Ex'x, 2 Munf. 452.

[b] (Ala. 1849) Where an execution against A. is levied on slaves which are claimed by B., on a motion to quash the execution by A., B. having departed this life, a son of B., and joint legatee of his estate, is an incompetent witness for A.—Gilbert v. Bradford, 15 Ala. 769.

[c] (Ala. 1849) A legatee under a will is prima facie an incompetent witness for the executors in a suit against them for money alleged to have been due by the testator.—Robertson's Ex'rs v. Allen, 16 Ala. 106.

[d] (Ala. 1850) The interest of a legatee whose legacy has been paid is too remote and contingent to render him incompetent as a witness for the executor.—Clealand v. Huey, 18 Ala. 343.

[e] (Ala. 1851) When a testator devises all his estate, both real and personal, to his wife, during her life or widowhood, and at her death or on her marriage to be equally divided among his children, and also directs his estate to be kept together during her life or widowhood, "for the support, maintenance, and education of the family," a son, who has continued to reside on the farm with his mother after the testator's death, is a competent witness for her, in an ac-

tion brought by her to recover for board, washing, etc., furnished after the testator's death.—McClung's Ex'rs v. Spotswood, 19 Ala. 165.

[f] (Ga. 1875) On the trial of an issue of devisavit vel non, a legatee is a competent witness.—Harris v. Harris, 53 Ga. 678.

[g] (Me. 1825) In an action of trover by an executor for the conversion of goods since the decease of the testator, a legatee under the will is a competent witness, the event of the suit having no tendency to increase or diminish the assets.—Carlisle v. Burley, 3 Me. (3 Greenl.) 250.

[h] (Md. 1805) Where defendant, in an action of ejectment, claimed under a separate bequest of property, and A. had a similar bequest by the same will, and there was also an ejectment pending against A. for the property so bequeathed to him, brought by the same plaintiff, who is executor of the will, A. is a competent witness for defendant to prove that plaintiff assented to the legacy to defendant.—Cole's Lessee v. Cole, 1 Har. & J. 572.

[i] (Md. 1854) In an action by the administrator under a will, against defendant, to recover two slaves alleged to belong to the estate of his testator, in possession of defendant, plaintiff offered to introduce the evidence of the son of the testator, which was objected to; the following disposal of the personal property of the testator having been made: "I give to my wife, Caty J. Melvin, all my personal property during her life, and to dispose of it as she pleases, after my death among our children." *Held*, that the interest of the witness to the property was not so certain, direct, and existing as to disqualify him from giving his testimony in the case.—Townshend v. Townshend, 6 Md. 295.

[j] (Mo. 1837) Whether a witness who is both devisee and heir at law is competent to prove a will depends on whether he would take more by the will or as heir.—Graham v. O'Fallon, 4 Mo. 601.

[k] (N. J. 1823) Legatees of specific movable property are not competent witnesses for the executors, in a suit against them for a debt of testatrix, though the executors have paid the specific legacies.—Hedges' Ex'rs v. Boyle, 7 N. J. Law (2 Halst.) 68.

[l] (N. J. 1863) The interest of a residuary legatee under a will which was destroyed by him does not disqualify him as a witness as to its contents, in proceedings to establish the will.—Wyckoff v. Wyckoff, 16 N. J. Eq. (1 C. E. Green) 401.

[m] (N. Y. 1826) In ejectment against a devisee, a co-devisee, and tenant in common with defendant, not in actual possession, and who, on his voir dire, states that he does not know that he is interested, may be a witness for defendant.—Jackson v. Nelson, 6 Cow. 248.

[n] (N. Y. 1827) A residuary legatee is not a competent witness in favor of the personal representative of the testator.—Campbell v. Tousey, 7 Cow. 64.

[o] (N. Y. 1857) In an action against an executor for services rendered his testatrix, a legatee under the will was offered by defendant as a witness. *Held*, that the action was not defended for the "immediate" benefit of the witness, so as to exclude her under section 399 of the Code.—Lisk v. Sherman, 25 Barb. 433.

[p] (N. C. 1810) A specific legatee, not entitled to any share of the residuum, is a competent witness to prove the delivery of goods, unless there be a reasonable probability that his legacy must be resorted to for the payment of debts.—Learey's Ex'rs v. Littlejohn, 5 N. C. 406.

[q] (N. C. 1823) A. became the subscribing witness to an instrument executed by his father. On the trial, the handwriting of A. was proved. Defendant offered the deposition of A., taken after his father's death, to prove that the instrument never was delivered. The father of A. had made a will. *Held*, that the deposition was admissible until plaintiff showed an interest in A.—McKinna v. Hayer, 9 N. C. 422.

[r] (Pa. 1806) A legatee under a will may give evidence to impeach a deed of a testator, if there is no remedy for the recovery of such legacy payable out of the lands of testator.—Shultz's Lessee v. Hahn, 4 Yeates, 299.

[s] (Pa. 1846) A legatee in a will more than 20 years old, which charges his legacy on the land, is a competent witness for the devisees; it appearing that there was other property, and no evidence that he could be called on to refund.—Levers v. Van Buskirk, 4 Pa. (4 Barr) 309.

[t] (Pa. 1855) On the trial of an issue devisavit vel non, legatees under the alleged will are competent witnesses against its validity.—Landis v. Landis, 1 Grant, Cas. 248.

[u] (Pa. 1874) The testimony of a plaintiff, who was one of the devisees or legatees under a will, is not admissible to affect his co-heirs or co-legatees.—Irwin v. West, 31 Leg. Int. 397.

[v] (S. C. 1847) In an action of trover, by a legatee, to recover from the purchaser the value of a slave bequeathed to him, sold under an execution against the executor, the residuary legatee, under the same will, is a competent witness for plaintiff to prove the assent of the executor to the legacy.—Nunn v. Owens, 2 Strob. 101.

§ 361. —— Proceedings to establish will.

[a] (U. S. 1820) The person to whom an estate in fee is given by testator, if she should survive his daughter dying without issue then living, is not a competent witness in support of the will.—Harrison v. Rowan, Fed. Cas. No. 6,141 [3 Wash. C. C. 580].

[b] (Ala. 1848) A legatee is incompetent to testify against the validity of the will, where it is for his interest to defeat it.—Roberts v. Trawick, 13 Ala. 68.

[c] (Ala. 1863) The mere fact that a legacy is bequeathed to one does not render him incompetent to testify against the validity of the will by which the bequest is made.—Leslie v. Sims, 39 Ala. 161.

[d] (Ill. 1875) The execution of a will cannot be proved by the testimony of a devisee.—Crowley v. Crowley, 80 Ill. 469.

[e] (La. 1876) In proceedings to establish a will, a legatee is a competent witness to testify as to any material fact within his knowledge.—Succession of Hall, 28 La. Ann. 57.

[f] (La. 1893) A beneficiary under a holographic will offered for probate is competent to testify as to whether the handwriting is that of deceased, though he cannot be a subscribing witness.—Succession of Morvant, 45 La. Ann. 207, 12 South. 349.

[g] (Mass. 1835) A devisee under a will which may possibly be allowed and take effect if a subsequent one should be set aside is not a competent witness against the latter.—Hall v. Hall, 34 Mass. (17 Pick.) 373.

[h] (Mich. 1860) A legatee in a will is neither a party to the probate proceeding, nor one "in whose immediate and individual behalf" the proceedings are wholly or in part had, within the meaning of the statute, and is therefore a competent witness to sustain the will.—Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460.

[i] (Mo. 1836) A legatee or devisee, who is also heir at law, is a competent witness to prove a fact to establish the will under which he takes the legacy, where the establishment of the will is clearly against the interest he would have as heir.—Graham v. O'Fallon, 4 Mo. 338.

[j] (Mo. 1839) A devisee in a will, who is also heir at law, is a competent witness to establish the contents of a will lost or destroyed, where the establishment of the will is against his interest as heir.—Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130.

[k] (N. Y. 1838) A legatee, one of the heirs at law of a testator, may be a witness in support of the will, where his interest is adverse to that of the party calling him.—Clark v. Vorce, 19 Wend. 232.

[l] (Pa. 1875) A devisee is not a competent witness to prove the execution of a married woman's will, made before the passage of the act allowing parties in interest to be witnesses. —Camp v. Stark, *81 Pa. (32 P. F. Smith) 235.

[m] (Tenn. 1891) A beneficiary under a will is a competent witness as to the handwriting of the deceased, though under the statute of wills he could not have been a subscribing witness.—Franklin v. Franklin, 90 Tenn. (6 Pickle) 44, 16 S. W. 557.

§ 362. Heirs, distributees, and next of kin.

[a] A distributee of an estate is not a competent witness where his distributive share will be affected by the event of the suit.

—(Miss. 1841) Carter v. Graves, 7 Miss. (6 How.) 9;

(Mo. 1835) Foster v. Nowlin, 4 Mo. 18.

[b] (U. S. 1820) A co-heir or co-next of kin is not a competent witness for plaintiff, in a suit brought for an account of a trust fund, created for the benefit of all the heirs, or next of kin.—West v. Randall, Fed. Cas. No. 17,424 [2 Mason, 181].

[c] (U. S. 1824) The heirs of a deceased mortgagor are not competent witnesses in a suit in equity by an assignee to redeem, to prove the assignment fraudulent, for that is to establish their own title.—Randall v. Phillips, Fed. Cas. No. 11,555 [3 Mason, 378].

[d] (U. S. 1850) In a proceeding under Act Sept. 18, 1850 (9 Stat. 462), a son of the master from whom it is alleged that the fugitive escaped is not a competent witness, when it appears that such master has since died, and there is no competent evidence before the court as to the disposition of his property; for in such case a son is presumably a party in interest. Nor is it competent to examine the son on his voir dire to show that he has no interest.—Ex parte Garnet, Fed. Cas. No. 5,243.

[e] (Ala. 1844) In an action on a note, if the nominal plaintiff dies, and the suit progresses in the name of the real plaintiff, who is liable for costs, a distributee of the estate of deceased is a competent witness for plaintiff.—Bates v. Terrell, 7 Ala. 129.

[ee] (Ala. 1846) In an action of trover against the purchaser from one who is dead, his widow and son are competent witnesses for defendant, it being shown that the estate of their relation is insolvent.—Tatum v. Manning, 9 Ala. 144.

[f] (Ala. 1849) In a trial of the right of property, between one claiming under deed of trust, for the benefit of certain creditors of the debtor, and an attaching creditor, the debtor being dead, and a decree of insolvency and distribution having been passed on his estate, his distributees are prima facie competent witnesses for the claimant.—Scales v. Desha, 16 Ala. 308.

[ff] (Ala. 1849) In a proceeding to try the validity of a will which gives to the widow of the deceased a larger portion of the estate than she would be entitled to under the statute of distribution, her heirs, she being dead, are competent witnesses to defeat, but not to sustain, the will.—Roberts v. Trawick, 17 Ala. 55, 52 Am. Dec. 164.

[g] (Ala. 1852) A distributee of an estate is prima facie an incompetent witness when his testimony tends to increase the funds of the estate, and the presumption of interest is not removed by proof to the court that the estate had been declared insolvent before the witness was sworn, the party against whom the evidence is offered being neither the personal representative nor a creditor of the estate.—McGuire v. Shelby, 20 Ala. 456.

[gg] (Ala. 1859) A distributee, who had come into possession of personal property without any administration, brought trover against a stranger who took the property from him. *Held*, that a co-distributee was a competent witness for him under Code, § 2302, for the judgment was not evidence for or against the witness in another suit; neither did it determine the right of the intestate's estate.—Cook v. Patterson, 35 Ala. 102.

[ggg] (Ala. 1861) A distributee of the estate of a married woman, deceased during the pendency of an action brought by her trustee for her benefit, is not a competent witness for plaintiff. —McLemore v. Nuckolls, 37 Ala. 662.

[h] (Ala. 1863) A distributee of the estate of a deceased co-maker of a joint note is a competent witness for defendant in an action by an assignee against the other maker.—Broadhead v. Jones, 39 Ala. 96.

[hh] (Conn. 1831) In an action for the diversion of a water course from land to which plaintiff had a title as tenant in dower, she offered one of the heirs at law of her deceased husband as a witness to prove the injury, which heir, on her death, would be entitled to a distributive share in the land. *Held*, that he was a competent witness, there being no privity in estate between him and plaintiff.—Adams v. Butts, 9 Conn. 79.

[i] (Del. 1860) An heir at law and distributee of the personal estate of a decedent was not a competent witness for his administrator, in an action to recover a share due the deceased on a recognizance.—State v. Connoway, 2 Houst. 206.

[ii] (Ga. 1831) A distributee of the estate of an intestate is not a competent witness for plaintiff in an action against defendant as executor de son tort, as a recovery would increase the residuum for distribution to the amount of the recovery.—Anderson v. Primrose, Dud. 216.

[j] (Ind. 1857) One entitled to a distributive share of an estate is a competent witness for the administrator, in a suit against him to recover money due from the estate.—Swofford v. Gray, 8 Ind. 508.

[jj] (Iowa, 1855) In an action by a widow to recover the rent due for a portion of the homestead, the children are competent witnesses on behalf of plaintiff.—Floyd v. Mosier, 1 Iowa (1 Clarke) 512.

[k] (Ky. 1811) In an action against an administratrix to recover property in her possession and claimed by her as part of the estate, a distributee is not a competent witness for her. —Denny v. Booker, 5 Ky. (2 Bibb) 427.

[kk] (Ky. 1834) In a suit by an executor on a bond which is his individual property, but given for property of his testator, a distributee is a competent witness for the executor.—Boon v. Nelson's Heirs, 32 Ky. (2 Dana) 391.

[l] (Ky. 1845) A father who is heir at law of his son is not a competent witness for his administrator.—Botts' Adm'r v. Fitzpatrick, 44 Ky. (5 B. Mon.) 397.

[ll] (La. 1827) In a suit against an administrator, the heir is a good witness to testify against his own interest.—Levesque v. Anderson, 6 Mart. (N. S.) 293.

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[m] (La. 1829) A judgment debtor's heir is incompetent for her coheirs sued on the judgment, though she state that, having received her portion in the estate, she is without interest, when she may still be responsible on a final partition if her share have exceeded the disposable portion.—Dangerfield's Ex'x v. Thurston's Heirs, 8 Mart. (N. S.) 232.

[mm] (Md. 1832) In an action on an administration bond, brought for the use of the president and trustees of a school, who claimed the residue of the intestate's estate under the acts of 1719 and 1729, for default of kin within the fifth degree of either consanguinity or affinity, defendant pleaded, in bar, that the intestate left one B., within the fifth degree, who was entitled to the residue. *Held*, that B. could not be called to prove that she was related to the deceased within such degree, as she had a direct interest in establishing that fact.—State v. Greenwell, 4 Gill & J. 407.

[n] (Md. 1849) A distributee of a testator's estate is not a competent witness for the executor in an action of replevin.—Smith v. Morgan, 8 Gill, 133.

[nn] (Md. 1854) The facts that a witness is a distributee of the estate of his father, and that a suit is pending by plaintiff against the father's trustee, involving the title to which he is called to testify, do not disqualify him.—Stewart v. Spedden, 5 Md. 433.

[o] (Md. 1854) And if the father's estate would be liable upon an implied warranty of title, if plaintiff recovered, such witness would still be competent, for his interest is balanced.—Stewart v. Spedden, 5 Md. 433.

[oo] (Md. 1864) The testimony of the grandchildren of a grantor, tending to set aside the deed for incapacity in the grantor, is not incompetent, on the ground of interest; the objection goes to their credibility, rather than their competency, since their interest is contingent, not certain.—Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593.

[p] (Mass. 1804) In an action by an executor, the heir of the testator is not a competent witness for the executor.—White v. Derby, 1 Mass. 239.

[pp] (Miss. 1844) A son of an intestate is incompetent to prove that his father did not execute a note, on which it is attempted to charge the estate.—McIntyre v. Ledyard, Smedes & M. Ch. 91.

[q] (Miss. 1848) Where a married woman, by bill in chancery, claims certain property, and she dies before the decision of the suit, and the bill is revived in her husband's name, as administrator, the testimony of her children, in support of the bill, taken after her death, will not be competent without proof of the insolvency of her estate, they being interested as distributees thereof.—Dillard v. Wright, 19 Miss. (11 Smedes & M.) 455.

[qq] (Miss. 1856) In an attempt to show the illegitimacy of a party claiming as heir, the deposition of the next of kin, who would be entitled to inherit next after the supposed heir, is not admissible.—Spears v. Burton, 31 Miss. 547.

[r] (Mo. 1850) A distributee of an estate is a competent witness to prove liabilities of the estate.—Richmond v. Cross, 13 Mo. 75.

[rr] (Mo. 1860) The distributee of a solvent estate is a competent witness for the estate, in a suit brought by the administrator to recover a debt due to the intestate.—Perry's Adm'rs v. Maguire, 31 Mo. 287.

[s] (N. H. 1843) In an action by an administrator to recover a debt due the intestate, the son and heir at law of the deceased is not a competent witness for plaintiff.—Sawyer v. Tappan, 14 N. H. 352.

[ss] (N. J. 1852) In a suit brought by the administrator of a deceased obligee to foreclose a bond and mortgage, where the defense is payment, a brother of the deceased, who is entitled to a distributive share in his personal estate, is not a competent witness for the administrator.—King v. King, 9 N. J. Eq. (1 Stockt.) 44.

[t] (N. Y. 1832) Where, in a suit against two defendants, one of them dies after the commencement of the suit, the son of the party dying is not a competent witness, although the death is not suggested on the record.—Shepard v. Ward, 8 Wend. 542.

[tt] (N. Y. 1857) Under St. 1847, c. 450, "requiring compensation for causing death by wrongful act, neglect, or default," the mother of the deceased, being also his sole distributee and next of kin, is a competent witness.—Quin v. Moore, 15 N. Y. 432.

[u] (N. C. 1855) In an action on a covenant made by an administrator that a certain slave belonged to him as administrator, the next of kin of the intestate are competent witnesses.—Cowles v. Rowland, 47 N. C. 219.

[uu] (Ohio, 1848) The heirs of a deceased person are not competent witnesses in a suit in which the estate of the decedent is interested, unless it be shown affirmatively that they have no interest in the event of the suit.—Fagin v. Cooley's Adm'r, 17 Ohio, 44.

[v] (Pa. 1821) An heir is competent to testify against coheirs where the witness is not a party to the suit, as to exclude a witness on the ground of interest he must be interested in the event of the suit; and it is not sufficient that he is interested in the question merely, but the verdict must establish something in his favor or against him.—Nass v. Vanswearingen, 7 Serg. & R. 192.

[vv] (Pa. 1855) On the trial of an issue devisavit vel non, heirs at law are competent witnesses against the validity of the will unless it appears that it is to their interest to defeat it.—Landis v. Landis, 1 Grant, Cas. 248.

[w] (Pa. 1859) In an action against the administrator for his refusal to set apart the widow's allowance of the decedent's estate, the heirs of the intestate are competent witnesses.—Hill v. Hill's Adm'r, 32 Pa. (8 Casey) 511.

[ww] (Pa. 1863) In trespass for taking away personal property, where the defense was that it belonged to the estate of an intestate, which defendants represented as administrators, the heirs of the intestate are incompetent witnesses for them.—Buchanan v. Buchanan, 46 Pa. (10 Wright) 186.

[x] (S. C. 1827) The heirs of an estate are incompetent witnesses in behalf of the estate in a suit by the executors.—Christie's Ex'rs v. Furman's Ex'rs, Harp. 553.

[xx] (S. C. 1846) In trespass to try titles, the land in dispute was granted to one A. Plaintiff claimed under a conveyance from one who was called A. of B., and defendant contended that the true grantee was A. of C., who was dead. *Held*, that a brother of A. of C., who, as one of his heirs at law, was entitled to a portion of the land, was a competent witness to prove that A. of C. was the true grantee, being perfectly indifferent as to the result of the trial.—Smith v. Asbill, 2 Rich. Law, 546.

[y] (S. C. 1878) In an action by administrators of a junior judgment creditor against the administratrix of the senior judgment creditor and the administrator of the judgment debtor, to set aside a senior judgment by confession as fraudulent, conversations and transactions which led to the confession of the senior judgment between the judgment debtor and the senior judgment creditor may be proved by a dis-

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tributee of the judgment debtor.—Roe v. Harrison, 9 S. C. (9 Rich.) 279.

[yy] (Tenn. 1850) A. by will provided that certain slaves should be the property of his wife for life, with remainder to his daughters B. and C. By agreement between the tenant for life and the daughters, a slave was delivered to B. by parol gift, who held the slave 30 years. C. and her husband brought a bill against B. to recover a share of said slave and her increase. *Held*, that the children of B. were competent witnesses for her in the case, for they could neither gain nor lose by the decision of the case, nor could the decree be given in evidence against or for them in any subsequent proceeding.—Farnsworth v. Lemons, 30 Tenn. (11 Humph.) 140.

[z] (Vt. 1857) In a suit against an intestate estate, the testimony of a married woman, who is an heir at law, is not inadmissible on account of interest.—Rutland & B. R. Co. v. Lincoln's Estate, 29 Vt. (3 Williams) 206.

[zz] (Va. 1837) In an action against an executor's administrator, involving transactions of the executor in his individual capacity, distributees of the first decedent were not incompetent witnesses on the ground that they were interested in preventing the diminution of the individual estate of the executor lest it would hinder the application of the estate he was representing to the payment of legacies, as the interest was too remote and contingent.—Janey v. Blake's Adm'r, 8 Leigh, 88.

(f) PUBLIC AND JUDICIAL OFFICERS.

IN GENERAL, § 363.
NOTARIES, § 364.
SHERIFFS, CONSTABLES, AND MARSHALS, § 365.
DEPUTIES, § 366.
MILITARY AND NAVAL OFFICERS, § 367.
MUNICIPAL OFFICERS, § 368.
SCHOOL OFFICERS, § 369.
SURVEYORS, § 370.

Interest in criminal prosecution or penal action, see post, § 413.

Statutory removal of incompetency, see post, § 516.

Transfer, release, or extinguishment of interest, see post, § 452.

§ 363. In general.

[a] (U. S. 1845) On the trial of a case involving the validity of a seizure of goods by United States revenue officers, the officers were competent witnesses, notwithstanding they were liable to an action at the suit of the claimants if reasonable cause for the seizure was not established.—Taylor v. United States, 44 U. S. (3 How.) 197, 11 L. Ed. 559.

[b] (Ga. 1857) In an action for the recovery of land, the defendants in the declaration signed an acknowledgment of "due and legal service of the within writ, and waive the necessity of a copy of it, and service thereof by the sheriff." This acknowledgment was drawn up by the clerk of the court, and signed by the defendants. *Held*, that the clerk was not incompetent on the ground of interest to testify as a witness for plaintiff, as to his intention to waive the process by such acknowledgment.—Ingram v. Little, 21 Ga. 420.

[c] (Ga. 1860) A clerk of the court is not a competent witness for plaintiff in an action to prove that process was annexed to the declaration when filed. If the process was annexed the clerk would be entitled to a fee therefor at the end of the suit, otherwise not.—Ballard v. Bancroft, 31 Ga. 503.

[d] (Mich. 1843) Where the register of deeds had received a check from complainant in redemption of mortgaged premises, and given him a receipt for the same, as money, on behalf of defendant, who was the purchaser at the mortgage sale, he was a competent witness for either party, as being equally liable to both.—Woodbury v. Lewis, Walk. Ch. 256.

[e] (N. Y. 1825) In an action by a commissioner to make partition of lands, under 1 Rev. Laws, p. 507, for his fees and disbursements, his co-commissioner is not a competent witness for plaintiff to prove the disbursements.—Smyth v. Bradstreet, 5 Cow. 213.

[f] (N. C. 1799) A collector of arrearages, under the act of 1793, is not a competent witness against a defendant, charged with fraudulently buying the property of delinquents to the state.—Treasurer of State v. Nall, 1 N. C. 102.

[g] (S. C. 1827) A commissioner in chancery is a competent witness to prove a sale by himself, and the facts attending it, where the written entry of the sale has been lost.—Gordon v. Saunders, 2 McCord, Eq. 151.

[h] (Tenn. 1840) A register who has made an incorrect registration of a deed is a competent witness to prove such fact in any suit between third parties.—Baldwin v. Marshall, 21 Tenn. (2 Humph.) 116.

[i] (Vt. 1851) In an action against a postmaster for negligence, by reason of which a letter directed to his office, and alleged to have been received there, was lost, the postmaster of the office at which the letter was deposited is a competent witness for plaintiff to prove that the letter was forwarded in due course of mail.—Christy v. Smith, 23 Vt. 663.

§ 364. Notaries.

[a] (La. 1839) In an action for a note against a broker who bought it of a notary's clerk, the notary, though employed to protest it, may prove that his clerk purloined and sold it to defendant.—Nicholson v. Patton, 13 La. 213.

[b] (La. 1845) The notary who has protested a note and given notice to the indorsers is not disqualified as a witness to prove such facts because of his contingent liability for negligence in making such protest.—Ducros v. Jacobs, 10 Rob. 453; Follain v. Dupre, 11 Rob. 454.

[c] (La. 1868) The word "maturity" in a note was erased and the word "date" interlined, so that it read "with interest from date," while the mortgage securing the note described the note as bearing interest from maturity. *Held*, that evidence being admissible to explain the erasure and interlineation in the note, the notary before whom the act was passed was a competent witness for that purpose.—Bernstien v. Ricks, 20 La. Ann. 409.

[d] (S. C. 1831) A notary who omitted to give notice to an indorser is not thereby made an incompetent witness in an action on the note by the holder against the indorser.—Johnson v. Harth, 2 Bailey, 183.

§ 365. Sheriffs, constables, and marshals.

[a] (Ala. 1844) Defendant was arrested at the suit of W., and escaped from the sheriff's custody. W. sued out an ancillary attachment, and levied it upon the same property before levied on at the suit of plaintiff. *Held* that, as the judgment in the case could not be evidence in an action against the sheriff for the escape, he was a competent witness for defendant, although, to defeat a recovery and subject the property attached to W.'s attachment, would diminish, pro tanto, the sheriff's liability for the escape.—Massey v. Rogan, 6 Ala. 647.

[b] (Ala. 1851) A constable who has collected money on an execution is an incompetent witness, without a release, to prove that he has paid it over to the justice of the peace who is-

sued the execution.—McGrew v. Governor, 19 Ala. 89.

[c] (Ala. 1852) In an action of debt on a claim bond, where the plea of non est factum is interposed, the sheriff is an incompetent witness for plaintiff, without a release, to prove the execution of the bond.—Alexander v. Trask, 20 Ala. 805.

[d] (Ala. 1852) In assumpsit to recover money paid by plaintiff as defendant's surety on his official bond as deputy marshal, the marshal is a competent witness for plaintiff, the money having been paid on a compromise in full discharge of plaintiff's liability on said bond.—Love v. Dargan, 21 Ala. 583.

[e] (Conn. 1810) In an action by the indorsee of a note against the indorser, it appeared that the officer, having an execution against the maker of said note, took property of less value than the debt, and afterwards relinquished it and took the debtor's body. *Held*, that the officer was not a competent witness for plaintiff to prove the fact of the relinquishment.—Sheldon v. Ackley, 4 Day, 458.

[f] (Conn. 1848) An officer who has levied an execution on land, and in all his proceedings has conformed to the directions of the creditor, is a competent witness for the creditor, in a suit brought by him to recover possession of the land so taken in execution, involving the legality of the proceedings.—Graves v. Merwin, 19 Conn. 96.

[g] (Del. 1855) A constable who has delivered money collected on execution to a third person to pay it to the plaintiff in execution is not a competent witness to testify to such delivery, in an action by said plaintiff against such third person to recover the money. And it makes no difference that the claim against the constable for the money is barred by the statute of limitations.—Hosea v. Kinney, 1 Houst. 141.

[h] (Ill. 1846) On a trial under a distress warrant, for the purpose of determining the amount of rent due, the bailiff who served the distress warrant is not, on that account, incompetent.—Stow v. Gregory, 8 Ill. (3 Gilman) 575.

[i] (Ind. 1841) In an action on a sheriff's bond for the escape of a debtor, alleged to have been arrested on a capias ad satisfaciendum by a constable, and delivered by him, with a copy of the capias ad satisfaciendum to the sheriff, the constable is not a competent witness for the plaintiff to prove the delivery of the copy of the capias ad satisfaciendum to the sheriff.—Linsee v. State, 5 Blackf. 601.

[j] (Ind. 1853) An action was brought for failure in the levy of an execution, against a sheriff, whose duty it was to have delivered it to his successor in office. *Held*, that the latter was not a competent witness to prove that it was not so delivered.—Hughes v. McClelland, 4 Ind. 92.

[k] (Ky. 1822) On a motion to set aside a sale on execution, on the ground of a small excess, produced by a miscalculation of the officer, the officer is a competent witness against such motion.—Merrill v. Housley, 12 Ky. (2 Litt.) 277.

[l] (Ky. 1846) A sheriff, who takes a delivery bond, is a competent witness for plaintiff, in an action on the bond.—Kelly v. Lank, 46 Ky. (7 B. Mon.) 220.

[m] (Me. 1832) If the purchaser at a sheriff's sale of a right in equity of redemption refuses to receive the deed and complete the purchase, and a bill for specific performance is filed by the judgment creditor alone, the sheriff is a competent witness for plaintiff.—French v. Sturdivant, 8 Me. (8 Greenl.) 246.

[n] (Mass. 1807) In an action on a prisoner's bond, given for the liberty of the prison yard, the sheriff is a competent witness to prove that the debtor in execution was discharged from prison by the parol direction of the creditor.—Bridge v. McLane, 2 Mass. 520.

[o] (Mass. 1837) Personal property which had been attached upon several writs was sold by consent of the parties, and the proceeds paid over by the officer to the attorney of all the plaintiffs, and the attorney, as such, received the same, as an aggregate sum, and, subsequently, having obtained judgment in the actions, retained the executions in his possession. *Held*, that in assumpsit by a creditor for his portion of the proceeds, according to the priority of his attachment, the officer would be a competent witness.—Hardy v. Peters, 36 Mass. (19 Pick.) 370.

[p] (Mass. 1850) An officer, who after serving a writ of replevin allows, as agent of plaintiff, the property replevied to remain in the possession of a third person, taking his agreement to account therefor, is a competent witness for plaintiff in an action brought by the latter on the agreement.—Fiedler v. Smith, 60 Mass. (6 Cush.) 336.

[q] (N. H. 1837) An officer who on mesne process made a return of an arrest and of a rescue is a competent witness in an action for damage arising from the rescue, to show by whom it was committed.—Buckminster v. Applebee, 8 N. H. 546.

[r] (N. H. 1851) A sheriff may testify respecting facts stated in his return on a writ.—Meserve v. Hicks, 24 N. H. (4 Fost.) 295.

[rr] (N. J. 1831) A constable is competent to prove the execution of a bail bond taken by himself.—Day v. Hall, 12 N. J. Law (7 Halst.) 203.

[s] (N. Y. 1815) A constable who is an inhabitant of one town and pays taxes to support the poor is a competent witness in a suit brought against another town relative to the settlement of a pauper.—Bloodgood v. Overseers of Poor of Jamaica, 12 Johns. 285.

[ss] (N. C. 1805) An execution issued after the death of the execution defendant, and the sheriff levied on certain property and sold it to the plaintiff in execution. The sheriff had previously purchased lands of the defendant in execution, promising to apply the purchase money to the payment of the execution. *Held*, in a suit by the debtor's administrator against the plaintiff in execution to recover the property, that the sheriff was a competent witness on the ground that he was equally interested in either event in the action.—Williams' Adm'rs v. Bradley, 3 N. C. 363.

[t] (N. C. 1811) An officer who sells property under an execution for A., for whom he bids it in, and as whose agent he executes a bill of sale as an officer to a third person, is a competent witness to prove these facts.—Reid v. Powell, 6 N. C. 53.

[tt] (N. C. 1882) A deputy collected money on account of taxes and deposited the same with A., with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sum so collected to the sheriff. *Held*, in suit by the deputy against A.'s administrator, that the sheriff had no interest in the event of the suit, and was a competent witness under Code, § 343.—Allen v. Gilkey, 86 N. C. 64.

[u] (Pa. 1829) The sheriff is competent to prove an indorsement on a writ, "Proceedings stayed," made by an attorney.—Meredith v. Shewall, 1 Pen. & W. 495.

[uu] (Pa. 1850) In an action of trespass for wrongfully attaching and levying on property, the officer who made the attachment complain-

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ed of is a competent witness for plaintiff.—Bowen v. Burk, 13 Pa. (1 Harris) 146.

[v] (Pa. 1863) In an action on a sheriff's official bond, the testimony of the sheriff, as taken by the auditor appointed to distribute the proceeds of the sale under the execution which the complaint alleged was defectively served, is inadmissible in behalf of defendant.—Linton v. Commonwealth, 46 Pa. (10 Wright) 294.

[vv] (S. C. 1822) Where the agents of the captors libeled the prize in their own names for the captors, and the prize goods were sold by order of an admiralty court, the marshal who made the sale is a competent witness to prove them.—Depeau v. Hyams, 2 McCord, 146.

[w] (S. C. 1828) In an action by a jailer for jail fees, a sheriff is not an incompetent witness merely from his official relation to plaintiff, and in the absence of a showing that he is interested in the event of the suit.—Saxon v. Boyce, 1 Bailey, 66.

[ww] (S. C. 1833) A sheriff who has sold land under an execution is a competent witness, in an action to recover the possession, to prove that before the sale the execution was paid to him.—Hunter v. Stevenson, 1 Hill, 415.

[x] (S. C. 1836) In an action brought by the city council of Charleston to recover the penalty for violating the ordinance requiring badges to be taken out for slaves hired in the city, the city marshal is a competent witness; but even if he were incompetent from interest, a release of his interest to plaintiff would restore his competency.—City of Charleston v. England, 3 Hill, 56.

[xx] (S. C. 1848) A sheriff, after the assignment of a judgment, sold under execution the property covered thereby, and appropriated a part of the proceeds as directed by the assignee, retaining the balance under rule, subject to litigation. The assignor of the judgment, who had afterwards confessed a judgment to A. on debts older than the assignment, was subsequently arrested by him, and enlarged for the bounds by the sheriff, on a bond which might, perhaps, prove insufficient, which bond was assigned to A. The assignor broke the bounds, and left the state. On the trial of an issue between A. and the assignee of the judgment, made up to try the validity of the assignment of the judgment, *held*, that the sheriff was a competent witness for A.—Maddox v. Williamson, 3 Strob. 294.

[y] (Tenn. 1838) The sheriff is competent to give evidence of his own failure to give notice of the time and place of an execution sale, as required by statute.—Valentine v. Cooley, 19 Tenn. (Meigs) 613, 33 Am. Dec. 166.

[yy] (Vt. 1841) A. bought a quantity of hay at a sheriff's sale, as the property of an execution debtor who had no title, and the owner of the hay recovered the value of it against A., who then brought suit against the execution creditor, claiming on an implied warranty of the title of the debtor. *Held*, that the officer who sold the hay was an incompetent witness for plaintiff.—Kelsey v. Silver, 13 Vt. 586.

[z] (Va. 1790) In an action against a sheriff for an escape, a succeeding sheriff is not a proper witness to prove the prisoner was not turned over to him, as it goes to exonerate himself.—Johnston v. Macon, 4 Call, 367.

[zz] (Wis. 1849) In an action by a client against his attorney, a sheriff is a competent witness to prove that he collected and paid over to the attorney the money sued for.—Eaton v. Gentle, 1 Chand. 10.

§ 366. Deputies.

[a] (Del. 1855) The deputy of a sheriff who has executed a fieri facias is a competent witness in an action against the sheriff's successor for negligence in executing a second fieri facias in the same case.—State v. Gemmill, 1 Houst. 9.

[b] (Ga. 1860) In an action by a sheriff for the use of execution creditors to recover the price of property sold under the execution, a deputy sheriff who did not make the sale, and who is not a party to the suit, is a competent witness.—Glenn v. Black, 31 Ga. 393.

[c] (Ill. 1841) In an action against a sheriff for malfeasance in office, the deputy of the sheriff is a competent witness against him.—Ryder v. Buckmaster, 4 Ill. (3 Scam.) 196.

[d] (Ky. 1824) In an action of trespass against a sheriff for levying on property, the deputy sheriff who made the levy was not a competent witness for the sheriff on account of his liability over, if the levy was wrongful.—Harris v. Paynes, 15 Ky. (5 Litt.) 105.

[e] (N. H. 1856) The deputy sheriff, who is liable for neglect to attach a specific chattel, is not a competent witness for the defendant in the action on the writ in which he thus neglected to make the attachment.—Perkins v. Pitman, 34 N. H. 261.

[f] (N. Y. 1810) In an action against a sheriff for the escape of a prisoner under execution who had given a bond for the jail limits, the deputy sheriff and jailer, who had taken the bond for the prisoner, are competent witnesses.—Stewart v. Kip, 5 Johns. 256.

[g] (N. C. 1853) A deputy sheriff, to whom a judgment debtor alleged that he had paid the judgment, is a competent witness to disprove the allegation.—State v. Simpson, 46 N. C. 80.

[h] (Pa. 1841) In an action against a sheriff's sureties to recover the amount of a fieri facias which came to the hands of his deputy for execution, the deputy is a competent witness for defendant, unless it appear that such deputy is liable to his principal for the amount of the writ by reason of negligence or misfeasance.—Juniata Bank v. Beale, 1 Watts & S. 227.

[i] (Pa. 1850) In a suit on the official bond of a sheriff for negligence of his deputy, the deputy, being ultimately liable, is not a competent witness for defendant without a release.—Dorrance's Adm'rs v. Commonwealth, 13 Pa. (1 Harris) 160.

[j] (Vt. 1839) A person who has not been appointed to the office of deputy jailer, but with whom the sheriff intrusts the keys of the prison, and who is suffered to take prison bonds for the enlargement of persons committed, and who signs such bonds as a witness, is competent to testify, on the part of plaintiff, in a suit on such bond in the name of the creditor, at least to the execution of the instrument.—Dean v. Swift, 11 Vt. 331.

[k] (Vt. 1839) A person acting as deputy jailer by the consent of the sheriff, who has given no bond, and has not been appointed at his own solicitation, or for his own benefit, but merely as servant, and for the convenience of the sheriff, is competent to testify to the execution of a bond taken by him for the limits.—Clark v. Kidder, 12 Vt. 689.

[l] (Vt. 1843) The default complained of, in a suit against a sheriff, was the neglect of the deputy to arrest a debtor upon execution, and it appeared that the deputy was with the debtor during the life of the execution, and forebore to arrest him, and permitted him to go into a neighboring state upon his promise to return during the life of the execution and settle the amount due, and the sheriff had released the deputy from all liability on account of the alleged default. *Held*, that the promise of the debtor created in him no existing interest which could exclude him from being called as a witness by defendant.—Hopkinson v. Holmes, 18 Vt. 18.

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[m] (Vt.) In an action on a receipt for property attached, a deputy sheriff, to whom the execution was delivered, is a competent witness to testify that he made a seasonable demand of the property of the officer who made the attachment.—(1846) Allen v. Carty, 19 Vt. 65; (1851) Ferris v. Smith, 24 Vt. 27.

[n] (Va. 1835) In an action by the high sheriff, against the purchaser of an insolvent debtor's interest in land sold by the deputy, to recover the purchase money, the deputy is a competent witness for plaintiff to prove the facts.—Brent v. Green, 6 Leigh, 16.

[o] (Va. 1838) In an action on an indemnifying bond, brought by a person claiming the property sold, the deputy sheriff who sold the property under the execution, and took the bond, is not a competent witness for defendants to prove that the property belonged to the person against whom the execution issued.—Wilson v. Alexander, 9 Leigh, 459.

§ 367. Military and naval officers.

[a] (Me. 1840) The clerk of a company is competent to explain the meaning of marks, on the company roll, set against the names of the persons enrolled, and in columns headed, "present," "absent," etc.—Robinson v. Folger, 17 Me. (5 Shep.) 206.

[b] (Me. 1844) The commanding officer of a militia company is a competent witness on the trial of action against a town for its failure to furnish money in lieu of rations for soldiers present at militia review.—Inhabitants of Williamsburg v. Gilman, 24 Me. (11 Shep.) 206.

[c] (Pa. 1809) The commander of a public armed vessel, capturing a prize, is a competent witness in an action by a seaman against the prize agent.—Murray v. Wilson, 1 Bin. 531.

§ 368. Municipal officers.

[a] (U. S. 1809) The superintendent of the city of Washington was a competent witness in an action brought in the name of the former commissioners, although all their rights and duties had devolved on him by force of the statute.—Thornton v. Stoddert, Fed. Cas. No. 14,000 [1 Cranch, C. C. 534].

[b] (Conn. 1824) In a suit by a town for the maintenance of a bastard child, a selectman who signed the complaint is a competent witness for plaintiffs.—Fuller v. Town of Hampton, 5 Conn. 416.

[c] (Ill. 1867) In a suit in the name of the people for the benefit of a county on the county treasurer's bond, a defaulting county collector is not competent to prove payments by him in his official capacity to the treasurer.—Frink v. People, 43 Ill. 27.

[d] (Me. 1830) In an action by a town treasurer on a collector's bond, given to his predecessor in office, such predecessor is not admissible, as a witness for plaintiff, to disprove the payment of money for which the collector held his receipt.—Pingree v. Warren, 6 Me. (6 Greenl.) 457.

[e] (Me. 1830) In an action for contribution, between the sureties of a collector of taxes, for money paid by one of them without suit, the town treasurer is a competent witness to prove the collector's delinquency.—Nason v. Read, 7 Me. (7 Greenl.) 22.

[f] (N. H. 1844) In a suit by a town against a tax collector to recover money officially received by him, the treasurer who settled with the collector and receipted for the money is a competent witness to show the receipt to have been given by a mistake occurring in the settlement.—Town of Grafton v. Follansbee, 16 N. H. 450, 41 Am. Dec. 736.

[g] (N. J. 1808) It is no objection to a witness that he is a member of a board of chosen freeholders of the county, and that the suit is prosecuted at the instance of the board, and notwithstanding the board has advanced money to carry on the suit.—Schank v. Stevenson, 2 N. J. Law (1 Penning.) 387.

[h] (N. J. 1844) In a suit brought by the board of chosen freeholders of a county, the collector of such county is a competent witness in the cause.—Peck v. Essex County, 20 N. J. Law (Spencer) 457.

[i] (N. Y. 1850) In an action against the corporation of the city of New York by its corporate name of "the mayor, aldermen, and commonalty of the city of New York," one of the aldermen is a competent witness for defendants both at common law and under the Code.—Pack v. City of New York, 3 N. Y. (3 Comst.) 489.

[j] (N. C. 1854) The intendant of police of an incorporated town, who issues a warrant against a slave for a penalty for violating a town ordinance, which warrant is in the name of the commissioners of the town, as plaintiffs, of whom he is also one, is a competent witness to prove the disorderly conduct of such slave, alleged as a breach of such ordinance.—Town of Washington v. Frank, 46 N. C. 436.

[k] (Ohio, 1834) Trustees of a township, sued in their official capacity, may be witnesses, if they have no individual interest.—Stewart v. Saybrook Tp., Wright, 374.

[l] (Pa. 1825) A commissioner who is taxable, and has paid his taxes, is a competent witness for the township, under Act April 2, 1822, in a suit commenced prior to the act.—McFarland v. Moyamensing Tp., 12 Serg. & R. 297.

[m] (Pa. 1851) In an action by a board of county commissioners against the surety on a tax collector's bond, a former commissioner is a competent witness for plaintiff.—Fritz v. Montgomery County, 17 Pa. (5 Harris) 130.

[n] (S. C. 1828) In an action against a tax collector for not paying over the poor tax, the clerk of the commissioners of the poor is a competent witness to prove that he had not at any time received from defendant any moneys for the use of the poor.—State v. Davidson, 1 Bailey, 35.

[o] (Vt. 1849) Where a suit is commenced and prosecuted in favor of a town, it is no objection to the competency of a witness, offered on the part of plaintiff, that he is an inhabitant and taxpayer of the town, and is one of the selectmen of the town, and, in connection with the other selectmen and the town agent, directed the suit to be commenced. In the absence of any evidence to the contrary, the court will presume the suit to have been duly authorized by the town.—Town of Peacham v. Carter, 21 Vt. 515.

§ 369. School officers.

[a] (Ill. 1859) A school trustee is a competent witness to prove the loss of a treasurer's bond.—Holbrook v. Trustees of Schools of Tp. 33, 22 Ill. (12 Peck) 539.

[b] (Ill. 1860) The school treasurer has a commission on all funds passing through his hands; therefore he is interested and incompetent in a suit, the money recovered in which will pass through his hands.—Marks v. Butler, 24 Ill. 567.

[c] (Iowa, 1859) Where a suit is brought in the name of a school district, on a note made payable to certain persons by name, as school directors, and their successors in office, the fact that the note is made payable to them and others as directors, it not appearing that they have any legal interest in the note, does not render them incompetent as witnesses.—School Dist. No. 2 of Madison Tp. v. Rogers, 8 Iowa (8 Clarke) 316.

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[d] (La. 1847) A school commissioner, waiving his exemption, may, though objected to, be sworn; but on declaring he is interested will be discharged.—Edwards v. Farrar, 2 La. Ann. 307.

[e] (Me. 1840) A recovery in an action against a school district for the price of building a schoolhouse, alleged to have been built in pursuance of a contract with a committee of the district, does not imply any fault on their part by reason of which they would be liable to the district, nor would a verdict be evidence against them in an action for mismanagement; they are, therefore, competent witnesses for the district.—Hill v. School Dist. No. 2 in Millburn, 17 Me. (5 Shep.) 316.

[f] (Mass. 1833) A prudential committee of a school district is competent to testify to a contract made in that capacity, in an action against the district upon such contract.—Allen v. School Dist. No. 2 in Westport, 32 Mass. (15 Pick.) 35.

[g] (Ohio, 1844) In an action by a township against an ex-treasurer of the township school fund, his successor is not a competent witness for the township to show that he received less money of him than he receipted for to him on settlement.—State v. Williams, 13 Ohio, 495.

[h] (Pa. 1868) In an action by a school district against a person to recover money paid to procure a substitute, *held* that testimony of the school directors was inadmissible to prove his contract to repay, they being liable to the district for unauthorized payments. — Longswamp School Dist. v. Trexler, 58 Pa. (8 P. F. Smith) 141.

§ 370. Surveyors.

[a] (Ill. 1847) In a proceeding against a person for obstructing a public road, the supervisor is a competent witness.—Ferris v. Ward, 9 Ill. (4 Gilman) 499.

[b] (Mass. 1845) A surveyor of highways is a competent witness for the town, in an action against the town to recover damages for an injury received by reason of a defect or want of repair in a highway within the surveyor's district, he not being liable to the town for the amount of the damages that may be recovered in such action.—White v. Inhabitants of Phillipston, 51 Mass. (10 Metc.) 108.

[c] (N. H. 1854) A surveyor of highways who has caused all the taxes on the list to be worked out is a competent witness for the town, without a release, in an action against it to recover for injuries occasioned by defects in a highway within the limits of the district, where the injury was received after he had so expended such taxes.—Patterson v. Colebrook, 29 N. H. (9 Fost.) 94.

[d] (Vt. 1834) In a suit against a town for damages sustained for want of repairs in a bridge, the surveyor of highways for the district is not a competent witness for the town, nor will a release by a selectman, nor, it seems, by the selectmen, qualify him.—Yuran v. Inhabitants of Randolph, 6 Vt. 369.

[e] (Vt. 1849) In a suit, brought by a town against an individual, to recover a sum of money paid by the selectmen to him for damages which he claimed to have sustained by reason of the want of repair of a highway in the town, and in which plaintiffs claimed to recover, on the ground that the payment was procured by defendant wholly by fraud, the highway surveyor of the district in which the injury was alleged by defendant to have been sustained is a competent witness on the part of the town. —Town of Peacham v. Carter, 21 Vt. 515.

[f] (Vt. 1851) In an action against a town, brought to recover damages occasioned by an alleged insufficiency of the public highway, one who was, at the commencement of the year during which the injury occurred, duly elected highway surveyor of the district in which the highway was situated, and received from the selectmen a tax bill, in usual form, and acted as highway surveyor for a time, and then, previous to the occurring of the alleged injury, refused longer to act as highway surveyor, and resigned, and returned to the selectmen of the town his tax bill, which they accepted, and who did not afterwards act as highway surveyor, is not thereby rendered incompetent as a witness for the town.—Battey v. Town of Duxbury, 23 Vt. 714.

[g] (Vt. 1851) A highway surveyor can only be held incompetent as a witness for the town on the ground that he would be liable to the town if plaintiff should succeed; but no suit could be maintained against him by the town after the selectmen had received from him his tax bill and warrant, with the mutual intention to release him from further responsibility, even if it should be held that he had strictly, under the statute, no right to resign.—Battey v. Town of Duxbury, 23 Vt. 714.

9. INTEREST OF MEMBER, STOCKHOLDER, OR OFFICER OF CORPORATION OR ASSOCIATION, AND OF INHABITANT OR CITIZEN OF MUNICIPALITY OR STATE.

MEMBER OR STOCKHOLDER OF CORPORATION, § 371.
—— PARTICULAR CORPORATIONS, § 372.
OFFICER, DIRECTOR, OR TRUSTEE OF CORPORATION, § 373.
—— CASHIER OF BANK, § 374.
MEMBER OR OFFICER OF ASSOCIATION OR SOCIETY, § 375.
MEMBER OR OFFICER OF RELIGIOUS SOCIETY, § 376.
INHABITANT OR CITIZEN OF MUNICIPALITY OR STATE, § 377.

Liability for costs, see post, § 401.
Statutory removal of incompetency, see post, § 517.
Transfer, release, or extinguishment of interest, see post, §§ 454, 455.

§ 371. Member or stockholder of corporation.

[a] The stockholders in a corporation created for private emolument are not competent witnesses for the company.
—(Ala. 1855) Montgomery & W. Plank Road Co. v. Webb, 27 Ala. 618;
(Del. 1843) Jefferson v. Stewart, 4 Har. 82;
(Fla. 1852) Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359;
(Ky. 1871) Digby v. Kenton Iron Co., 71 Ky. (8 Bush) 166.
CONTRA, see
(Mo. 1858) Barclay v. Globe Mut. Ins. Co., 26 Mo. 490; (1859) Bredow v. Mutual Sav. Inst., 28 Mo. 181;
(N. Y. 1850) New York & E. R. Co. v. Cook, 4 N. Y. Super. Ct. (2 Sandf.) 732; (1850) Washington Bank v. Palmer, Id. 686; (1852) Montgomery County Bank v. Marsh, 7 N. Y. (3 Seld.) 481.

[b] (U. S. 1809) A stockholder in a company which itself owns stock in plaintiff company is a competent witness for plaintiff.—Bank of Alexandria v. Mandeville, Fed. Cas. No. 851 [1 Cranch, C. C. 575].

[c] (Cal. 1862) In cases of corporations, the exception to the rule forbidding interested parties to testify admits only keepers of corporate documents. Members acting for the corporation

in ordinary matters of business are incompetent. —Blen v. Bear River & A. Water & Mining Co., 20 Cal. 602, 81 Am. Dec. 132.

[d] (Ill. 1851) Notwithstanding the rule that the testimony of a stockholder is excluded as that of an interested party in a suit by or against a corporation, yet from reasons of convenience and necessity a stockholder who had charge of the minutes of the commissioners appointed to organize the company is a competent witness to identify them.—Ryder v. Alton & S. R. Co., 13 Ill. (3 Peck) 516.

[e] (Ill. 1861) Stockholders in a corporation are not competent witnesses for the company, and can be made so only by an assignment of their stock.—Thrasher v. Pike County R. Co., 25 Ill. (15 Peck) 393.

[f] (Ind. 1861) A corporator or stockholder is a competent witness to prove the account of the corporation.—Cooper v. Sisters of Providence of St. Mary's of the Woods, 16 Ind. 164.

[g] (La. 1841) A corporation cannot offer its stockholders as witnesses, though the opposite party may.—Hart v. New Orleans & C. R. Co., 1 Rob. 178, 36 Am. Dec. 689.

[h] (Md. 1827) An interested corporator is a competent witness to prove himself either to be or to have been the depositary of the muniments of his corporation. — Union Bank v. Ridgely, 1 Har. & G. 324.

[i] (Mass. 1839) In an action against a manufacturing corporation to recover a debt, it appeared that the annual notice published by the corporation, next before the debt was contracted, did not certify the amount both of their debts and of their capital stock, as required by St. 1829, c. 53, but only of their debts. *Held*, that one who was a member of the corporation when the debt was contracted, but had ceased to be such when the action was tried, was individually liable for the debt, and, consequently, was not a competent witness for the corporation.—Proprietors of Milldam Foundry v. Hovey, 38 Mass. (21 Pick.) 417.

[j] (Mass. 1844) A clerk of a corporation is a competent witness to identify its books and verify its records, though he is a member of the corporation, and interested in the suit in which those books and records are used as evidence.—Wiggin v. Freewill Baptist Church in Lowell, 49 Mass. (8 Metc.) 301.

[k] (Mich. 1843) A stockholder in a corporation, who is, as such, liable individually for its debts, is a competent witness for plaintiff, in a suit against the corporation; his interest being against plaintiff, and not being a party to the suit by virtue of his being such stockholder. —Hasey v. White Pigeon Beet Sugar Co., 1 Doug. 193.

[l] (N. H. 1855) Where the members of a corporation are made personally liable for the corporate debts in certain events, the liability is too uncertain and contingent to render a member who has assigned his stock incompetent as a witness for the corporation, unless it is shown that all the facts exist which the statute requires to render his liability fixed and certain. —Manchester Bank v. White, 30 N. H. (10 Fost.) 456.

[m] (N. H. 1856) It is no sufficient ground for excluding a witness from testifying for a corporation that he may be liable, under the statute, for the debts of the corporation on account of his having been a stockholder therein. —White Mountains R. Co. v. Eastman, 34 N. H. 124.

[n] (N. Y. 1843) One who is a stockholder of the Galena Company, and liable for its debts, under Laws 1837, p. 455, cannot be a witness in a suit brought to charge the defendant as a co-stockholder.—Pierce v. Kearney, 5 Hill, 82.

[o] (Pa. 1842) A stockholder in a company is a competent witness in an ejectment by the company to prove service of a notice on defendant's agent, and the admission of such person that he was agent, and that notice was served.—Union Canal Co. v. Loyd, 4 Watts & S. 393.

[p] (Pa. 1853) A stockholder of a corporation is not a competent witness for plaintiff, in a suit against a director, who, if judgment be rendered against him, can have no recourse against the corporation.—Hill v. Frazier, 22 Pa. (10 Harris) 320.

[q] (Pa. 1862) Upon the question of the acceptance, by the company, of an amendment to the charter, a stockholder who had paid up his stock in full was a competent witness for plaintiffs to prove the acceptance, not having any interest in the result of the suit, nor in the fund to which the proceeds were to go, and the company being insolvent.—Fell v. McHenry, 42 Pa. (6 Wright) 41.

[r] (Tenn. 1826) In questions respecting the rights and immunities of a corporation, individuals not personally interested, though members, are competent witnesses for the corporation; but where they have a private or individual interest, they are incompetent.—City of Jonesborough v. McKee, 10 Tenn. (2 Yerg.) 167.

§ 372. — Particular corporations.

[a] A stockholder in a railroad corporation is a competent witness for the company.

—(Ind. 1854) Newcastle & R. R. Co. v. Brumback, 5 Ind. 543; (1855) New Albany & S. R. Co. v. Gillespy, 7 Ind. 245.

CONTRA, see

(Ala. 1860) Alabama & M. R. Co. v. Sanford, 36 Ala. 703;

(Pa. 1857) Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. (4 Casey) 318.

[b] (Ala. 1848) In an action against a sheriff for failing to return an attachment which he had levied on slaves, the stockholder of a bank was a competent witness for the sheriff to prove a mortgage and sale of the slaves to the bank previous to the levy of the attachment.—Governor v. Baker, 14 Ala. 652.

[c] (Ind. 1855) A stockholder in a turnpike company is a competent witness for the company.—Unthank v. Henry County Turnpike Co., 6 Ind. 125.

[d] (Ky. 1838) Members of a turnpike corporation are not, in general, incompetent witnesses to prove the signature of a party to an agreement to take and pay for shares in the company.—Danville, L. & N. Turnpike Road Co. v. Burdett, 37 Ky. (7 Dana) 99.

[e] (Ky. 1868) A stockholder in a bank is a competent witness in behalf of the bank, and however his interest might be regarded as affecting his credit, his deposition is admissible, especially where he is shown to have been indemnified against loss by the result of a suit by the bank.—Petitt v. First Nat. Bank, 67 Ky. (4 Bush) 334.

[f] (Mass. 1843) A note was made by a firm, payable to A., B., and C., and a corporation, joint owners of a vessel. The promisees assigned the note to A. toward his share of the earnings of the vessel. The corporation assigned all its property, under the insolvent law, for the benefit of all its creditors, one of which creditors was a bank. A suit against said firm was brought on said note, in the name of all the promisees, for the benefit of A. *Held*, that a stockholder in the bank, which was a creditor of said corporation, was a competent witness for plaintiffs.—Hathaway v. Crocker, 48 Mass. (7 Metc.) 262.

[g] (N. Y. 1852) A stockholder in a bank is not a party for whose immediate benefit an ac-

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tion by it is prosecuted, and he may testify in its behalf.—Bank of Lansingburg v. McKie, 7 How. Prac. 360.

[h] (N. Y. 1856) The stockholders of an incorporated bank, however few in number, are admissible as witnesses on behalf of the corporation.—New York & V. State Stock Bank v. Gibson, 12 N. Y. Super. Ct. (5 Duer) 574.

[i] (N. C. 1856) A stockholder in a bank is not a competent witness to prove a debt due to the bank.—Stevenson v. Simmons, 49 N. C. (4 Jones, Law) 12.

[j] (Pa. 1796) A stockholder in a bank is an incompetent witness to prove notice, in an action by the bank against the indorser of a note. —Bank of North America v. Wycoff, 4 Dall. 151, 1 L. Ed. 778.

[k] (Pa. 1855) The contingent liability to the noteholders of a bank of one who has been a stockholder is too remote an interest to disqualify him from testifying in favor of the bank, unless there is some evidence of the inability of the institution to meet its engagements.—Meighen v. Bank, 25 Pa. (1 Casey) 288.

[l] (Vt. 1847) Depositions of stockholders in a banking corporation are inadmissible as evidence in favor of the corporation.—Porter v. Bank of Rutland, 19 Vt. 410.

§ 373. Officer, director, or trustee of corporation.

[a] (Ala. 1846) Under the act of 1845, which declares defendants in execution incompetent as witnesses in a claim, interposed by a third person on the levy, a trustee of a corporation is, notwithstanding, a competent witness for the claimant, although the levy is made under a fi. fa. against the corporation.—Brumby v. Langdon, 10 Ala. 747.

[b] (Ala. 1848) In an action against a sheriff for failing to return an attachment which he had levied on slaves, the president of a bank was a competent witness for the sheriff to prove a mortgage and sale of the slaves to the bank previous to the levy of the attachment.—Governor v. Baker, 14 Ala. 652.

[c] (Cal. 1860) One allowing himself to be represented on the books of a water company as a stockholder, and holding the office of secretary, which is open only to stockholders, is an incompetent witness for the company, although the stock was the property of other parties.—Wolf v. St. Louis Independent Water Co., 15 Cal. 319.

[d] (Cal. 1862) In a suit against a corporation, on a contract for a purchase of land, the president of the company is incompetent to testify in its behalf.—Blen v. Bear River & A. Water & Mining Co., 20 Cal. 602, 81 Am. Dec. 132.

[e] (Conn. 1836) A person who was a trustee of a bank under the charter, but who was neither a depositor nor stockholder therein, and who had, in fact, no interest in the event of the suit, was a competent witness for the institution in a suit to which it was a party.—Middletown Sav. Bank v. Bates, 11 Conn. 519.

[f] (Conn. 1844) In September, 1839, A., the president, and B., the treasurer, of a railroad company, acting as the agents of the corporation, purchased of C., with a view to obtain a supply of gravel for the road, a piece of land lying near it, for the sum of $24,788, and without authority took a deed thereof to themselves. They paid $88 of the purchase money from the funds of the corporation, and gave to C. their individual note for the balance. The company paid the interest on such note until the 23d of February, 1841, when A. and B., by direction of the company, sold a part of such land for a sum sufficient to pay the note and leave in their hands the sum of $599, which sum, together with the legal title to the unsold part of the land, they retained. *Held*, in an action against the corporation and A. and B. by the state commissioners, to recover from A. and B. the property and funds so retained by them to satisfy notes of the corporation, approved by them, issued under Act 1839 to aid in construction of the road, payment of which at maturity the corporation had refused, that A. with his consent was a competent witness for plaintiffs, though a stockholder, since his corporate interest was overbalanced by his private interest in the controversy.—Church v. Sterling, 16 Conn. 388.

[g] (Del. 1879) The secretary of a corporation who keeps its books is not a competent witness on its behalf in a case in which he is counsel for the corporation.—Bancroft v. Wilmington Conference Academy, 5 Houst. 577.

[h] (Ill. 1856) The secretary of a corporation, though a stockholder, is from the necessity of the case competent to identify the books and records of the company, and such books are competent evidence of their contents.—Peake v. Wabash R. Co., 18 Ill. (8 Peck) 88.

[i] (Me. 1854) The trustees of a ministerial fund are competent witnesses in an action brought in the name of the corporation, when they are not personally named as parties to the suit.—Trustees of Ministerial & School Fund in Andover v. Reed, 39 Me. 41.

[j] (Me. 1855) A stockholder in a corporation is competent to testify to his official acts as treasurer, in an action to which the corporation is a party.—York & C. R. Co. v. Pratt, 40 Me. 447.

[k] (Md. 1860) The president and secretary of an insurance company, not being stockholders therein, are competent witnesses for the company, in an action on a policy executed by the company.—National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289.

[l] (Mass. 1851) A stockholder and director in a manufacturing corporation, which has failed to comply with the provisions of Rev. St. c. 38, §§ 16, 17, 19, 22, and who is therefore individually liable for its debts, is an incompetent witness in favor of the corporation, in an action brought against it by one claiming to be a stockholder, to recover the value of shares withheld by it from him.—Wyman v. American Powder Co., 62 Mass. (8 Cush.) 168.

[m] (Ohio, 1843) The secretary of a corporation who is also a stockholder therein is not a competent witness in behalf of the corporation because he is interested.—Imbush v. Mechanics' & Traders' Bank, 1 Ohio Dec. 8.

[n] (Pa. 1839) In an action brought by the trustees of a company, incorporated for the purpose of embanking certain meadows, against one of the corporators, to recover the amount of a tax assessed against him for the support of the embankment, one of the trustees, who is also a corporator, is not a competent witness to prove that a notice required to be given to the members to work out their assessments, before bringing suit to recover the tax, was given to defendant.—Crozer v. Leland, 4 Whart. 12.

[o] (Pa. 1854) The president of the trustees of an insurance company, who states that he was a salaried officer of the company, but not a member, nor interested in the suit, and that he gave the order for the reinsurance forming the cause of action, is not incompetent to testify on the ground of interest.—Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. (11 Harris) 250.

§ 374. —— Cashier of bank.

[a] (U. S. 1829) In an action by a bank for money overdrawn, the cashier is a competent witness for plaintiff.—Bank of Alexandria v.

McCrea, Fed. Cas. No. 849 [3 Cranch, C. C. 649].

[b] (Ga. 1849) The cashier of the Central Bank is not a competent witness to prove the contents of the books of the bank, not within his own knowledge, except in those cases in which the bank is a party, under the ninth section of the amendatory act of the charter of the bank.—Williams v. Kelsey, 6 Ga. 365.

[c] (La. 1841) A cashier, as agent of a bank to collect a claim, may prove the circumstances of its payment, and how, by whom, and for what purpose, such payment was made. So, generally, he is competent for the bank in a matter within the scope of his employment.—Williams v. Bank of Louisiana, 17 La. 378.

[d] (La. 1849) A cashier of a bank is a competent witness for the bank in a matter within the scope of his employment.—Union Bank v. Meeker, 4 La. Ann. 189, 50 Am. Dec. 559.

[e] (Pa. 1848) In a sci. fa. against a bank, as the garnishee of a depositor, the cashier is a competent witness for the bank, although the money was paid out on the checks of the principal defendant by his direction.—Jackson v. Bank of United States, 10 Pa. (10 Barr) 61.

[f] (S. C. 1847) On a bill to foreclose a mortgage which the cashier of the mortgagee bank had, by mistake, satisfied on the record in the register's office, under his own seal, the cashier is a competent witness to explain the mistake.—Bank of State v. Rose, 1 Strob. Eq. 257.

§ 375. Member or officer of association or society.

[a] (Ala. 1861) A member of the society of freemasons is a competent witness for the society, which is a charitable organization.—Burdine v. Grand Lodge of Alabama, 37 Ala. 478.

[b] (Ark. 1854) The corporators of the Clarksville Institute are mere trustees in aid of a benevolent object, and as such have no pecuniary or personal interest in the property and assets belonging to it, which should exclude them from giving testimony, when they are a party to the record.—Hershy v. Clarksville Institute, 15 Ark. 128.

[c] (Ark. 1866) In an action where a masonic fraternity is defendant, a party who is a mason and one of the trustees of the institution, but without any personal or pecuniary interest in the controversy, is a competent witness for defendant.—Trapnall v. Burton, 24 Ark. 371.

[d] (Ill. 1863) Where the corporators of a cemetery association were to be reimbursed for their outlays in purchasing and improving the grounds, and also expected to realize profits from the sale of lots, they were incompetent to testify in behalf of the corporation in a suit brought against it for labor and materials employed in building a vault.—Springdale Cemetery Ass'n v. Smith, 32 Ill. 252.

[e] (Ill. 1890) A member in a benefit society, liable to an assessment to pay a benefit, is not thereby rendered incompetent as a witness for the society in an action by the beneficiary.—Sherret v. Royal Clan of the Order of Scottish Clans, 37 Ill. App. 446.

[f] (Miss. 1845) In a suit against some of the members of an unincorporated company, one of the members thereof is a competent witness.—Lake v. Munford, 12 Miss. (4 Smedes & M.) 312.

[g] (Pa. 1855) In mandamus against a beneficial society to compel the restoration of a member illegally expelled, a member of the society is incompetent as a witness for defendants (1) because the fund, to which the members would have to look for aid, in case of sickness, would be diminished by the relator's recovery; and (2) because it seems the members may be compelled in equity to raise a fund for the payment of the relator's damages.—Marion Ben. Soc. v. Commonwealth, 31 Pa. (7 Casey) 82.

[h] (Vt. 1845) If an action be brought against the agent of a voluntary association by one with whom he contracted for the benefit of the association, to recover for services rendered in pursuance of such contract, the individual members of the association are competent witnesses for defendant; their interest being equally balanced.—Abbott v. Cobb, 17 Vt. 593.

§ 376. Member or officer of religious society.

Statutory removal of incompetency, see post, § 518.

Transfer, release, or extinguishment of interest, see post, § 456.

[a] A member of a religious or charitable corporation, having no individual interest, is a competent witness where such corporation is a party.

—(Me. 1830) Miller v. Mariner's Church, 7 Me. (7 Greenl.) 51, 20 Am. Dec. 341;

(Ohio, 1831) Methodist Episcopal Church v. Wood, 5 Ohio (5 Ham.) 283.

[aa] (U. S. 1870) The trustees of a religious corporation are competent witnesses for the corporation in a suit in the court of claims, notwithstanding Act June 25, 1868, § 4 (15 Stat. 75), which prohibits "claimants" and "persons interested" from testifying against the government.—Hebrew Congregation Benai Berith Jacob v. United States, 6 Ct. Cl. 241.

[b] (Ky. 1847) In suit between the members of a church and other parties, who are litigating the right to the exclusive use of the church, one of the members of the church, who is himself no party to the suit, is a competent witness.—Hadden v. Chorn, 47 Ky. (8 B. Mon.) 70.

[c] (Me. 1829) The members of a society of shakers are competent witnesses, without releases, in any suit in which the deacons are parties, not directly concerning the common property.—Richardson v. Freeman, 6 Me. (6 Greenl.) 57.

[d] (Mass. 1811) Where a corporation, created for pious and charitable uses, was made the residuary legatees in a will, its members were competent as witnesses on the question of the sanity of the testator, which was at issue between the executors and the heirs at law.—Nason v. Thatcher, 7 Mass. 398.

[e] (Mass. 1842) The members of an association entered into for religious purposes, without any lay organization, but solely under the advice of the ministers and elders of their denomination, and who maintain public worship, are competent witnesses in a suit brought by or against such association.—Christian Society in Plymouth v. Macomber, 46 Mass. (5 Metc.) 155.

[f] (N. H. 1833) The members of a parish are competent witnesses for the parish.—Congregational Soc. in Troy v. Perry, 6 N. H. 164, 25 Am. Dec. 455.

[g] (N. Y. 1811) In a penal action against a member of a religious society or sect called "Shakers," a member of that society is a competent witness, although the members hold all things in common, and have a partnership interest in all their concerns, as a religious sect.—Wells v. Lane, 8 Johns. 462.

[h] (Pa. 1841) Merely being one of a church council, without any concern in a suit brought for the use of the church, or personal interest in the result, does not disqualify a witness.—Shortz v. Unangst, 3 Watts & S. 45.

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[i] (Pa. 1851) Members of a church, who have no direct personal interest in the matter, are competent witnesses in a suit in which the church or corporation is a party.—Davies v. Morris, 17 Pa. (5 Harris) 205.

[j] (Pa. 1870) Trustees of a charitable or religious corporation, if they have no personal or private interest in the property of the corporation, are competent witnesses in an action, notwithstanding the corporation is a party.—Sorg v. First German Evangelical St. Paul's Congregation, 63 Pa. (13 P. F. Smith) 156.

[k] (Vt. 1842) Members of a society organized with corporate powers, under the statute for the support of the gospel, are not competent witnesses, at common law, for the corporation; and it is not a case within the act passed in 1816, making corporators witnesses in certain cases.—Stone v. Congregational Soc. of East Berkshire, 14 Vt. 86.

[l] (Vt. 1846) A committee of a religious society executed a lease in behalf of the society, and as their agents, and the society subsequently brought an action against the tenant. *Held*, that one of the committee, who had ceased to be a member of the society, was not incompetent as a witness for plaintiffs by reason of his having executed the lease on the part and behalf of the society.—Congregational Soc. in Newport v. Walker, 18 Vt. 600.

§ 377. Inhabitant or citizen of municipality or state.

Statutory removal of incompetency, see post, § 519.

[a] Members of public corporations are competent witnesses in suits in which the corporation is a party and interested, where they have no individual interest.

—(U. S. 1809) Virginia v. Evans, Fed. Cas. No. 16,969 [1 Cranch, C. C. 581]; (1846) Hunter v. Marlboro, Fed. Cas. No. 6,908 [2 Woodb. & M. 168];

(Ala. 1835) Town of Tuskaloosa v. Wright, 2 Port. 230;

(Conn. 1790) Smith v. Barber, 1 Root, 207; (1796) Town of Salisbury v. Town of Harwinton, 2 Root, 435;

(Ky. 1835) City of Maysville v. Shultz, 33 Ky. (3 Dana) 10;

(Mo. 1844) Barada v. Inhabitants of Carondelet, 8 Mo. 644;

(N. H. 1819) Canning v. Pinkham, 1 N. H. 353;

(N. J. 1793) Schenck v. Corshen County Collector, 1 N. J. Law (Coxe) 189; (1818) Overseers of Poor of Orange Tp. v. Overseers of Poor of Springfield Tp., 4 N. J. Law (1 Southard) 186; (1819) Roll v. Maxwell, 5 N. J. Law (2 Southard) 493;

(N. C. 1835) Jackson v. Commissioners of Town of Hillsborough, 18 N. C. 177;

(Ohio, 1831) Methodist Church v. Wood, Wright, 12;

(Tenn. 1826) City of Jonesborough v. McKee, 10 Tenn. (2 Yerg.) 167; (1859) Ezell v. Giles County Justices, 40 Tenn. (3 Head) 583;

(Tex. 1848) Kemper v. Victoria Corp., 3 Tex. 135; (1851) Lewis v. City of San Antonio, 7 Tex. 288;

(Vt. 1814) Pond v. Sage, 1 D. Chip. 250.

[b] (Ill. 1841) The interest of a member of a municipal corporation and a taxpayer is too remote to render him incompetent to testify for the corporation, in an action by the corporation to recover taxes or a penalty imposed by the corporation.—Sawyer v. City of Alton, 4 Ill. (3 Scam.) 127.

[c] (Me. 1843) Where a party sets up a common right in all the inhabitants of a town, an inhabitant of such town is not a competent witness to establish the right.—Moore v. Griffin, 22 Me. (9 Shep.) 350.

[d] (Mass. 1817) An inhabitant of another state is a competent witness in an action to which such state is a party.—State of Connecticut v. Bradish, 14 Mass. 296.

[e] (Mass. 1825) In an action of trespass by a grantee of a town of a portion of its sea flats, against one of the inhabitants, for taking clams from a bed claimed by plaintiff to be included in his grant, other inhabitants of the town are not competent witnesses to prove a custom of the inhabitants to take clams from this bed, since a verdict for defendant would in effect inure to their benefit, and they are therefore interested in the action.—Lufkin v. Haskell, 20 Mass. (3 Pick.) 356.

[f] (Mass. 1847) When the right of all the inhabitants of a town to fish in a certain pond and creek is tried on the general issue, in a suit between two of them, the other inhabitants are competent witnesses to prove such right, although defendant files a specification of defense, in which he sets forth such right; aliter, before St. 1836, c. 273, when such right was put in issue on a special plea in bar.—Look v. Bradley, 54 Mass. (13 Metc.) 369.

[g] (Miss. 1856) An inhabitant and taxpayer of a municipal corporation is a competent witness for the corporation.—Mann v. Yazoo City, 31 Miss. 574.

[h] (N. Y. 1807) An inhabitant of a place is incompetent to prove a right of fishery common in all the inhabitants of the place; but he is a competent witness for a party denying such right.—Jacobson v. Fountain, 2 Johns. 170.

[i] (N. Y. 1826) An inhabitant of a particular place is not a competent witness to prove a prescriptive right, common to all the inhabitants of that place; but he would be competent to prove a public right of fishery in all the citizens of the state.—Gould v. James, 6 Cow. 369.

[j] (N. Y. 1834) In a suit by a mere municipal corporation, as a village, the interest of a corporator is not such as to disqualify him as a witness in behalf of the corporation; and an agent or trustee for such corporation has no greater interest than any other corporator.—Trustees of Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80.

[k] (N. Y. 1850) The mere fact that a party is a corporator is not sufficient at common law to exclude him as a witness in a suit by or against a public corporation, unless it appears that he has some further personal interest in the suit.—Pack v. City of New York, 3 N. Y. (3 Comst.) 489.

[l] (Pa. 1843) In an action to which the school directors are a party, a rated inhabitant of the district is a competent witness under the statute of 1840.—Barnet v. School Directors, 6 Watts & S. 46.

[m] (Vt. 1816) An inhabitant of a town, who is rated and taxed in that town, cannot testify in an action between that town and another to compel the support of a pauper.—Chester v. Rockingham, Brayton, 239.

10. INTEREST OF PRINCIPAL, AND OF AGENTS, EMPLOYÉS, OR OTHER REPRESENTATIVES.

(a) PRINCIPAL AND EMPLOYÉS OR REPRESENTATIVES IN GENERAL, §§ 378-383.
(b) AGENTS, §§ 384-394.

Statutory removal of incompetency, see post, § 520.

Transfer, release, or extinguishment of interest, see post, §§ 457, 458.

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(a) PRINCIPAL AND EMPLOYÉS OR REPRESENTATIVES IN GENERAL.

PRINCIPAL, § 378.
REPRESENTATIVES IN GENERAL, § 379.
EMPLOYÉS, § 380.
MASTER AND CREW OF VESSEL, § 381.
CAPTAIN AND PILOT OR HELMSMAN OF VESSEL, § 382.
STEVEDORE, § 383.

§ 378. Principal.

[a] (Ala. 1848) The principal is not a competent witness for the agent, in a suit brought by him against an attorney for the recovery of a debt due the principal which the agent had placed in the attorney's hands for collection, as the record would be evidence for the principal, of the amount recovered, in a suit by him against the agent.—Wallace v. Peck, 12 Ala. 768.

[b] (Ill. 1865) In an action of replevin by the agent of the mortgagee of personal property levied upon under execution by a creditor of the agent as his property, the mortgagee is not, as between the agent and the creditor, a competent witness for the former. A recovery by the agent is, in effect, a recovery by the mortgagee, and he will not be permitted to testify in his own favor.—Sherman v. Bruce, 37 Ill. 39.

[c] (La. 1842) One for whom articles were ordered cannot testify for defendant who ordered them.—Leeds v. Caldwell, 1 Rob. 256.

[d] (Md. 1859) A witness whose title is set up by his agent, a defendant in replevin, is incompetent for defendant.—Russell v. McKenzie, 13 Md. 560.

[e] (N. Y. 1842) In replevin by the owner of goods against the sheriff, one in whose name the goods were purchased by an agent fraudulently representing himself authorized is a competent witness, though the fraudulent agent had given notes in his name.—Cutter v. Rathbun, 3 Hill, 577.

[f] (Pa. 1811) In a suit by a county treasurer against an agent for nonpayment of his principal's taxes, the principal is not a competent witness.—Hayes v. Grier, 4 Bin. 80.

[g] (Pa. 1823) The principal is a competent witness for the agent who is sued for money had and received on account of his principal; the ground of suit being that there is nothing due the principal.—Seidel v. Peckworth, 10 Serg. & R. 442.

[h] (Tenn. 1850) On the issue whether defendant was acting as agent in making the sale, in an action for fraud in the sale of an execution, the alleged principal is a competent witness for defendant.—Lipscomb v. Kitrell, 30 Tenn. (11 Humph.) 256.

§ 379. Representatives in general.

[a] An agent may be a witness for his principal and a servant for his master without a release.

—(Ala. 1840) Stringfellow v. Mariott, 1 Ala. 573;

(Ind. 1838) Morris v. Himelick, 4 Blackf. 494;

(La. 1813) Duplantier v. Randolph, 3 Mart. (O. S.) 194; (1821) Finlay v. Kirkland, 9 Mart. (O. S.) 463; (1824) Robertson v. Nott, 2 Mart. (N. S.) 122; (1824) Pratt v. Flowers, Id. 333; (1826) Martial v. Cotterel, 5 Mart. (N. S.) 274; (1827) O'Brien v. Louisiana State Bank, Id. 305; (1827) United States Bank v. Johnson, Id. 310; (1829) Lane v. De Peyster, 7 Mart. (N. S.) 372; (1829) Cornie v. Leblanc, Id. 591;

(Mo. 1842) Stothard v. Aull, 7 Mo. 318;

(N. H. 1851) Bailey v. Shaw, 24 N. H. (4 Fost.) 297;

(Vt. 1843) Wainwright v. Straw, 15 Vt. 215, 40 Am. Dec. 675.

[b] Servants or agents are competent witnesses, without a release, to prove the payment or receipt of money, or the delivery of goods, on the part of their principals, though their evidence tends to discharge themselves.

—(Ky. 1822) Alexander v. Emerson, 12 Ky. (2 Litt.) 25;

(N. H. 1823) Phelps v. Sinclair, 2 N. H. 554.

[c] (U. S. 1809) In an action against a deputy postmaster for negligence, the plaintiffs' clerk who puts the letter into the post office is a competent witness for the plaintiffs, without a release.—Dunlop v. Munroe, Fed. Cas. No. 4,167 [1 Cranch, C. C. 536], affirmed (1812) 11 U. S. (7 Cranch) 242, 3 L. Ed. 329.

[d] (Ga. 1854) Nothing is better settled than that the cases of agents, carriers, factors, and other servants of this description, constitute a class of special exceptions to the general rule that a witness interested in the subject of the suit is not competent to testify on the side of his interest; and this principle is extended to every species of agency or intervention by which business is transacted, unless the case is overborne by some other rule.—Collins v. Lester, 16 Ga. 410.

[e] (Mich. 1891) The fact that a physician, who is employed to examine a person injured through the negligence of another, is employed for the express purpose of giving his testimony in a suit to be brought for such injury, does not make him an incompetent witness.—Jones v. Village of Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437.

[f] (N. H. 1851) A cartman, employed by the owner of goods to deliver them for transportation to a railroad company, is a competent witness for the owner to prove the delivery, without a release.—Moses v. Boston & M. R. R., 24 N. H. (4 Fost.) 71, 55 Am. Dec. 222.

[g] (N. J. 1820) The agent or servant of defendant in making purchases of goods for which defendant is sued is a competent witness.—Ayres v. Van Lieu, 5 N. J. Law (2 Southard) 765.

[h] (Pa. 1857) A clerk in the office of the state treasurer, by whom an erroneous entry was made crediting a county treasurer with more money than he actually paid, is a competent witness to show such mistake.—Young v. Commonwealth, 28 Pa. (4 Casey) 501.

[i] (S. C. 1850) Where a postmaster is sued for the negligence of his assistant, the latter is an incompetent witness for the former.—Coleman v. Frazier, 4 Rich. Law, 146, 53 Am. Dec. 727.

[j] (Tenn.) Code, § 1169, which excludes particular witnesses in certain cases where a railroad company is defendant, excludes only such agents, employés, or engineers whose tortious act or acts, carelessness, and negligence are drawn in question in the case, and for which he or they would be liable over to the railroad company, if the latter should be held responsible for the wrong or injury.—(1860) Horne v. Memphis & O. R. Co., 41 Tenn. (1 Cold.) 72; (1866) Nashville & C. R. Co. v. Fugett, 43 Tenn. (3 Cold.) 402.

[k] (Wis. 1849) The true test of the interest of a witness is whether he will gain or lose by the direct legal operation and effect of the judgment in the cause, or whether the record will be legal evidence for or against him in some other action; but this rule does not extend to agents, carriers, factors, brokers, or other servants, when offered to prove any acts done within the scope of their employment.—Eaton v. Gentle, 1 Chand. 10.

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§ 380. Employés.

[a] The engineer in charge of a train causing an injury is not a competent witness for the company in an action to recover damages therefor without a release.
—(Ill. 1864) Chicago & R. I. R. Co. v. Hutchins, 34 Ill. 108;
(Pa. 1865) Catawissa R. Co. v. Armstrong, 49 Pa. (13 Wright) 186;
(Tenn. 1860) Memphis & O. R. Co. v. Tugwell, 41 Tenn. (1 Cold.) 91.

[b] (U. S. 1826) Plaintiff's bookkeeper, who has given a credit to defendant instead of another person by mistake, is a competent witness to prove the mistake, without a release from plaintiff.—Patriotic Bank v. Frye, Fed. Cas. No. 10,808 [2 Cranch, C. C. 684].

[c] (U. S. 1836) In an action for the negligence of defendants' driver in running against plaintiffs' stagecoach, plaintiffs' driver is not a competent witness for plaintiffs, without their release.—Beltzhoover v. Stockton, Fed. Cas. No. 1,283 [4 Cranch, C. C. 695].

[d] (Ala. 1853) In an action against the owners of a steamboat to recover damages for the loss of a stage, caused by a collision between the steamboat and a ferryboat, on board of which was the stage, the stage driver, who had the control of the stage at the time, is an incompetent witness for plaintiff, without a release.—Otis v. Thorn, 23 Ala. 469, 58 Am. Dec. 303.

[e] (Ark. 1853) In a suit in chancery by one partner against the other, who had charge of the business, for general settlement of partnership accounts, a clerk whose wages was to depend on the amount of sales was not on that account an incompetent witness for complainant, as the decree would embrace many items other than the amount of sales at a particular place, as to which the clerk was called to depose, and would not therefore be used by the clerk in a suit by him against the firm for wages as evidence of the amount of sales.—Roberts v. Totten, 13 Ark. (8 Eng.) 609.

[f] (Ill. 1860) In an action against a railroad company for injury from the washing away of their road, the engineer who built the alleged defective portion is not a competent witness for the company, without a release from them.—Galena & C. U. R. Co. v. Welch, 24 Ill. (14 Peck) 31.

[g] (Ky. 1829) A servant paying money, or a porter delivering goods, in the common course of business, is a competent witness to charge another, although he thereby exonerates himself.—Bank of Kentucky v. McWilliams, 25 Ky. (2 J. J. Marsh.) 256.

[h] (La. 1823) A witness is not incompetent because he is in the service of the party who calls him, and receives a salary.—Lafon's Ex'x v. Gravier, 1 Mart. (N. S.) 243.

[i] (La. 1853) One employed at a fixed salary, in lieu of which he is to receive such portion of the profits as exceeds it, is competent for his employer; the disqualifying interest being too remote.—Diggs v. Kirkland, 8 La. Ann. 309.

[j] (La. 1866) A clerk receiving for his compensation a percentage of profits in lieu of a regular salary, but without any control of his employer's business, is a competent witness for his employer; his interest being too remote to disqualify him.—Wright v. Rogers, 18 La. Ann. 671.

[k] (Me. 1839) Where a person is hired by the month to sell goods as a peddler, and was to be paid in proportion to his earnings, this is not such an interest in the goods as to render him incompetent to testify for the owner, in an action to recover the goods from a person who had unlawfully seized them.—Campbell v. Thompson, 16 Me. (4 Shep.) 117.

[l] (Me. 1846) In an action against a town to recover the value of plaintiff's goods, alleged to have been lost by reason of a defect in a highway, while loaded on a wagon which, with the team, was under the care of a driver in the employment of plaintiff, *held*, that such driver was a competent witness for plaintiff.—Littlefield v. City of Portland, 26 Me. (13 Shep.) 37.

[m] (Mass. 1825) In an action by a bank against a depositor, who was supposed to have overdrawn in consequence of a mistake in the ledger, the clerk who made the mistake said he did not know whether he was accountable or not, and that, if the money should be lost, he should remunerate the bank, if required. *Held*, that he was not liable to the bank, or, at most, only on a contingency, and that he was a competent witness on the part of the bank.—Union Bank v. Knapp, 20 Mass. (3 Pick.) 96, 15 Am. Dec. 181.

[n] (Mass. 1838) In an action of trespass by an officer, by whom certain goods had been attached, against another officer who subsequently attached and carried away the same goods, *held*, that a servant for him, appointed by plaintiff to keep the goods, was not a competent witness to prove that the property was faithfully and carefully kept, and that defendant knew it was under attachment when he made the second attachment, since a recovery by plaintiff against defendant would be either a bar to an action by plaintiff against the servant for negligence or a part satisfaction of plaintiff's claim.—Thompson v. Lothrop, 38 Mass. (21 Pick.) 336.

[o] (Mass. 1846) In an action against a railroad to recover damages for the nondelivery of goods intrusted to defendants for transportation, and in an action of trover to recover the value of such goods, a servant of defendants, employed by them to load and unload cars, and deliver freight, at the depot where the goods arrived, is a competent witness for defendants to prove that all the goods were delivered at such depot to plaintiff or his agents.—Draper v. Worcester & N. R. Co., 52 Mass. (11 Metc.) 505.

[p] (Mo. 1851) A clerk who pays out the money of his employer by mistake is a competent witness for his employer in an action to recover it back.—Burd v. Ross, 15 Mo. 254.

[q] (Neb. 1895) A contract under which the work was done for which a mechanic's lien is claimed may be proved by an employé of the claimant.—Blazer v. Rogner, 45 Neb. 588, 63 N. W. 846.

[r] (N. H. 1856) Plaintiff's hay in the freighthouse of a railroad company, in charge of a servant employed to attend to the receipt and delivery of goods there, was taken, through the mistake of the servant, by him and defendant, from the freighthouse, and sent away as defendant's. *Held*, that the servant was a competent witness for plaintiff in an action of trover for the hay thus taken.—Bartlett v. Hoyt, 33 N. H. 151.

[s] (N. Y. 1836) A teller in a bank is a competent witness for the bank, though he has given a bond with sureties for the discharge of his duties.—United States Bank v. Stearns, 15 Wend. 314.

[t] (N. Y. 1840) A servant in charge of his master's property, which has been injured by the negligence of another, is a competent witness in an action by the master for damages.—Dudley v. Bolles, 24 Wend. 465.

[u] (Pa. 1822) Where plaintiff's witness testified that he was in the employ of plaintiff and was sent with the goods with orders not to

deliver them to defendants without receiving pay, but that defendant obtained possession of the goods by stratagem and refused to redeliver them unless witness would receive the note of a third person in payment, he was not incompetent on the ground of interest, where it appeared that he did not voluntarily surrender the proceeds of the goods, and was therefore not liable to an action by plaintiff.—Wilmarth v. Mountford, 8 Serg. & R. 124.

[v] (Pa. 1846) A wagoner, in charge of a team from which a horse has been forcibly taken, is a competent witness for plaintiff, though he had been permitted to hold himself out to the world as owner.—Moore v. Shenk, 3 Pa. (3 Barr) 13, 45 Am. Dec. 618.

[w] (Tex. 1886) It is error in an action on an insurance policy to exclude testimony as to the excessive valuation placed on the goods insured, because the testimony is that of a witness who was an employé of defendant's agent, as that fact, if it could affect the witness at all, could only do so as to his credibility.—Lion Fire Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45.

[x] (Vt. 1846) In a suit brought by a bank against a common carrier, to recover for a package of bank bills intrusted to the carrier and lost by him, the teller of the bank, who delivered the package to the carrier, is a competent witness for plaintiffs.—Farmers' & Mechanics' Bank v. Champlain Transp. Co., 18 Vt. 131.

§ 381. Master and crew of vessel.

Transfer, release, or extinguishment of interest, see post, § 459.

[a] Seamen are competent witnesses for each other in suits for wages earned on the same voyage.

—(U. S. 1829) The Cypress, Fed. Cas. No. 3,530 [1 Blatchf. & H. 83];

(Mass. 1837) Baker v. Corey, 36 Mass. (19 Pick.) 496;

(N. Y. 1808) Hoyt v. Wildfire, 3 Johns. 518.

[b] (U. S. 1800) The master is not a competent witness in an action by the seamen against the owner or the vessel for wages, as the master is personally liable for the wages, where the owner is insolvent, or the vessel is not sufficiently valuable to discharge the lien.—Jones v. The Phœnix, Fed. Cas. No. 7,489 [1 Pet. Adm. 201].

[c] (U. S. 1804) A mate, who by the death of the master becomes master of the ship for the rest of the voyage, not being responsible on a contract for seamen's wages made by his predecessor, is a competent witness in a suit by the seamen against the owners.—Anonymous, Fed. Cas. No. 467a [1 Pet. Adm. 247, note].

[d] (U. S. 1805) Where a seaman sues for wages, and the question involved is one affecting the whole crew, such as embezzlement, where all must contribute in damages, one of the crew cannot be admitted as a witness for another; but where especial circumstances distinguish the cases, as where special indulgences are given to one, though not to the rest, a seaman may be a witness for another.—Thompson v. The Philadelphia, Fed. Cas. No. 13,973 [1 Pet. Adm. 210].

[e] (U. S. 1805) Where seamen are involved in similar breaches of contract, and the agreement of each is separate and independent, and one seaman is sworn a witness for another, the fact that he has been involved in similar breaches of contract affects his credit only and not his competency.—Thompson v. The Philadelphia, Fed. Cas. No. 13,973 [1 Pet. Adm. 210].

[f] (U. S. 1814) The master of a ship is not a competent witness in an information in rem for a forfeiture occasioned by his misconduct.—The Hope, Fed. Cas. No. 6,678 [2 Gall. 48].

[g] (U. S. 1816) One seaman may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the suit.—Spurr v. Pearson, Fed. Cas. No. 13,268 [1 Mason, 104].

[h] (U. S. 1830) In a suit in rem for seamen's wages, the master is a competent witness for the libelant, though he may have executed a bill of sale of the vessel to the claimant.—The Trial, Fed. Cas. No. 14,170 [1 Blatchf. & H. 94].

[i] (U. S. 1833) In a libel against a vessel for a forfeiture, the master under whom the alleged illegal act was done is inadmissible as a witness for the claimant.—The Nymph, Fed. Cas. No. 10,389 [1 Ware (257) 259].

[j] (U. S. 1835) Seamen, having a common interest in the immediate point in dispute, are competent to testify for each other, and the objection of interest goes to their credit only.—The Elizabeth v. Rickers, Fed. Cas. No. 4,353 [2 Paine, 291], modifying The Elizabeth Frith (1831) Fed. Cas. No. 4,361 [Blatchf. & H. 195].

[k] (U. S. 1837) In a libel against a vessel for wages, the master is incompetent to prove any matter of defense which originates in his own acts, for which he is responsible.—The William Harris, Fed. Cas. No. 17,695 [1 Ware (367) 373].

[l] (U. S. 1837) Upon a libel for seamen's wages, the master is not a competent witness to prove that a medicine chest was on board, for the purpose of throwing the expense of medical advice on a seaman.—The William Harris, Fed Cas. No. 17,695 [1 Ware (367) 373].

[m, n] (U. S. 1844) The master of a vessel who hypothecated her on bottomry is a competent witness in favor of the holder of the bottomry, particularly if released by him.—Furniss v. The Magoun, Fed. Cas. No. 5,163 [Olcott, 55].

[o] (U. S. 1846) The master of a vessel is a competent witness for the owner in a suit in rem for wages by one of the ship's company. Though the master has a contingent interest in the result of the suit, his interest lies in casting the debt upon the boat.—The Hudson, Fed. Cas. No. 6,831 [Olcott, 396].

[p] (U. S. 1846) In a suit by the holder of a bottomry bond, given by the master of a vessel, in a foreign port, for necessary supplies, the master is a competent witness to prove that the supplies were furnished, and that they were necessary.—The Medora, Fed. Cas. No. 9,391 [1 Spr. 138].

[q] (U. S. 1847) The master and crew of a vessel are competent witnesses for the owner of the vessel in a cause of collision.—The Neptune, Fed. Cas. No. 10,120 [Olcott, 483].

[qq] (U. S. 1854) In a libel against the ship on a contract of affreightment by the shipper, the master is not a competent witness for the owners without a release.—The Peytona, Fed. Cas. No. 11,059 [1 Ware, 541], affirmed (1854) Fed. Cas. No. 11,058 [2 Curt. 21].

[qqq] (U. S. 1859) A master of a vessel is a competent witness for the owners in a suit brought by the owners for contribution by way of general average for the loss of the masts, sails, and rigging of the vessel, alleged to have been sacrificed for the common benefit of the ship, cargo, and freight, except in a case where he would be exonerated from some certain liability, provided the owners should prevail.—Patten v. Darling, Fed. Cas. No. 10,812 [1 Cliff. 254].

[r] (U. S. 1861) In a suit by the owners of a vessel, against the shippers of a cargo, for freight, where the defense is that the cargo was never delivered to the consignee, the master, although interested, is a competent witness.—

Swett v. Black, Fed. Cas. No. 13,690 [1 Spr. 574].

[rr] (Del. 1832) In an action on the warranty of a vessel at the suit of the owner, the master is not a competent witness to prove that the vessel was lost through unsoundness and not from negligence.—Newbold v. Wilkins, 1 Har. 43.

[ss] (La. 1826) The mate or clerk of a ship is a good witness for the captain when sued by the owners for negligence; all persons employed in the navigation of vessels are direct servants of the owners in different grades of authority. Civ. Code, art. 2261.—Jordan v. White, 4 Mart. (N. S.) 335.

[ss] (La. 1826) As all persons employed in the navigation of the vessel are the direct servants of the owners in different grades of authority, on a charge of negligence against any one of them, the others are competent witnesses.—Jordan v. White, 4 Mart. (N. S.) 335.

[t] (La. 1844) The master and others employed to navigate a vessel, though servants of the owners in different grades of authority, are competent for the latter. A witness is not incompetent because he is, or has been, employed by the party who calls him.—Randall v. Laguerenne, 7 Rob. 327.

[tt] (La. 1851) Where, in an action on a policy of insurance on goods shipped, the defense is that the loss was occasioned by the barratry of the master, he is a competent witness for plaintiff, and the object of his interest goes only to his credibility.—Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596.

[u] (La. 1857) The clerk of the ship is a competent witness for his employers to prove the instructions given by the owner to the clerk in shipping the slave.—Farwell v. Harris, 12 La. Ann. 50.

[uu] (La. 1861) Under the act of 1840, the mere fact of a slave being found on board a boat without a written permission creates a presumption against the owners of the boat that such slave was received with the intention of depriving his master of him, or of transporting him out of the state, or from one part of the state to another. *Held*, that the requirement of the act that the witnesses called to rebut the presumption must be such as are not employed on the vessel referred to the time when they are called to testify.—Pelham v. The Messenger, 16 La. Ann. 99.

[v] (La. 1861) The exclusion of a citizen from giving evidence is somewhat opposed to natural right, and ought not to be extended beyond the letter of the statute.—Pelham v. The Messenger, 16 La. Ann. 99.

[vv] (Me. 1832) The master of a vessel, having, in a foreign port, borrowed money, on the credit of the owner, for the necessary purposes of the voyage, is a competent witness for the lender, in a suit against the owner of the vessel to recover the money borrowed, though he may have drawn a bill of exchange on his owner for the amount.—Descadillas v. Harris, 8 Me. (8 Greenl.) 298.

[w] (N. C. 1858) In an action against the owner of a vessel for failing to deliver goods according to his written contract, which excepted in his favor the dangers of the sea, the master in charge of the vessel is competent to prove that the goods were lost in consequence of a storm at sea.—Willard v. Carter, 50 N. C. 395.

[ww] (Pa. 1796) In an action against the owner for unskillful storage by the mariners, the mate and seamen are competent witnesses without a release.—Arnold v. Anderson, 2 Yeates, 93.

[www] (Pa. 1802) The master, unless released by the owners, is not a witness to prove the legality of discharging the mate in a foreign port.—Galloway v. Morris, 3 Yeates, 445.

[x] (Pa. 1842) In an action by the owner to recover for an injury to a boat, the master is incompetent by reason of interest, it being alleged that the injury was occasioned by the master's mismanagement.—Schuylkill Nav. Co. v. Harris, 5 Watts & S. 28.

[xx] (Pa. 1842) In an action by the owner to recover for an injury to a boat, the hands employed are competent.—Schuylkill Nav. Co. v. Harris, 5 Watts & S. 28.

[y] (Pa. 1847) In an action on a marine policy of insurance for a loss, the master and crew are competent witnesses for the insured.—American Ins. Co. v. Insley, 7 Pa. (7 Barr) 223, 47 Am. Dec. 509.

[yy] (Pa. 1854) Defendants, who had insured a vessel, obtained reinsurance by plaintiffs, and sought to have the amount of the reinsurance allowed on an account. A deposition of the master of the vessel was offered, which was objected to by plaintiffs on the ground of interest. *Held* that, as it did not appear on the paper book that the verdict and judgment could ever be evidence against the master, the admission of such evidence was not error.—Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. (11 Harris) 250.

[z] (S. C. 1819) A seaman of the vessel is a competent witness to the diligence of the master.—Reeves v. Burrows, 1 Nott & McC. 427.

§ 382. Captain and pilot or helmsman of vessel.

Transfer, release, or extinguishment of interest, see post, § 459.

[a] (Ala. 1859) The pilot is a competent witness to disprove negligence of the carrier (a boatman), unless it appear that the pilot was in fact guilty of the negligence, so as to be liable therefor.—Johnson v. Lightsey, 34 Ala. 169, 73 Am. Dec. 450.

[b] (Ky. 1856) A pilot is a competent witness for defendants in an action against the managers of a steamer for loss by jettison claimed to be unjustifiable.—Bentley v. Bustard, 55 Ky. (16 B. Mon.) 643, 63 Am. Dec. 561.

[c] (Mass. 1847) In trespass against a master of a vessel for carrying to sea an officer who went on board to arrest a person just as the vessel was leaving the wharf, the pilot is a competent witness to prove that he got the vessel off under the direction of the owner, and that the master had no agency in the matter.—Spoor v. Spooner, 53 Mass. (12 Metc.) 281.

[d] (Miss. 1856) In an action against the owners of a steamboat, as common carriers, for negligence, the captain is a competent witness for plaintiff, as his only interest is to defeat the action, which would disqualify him for the defense.—The General Worth v. Hopkins, 30 Miss. 703.

[e] (N. Y.) In an action against the master of a canal boat for negligence in navigating her, whereby injury is done to her, the helmsman of defendant is a competent witness for him, if defendant had the immediate charge and direction of the boat at the time of the injury.—(1838) Noble v. Paddock, 19 Wend. 456; (1839) Barnes v. Cole, 21 Wend. 188.

[f] (N. Y. 1852) In an action to recover damages for a collision between vessels, the captain of defendant's ship is not disqualified as a witness, on the ground that he would be responsible for a loss sustained by the collision. Such interest in the event cannot affect his competency.—Crary v. Marshall, 1 E. D. Smith, 530.

[g] (N. C. 1805) A captain of a ship is not a competent witness for the owner, in an action

for the loss of a cargo, to prove that the loss was not occasioned by negligence.—Gardner v. Smallwood, 3 N. C. 349.

[h] (Ohio, 1835) In a suit between the insurer and insured on a steamboat policy, the captain of the boat at the time of the loss is a competent witness.—Howell v. Cincinnati Ins. Co., 7 Ohio (7 Ham.) 276, pt. 1.

[i] (Ohio, 1840) In an action upon a policy of insurance for the loss of the steamboat insured, the pilot at the wheel is a competent witness; for, if he is liable at all on account of his negligence, he will be liable to the losing party, whichever it may be.—Vairin v. Canal Ins. Co., 10 Ohio, 223.

[ii] (Pa. 1763) In an action on a policy of insurance, the captain of the ship, having goods on board insured by other underwriters, who refused to pay until the determination of this suit, was examined on his voir dire, and swore himself disinterested, *held*, that he might be sworn in chief.—Wallace v. Child, 1 Dall. 7, 1 L. Ed. 13.

[iii] (Pa. 1796) In an action against the owner for unskillful stowage by the mariners, the captain may be a witness, if released by the owners.—Arnold v. Anderson, 2 Yeates, 93.

[j] (Pa. 1808) The captain is a competent witness to prove the sale and delivery of goods, in an action against his owner.—McIndoe v. Lunt, 1 Browne, 85.

[k] (Pa. 1841) Where the captain of a boat delivered goods at the wharf of defendants, who were commission merchants, with instructions not to deliver them to the consignee until the freight was paid, but defendants delivered them without receiving freight, and the owner of the boat brought trover for the goods, in which defendants claimed that, in consequence of the unskillfulness or negligence of the persons employed in the management of the boat, the goods were injured, so that plaintiff was not entitled to recover the stipulated freight, the captain and steersman of the boat were not competent witnesses for plaintiff without a release.—Humphreys v. Reed, 6 Whart. 435.

[l] (Pa. 1849) In action by the owner of a boat for her loss, where the defense is that the loss accrued through the want of skill or negligence of the pilot, such pilot is not a competent witness for plaintiff.—Plumer v. Alexander, 12 Pa. (2 Jones) 81.

§ 383. Stevedore.

[a] (N. Y. 1829) In an action on a policy of insurance for a claim for damages sustained by the perils of the sea, a stevedore employed by the master to stow the cargo is a competent witness to prove that it was properly stowed, though he might not have been, had the action been directly against the master for negligence in the loading of the vessel.—Rankin v. American Ins. Co., 1 N. Y. Super. Ct. (1 Hall) 682.

(b) AGENTS.

IN GENERAL, § 384.
NEGLIGENCE AND BREACH OF DUTY IN GENERAL, § 385.
FACT OF AGENCY AND SCOPE OF AUTHORITY IN GENERAL, § 386.
CONTRACTS IN GENERAL, § 387.
PURCHASES, § 388.
SALES, § 389.
BILLS AND NOTES, § 390.
BONDS, § 391.
TESTIMONY AS TO PAYMENT, SETTLEMENT, AND RELEASE, § 392.
FACTORS AND BROKERS, § 393.
ATTORNEYS, § 394.

Usurious transactions, see ante, § 301.

§ 384. In general.

[a] Agents are generally competent witnesses.
—(Ill. 1858) Nichols v. Guibor, 20 Ill. (10 Peck) 285;
(Ind. 1846) State v. Holloway, 8 Blackf. 45;
(Ky. 1820) Connelly's Heirs v. Chiles, 9 Ky. (2 A. K. Marsh.) 242;
(N. C. 1843) Ward v. Griffin, 38 N. C. 150.

[b] An agent is a competent witness, ex necessitate, to prove his acts as such agent.
—(U. S. 1847) Pendall v. Rench, Fed. Cas. No. 10,917 [4 McLean, 259]; (1848) Chapin v. Siger, Fed. Cas. No. 2,600 [4 McLean, 378];
(Ala. 1847) Bean v. Pearsall, 12 Ala. 592;
(Ind. 1846) State v. Holloway, 8 Blackf. 45;
(La. 1846) Britton v. Andrews, 1 La. Ann. 398;
(Mass. 1814) Phillips v. Bridge, 11 Mass. 242;
(S. C. 1828) Covington v. Bussey, 4 McCord, 412.

[c] The general rule is that an agent is competent as a witness for his principal, except in cases where the principal is sued on account of the negligence of the agent.
—(La. 1826) Jordan v. White, 4 Mart. (N. S.) 335; (1839) Nicholson v. Patton, 13 La. 213; (1845) Ducros v. Jacobs, 10 Rob. 453;
(Pa. 1856) Cushman v. Adams, 2 Phila. 83; (1862) Struthers v. Kendall, 41 Pa. (5 Wright) 214, 80 Am. Dec. 610.

[d] (Ala. 1858) In an action to recover damages for a wagon lost in crossing a ferry, plaintiff's agent, who had charge of the property, is, under Code, § 2302, a competent witness for his principal.—Harris v. Plant, 31 Ala. 639.

[e] (Ark. 1853) In an action by the principal against a third party, the agent of plaintiff is a competent witness to prove all acts done by him within the scope of his authority; but where he has acted without authority, and laid himself liable to plaintiff, he is not a competent witness, where the verdict for plaintiff would release him from all liability.—Scott v. Jester, 13 Ark. (8 Eng.) 437.

[f] (Cal. 1861) An agent is a competent witness to prove matters of which his testimony affords the only means of obtaining any knowledge.—Mills v. Beard, 19 Cal. 158.

[g] (Del. 1819) The attorney in fact, by whom a bill in equity is filed, is not a competent witness for complainant.—De Pusey v. Du Pont, 1 Del. Ch. 77.

[h] (Fla. 1855) If the agent has prima facie a direct interest in the suit, this is not sufficient to render him incompetent, without examining him on his voir dire as to his situation; and, in general, it must be shown that he had a legal, certain, and immediate interest in the event of the suit, before he can be declared incompetent.—Croom v. Noll, 6 Fla. 52.

[i] (Fla. 1855) Even if an agent is a party interested in the suit, he is often a competent witness, ex necessitate, but cannot be allowed to testify to matters out of the usual and ordinary course of business.—Croom v. Noll, 6 Fla. 52.

[j] (Ky. 1858) An agent is a competent witness to prove his own acts, done for the principal in the usual course of business, although directly interested in the result of the suit; and there is no distinction in this respect between private and public agents.—Weaver v. Bracken County Court, 57 Ky. (18 B. Mon.) 728.

[k] (La. 1841) An agent interested only for his commissions is competent; aliter, if his interest be distinct from them, and not growing

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out of his agency.—Stetson v. Gurney, 17 La. 162; Burke v. Breazeale, 1 Rob. 73.

[l] (La. 1849) An agent is a competent witness against his principal in regard to the business of the agency.—Forman v. Walker, 4 La. Ann. 409.

[m] (La. 1859) The agent is a competent witness to prove acts done within the scope of his authority; his liability for damages for falsely representing himself as agent going only to his credibility.—Barriere v. Peychaud, 14 La. Ann. 370.

[n] (Mass. 1843) One, as the agent of others, commenced and prosecuted a suit in their names, and they afterwards ratified his acts and became responsible to him for the costs, and he made no agreement with them respecting the avails of the suit, and had no interest therein. *Held*, that he was a competent witness for plaintiffs in the trial of the action.—Medbury v. Watson, 47 Mass. (6 Metc.) 246, 39 Am. Dec. 726.

[o] (Miss. 1843) Where an agent of defendant was called by plaintiffs, who stated on the voir dire that he was not interested in the event of the suit, and that he did not know whether he should be liable to defendant in the event of his failure in the suit, he was competent.—Austin v. Feamster, 9 Miss. (1 Smedes & M.) 166.

[p] (N. H. 1855) An agent, authorized to demand goods alleged to have been converted, has no such interest in the suit as to make him incompetent to testify as to the demand.—Phelps v. Gilchrist, 30 N. H. (10 Fost.) 171.

[q] (N. J. 1845) The rule which allows an agent, ex necessitate rei, to give evidence, applies only to agents employed in the ordinary transactions of commerce.—Runyon v. Farmers' & Mechanics' Bank, 4 N. J. Eq. (3 H. W. Green) 480.

[r] (N. Y. 1837) An agent is a competent witness in a suit commenced by his directions, where he has not assumed any personal responsibility for the costs of the prosecution.—Morris v. Wadsworth, 17 Wend. 103.

[s] (N. Y. 1848) An agent, who had acted within his instructions, and was therefore not personally liable, is not incompetent by reason of interest.—Hoffman v. Delihanty, 13 Abb. Prac. 388.

[t] (N. Y. 1850) In an action brought by the consignor, he being the owner of the property, against the carrier, for damage to the goods, the consignee, if he is only an agent, is a competent witness for plaintiff.—Price v. Powell, 3 N. Y. (3 Comst.) 322.

[u] (N. C. 1848) An agent is not necessarily an incompetent witness for his principal. A prima facie case of the agent's liability over to the principal ought first to be made out in support of his incompetency as a witness, and then the principal has the right to examine him on his voir dire, in order that he may explain his situation.—Ashe v. Murchison, 30 N. C. 215.

[uu] (N. C. 1859) An agent, who has intrusted a claim belonging to his principal to a constable for collection, is a competent witness for the principal in a suit on the constable's bond.—Nixon v. Bagby, 52 N. C. 4.

[v] (Pa. 1839) An agent may prove the loss of an instrument, parol or under seal, though given to himself.—Grayson v. Bannon, 8 Watts, 524.

[vv] (Pa. 1856) An agent of the sheriff's deputy was a competent witness in an action against the sheriff for not returning the writ; the liability of the witness being too remote and contingent to affect his competency.—Commonwealth v. Allen, 2 Phila. 22.

[w] (Pa. 1856) An agent is a competent witness for the landlord in proceedings to obtain possession of demised premises.—Reid v. Christy, 2 Phila. 144.

[ww] (Pa. 1867) An agent of an attorney in fact, who collects and pays over to the attorney the proceeds of a sale of land, is a competent witness to support a claim against the attorney by the owner of the land.—In re Harper's Estate, 1 Brewst. 471.

[x] (S. C. 1860) A witness having no personal interest, but only an interest as agent for others, is competent.—Salas v. Cay, 12 Rich. Law, 558.

[xx] (Tex. 1849) The owner of a slave hired it to the witness as the agent of another, and while the slave was in the possession of the principal under the contract of hiring he was attended by plaintiff, who was a physician. *Held*, in a suit by plaintiff against the owner for the value of professional services rendered to the slave, that the agent was incompetent as a witness to prove that there was an understanding that the owner was to pay for the medical attendance.—McGee v. Currie, 4 Tex. 217.

[y] (Tex. 1857) Agents are in some cases admitted as witnesses notwithstanding their interest, on the ground of public convenience and necessity.—Ware's Adm'rs v. Bennett, 18 Tex. 794.

[yy] (Vt. 1851) An agent of plaintiff, to whom a letter was directed for the benefit of plaintiff, is a competent witness for plaintiff to prove that he never received the letter from the post office.—Christy v. Smith, 23 Vt. 663.

[z] (Vt. 1851) An agent, factor, or broker is not a competent witness for plaintiff in a suit, without a release, when his testimony would discharge him from plaintiff's demand by establishing it against defendant.—Christy v. Smith, 23 Vt. 663.

[zz] (W. Va. 1868) A party acting for and in the name of another as his agent, and at the time declaring his principal, is a competent witness in a suit arising out of the transaction; for he is not personally liable.—Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

§ 385. Negligence and breach of duty in general.

[a] (Cal. 1857) Where the defense to an action is based on a breach of duty on the part of plaintiff's agent, he cannot be called to disprove such defense, because of his liability over.—Finn v. Vallejo Street Wharf Co., 7 Cal. 253.

[b] (Ga. 1831) Where an agent lost money of his principals at gaming, in an action by the principals against the winners to recover it, the agent was not a competent witness for plaintiffs without a release from them.—Allen v. Lacy, Dud. 81.

[c] (Ind. 1851) Where the right of action turns upon the question whether an agent has been guilty of negligence or other breach of duty, the agent is incompetent to testify for defendant.—McClure v. Whitesides, 2 Ind. (2 Cart.) 573.

[d] (Ky. 1838) An agent is not a competent witness for his principal, where the principal is sued for a tort done by the agent, while in his service, but without his authority.—Lexington & O. R. Co. v. Kidd, 37 Ky. (7 Dana) 245.

[e] (Md. 1851) In an action against the principal for damages occasioned by the neglect of his agent, the latter is not a competent witness for defendant without a release, as the record of the case would be evidence of the amount of damages recovered against his principal, in a suit by him against the agent.—Middlekauff v. Smith, 1 Md. 329.

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[f] (N. C. 1858) In assumpsit to recover from defendant money which he had, by gaming or other unlawful means, obtained from plaintiff's agent, such agent is not a competent witness without a release.—Jones v. McRay, 51 N. C. 192.

[g] (S. C. 1856) In an action against employers founded on the imputed negligence of their agent, the testimony of the latter for defendant will be excluded, on the ground of interest in defeating the action; for although, in an action against him by the employers, the record will not be evidence to establish his misconduct, it will be admissible to establish the quantum of damages.—Charleston Gas-Light Co. v. City of Charleston, 9 Rich. Law, 342.

[h] (Tex. 1857) An agent is incompetent as a witness where he has been guilty of any tortious act or negligence in executing the orders of his principal, in respect to which he would be liable over to the latter, should he fail in his suit.—Ware's Adm'rs v. Bennett, 18 Tex. 794.

[i] (Tex. 1857) An agent deposited money consigned to him by his principal in a bank in his own name, and afterwards drew it from the bank for his own use, and, on being called on to account for it by his principal, gave him his notes of hand for the amount. *Held*, in a suit brought by the principal against the bank for complicity of its officers in the fraud, which was not known by the principal when he received the notes, that the agent was a competent witness for plaintiff; the notes being then barred by the statute of limitations, and plaintiff having offered to surrender them to the bank, and the agent being insolvent.—Commercial & Agricultural Bank v. Jones, 18 Tex. 811.

§ 386. Fact of agency and scope of authority in general.

[a] Generally an agent is a competent witness to prove his own agency and authority.

—(U. S. 1828) Pannill v. Eliason, Fed. Cas. No. 10,707 [3 Cranch, C. C. 358];

(Ala. 1848) Gayle v. Bishop, 14 Ala. 552;

(Ill. 1855) Cadwell v. Meek, 17 Ill. (7 Peck) 220;

(Ky. 1813) Kirkpatrick v. Cisna, 6 Ky. (3 Bibb) 244;

(Mass. 1839) Rice v. Gove, 39 Mass. (22 Pick.) 158, 33 Am. Dec. 724;

(Mo. 1891) Crothers v. Acock, 43 Mo. App. 318;

(N. H. 1844) Caldwell v. Wentworth, 16 N. H. 318;

(S. C. 1828) Covington v. Bussey, 4 McCord, 412; (1829) Black v. Goodman, 1 Bailey, 201;

(Tenn. 1844) Harvey v. Sweasy, 23 Tenn. (4 Humph.) 449.

[b] An agent, acting under a parol authority, is a competent witness to prove his own agency and authority.

—(Fla. 1855) Croom v. Noll, 6 Fla. 52;

(Ind. 1860) Wolf v. Smith, 14 Ind. 360;

(Mass. 1852) Gould v. Norfolk Lead Co., 63 Mass. (9 Cush.) 338, 57 Am. Dec. 50;

(N. H. 1849) Kent v. Tyson, 20 N. H. 121;

(W. Va. 1868) Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

[c] (U. S. 1838) An agent is a competent witness to prove his own authority, if not in writing, and is not incompetent by reason of his liability to either of the parties.—Welch v. Hoover, Fed. Cas. No. 17,368 [5 Cranch, C. C. 444].

[d] (U. S. 1847) An agent is a competent witness to prove the nature of his agency.—Pendall v. Rench, Fed. Cas. No. 10,917 [4 McLean, 259].

[e] (Ala. 1854) In trover for the conversion of a slave, a witness who, as agent of plaintiff, brought the slave into the state, is competent to prove his own agency.—Napier v. Barry, 24 Ala. 511.

[f] (Ala. 1854) In trover for the conversion of a slave, though the testimony of a witness who, as agent of plaintiff, brought the slave to the state, tends to show that the slave was sold under attachment against himself sued out by defendant, this does not render him incompetent to prove his own agency, if there is no evidence showing that he consented to the levy or sale.—Napier v. Barry, 24 Ala. 511.

[g] (Ky. 1813) Where an agency is created by a letter, which is lost, the agent is a competent witness to prove its contents.—Kirkpatrick v. Cisna, 6 Ky. (3 Bibb) 244.

[h] (Me. 1845) Where the alleged authority of an agent is by parol and for a specified purpose, the principal may prove the nature and extent of the agency by the agent, unless he is otherwise disqualified.—Crooker v. Appleton, 25 Me. (12 Shep.) 131.

[i] (Me. 1845) When the question is whether the agent did or did not exceed his authority, he is equally liable to the losing party, if he exceeds his powers, for the damage done thereby, and is competent without a release.—Crooker v. Appleton, 25 Me. (12 Shep.) 131.

[j] (Mass. 1839) In an action on a note, reciting that "we jointly and severally promise to pay," etc., and signed by third persons for defendant, one of such signers is a competent witness to prove that they were authorized to execute the note as the agent of defendant, over objection that it was not competent for one professing to have acted as agent to establish the fact of his authority by his own testimony.—Rice v. Gove, 39 Mass. (22 Pick.) 158, 33 Am. Dec. 724.

[k] (Miss. 1849) If an agent's authority be by parol, he is a competent witness to prove it. If the attempt be to prove agency, when in fact the person did not purport to act as agent, he may be called to prove that he is not an agent.—Dean v. Young, 21 Miss. (13 Smedes & M.) 118.

[l] (N. H. 1853) When an agent's authority is given by parol, he is a competent witness to prove his authority, and to show that he acted according to the directions of his principal and within the scope of his authority.—Downer v. Button, 26 N. H. (6 Fost.) 338.

[m] (N. Y. 1843) A mortgagee assigned the mortgage, and afterwards, at the request of the assignee and as his agent, surrendered the bond, and took a conveyance of the equity of redemption, to the assignee. *Held*, that the agent was a competent witness to prove the agency, and his acts as such.—Reed v. Marble, 10 Paige, 409.

[n] (Pa. 1796) An agent not being a competent witness to prove his agency, if the agency is created by a written contract, which is mislaid, he is not a competent witness to prove its contents.—Nicholson's Lessee v. Mifflin, 2 Dall. 246, 1 L. Ed. 367.

[o] (Pa. 1854) An agent to make an entry upon land, so as to toll the statutes of limitation, is competent to prove his own agency.—Miles v. Cook, 1 Grant, Cas. 58.

§ 387. Contracts in general.

[a] (U. S. 1804) The agent who makes the insurance, after purging himself on his voir dire, is a good witness for the assured to prove matters respecting the policy.—Ruan v. Gardner, Fed. Cas. No. 12,100 [1 Wash. C. C. 145].

[b] (U. S. 1843) On a libel in rem upon a bill of lading, the clerks and agents of the transportation company claimant, having personally

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no interest in the business, and not being responsible for its defaults, are competent witnesses.—Howe v. The Lexington, Fed. Cas. No. 6,767b.

[c] (Ill. 1855) An agent of either of the parties to a suit is a competent witness to prove any contract made by him as agent, unless disqualified by interest.—Cadwell v. Meek, 17 Ill. (7 Peck) 220.

[d] (Ill. 1857) In an action to enforce a mechanic's lien, an agent of the parties sued, paid by a proportion of their business profits, is a competent witness in their behalf.—Hunter v. Blanchard, 18 Ill. (8 Peck) 318.

[e] (La. 1844) An agent, in an action on a contract executed by him, may prove the extent of his powers for his principal, who has released him from any liability.—Miller v. New Orleans Canal & Banking Co., 8 Rob. 236.

[f] (Me. 1852) A witness introduced by plaintiff may prove by his own testimony that he was the agent of plaintiff to make the contract sued on, and that it was made in conformity with the authority given him.—Perkins v. Jordan, 35 Me. 23.

[g] (Md. 1836) Where an agent has a direct interest in the event of a suit relating to a contract made by him independently of his acts as agent, he is not a competent witness for his principal in regard to such contract.—Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

[h] (Md. 1861) An agent of an insurance company, who, at the request of the insured, draws up for him an application for insurance, becomes the agent of the insured, and is a competent witness for the company in a suit on the policy.—Mutual Fire Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673.

[i] (Pa. 1792) One who writes and signs an order at the request of another, if uninterested in the event of the suit, should be produced as a witness.—McKee v. Myers, Add. 31.

[j] (Pa. 1796) One who contracts as an agent is a competent witness to establish the contract.—Steward's Lessee v. Richardson, 2 Yeates, 89.

[k] (Pa. 1823) An agent is admissible to prove his own authority by parol to make a parol lease.—McGunnagle v. Thornton, 10 Serg. & R. 251.

[l] (Pa. 1834) A person who has undertaken as the agent of plaintiff in ejectment to give a lease of the land in controversy to the defendants, under which they claim a right to hold the possession, is competent to establish by his own testimony his authority as agent, for his having undertaken to act in the character of an agent for plaintiff is not sufficient to render him incompetent.—McDowell v. Simpson, 3 Watts, 129, 27 Am. Dec. 338.

[m] (Pa. 1842) If a member of an association is the agent of it to make a contract, in an action on that contract against the members of the association, such agent may be examined by plaintiff to prove the contract and his authority.—Ridgely v. Dobson, 3 Watts & S, 118.

[n] (Vt. 1868) The rule that an agent is a competent witness, either for or against the principal, to prove his acts done and contracts made as agent, and his authority therefor from the principal, is equally applicable to the case of a written contract purporting to be executed by an agent in the name and behalf of his principal as to a case of a verbal contract.—Lytle v. Bond's Estate, 40 Vt. 618.

§ 388. Purchases.

[a] (U. S. 1845) An agent, who purchased a chattel and is interested therein, is not a competent witness for the plaintiff, in a suit by the purchaser against the vendor for fraud in the sale.—Ferson v. Sanger, Fed. Cas. No. 4,751 [2 Ware (Dav. 252) 256].

[b] (Ala. 1843) An agent who purchases goods for his principal, which, without the consent of the agent, are attached as the property of the agent in favor of a third person, and sold to satisfy the execution, is a competent witness in trespass by the principal against the officer.—Bush v. McGee, 4 Ala. 710.

[c] (Ala. 1853) An agent of a commission merchant, who receives commissions on all the cotton which he procures and ships to his principal, is a competent witness for the latter in a suit concerning the title to certain bales of cotton, which the agent had procured and shipped and on which he had received his commissions.—Bryan v. Smith, 22 Ala. 534.

[d] (Ala. 1853) In assumpsit to recover for lumber furnished by plaintiffs to defendant, defendant's agent by whom it was procured is a competent witness for plaintiffs; and evidence that he was indebted to defendant for money advanced on the building contract at the time he procured the lumber is irrelevant.—Ortez v. Jewett, 23 Ala. 662.

[e] (Ala. 1858) An agent employed to procure lumber, which his principal has agreed to furnish, is a competent witness for the latter under Code, § 2302, in a suit brought by him to recover for the lumber, although defendant pleads the unsuitableness of the lumber.—Moore v. Lea's Adm'r, 32 Ala. 375.

[f] (Ala. 1859) A defense being that plaintiff had promised to sell a slave to defendant, and had refused to keep his promise, an agent, whom defendant had employed to buy the slave, and who had bought him in his own name, and was ready to deliver the slave to defendant on payment, though defendant, on the agent's refusal to deliver the slave, making certain allowances from the price, had brought detinue, which was then pending, against the agent, will be allowed to testify to these facts on behalf of plaintiff, since the judgment in this case could not be evidence for the agent in the other suit.—Nesbitt v. Pearson's Adm'rs, 33 Ala. 668.

[g] (Ill. 1856) An agent, acting under parol authority in the purchase of land, is competent to prove his agency as between his principal and a third person.—Collins v. Smith, 18 Ill. (8 Peck) 160.

[h] (La. 1852) Where the principal's property is seized as the agent's, the latter, whose agency to purchase it is established allunde, is competent for the principal, in an action to recover it, to prove that he acted within the scope of his instructions.—McLeod v. Frost, 7 La. Ann. 50.

[i] (La. 1852) The agent of a vendee is from necessity a competent witness to prove the contract of sale and the price.—Boardman v. Glenn, 7 La. Ann. 581.

[j] (Me. 1833) A. furnished goods to B. at the request of C., to sell the same in the name of and as agent for C., under a fraudulent arrangement between the three to protect the goods from attachment at the suit of B.'s creditors. *Held*, in an action by A. against C. to recover the price of the goods, that B. was a competent witness to show the fraud as a defense.—Smith v. Hubbs, 10 Me. (1 Fairf.) 71.

[k] (Me. 1835) A. purchased a quantity of goods of B., and gave his bill on C. at 30 days for the amount, which was protested for nonacceptance. In an action by B. against C. to recover the price, *held*, that A. was incompetent, as a witness for B., to prove that, in making the purchase, he acted as the agent of C.—Hewitt v. Lovering, 12 Me. (3 Fairf.) 201.

[l] (N. J. 1820) The agent of the vendee is a competent witness for the vendor, in an action for the price of goods sold and delivered, to

show the purchase and delivery of the goods.—Ayres v. Van Lieu, 5 N. J. Law (2 Southard) 765.

[m] (N. Y. 1807) An agent, in whose favor a written order to receive goods is given, and who indorses a receipt on the order, may be admitted as a witness, from necessity, in an action relative to the goods.—Burlingham v. Deyer, 2 Johns. 189.

[n] (N. Y. 1828) An agent who bought goods for his principal is a competent witness for the principal in an action against the vendor for not delivering the goods, though he did not disclose his agency at the time.—Sewall v. Fitch, 8 Cow. 215.

[o] (N. Y. 1841) An agent authorized to purchase lands for his principal, and draw on him for the purchase money, is not a competent witness to charge his principal with the price of the lands sold, in an action by the vendor against the principal, if the agent is prima facie liable to the vendor for the purchase money.—Sage v. Sherman, 25 Wend. 426.

[p] (Pa. 1791) An agent, factor, or attorney, who purchases property at a sale for another, may prove his power to act as such.—Miller v. Hayman, 1 Yeates, 23.

[q] (Pa. 1818) The purchaser of land in his own name, but as agent or trustee of another, to whom he afterwards conveys, is a witness to prove the trust.—Brown v. Downing, 4 Serg. & R. 494.

[r] (Pa. 1836) Where an agent deals in his own name, without disclosing his principal, he is not a witness for the vendee, the plaintiff, without a release from him.—Hickling v. Fitch, 1 Miles, 208.

§ 389. Sales.

[a] (Conn. 1826) An agent for the sale of goods is a competent witness for his principal, in an action between the latter and a third person for the avails of the goods.—Shepard v. Palmer, 6 Conn. 95.

[b] (Ill. 1856) An agent acting under parol authority in the sale of land is competent to prove his agency.—Collins v. Smith, 18 Ill. (8 Peck) 160.

[c] (Ill. 1859) The testimony of an agent acting under power of attorney is competent to prove that his principal ratified a sale made by such agent.—Head v. Bogue, 22 Ill. (12 Peck) 117.

[d] (Ky. 1833) The fact that an agent had exceeded his authority in selling and conveying land, and thereby incurred a liability, does not render him incompetent as a witness, in a suit for the land by persons who do not derive their title from his principal.—Swearingen v. Fields, 31 Ky. (1 Dana) 387.

[e] (La. 1835) The agent may prove his agency, and that he sold and delivered the goods to defendant for his principal, though unknown at the time to defendant.—Brewster v. Saul, 8 La. 296.

[f] (La. 1843) In an action for the price of timber, plaintiff may prove by his agent that the latter delivered it without authority to the defendant's vendor.—Marks v. Landry, 4 Rob. 31.

[g] (Me. 1839) Where there is other evidence of the sale and delivery of goods, the agent by whom the sale is made, if interested, is not a competent witness to prove the sale and delivery.—Earle v. Clark, 15 Me. (3 Shep.) 368.

[h] (N. H. 1851) An agent who sells the property of his principal in a mode not authorized is a competent witness for his principal. The balance of his interest is against the principal.—Towle v. Leavitt, 23 N. H. (3 Fost.) 360, 55 Am. Dec. 195.

[i] (N. J. 1827) An agent, who has sold personal property belonging to his principal without authority, is not a competent witness for the vendee to prove that he was not agent, but that the property was sold on his own account, thereby to establish the validity of the sale.—Harwood v. Murphy, 9 N. J. Law (4 Halst.) 215.

[j] (N. C. 1805) A., as attorney in fact, conveyed land to B., and afterwards conveyed the same land to C. On a bill by complainants claiming through C. against those claiming through B., in the trial of the issue whether B. was a purchaser for a valuable consideration and whether a conveyance was made to him before the conveyance to C., *held*, that A. was competent to testify.—Alston's Ex'rs v. Jones' Devisees, 5 N. C. 45.

[k] (Pa. 1843) An agent selling a chattel is a competent witness for the principal in an action for the price, unless his liability for negligence or misfeasance be proved.—Scott v. Wells, 6 Watts & S. 357, 40 Am. Dec. 568.

[l] (Vt. 1832) A. and B., joint owners of timber, employed an agent to sell for their joint benefit. *Held*, that the agent was a competent witness, for A., that B., without his consent, directed the agent to apply the whole proceeds to his (B.'s) benefit, and that he so applied them.—Spencer v. Barnum, 4 Vt. 298.

[m] (Vt. 1835) Where an agent, authorized to sell lands and to receive payment, takes a horse in payment which is afterwards attached as his property, he is a competent witness for his principal in trover against the officer.—Waldo v. Peck, 7 Vt. 434.

[n] (Vt. 1847) Iron was sold by plaintiff's agent to defendant by parol, and on delivery, the agent not being present, defendant claimed that the sale was at gross weight, and not net weight, and plaintiff consented that it might be so computed, on defendant promising that, if it was not so agreed, he would make it right when they could see the agent. *Held*, that the agent was a competent witness for plaintiff, plaintiff and agent having executed mutual releases, although it appeared that the agent was to have all he could get for the iron above a certain price, and that plaintiff had received from defendant, toward the price of the iron, more than he was to receive as between him and the agent, and that plaintiff had no interest in the avails of the suit, and that the suit was commenced and prosecuted by the agent for his own benefit and at his own expense; it not appearing affirmatively that there was anything due from the agent to his attorneys in the case which would give them a lien upon the judgment.—Edwards v. Golding, 20 Vt. 30.

§ 390. Bills and notes.

[a] (U. S. 1815) A., the sole owner of a bill of exchange, indorsed it in blank, and delivered it to B. to deliver it to C. for collection, and, when collected, to place the amount to the credit of A. and B., in account. C. collected the amount, but refused to pass it to the credit of A. and B., who settled their account with C. and paid him the balance. A. afterwards sued C. for the amount received upon the bills. *Held*, that B. was a competent witness for A.—Taber v. Perrott, 13 U. S. (9 Cranch) 39, 3 L. Ed. 649.

[b] (U. S. 1829) Certain merchants entered into a written contract to subscribe certain sums for a voyage to Africa, and authorized their agent to draw bills for the amount, if he fitted out the expedition. He drew a bill on one of the subscribers for the amount subscribed by him to pay for goods bought for the voyage on the credit of the written authority above stated, which was shown to the payee of the bill. *Held*, that the agent, though drawer, was a competent witness to prove the facts in a suit brought by the payee against the subscriber on

a constructive acceptance of the bill; it having been dishonored when presented for acceptance. —Lowber v. Shaw, Fed. Cas. No. 8,563 [5 Mason, 241].

[c] (Ala. 1842) One signing a note in behalf of others is a competent witness to show that his principals were indebted to the payees.—Childress v. Miller, 4 Ala. 447.

[d] (Ala. 1846) The agent of a corporation, who accepts bills drawn on him by a stockholder for the accommodation of the corporation, is a competent witness against the drawer or indorsers, when sued on the bills, and also if the action is for money paid by one party to the bill against another.—Rhodes v. Sherrod, 9 Ala. 63.

[e] (Ala. 1852) When an agent, acting within the scope of his authority, executes a note in the name of his principal and himself, he is an incompetent witness against his principal, when the latter is sued alone on the note.—Barney v. Earle, 20 Ala. 405.

[f] (Cal. 1861) One who acted as agent for the payee and indorsee of a note is competent to prove that he had waived demand and notice.—Mills v. Beard, 19 Cal. 158.

[g] (La. 1846) In an action against the principals on an unaccepted bill drawn on them by their agent, the latter is a competent witness for plaintiff.—Britton v. Andrews, 1 La. Ann. 398.

[h] (Mass. 1815) In an action on a note made by one assuming to be agent for defendant, he is a competent witness for plaintiff to prove his own authority to make the contract.—Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

[i] (Mass. 1816) Where a general agent accepts in payment for goods of the principal sold by him an order of the vendee on a third person, payable to bearer, which is dishonored, the agent is a competent witness, in an action by the principal against the vendee on the order.—Fisher v. Willard, 13 Mass. 379.

[j] (N. H. 1841) One who was an agent in a particular transaction executed a note for his principal, pledged certain other notes and a mortgage as collateral security, and gave his own promise, at the same time, that the lands were of sufficient value to secure the debt, or, if they were not, that he would make it good, and the principal afterwards executed another note for the same sum in renewal of the first. *Held*, that the change of the note did not operate to discharge the debt, and that, as the agent was still liable, he was so interested as to be inadmissible as a witness for the principal in an action on the note.—Williams v. Little, 12 N. H. 29.

[k] (N. Y. 1823) One indorsing a note as agent is a competent witness for the indorsee in an action against the maker.—Mott v. Hicks, 1 Cow. 513, 13 Am. Dec. 550.

[l] (N. Y. 1827) Where an agent drew a bill of exchange on his principal, but did not describe himself as "agent," which was protested, *held*, in an action against the principal, who denied the authority of the agent to draw the bill, that the agent was not a competent witness for plaintiff.—Shiras v. Morris, 8 Cow. 60.

[m] (Pa. 1836) In an action by the indorsee of a note against the drawer, the indorser is not a competent witness for defendant to prove that plaintiff constituted the witness his agent to receive payment of the note from defendants, and that he did receive payment. —Elias v. Teill, 1 Miles, 272.

[n] (S. C. 1803) An agent, with authority to purchase goods and draw bills for the amount, drew a bill upon his principal for the payment of a demand against himself, not within the scope of his authority, and which the principal declined to accept. *Held*, that the agent was a competent witness for the principal to prove the consideration of the bill, in an action brought against the principal for refusing to accept such bill.—Suckley v. Tunno, 1 Brev. 257.

[o] (Va. 1802) If an agent purchase a bill of exchange and indorse it to his principal, the latter may call the agent as a witness, if he first prove that he was agent by other testimony than such agent's own oath, or give him a release.—Murray v. Carrot, 3 Call, 373.

§ 391. Bonds.

[a] (Ala. 1852) An agent who sues out an attachment in the name of his principal, and executes an attachment bond purporting to bind the principal only, to which he signs his principal's name, and his own as agent, is an incompetent witness for the principal in the attachment suit.—Lankford v. Keith, 21 Ala. 342.

[b] (N. M. 1854) One signing a replevin bond as plaintiff's agent is disqualified by his interest from being a witness for plaintiff, though he denies that he is interested.—Ward v. Broadwell, 1 N. M. 75.

[c] (Pa. 1846) A., as the agent of C., but without disclosing his agency, directed B. to purchase stock, and gave his note, indorsed by C., for the price, with the stock and a bond payable to C., as collateral security. The amount of the bond was received by B., who applied the same to the payment of the note of A. indorsed by C., which was delivered up. In an action by C. against B. to recover the balance of the bond over the amount of the note, *held*, that A. was a competent witness for plaintiff.—Gilpin v. Howell, 5 Pa. (5 Barr) 41, 45 Am. Dec. 720.

[d] (Pa. 1849) A., being indebted to B. for services rendered, requested a bond for the amount to be prepared, and, being unable from sickness to write, requested C., who acted as his agent, to sign it. C. signed and sealed the bond, styling himself "guardian," and authorizing judgment to be entered against him as guardian of A. *Held*, that C. was a competent witness for B., in a suit by B. against A. for the service.—Abrams v. Musgrove, 12 Pa. (2 Jones) 292.

§ 392. Testimony as to payment, settlement, and release.

[a] (U. S. 1847) A creditor, who is employed by his fellow creditors to collect money under an agreement to apply it to his and their claims, is not an incompetent witness, for the reason of interest, to prove payment to his fellow creditors of their share of the amount collected. —Howe v. Wade, Fed. Cas. No. 6,777 [4 McLean, 319].

[b] (Ala. 1851) An agent is a competent witness for his principal to prove that he has paid over money left with him by his principal for that purpose.—Governor v. Gee, 19 Ala. 199.

[c] (Ark. 1861) On a petition for confirmation of title by a purchaser of land at a tax sale, the agent who paid the taxes for the owner of the land is not incapacitated as a witness for the respondent to prove the fact "on account of the interest of the witness arising out of his former relations with the respondent."—Townsend v. Wells, 23 Ark. 581.

[d] (Fla. 1848) Where money has been overpaid by an agent, or paid by mistake, he is a competent witness for his principal in an action to recover it back.—Williams v. McGhee, 2 Fla. 58.

[e] (Ga. 1850) In an action by B. against C. to recover money deposited with C. by A. as the agent of B., A. is not a competent witness

for plaintiff to prove the liability of C.—Montgomery v. Evans, 8 Ga. 178.

[f] (La. 1845) An agent is competent for his principal, sued for money paid to the agent through error and admitted to have been paid by him to his principal, since the witness is indifferent, being responsible to one or the other party.—McDonogh v. Delassus, 10 Rob. 489.

[g, h] (Me. 1832) Where an agent, appointed by parol, paid the money of his principal to the creditor of the latter, in part payment, but took the creditor's receipt and promise in writing to account for the money to the agent himself, and the creditor afterwards received the whole amount of the original debt from the debtor, in an action by the principal against the creditor to recover back the sum thus paid by the agent, the agent is a competent witness to prove his appointment, the extent of his authority, the terms of his contract with the creditor, and that his agency was known to the latter.—Judkins v. Lancey, 8 Me. (8 Greenl.) 442.

[i] (Mass. 1830) A person who had been authorized by plaintiff to receive the money due from defendant on an account, and who had given defendant a receipt for the amount, was incompetent, by reason of interest, to prove that no money had been paid to him, and was not within the exception in regard to agents.—Fuller v. Wheelock, 27 Mass. (10 Pick.) 135.

[j] (Miss. 1846) In a bill to foreclose a mortgage, it appeared that defendant had made payments of money to the attorney in fact of plaintiff, and plaintiff offered the attorney to show that such payments were applied to a debt of defendant to the attorney individually. *Held*, that he was not competent to prove that fact, as it would give him the means of securing his own debt, and discharging himself from liability to his principal.—Poindexter v. La Roche, 15 Miss. (7 Smedes & M.) 699.

[k] (N. C. 1808) Where A. receives money for B., and pays it to C., who says he is authorized by B. to receive it, and B. sues A. for the money, C. is a competent witness to prove that B. authorized him to receive the money.—Blackledge v. Scales, 5 N. C. 179.

[l] (Pa. 1830) An attorney in fact is competent to prove that a settlement made with him for his principal, on which he executed a release to the party, was obtained by misrepresentations.—Irwin v. Allen, 1 Pen. & W. 444.

[m] (Vt. 1797) An agent is a competent witness that he paid over moneys received by him of his principal for that purpose, in an action by such principal against the party to whom the payment was made.—Eastman v. Hodges, 1 D. Chip. 101.

[n] (Vt. 1827) Where a receipt is explainable by parol, the agent, by whom and in whose name it was given, is a competent witness, though to limit its terms.—Giddings v. Munson, 4 Vt. 308.

§ 393. Factors and brokers.

[a] (U. S. 1793) A broker who makes a contract on behalf of his principal to deliver stock is competent to testify as to the transaction, and his authority to make such contract, in a suit against the principal for damages for non-delivery.—Livingston v. Swanwick, Fed. Cas. No. 8,419 [2 Dall. 300, 1 L. Ed. 389].

[b] (U. S. 1832) Where goods are shipped from one state to an agent to sell in another for shippers under a special agreement, and while in such other state the goods are attached for a debt of the agent due before such agreement, after which the agent abandons the goods to the shippers, who rescind the contract, such agent is a competent witness in an action by the shippers against the creditors for taking the goods.—Merrill v. Rinker, Fed. Cas. No. 9,471 [Baldw. 528].

[c] (U. S. 1849) Brokers who negotiate a contract of affreightment, their commissions not being dependent on its performance, are competent witnesses in a suit for breach.—Quirk v. Clinton, Fed. Cas. No. 11,518.

[d] (Ala. 1848) An agent who has made a contract for the sale of land, and is to be allowed a commission upon the sale, is not a competent witness for his vendor, in a suit by the vendee to rescind the contract for fraudulent representations made by the agent at the time of the sale.—Griggs v. Woodruff, 14 Ala. 9.

[e] (Cal. 1855) A broker, whose brokerage or compensation depends on plaintiff's recovery, is not a competent witness, inasmuch as he is directly interested in the event of the suit.—Shaw v. Davis, 5 Cal. 466.

[f] (Me. 1849) A note, on which there were two indorsements, was held by a broker without disclosing his principal or making any representations in regard to the note. The indorsements proved to be forgeries, but neither the seller nor the broker had any knowledge of that fact. In an action brought by the purchaser against the seller, on the ground of an implied warranty of the genuineness of the signatures, *held*, that the broker was under no liability to plaintiff, and in no way interested in the event of the suit, and therefore that he was a competent witness for plaintiff.—Baxter v. Duren, 29 Me. (16 Shep.) 434, 50 Am. Dec. 602.

[g] (Mass. 1814) One who has sold goods as the agent of another upon a del credere commission is not a competent witness in an action brought by the principal against the purchaser for the price of the goods sold.—New York Slate Co. v. Osgood, 11 Mass. 60.

[h] (Mass. 1824) A commission merchant, being called to prove that he sold goods of plaintiff to the two defendants jointly, stated that plaintiff was indebted to him for advances on the goods, and was insolvent; that he was uncertain whether he had sufficient security; that, if the proceeds of the goods should come into his hands, he should apply them to his debt; and that, as agent of plaintiff, he had applied to the attorney to commence this suit. *Held*, that he was not a competent witness.—Marland v. Jefferson, 19 Mass. (2 Pick.) 240.

[i] (Miss. 1858) Defendant shipped goods of plaintiff to a factor, who applied the proceeds to a debt due him by defendant. *Held*, that the factor was interested that plaintiff should establish his claim for the proceeds against defendant, and therefore was incompetent to prove it.—Kirkland v. Carr, 35 Miss. 584.

[j] (Mo. 1821) Where goods were consigned to a firm composed of A. and B., and, before their arrival, A. was directed by the owner to deliver them to B. to be sold on commission, and A. acted as the agent of the owner, B. having at the same time a concern distinct from the firm, *held* that, in an action by the owner against B. for the value of the goods, A. was a competent witness for the owner.—Hanly v. Blanton, 1 Mo. 49.

[k] (N. Y. 1827) A broker, who lends money and takes a check, including in it his commissions, and passes the check over to his principal, is a competent witness for his principal in an action against the drawer of the check.—Mauran v. Lamb, 7 Cow. 174.

[l] (N. Y. 1829) A factor, who has made advances for his principal, though he has a general lien on the goods and the proceeds in his hands as security for his advances, is a competent witness for his principal in assumpsit for the goods sold and delivered, unless he has a specific claim on the subject-matter of the controversy.—Mildeberger v. Baldwin, 2 N. Y. Super. Ct. (2 Hall) 196.

[m] (Pa. 1849) A. sent goods to B. to sell on commission. B. transferred them to C., a cred-

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itor of his own, to be sold by him at a limited price in payment of his debt. Not being able to sell them at that price, C. sold them on an execution against B. In trover by A. against C. for these goods, *held*, that B. was not a competent witness for plaintiff, on the ground of interest.—Keymborg v. Burbridge, 11 Pa. (1 Jones) 535.

[n] (Tenn. 1858) In an action against a common carrier for the loss of goods, the consignee, who is a mere factor, is, apart from the question of interest, a competent witness.—W. & A. R. Co. v. Kelly, 38 Tenn. (1 Head) 158.

§ 394. Attorneys.

Liability for costs, see post, § 402.

[a] (U. S. 1849) In a suit at equity to restrain a suit at law, the attorney of plaintiff in the suit at law is not incompetent by reason of his holding the notes upon which the suit at law was brought, for the mere purpose of paying over the money to his clients when the same should be recovered thereon.—Patton v. Taylor, 48 U. S. (7 How.) 132, 12 L. Ed. 637.

[b] (Ala. 1858) An attorney, employed to file a wife's bill for a divorce and the removal of her husband from the control of her separate estate, who holds her note for his fees, is not incompetent to sustain the validity of her will, subsequently executed, of all her separate estate, attested by him.—Mosser v. Mosser's Ex'rs, 32 Ala. 551.

[c] (Me. 1833) An attorney, having taken a jail bond and begun a suit thereon for an alleged breach of it, without the knowledge of his client afterwards received the amount due on the bond, wrote a discharge thereon, and delivered it to the obligor, omitting to take pay for the writ and service in the case, and the obligor refused to redeliver the bond. The attorney then informed his client, who directed him to proceed with the suit, promising to be responsible for all costs and advancements. *Held*, that the attorney had no such interest as would exclude him from being a witness.—Steward v Riggs, 10 Me. (1 Fairf.) 467.

[d] (Me. 1847) In an action of trespass against an officer for taking a chattel on an execution, the attorney of the execution creditor is not incompetent as a witness for the officer by reason of his lien for his bill of costs, especially where it does not appear whether the bill of costs has or has not been paid.—Foord v. Hains, 27 Me. (14 Shep.) 207.

[e] (Me. 1847) In an action of trespass against an officer for taking a chattel on an execution, the creditor's attorney, who was directed by the creditor to cause the chattel to be taken to satisfy the execution, if he thought it advisable, and who thereupon put the execution into the hands of defendant, directed him to levy upon the chattel, and informed him that the creditor would indemnify him for so doing, is not thereby rendered an incompetent witness for defendant on the ground of interest.—Foord v. Hains, 27 Me. (14 Shep.) 207.

[f] (Mass. 1814) In an action against a sheriff for an alleged default of one of his deputies, the attorney for plaintiff is not incompetent as a witness on the ground that he himself may be liable to plaintiff for negligence in not delivering the execution seasonably to the sheriff or his deputy, in case the present suit should fail against the sheriff.—Phillips v. Bridge, 11 Mass. 242.

[g] (Mass. 1814) An attorney of record in a former suit is competent to testify, in an action against an officer for not seizing goods on an execution, that he delivered the execution to the officer within 30 days after rendition of judgment in the suit in which he was attorney.—Phillips v. Bridge, 11 Mass. 242.

[h] (Miss. 1848) In an action on a note, defendant set up in defense a payment made by him to the attorney of plaintiff. *Held*, that the attorney was a competent witness for plaintiff to explain the matter, as his interest was balanced.—Arthur v. Mitchell, 18 Miss. (10 Smedes & M.) 326.

[i] (N. Y. 1848) An attorney is an incompetent witness for his client, on the ground of interest.—Little v. Keon, 1 Code Rep. 4.

[j] (N. Y. 1882) The lien for costs which an attorney has does not disqualify him, by reason of interest, from testifying in his client's action.—Sherman v. Scott, 27 Hun, 331.

[k] (Vt. 1803) Where, in an action on a bail bond, defendant pleaded in bar an accord and satisfaction, in that plaintiff, in consideration of certain money paid to him, had agreed to discontinue the suit and release the person for whom the bail was given, and it appeared that the money was paid to plaintiff's attorney and plaintiff alleged that the payment was for another purpose, the attorney was not incompetent to testify, on account of interest, as the interest which will exclude a person must be direct, and not remote or contingent.—Phelps v. Hall, 2 Tyler, 399.

11. LIABILITY FOR COSTS.

IN GENERAL, § 395.
PARTIES IN GENERAL, § 396.
LIABILITY TO INDEMNIFY AGAINST COSTS, § 397.
PARTIES TO BILLS AND NOTES, § 398.
PRINCIPAL AND SURETY, § 399.
TRUSTEE, EXECUTOR OR ADMINISTRATOR, AND GUARDIAN, § 400.
CORPORATORS, § 401.
ATTORNEYS, § 402.

In criminal prosecution or penal action, see post, § 414.

Transfer, release, or extinguishment of liability, see post, § 432.

§ 395. In general.

[a] An interest in the costs of a suit will exclude a witness.

—(Conn. 1786) Benedict v. Brownson, Kirby, 70; (1831) Bill v. Porter, 9 Conn. 23;

(Ind. 1833) Graven v. Updike, 3 Blackf. 272;

(Iowa, 1859) Cherry v. McCorkle, 8 Iowa (8 Clarke) 522;

(Miss. 1843) Commercial & R. Bank v. Lum, 8 Miss. (7 How.) 414;

(N. J. 1831) Lowrey v. Summers, 12 N. J. Law (7 Halst.) 240;

(S. C. 1837) Carter v. Bennett, Riley, 287.

[b] (Ala. 1852) A witness, who is, individually or with others, directly liable for costs in a cause, is not competent to prove any fact which would relieve him from these costs.—Ware v. Jordan, 21 Ala. 837.

[c] (Conn. 1817) If a witness is interested to avoid the costs of a judgment, though his interest as to the debt is balanced, he is incompetent.—Beach v. Swift, 2 Conn. 269.

[d] (Ga. 1847) A person who has no interest in the subject of the suit, if liable for costs, is incompetent to testify.—Vason v. Merchants' Bank of Macon, 2 Ga. (2 Kelly) 140.

[e] (Me. 1823) It is not the amount of interest which determines the question of the competency of a witness. Any direct interest, however small, is sufficient to exclude him, even if it be only in the costs of the suit.—Scott v. McLellan, 2 Me. (2 Greenl.) 199.

[f] (Mass. 1810) An indorser of an original writ is a competent witness for the original

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plaintiffs in the trial of the same action by a writ of review, although liable for costs that may be eventually recovered by defendant.—Ely v. Forward, 7 Mass. 25.

[g] (Miss. 1855) Where opposite interests are unequal, a witness has an interest on one side, measured by the excess of the one interest over the other; and therefore, where the interest is equiponderant in other respects, yet if the witness would be liable to costs in one event and not in the other, he is incompetent.—Cason v. Robson, 29 Miss. (7 Cushm.) 97.

[h] (N. Y. 1827) An assignee is not a competent witness for plaintiff, being liable for costs on plaintiff's failure.—Hopkins v. Banks, 7 Cow. 650.

[i] (Pa. 1838) If persons, either before or after suit brought, agree to divide the amount recovered, they are liable to defendant for costs, and cannot testify till the costs of the suit have been paid, though they execute mutual releases.—Mackinley v. McGregor, 3 Whart. 370, 31 Am. Dec. 522.

[j] (Tex. 1859) A liability for costs in one event only disqualifies the witness, though he must pay the debt in either event.—Bennett v. Dowling, 22 Tex. 660.

§ 396. Parties in general.

[a] A party who, as one of a fraudulent combination against which relief is sought, is properly made a party, may be so far liable for costs as to disqualify him as a witness, though no relief is sought against him.

—(N. Y. 1822) Neilson v. McDonald, 6 Johns. Ch. 201, reversed McDonald v. Neilson (1823) 2 Cow. 139, 14 Am. Dec. 431; (1837) Eckford v. De Kay, 6 Paige, 565;

(Tenn. 1830) Breedlove v. Stump, 11 Tenn. (3 Yerg.) 257.

[b] (Ala. 1857) One of the contestants against a will, who is a party to the suit, and as such liable for costs, is an incompetent witness to defeat the probate of the will, even though he should release all his distributive interest in the estate.—Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150.

[c] (Ga. 1859) A party interested in the costs merely is not a competent witness for a party joined with him.—Wilkes v. McClung, 29 Ga. 371.

[d] (Ill. 1863) A defendant in chancery called a codefendant as a witness in his behalf. *Held*, that the witness' liability for costs would render him incompetent, except so far as his evidence had reference to the question of usury.—Kennedy v. Evans, 31 Ill. 258.

[e] (Iowa, 1851) A sheriff appearing as legal plaintiff on behalf of others, and as such interested only in the costs, may be a witness for defendant, though not for the real plaintiffs in interest.—Taylor v. Galland, 3 G. Greene, 17.

[f] (Ky. 1838) Where a witness, who is a party to a suit in equity, is liable for costs, his deposition must be rejected.—Allison's Devisees v. Allison's Heirs, 37 Ky. (7 Dana) 90.

[g] (Ky. 1854) An original complainant in a suit in chancery, being liable for costs, is interested in the suit, and is an incompetent witness.—Walker v. McKnight, 54 Ky. (15 B. Mon.) 467, 61 Am. Dec. 190.

[h] (Ky. 1858) Where a right of action is assigned during the pendency of the suit, and by order of court, made without objection on the part of defendant, the assignee is substituted in the action for the assignor, and no security for costs is ordered, all claim on the original plaintiff for costs is waived, and the assignor is a competent witness for the assignee.—Warner v. Turner, 57 Ky. (18 B. Mon.) 758.

[i] (La. 1861) A party to a suit cannot be received as a witness if he is liable for costs. He cannot in such case be considered as testifying against his interest.—Butlitt v. Stewart, 16 La. Ann. 22.

[j] (Md. 1848) A party who is a legal plaintiff on the record, and as such responsible for the costs of the suit, is an incompetent witness in the cause, upon the ground of interest.—Selby v. Clayton, 7 Gill, 240.

[k] (Pa.) A plaintiff in a suit, who has assigned all his interest in the event of it, and has paid the accrued costs, but has only given security for accruing costs, is not a competent witness.—(1834) Clement v. Bixler, 3 Watts, 248; (1835) McLughan v. Bovard, 4 Watts, 308.

[l] (Pa. 1843) The plaintiff of record, although not in interest, is prima facie liable for the fees of witnesses subpœnaed in his behalf; and, in an action by the witnesses to recover such fees of another, he is not a competent witness for plaintiff.—Utt v. Long, 6 Watts & S. 174.

[m] (Pa. 1851) The petitioners for contesting an election are competent witnesses to testify as to whom they voted for, though the act provided that, if the court decides their petition was not in good faith and on credible grounds, it may impose costs on them.—In re Kneass, 2 Pars. Eq. Cas. 553; In re Contested Election of Dist. Atty., 1 Phila. 159.

[n] (S. C. 1854) Although, where a motion is made to strike a party's name from the record, it may be required as a condition that costs should be paid, yet if no condition be then imposed, and the party be afterwards offered as a witness, it cannot be made an objection to his competency that he was liable for costs which had accrued before he ceased to be a party.—Freeman v. Jennings, 7 Rich. Law, 381.

[o] (S. C. 1858) A defendant is in equity a competent witness for his codefendants as to matters in which he has no interest, notwithstanding he may be contingently liable for costs.—Etheredge v. Partain, 10 Rich. Eq. 207.

[p] (S. C. 1859) A liability for costs will disqualify a master in chancery from being a witness on his own behalf in a suit brought by him in his official capacity.—Gray v. Ottolengui, 12 Rich. Law, 101.

[q] (Tex. 1859) A defendant who has filed a disclaimer is not thereby released from liability for previous costs, and is not therefore a competent witness for his codefendant.—Dikes v. Miller, 24 Tex. 417.

[r] (Tex. 1860) A bailee acts at his peril in undertaking to decide between conflicting claimants of property in his keeping as warehouseman, neither of whom is his bailor, and, if the claimant against whom he has decided sequestrates the property, such bailee, being liable, in case he decided wrong, for costs of detention till service of the writ, is incompetent to testify in behalf of his codefendant, the other claimant.—Freeman v. Perry, 25 Tex. 611.

§ 397. Liability to indemnify against costs.

[a] (Fla. 1848) Where a witness had verbally assumed the payment of the expenses of a suit for the benefit of plaintiff, so as to create a mere honorary or moral obligation on his part, he is not rendered incompetent to testify for plaintiff.—Williams v. McGhee, 2 Fla. 58.

[b] (Ind. 1841) A witness is not incompetent to testify for plaintiff because he considers himself bound in honor to indemnify plaintiff's

surety for costs.—Orput v. Miller, 5 Blackf. 571.

[c] (Ky. 1836) A surety in a bond given by complainants to secure defendant his costs and damages is not a competent witness for complainants; but if his testimony, though admitted, is entirely immaterial, the decree will not be reversed for that cause.—Miller v. Henshaw, 34 Ky. (4 Dana) 325.

[d] (La.) A witness is incompetent for a party to whom, liable in any event for the debt, he is liable for costs, only if the result be unfavorable. An interest in the costs disqualifies.—(1829) Lesassier v. Hertzel, 8 Mart. (N. S.) 265; (1845) Montross v. Hillman, 11 Rob. 87.

[e] (Mass. 1832) If, after a vote by a town not to defend an action, the selectmen defend, they are not competent witnesses in the action, because they are bound to indemnify the town for the costs.—Emerson v. Inhabitants of Newbury, 30 Mass. (13 Pick.) 377.

[f] (N. H. 1839) One who considers himself under an honorary obligation to indemnify for costs, but who is not legally interested, is a competent witness.—Howe v. Howe, 10 N. H. 88.

[g] (N. H. 1860) When a suit is brought by an administrator for the benefit of a residuary legatee, and a third person gives a bond to the administrator to indemnify him against the costs of the suit, such third person is in no sense a party to the suit, and is a competent witness.—Reed v. Spaulding, 42 N. H. 114.

[h] (N. Y. 1814) Where one has given a bond of indemnity to plaintiff against the costs of the suit, he is an incompetent witness for plaintiff to show service of notice on defendant to produce certain papers at the trial.—Butler v. Warren, 11 Johns. 57.

[i] (Vt. 1846) Plaintiff, in an action brought by a surety against his co-surety for contribution, had assigned his claim for contribution from defendant to three persons, who had incurred liabilities as sureties for him, and had been decreed a bankrupt after the commencement of his action for contribution. His assignee in bankruptcy had entered and prosecuted the suit, and it did not appear that he entered at the request of the assignees of the claim. One of those assignees, after having transferred his claim in the demand to his coassignees, was offered as a witness on the part of plaintiff. *Held*, that he was not incompetent by reason of interest arising from any liability to indemnify the assignee in bankruptcy against the costs of the suit.—Hayden v. Rice, 18 Vt. 353.

§ 398. Parties to bills and notes.

[a] (U. S. 1846) A liability for costs in the event of a recovery on notes prevents the person so liable from being a competent witness in a bill in equity to have the notes surrendered and canceled.—Ferson v. Sanger, Fed. Cas. No. 4,752 [1 Woodb. & M. 138].

[b] (Ala. 1843) In an action by the holder of a note against an indorser for the accommodation of the maker, the maker is not a competent witness for defendant without a release of costs.—Commercial Bank of Columbus v. Whitehead, 4 Ala. 637.

[c] (Conn. 1839) A bill was drawn by A. and accepted by B. for the accommodation of B., and was then placed in the hands of A. that he, as the agent of B., might get it discounted and pay over the avails to B. In prosecution of this object, A. delivered the bill, with some other paper, to C., who indorsed such paper, got it discounted, and paid a part of the avails to A. The bill not being paid at maturity, C. brought a suit on it against B., as acceptor, and B., in support of his defense, offered A. as a witness. *Held* that, as A. was not liable for costs, he had no such interest in favor of either party as would disqualify him as a witness.—Jackson v. Packer, 13 Conn. 342.

[d] (La. 1847) Where a note was indorsed for the accommodation of the maker, he is not a competent witness for the indorser, as in such case he is not indifferent, but by virtue of Civ. Code, § 2260, he is liable for the costs in case of judgment against the indorser, but not liable if in his favor.—Union Bank of Louisiana v. Jones, 2 La. Ann. 345.

[e] (Miss. 1844) In a joint action against the drawer and indorsers of a bill of exchange, each is interested to the extent of costs, and is incompetent to testify for another indorser.—Scott v. Watkins, 10 Miss. (2 Smedes & M.) 233.

[f] (N. Y. 1841) An indorser is not a competent witness for the maker of a note, in an action by the indorsee, if he is liable for the costs and expenses.—Tilden v. Gardinier, 25 Wend. 663.

[g] (S. C. 1858) The maker of a note is not a competent witness for his accommodation indorser on account of his liability for the costs.—Bank of Charleston v. Chambers, 11 Rich. Law, 657; Same v. Frost, Id.

§ 399. Principal and surety.

[a] In a suit against a surety alone, the principal, being interested to the extent of the costs, is not a competent witness for the defendant without a release.
—(Ala. 1843) Richards v. Griffin, 5 Ala. 195;
(Ga. 1846) Rackley v. Sanders, 1 Ga. (1 Kelly) 258;
(Ky. 1846) Kelly v. Lank, 46 Ky. (7 B. Mon.) 220.

[b] (U. S. 1812) The principal obligor in a bond is not a competent witness for the surety in an action on the bond; the principal being liable to the surety for costs in case the judgment should be against him.—Riddle v. Moss, 11 U. S. (7 Cranch) 206, 3 L. Ed. 317.

[c] (La. 1855) The maker of a note is not a competent witness for his surety in an action by the holder against the surety, as the eventual liability to the surety for costs, if plaintiff prevails, is sufficient to exclude the testimony of the maker.—Neda v. Simon, 10 La. Ann. 700.

[d] (Mass. 1828) In an action by a surety against a cosurety, for contribution, the principal debtor, not being liable for the costs, is a competent witness.—Leavenworth v. Pope, 23 Mass. (6 Pick.) 419.

[e] (Pa. 1848) Where A. becomes surety for B. without his knowledge or request, B. is not liable over to A. for the costs of an action by the creditor against A.; and B. is therefore a competent witness for A. in an action by the creditor on the contract.—Talmage v. Burlingame, 9 Pa. (9 Barr) 21.

[f] (S. C. 1848) Unless something appears to constitute the case an exception to the general rule that the principal is liable for the costs of his surety, the principal is on that ground an incompetent witness on the part of his surety in his defense against their common creditor.—Cleveland v. Covington, 3 Strob. 184.

[g] (S. C. 1851) In an action on a bail bond against the bail, the principal, being liable for the costs in cases of recovery, is an incompetent witness for the bail to prove a render to the sheriff.—Douglass v. Owens, 5 Rich. Law, 149.

§ 400. Trustee, executor or administrator, and guardian.

[a] (Ga. 1859) Though an executor deposit money to pay the costs, he is still interested

in the proof of the will, as, if it be proved, he is entitled to have his deposit back again, and is therefore an incompetent witness to prove the will.—Adams v. Sandige, 29 Ga. 563.

[b] (Ill. 1863) Where a surviving partner institutes a suit in regard to the partnership concerns, the administrator of the deceased partner is not a competent witness on behalf of plaintiff, although he may release all his interest in the suit, because, if the party so calling him should be defeated, he would have a right to pay the costs out of the partnership effects, and thus diminish the assets which would come to the hands of the witness as administrator. To that extent he would have an interest in the result of the suit, and therefore be incompetent, notwithstanding his release.—Myers v. Walker, 31 Ill. 353.

[c] (Md. 1825) An executor, administrator, or guardian is inadmissible to testify in an action against or in favor of the estate he represents; his being a party and liable eventually to costs having always been deemed a sufficient objection.—Fenwick's Adm'r v. Forrest, 6 Har. & J. 415.

[d] (Md. 1832) Where a married woman and her trustee united in a mortgage of her separate estate, and a bill was brought to enforce the mortgage, to which they were both made defendants, the trustee being responsible for costs, was not a competent witness for his co-defendant.—Chambers v. Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572.

[e] (Mass. 1828) If one of the trustees of a charity resigns his trust during the pendency of an action, he is still liable for costs, and hence not a competent witness.—Adams v. Leland, 24 Mass. (7 Pick.) 62.

[f] (Mass. 1855) An executor or administrator is not rendered, by St. 1852, c. 312, § 60, a competent witness to matters known to him before he assumed his trust, without first releasing costs, or receiving or being tendered security against costs, as required by St. 1839, c. 107, § 2.—Wood v. Gannett, 70 Mass. (4 Gray) 450.

[g] (Miss. 1844) On a revival by the administrator of a suit commenced by his intestate, the administrator is an incompetent witness, as he is liable to costs.—McIntyre v. Ledyard, Smedes & M. Ch. 91.

[h] (N. H. 1839) A guardian requested the administrator of an estate, in which his wards were interested, to object to a claim made before a commissioner, in order that it might be prosecuted in court in due course of law. The administrator declined to do so, unless indemnified. Whereupon the attorney, who appeared for the guardian, gave his personal bond of indemnity, without the request of the guardian. *Held*, that the guardian was not legally liable to indemnify either the administrator or the attorney, and that he was a competent witness for the administrator on the trial of the claim, notwithstanding he testified that he expected, if the attorney was obliged to pay anything, to indemnify him out of the property of the ward in his hands, but not out of his own.—Howe v. Howe, 10 N. H. 88.

[i] (Pa. 1808) On a feigned issue from the register's court to the court of common pleas to try the validity of a will, the executor, as plaintiff, was offered as a witness in support of the will. *Held*, that he was not competent; as a party in interest being liable to costs.—Vansant v. Bolleau, 1 Bin. 444.

[j] (Pa. 1843) In an action to recover fees as a witness for plaintiff in an ejectment brought by a lunatic in the name of his committee against one who was alleged to have instigated the action, the executor of the lunatic was a competent witness for plaintiff; it appearing that the estate of the lunatic was sufficient to pay the costs of the ejectment.—Utt v. Long, 6 Watts & S. 174.

[k] (Va. 1875) As a trustee in a deed of trust, who is made a party plaintiff in an original bill to enforce the trust, but whose name is omitted in the amended and supplemental bill, is not liable for costs, he is a competent witness to prove what passed between the grantor in the deed and himself as to the preparation of the deed.—Eacho v. Cosby, 26 Grat. 112.

§ 401. Corporators.

[a] (Cal. 1859) Under our statute corporators are personally liable, and are responsible for the costs, at least, of suits wherein the corporation is a party, and therefore are not competent witnesses.—Mokelumne Hill Canal & Mining Co. v. Woodbury, 14 Cal. 265.

[b] (N. H. 1855) A corporator who has assigned his stock is not rendered incompetent by any liability for costs of an action brought by the corporation. The liability for costs accrues by the rendition of the judgment.—Manchester Bank v. White, 30 N. H. (10 Fost.) 456.

§ 402. Attorneys.

Competency in general, see ante, § 394.

[a] (U. S. 1849) In a suit at equity to restrain a suit at law the attorney of plaintiff in the suit at law is not disqualified as a witness by reason of his being security for costs in the suit at law, where the party for whom he is security has already obtained a judgment against his adversary.—Patton v. Taylor, 48 U. S. (7 How.) 132, 12 L. Ed. 637.

[b] (Ga. 1860) The counsel of a nonresident plaintiff is liable for costs, and therefore is an incompetent witness in behalf of his client.—Robinson v. Towns, 30 Ga. 818.

[c] (Me. 1840) If the writ is indorsed by one of two partners as attorneys at law in his own name, and there is no agreement to indemnify him, the other partner is not bound by the partnership relation to contribute toward any loss, and is a competent witness for plaintiff.—Davis v. Gowen, 17 Me. (5 Shep.) 387.

[d] (N. H. 1851) In a case where another person indorsed the writ at the request of the attorney, the latter cannot be a witness, because he is liable over to the indorser for costs.—Meserve v. Hicks, 24 N. H. (4 Fost.) 295.

[e] (N. Y. 1831) An attorney, prosecuting a suit in the name of plaintiff residing abroad, though for the benefit of a resident here, not being indemnified against his liability to the defendant for costs, is not a competent witness.—Jones v. Savage, 6 Wend. 658.

12. INTEREST IN CRIMINAL PROSECUTION OR PENAL ACTION.

INTEREST IN CRIMINAL PROSECUTION IN GENERAL, § 403.
MASTER OF SLAVE, § 404.
INTEREST IN REWARD, § 405.
PERSON INJURED IN GENERAL, § 406.
OWNER OF PROPERTY STOLEN, § 407.
FORGERY, § 408.
PERJURY, § 409.
PROSECUTOR, § 410.
INTEREST IN FINE OR PENALTY IN GENERAL, § 411.
INFORMER OR COMPLAINANT, § 412.
OFFICER, § 413.
LIABILITY FOR COSTS, § 414.

Defendants in criminal prosecutions, see ante, §§ 243–248.

Effect of calling or examination as witness by adverse party and of admission of testimony of adverse party, see post, § 534.

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Husband or wife of party or person interested, see post, §§ 420–423.

Statutory removal of incompetency, see post, §§ 523–529.

Testimony of accomplices, see "Criminal Law," vol. 14, cc. 1791–1794, §§ 1099–1103; cc. 1799, 1800, § 1112.

§ 403. Interest in criminal prosecution in general.

[a] Evidence of the particeps criminis in adultery is admissible.

—(Ala. 1848) State v. Crowley, 13 Ala. 172; (Vt. 1878) State v. Colby, 51 Vt. 291.

[b] (U. S. 1809) On an indictment for bigamy, a person having an action pending against the prisoner for goods furnished to the supposed first wife is incompetent, by reason of interest, as a witness to prove the first marriage.—United States v. Maxwell, Fed. Cas. No. 15,749 [1 Cranch, C. C. 605].

[c] (U. S. 1823) A person who has given a receipt for goods, to be delivered to other persons, is a competent witness for the United States, upon a prosecution against another person for stealing the goods.—United States v. Bates, Fed. Cas. No. 14,543 [2 Cranch, C. C. 405].

[d] (Ala. 1851) A witness who has been examined in behalf of the state, on the trial of an indictment against three defendants for grand larceny, to show a common design and confederacy among them, may also testify to the same facts on a subsequent trial of two of the defendants on an indictment for obtaining money under false pretenses from the same person at a different time and place.—State v. Davis, 19 Ala. 13.

[e] (Ala. 1879) On the trial of an indictment under Code 1876, § 4205, for selling or giving spirituous, etc., liquors to a person of known intemperate habits, the person to whom the sale was made is a competent witness to testify as to his intemperate habits.—Tatum v. State, 63 Ala. 147.

[f] (Ark. 1883) Under an indictment for gaming, a participant in the game, if not included in the indictment, is a competent witness for defendant.—Robinson v. State, 41 Ark. 400.

[g] (Conn. 1820) In a prosecution for theft, an innkeeper, in whose inn and from whose guest the goods were stolen, is a competent witness to prove the facts alleged in the information.—Salisbury v. State, 6 Conn. 101.

[h] (Ga. 1860) On the trial of an indictment for stabbing, defendant attempted to prove a conspiracy between two of the witnesses and the prosecutor to do him some bodily harm. *Held*, that the said witnesses were competent to give evidence exculpating themselves.—McAffee v. State, 31 Ga. 411.

[i] (Mass. 1841) A. conveyed an estate to a manufacturing company, which had been previously mortgaged to C., and a judgment was recovered by C. under the mortgage for the possession of the estate, and a petition for a review was afterwards filed by the company, at the hearing of which A. testified that he notified the company, at the time of such conveyance, of the existence of the mortgage, and was afterwards indicted for perjury in giving such testimony. Upon his trial, when the debt which was secured by the mortgage was still unpaid by the company, a stockholder of the company, who had been instrumental in procuring the indictment against A., was offered as a witness. *Held*, that the interest of such witness went to his credibility, and not to his competency.—Commonwealth v. Farley, Thacher, Cr. Cas. 654.

[j] (Mo. 1879) A witness is not rendered incompetent to testify in a murder trial by the fact the prosecuting officer has promised him that he will dismiss an indictment pending against him after he has testified.—State v. West, 69 Mo. 401, 33 Am. Rep. 506.

[k] (N. H. 1857) Acts 1855, § 4, providing for the suppression of intemperance, and that the officer, complainant, etc., may be examined as witnesses on the trial of the person arrested, as to any matters alleged in the complaint, does not render such persons competent witnesses, as they are competent upon general principles, not having any interest in the result of the proceedings.—State v. McGlynn, 34 N. H. 422.

[l] (N. Y. 1809) In criminal cases, the rule is that the witness is to be received, if the verdict in the cause in which he is produced cannot be given in evidence in an action in which he is a party. The interest which the witness may have in question is not the test, and it seems fit and proper that the rule should be applied to a case of forgery.—People v. Howell, 4 Johns. 296.

[m] (N. Y. 1845) The testimony of witnesses for the prosecution in a criminal case cannot be excluded, because they have contributed funds to carry it on, as such witnesses were not interested in the event of the trial, except in feeling, and that could only affect their credibility.—People v. Cunningham, 1 Denio, 524, 43 Am. Dec. 709.

[n] (N. C. 1800) On an indictment for perjury, a person who was convicted of the charge of assault and battery by the defendant's testimony is a competent witness.—State v. Hasset, 1 N. C. 139.

[o] (Pa. 1795) The bona fide indorser of a forged note, unless he has paid such note, is not a competent witness.—Respublica v. Ross, 2 Yeates, 1; Id., 2 Dall. 239, 1 L. Ed. 364.

[p] (Pa. 1798) In a criminal case, if circumstances be proved from which it is possible for the jury to assume facts amounting to guilt, the person against whom such circumstances have been proved cannot be received as a witness.—Pennsylvania v. Leach, Add. 352.

[q] (Pa. 1818) On trial of an indictment for selling spirituous liquors without license, a taxable resident of the city is a competent witness. It not appearing that he has been actually rated and taxed, the mere liability to assessment is not such an interest as would disqualify.—Commonwealth v. Baird, 4 Serg. & R. 141.

[r] (S. C. 1826) A witness in a criminal case is to be received, if he be not interested in the event of the suit, so that the verdict could be given in evidence in an action in which he was a party.—State v. Foster, 3 McCord, 442.

[s] (Va. 1843) On the trial of an indictment for perjury, the commonwealth offered as a witness a person against whom a civil action was pending, wherein the defendant in the indictment had been summoned as a witness for the opposite party. *Held*, that the witness so offered for the commonwealth had no such interest in the prosecution as to render him incompetent to testify.—Commonwealth v. Hart, 2 Rob. 819.

[t] (Wis. 1855) A person who has entered into a recognizance for appearance at court to answer to an indictment for seduction is not disqualified to be a witness for defendant at the trial on that ground.—Andrews v. State, 4 Wis. 385.

§ 404. Master of slave.

[a] The owner of a slave is a competent witness in a prosecution involving the life of the slave.

—(Ala. 1845) State v. Marshall, 8 Ala. 302; (1850) Spence v. The State, 17 Ala. 192; (Ark. 1854) Austin v. State, 14 Ark. 555; (Miss. 1841) Isham v. State, 7 Miss. (6 How.) 35; (N. C. 1856) State v. Jim, 48 N. C. 348.

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[b] (Ark. 1855) On trial of a slave for rape, the master of the slave is a competent witness in his behalf; his interest going to his credibility.—Pleasant v. State, 15 Ark. 624.

[c] (La. 1859) Slaves are prosecuted as persons, and their right to have all the testimony that may establish their innocence is superior to the principle which would exclude their owners on the ground of interest; and their testimony ought to be received, subject to the credibility which the jury may attach to it.—State v. Peter, 14 La. Ann. 521.

[d] (Tenn. 1839) A master is a competent witness for or against his slave, on his trial for an assault and battery with intent to commit murder in the first degree.—Elijah v. State, 20 Tenn. (1 Humph.) 102.

§ 405. Interest in reward.

[a] (U. S. 1830) It is no objection to the competency of a witness that a reward has been offered to be paid on conviction of the prisoner, to which witness may be entitled.—United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78].

[b] (Conn. 1791) A person who will be entitled to a premium upon conviction may nevertheless be a witness, unless there are other circumstances which exclude him.—State v. Bennet, 1 Root, 249.

[c] (Ill. 1846) On a trial for murder, a witness swore that he assisted in the arrest of the prisoner, that a reward was offered by the state and by other persons for the arrest and conviction of the murderer, that he had received the reward offered by the state, but had received nothing from the other persons, and had not expected to. *Held*, that he was a competent witness for the government.—Baxter v. People, 8 Ill. (3 Gilman) 368.

[d] (Mo. 1888) The fact that a witness is to receive a reward in the event of conviction may affect his credibility in the minds of the jury, but does not disqualify him as a witness.—State v. Rush, 95 Mo. 199, 8 S. W. 221.

§ 406. Person injured in general.

[a] (U. S. 1806) On the trial of an indictment for casting away and destroying a vessel with intent to prejudice the underwriters, the president of the incorporated insurance company, by whom the property was assured, although a stockholder, may be a witness to prove the handwriting of defendant to the manifest of the cargo, because the conviction of defendant would not be evidence in a suit on a policy against the company.—United States v. Johns, Fed. Cas. No. 15,481 [1 Wash. C. C. 363, 4 Dall. 412, 1 L. Ed. 888].

[b] (U. S. 1812) On an indictment for taking usury, the borrower is a competent witness for the prosecution, if he has paid the money and be not the informer.—United States v. Moxley, Fed. Cas. No. 15,830 [2 Cranch, C. C. 64].

[c] (U. S. 1812) The person defrauded is a competent witness for the prosecution, upon an indictment for the fraud.—United States v. Porter, Fed. Cas. No. 16,072 [2 Cranch, C. C. 60].

[d] (Ala. 1849) On the trial of an indictment for malicious mischief, under the fifth section of the fourth article of the Penal Code, the person whose property is injured is not a competent witness for the state.—Blackstone v. State, 15 Ala. 415.

[e] (Ala. 1877) On prosecution for obtaining money under false pretenses, the person defrauded is a competent witness for the state.—Sandy v. State, 60 Ala. 58.

[f] (Ark. 1857) In an indictment under Dig. c. 51, art. 4, § 8, for wounding an animal, the owner of the animal is a competent witness for the state, under chapter 52, § 176, notwithstanding the provision of the statute that damages shall be assessed in his favor for the injury to his property; his interest going to his credit, not to his competency.—Lemon v. State, 19 Ark. 171.

[g] (Conn. 1811) In an information on the statute against "lascivious carriage and behavior," the person toward whom such acts are committed is a competent witness to prove them.—Fowler v. State, 5 Day, 81.

[h] (Ga. 1850) The injured party is a competent witness under an indictment for forcible entry and detainer.—Kersh v. State, 24 Ga. 191.

[i] (Me. 1851) In a criminal prosecution under Rev. St. c. 162, § 13, for willfully destroying property, the party injured may be a witness for the state.—State v. Pike, 33 Me. 361.

[j] (N. C. 1805) One entitled to restitution of goods taken by forcible entry cannot be a witness.—State v. Fellows, 3 N. C. 340.

[k] (Ohio, 1816) In the prosecution for uttering and publishing counterfeit bank notes, the person whom it was alleged the prisoner intended to defraud was a competent witness, whether or not the record in the case would be evidence for him in an action against the prisoner to recover back the money paid for the note.—Ohio v. Woodruff, Tapp. 58.

[l] (S. C. 1792) The swindling act of 1791 forfeits double the value of the property to the party aggrieved, and he, therefore, is an incompetent witness in a prosecution under the act.—State v. Vaughan, 1 Bay, 282.

[m] (S. C. 1850) Where A. gave a receipt for money, and such receipt was altered, A. was a competent witness to prove the alteration.—State v. Floyd, 5 Strob. 58, 53 Am. Dec. 689.

§ 407. Owner of property stolen.

[a] (U. S. 1842) Under Act Cong. April 30, 1790, for stealing on the high seas, the owner of the property stolen is a competent witness.—United States v. Murphy, 41 U. S. (16 Pet.) 203, 10 L. Ed. 937.

[b] (Ala. 1875) The owner of stolen property is a competent witness against a party charged with having received it, knowing that it had been stolen.—Gassenheimer v. State, 52 Ala. 313.

[c] (Ala. 1875) The fact that, upon conviction of a person for theft, judgment must be rendered in favor of the owner of the property for its value, does not render such owner incompetent as a witness in the case.—Hall v. State, 53 Ala. 634.

[d] (Conn. 1826) In a prosecution for theft, the owner of the goods is a competent witness to prove the facts alleged in the information.—Salisbury v. State, 6 Conn. 101.

[e] (Mass. 1812) A person from whom goods have been stolen is a competent witness for the government, notwithstanding he will be entitled, on a conviction, to the restoration of the goods stolen, if they can be found, or to a satisfaction out of the future earnings of the convict, in case the goods be not restored, and also to a recompense out of the county treasury for his labors and expenses in the prosecution; and, when a party from whom goods were stolen was by law entitled to recover treble the value, he was always received as a competent witness against the offender.—Commonwealth v. Moulton, 9 Mass. 30.

[f] (N. H. 1843) Upon the trial of an indictment for larceny, the party injured is not a competent witness for the prosecution, if he is entitled to treble the value of the property stolen upon the conviction of the prisoner.—State v. Pray, 14 N. H. 464.

[g] (S. C. 1818) The owner of stolen bank bills is a competent witness on the prosecution for the stealing.—State v. Casados, 1 Nott & McC. 91.

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§ 408. Forgery.

[a] In forgery, the party whose instrument is alleged to be forged is a competent witness to prove the forgery.

—(U. S. 1827) United States v. Brown, Fed. Cas. No. 14,658 [3 Cranch, C. C. 268];

(Ala. 1828) Pope v. Nance, 1 Stew. 354, 18 Am. Dec. 60;

(La. 1811) Territory v. Barran, 1 Mart. (O. S.) 207; (1883) State v. Morgan, 35 La. Ann. 293;

(Me. 1841) State v. Shurtliff, 18 Me. (6 Shep.) 368;

(Mass. 1804) Commonwealth v. Hutchinson, 1 Mass. 7, 2 Am. Dec. 1; (1807) Same v. Snell, 3 Mass. 82; (1809) Same v. Waite, 5 Mass. 261; (1840) Same v. Peck, 42 Mass. (1 Metc.) 428;

(N. Y. 1826) People v. Dean, 6 Cow. 27;

(Ohio, 1835) Simmons v. State, 7 Ohio (7 Ham.) 116, pt. 1;

(Pa. 1784) Respublica v. Keating, 1 Dall. 110, 1 L. Ed. 59; (1793) Same v. Wright, 1 Yeates, 401; (1794) Pennsylvania v. Farrel, Add. 246; (1795) Respublica v. Ross, 2 Dall. 239, 1 L. Ed. 364;

(Vt. 1839) State v. Phelps, 11 Vt. 116, 34 Am. Dec. 672.

CONTRA, see

(U. S. 1834) United States v. Anderson, Fed. Cas. No. 14,452 [4 Cranch, C. C. 476];

(Conn. 1791) State v. Brunson, 1 Root, 307; (1791) Bacon v. Minor, Id. 258; (1793) State v. Blodget, Id. 534;

(S. C. 1833) State v. Whitten, 1 Hill, 100.

[b] (U. S. 1810) The drawee of a forged draft, who has paid the same, is a competent witness to support the prosecution.—United States v. Bates, Fed. Cas. No. 14,542 [2 Cranch, C. C. 1].

[c] (U. S. 1823) The person intended to be injured by a forgery, and the person whose name is forged, if they have not paid money upon the forged paper, are competent to prove the forgery.—United States v. Crandell, Fed. Cas. No. 14,884 [2 Cranch, C. C. 373].

[d] (U. S. 1885) The person, to the prejudice of whose right a forgery is averred to be, is a competent witness to prove the forgery. So, also, is the person whose receipt is averred to be forged.—United States v. Jackson, Fed. Cas. No. 15,454 [4 Cranch, C. C. 577].

[e] (Ala. 1870) On the trial of an indictment for forgery, the agent of a company to whom application has been made for payment of the forged demand against the company is a competent witness to prove his agency.—Manaway v. State, 44 Ala. 375.

[f] (Conn. 1791) On an information for forgery, the person to whom the forged instrument was passed may be a witness.—State v. Nettleton, 1 Root, 308.

[g] (Mass. 1804) A person whose name it is alleged has been forged is not a competent witness to prove the forgery, unless the instrument is produced at the trial.—Commonwealth v. Hutchinson, 1 Mass. 7, 2 Am. Dec. 1.

[h] (Mass. 1807) Where, on the trial for passing a forged instrument, the instrument forged has been secured to protect the offender, the person whose name is charged to have been forged, and who had seen and copied the instrument, was a competent witness to prove the forged instrument.—Commonwealth v. Snell, 3 Mass. 82.

[i] (Mass.) On the trial of an indictment for forgery, the party whose signature is alleged to be forged is a competent witness to prove the forgery, and also the destruction of the instrument alleged to be forged, although civil actions are pending against him to which his only defense may be the forgery of said instrument.—(1807) Commonwealth v. Snell, 3 Mass. 82; (1809) Same v. Waite, 5 Mass. 261; (1840) Same v. Peck, 42 Mass. (1 Metc.) 428.

[j] (Mass. 1828) Upon the trial of an indictment for forging and uttering a counterfeit bank bill, the cashier of the bank, from which such bill purported to be issued, is a competent witness to the forgery.—Commonwealth v. Read, Thacher, Cr. Cas. 180.

[k] (N. Y. 1809) On an indictment for forging a check in the name of B. on the bank, which check was passed to C., and sent by him to D. to receive the money, but before it came to the hands of C. the forgery was discovered, and the money regained by the bank, B., on being released by the bank, is a competent witness, for he is not answerable to C.; the bank having acted without his directions, and C.'s remedy being against the bank if they had unduly taken the money out of his possession. If the check should be good, B. is not an interested witness, because no consideration had passed between him and C., who must be considered as an original party to the instrument.—People v. Howell, 4 Johns. 296.

[l] (N. C. 1841) On trial of an indictment for forgery, the person whose name is charged to have been forged, and whose interest, supposing the instrument to be genuine, is affected by it either as an obligation or acquiescence, is not, while the instrument remains in force, a competent witness to prove the forgery.—State v. Stanton, 23 N. C. 424.

[m] (N. C. 1843) Judgment was obtained against A. and his surety, B. B. paid a part of the judgment, and took the constable's receipt, which he fraudulently altered, so as to make the sum larger. Afterwards A. settled with B., and repaid him what appeared by the receipt to have bene paid by B. *Held*, on an indictment against B. for the forgery, that A. was a competent witness.—State v. Bateman, 25 N. C. 474.

[n] (S. C. 1811) A man who was swindled out of the possession of a slave, which he had as an agent to sell for another, was an incompetent witness, on an indictment against the swindler for stealing the slave, in order to prove that a bill of sale, purporting to be signed by the owner of the slave and transferring the property and possession to the swindler, was a forgery, and not made by such witness.—State v. Hope, 2 Brev. 463.

[o] (Vt. 1801) The promisor of a note, alleged to have been forged, cannot be a witness in support of the indictment for forgery, being "a party aggrieved," under the statute for "the punishment of high crimes and misdemeanors."—State v. A. W., 1 Tyler, 260.

§ 409. Perjury.

[a] (U. S. 1814) A defendant in equity is a competent witness upon an indictment against the plaintiff in equity for perjury in his affidavit made to procure an injunction.—United States v. Burford, Fed. Cas. No. 14,685 [2 Cranch, C. C. 102].

[b] (N. C. 1803) On the trial of one accused of perjury, a person who was interested in proving defendant guilty, because he would thereby exclude his testimony against him in a civil suit then pending, was incompetent to testify, as was also the adverse party in the civil suit, whose interest it was to secure the testimony of defendant.—State v. Hamilton, 3 N. C. 288.

[c] (S. C. 1824) One who had been charged with a crime by the oath of defendant was a competent witness against him on his trial for perjury.—State v. McKennan, Harp. 302.

[d] (Vt. 1797) A party to a suit is not disqualified as a witness to prove perjury therein, if a conviction would not entitle him to a new trial, or to damages as a party injured.—State v. Bishop, 1 D. Chip. 120.

§ 410. Prosecutor.

[a] (Ala. 1839) In an indictment for malicious mischief, the prosecutor, whose property has been injured, is a competent witness for the prosecution.—State v. Truss, 9 Port. 126.

[b] (Ala. 1877) On trial for trespass after warning, under Code 1876, §§ 4419, 4420, the prosecuting witness is a competent witness for the state.—Daniels v. State, 60 Ala. 56.

[c] (Ala. 1882) The prosecutor, in a trial for trespass after warning, is not incompetent as a witness because he is entitled to the fine in case of conviction.—Bohannon v. State, 73 Ala. 47.

[d] (Iowa, 1843) A private prosecutor is a competent witness for the government, although, on conviction of defendant, he will be entitled to recover of him double the amount stolen from the prosecutor, and although, on an acquittal of defendant, the prosecutor may be liable for the costs.—United States v. Everest, 1 Morris, 206.

[e] (Me. 1842) A person, by appearing voluntarily before the grand jury as a witness in support of a complaint, is not therefore to be deemed the complainant, but it must appear of record.—State v. Bailey, 21 Me. (8 Shep.) 62.

[f] (N. C. 1798) In an indictment for perjury in swearing to attendance as a witness, the prosecutor is a competent witness, though he is the person liable to pay for the attendance to which the defendant had sworn.—State v. Wyatt, 3 N. C. 56.

[g] (S. C. 1858) In an indictment for perjury, the prosecutor, unless he has a direct, certain, and immediate interest in the record, is a competent witness.—State v. Farrow, 10 Rich. Law, 165.

[h] (S. C. 1866) The fact that the prosecutor on the trial of an indictment for larceny is a party to a civil suit which is pending for an alleged trespass in taking the stolen goods does not make him incompetent as a witness.—State v. McGrew, 13 Rich. Law, 316.

§ 411. Interest in fine or penalty in general.

Statutory removal of incompetency, see post, § 529.

Transfer, release, or extinguishment of interest, see post, § 440.

[a] (U. S. 1807) The owner of goods stolen by a slave is not a competent witness for the prosecution, where it appears that he is entitled to one-half of the fine.—United States v. Rhodes, Fed. Cas. No. 16,152 [1 Cranch, C. C. 447].

[b] (U. S. 1808) Citizens of a municipal corporation are competent witnesses in an action of debt for a penalty for violation of a by-law.—Alexandria v. Brockett, Fed. Cas. No. 181 [1 Cranch, C. C. 505].

[c] (Ala. 1869) In a prosecution for malicious injury to animals, if the fine for the offense will go to the party injured, he is an interested witness, and cannot be examined on behalf of the state, if objection be made by the accused.—Northcot v. State, 43 Ala. 330.

[d] (Ga. 1854) Where the interest of the citizens of a county in the event of a suit is of the same kind which the citizens of a county have in the result of an indictment of an offense punishable by fine, they are not disqualified by such interest as witnesses in that suit.—Justices of Inferior Court of Pike County v. Griffin & W. P. Plank Road Co., 15 Ga. 39.

[e] (Ill. 1820) A person whose name is forged is a competent witness to prove the forgery, although upon conviction he receives one-half of the fine imposed.—Noble v. People, 1 Ill. (Breese) 54.

[f] (Ill. 1865) A wharfmaster, entitled to a certain percentage of wharfage fees collected, is not an incompetent witness on the ground of interest in a suit by the city to recover the penalty imposed by its ordinances on the owners, etc., of steamboats neglecting to pay wharfage fees. The penalty cannot be regarded as wharfage fees.—City of Beardstown v. Moody, 36 Ill. 347.

[g] (Ky. 1831) If an attorney has a per cent. on fines collected, he is an incompetent witness in any prosecution to inflict such fine.—Commonwealth v. Moore, 28 Ky. (5 J. J. Marsh.) 655.

[h] (Me. 1843) The inhabitants of the town wherein the offense is alleged to have been committed are competent witnesses to sustain the prosecution, on the trial of an indictment against an inhabitant of the same town for being a common seller of wine, brandy, rum, and other strong liquors without license, contrary to the provisions of Rev. St. c. 36, § 17, although the town would be entitled to the penalty incurred.—State v. Stuart, 23 Me. (10 Shep.) 111.

[i] (Me. 1852) Inhabitants of a town, to which the law appropriates a penalty which may be recovered in a criminal case, are not therefore incompetent witnesses for the state in such case.—State v. Woodward, 34 Me. 293.

[j] (N. Y. 1812) In a qui tam action to recover a penalty given by the act concerning slaves, a member of a society for the manumission of slaves was a competent witness, he being under no legal obligation to contribute to the expense of the suit and having no interest in the event, though he testify on his voir dire that if plaintiff should fail he thought he should, as a member of the society, if asked, contribute to compensate plaintiff.—Gilpin v. Vincent, 9 Johns. 219.

[k] (Pa. 1856) An agreement between the informer and the witness to share the money to be recovered in a qui tam action renders him incompetent to testify in the suit, but his competency may be restored by a rescission of the contract before suit brought. If rescinded after suit brought, his liability for costs would still render him incompetent.—Commonwealth v. Ohio & P. R. Co., 1 Grant, Cas. 329.

§ 412. Informer or complainant.

[a] (U. S. 1802) In the District of Columbia, the informer is not entitled to one-half of the penalty imposed by Acts Md. 1777, c. 12, § 9, on a minister for marrying a woman under 16 years of age without the consent of her parents or guardian, and is therefore a competent witness in such action.—United States v. McCormick, Fed. Cas. No. 15,662 [1 Cranch, C. C. 106].

[b] (U. S. 1802) Upon an indictment for retailing spirituous liquors, where the informer is not entitled to any part of the penalty, he is a competent witness.—United States v. Voss, Fed. Cas. No. 16,628 [1 Cranch, C. C. 101].

[c] (U. S.) An informer is a competent witness, although he may receive a part of the penalty, though this is not strictly the rule of the common law. The law is, however, now fully established, and is founded on necessity and policy.—(1842) United States v. Patterson, Fed. Cas. No. 16,009 [3 McLean, 53]; (1843) Id., 16,010 [3 McLean, 299].

[d] (U. S. 1856) An inspector under Act Aug. 30, 1852, c. 106, §§ 3–5 (10 Stat. 62), requiring steam vessels carrying passengers to be provided with certain safety appliances, although he

may be the informer, is not entitled to any part of the penalty (as he would have been under the act to which this is an addition), and is therefore not disqualified by interest from testifying in behalf of the libelants.—United States v. The Thomas Swan, Fed. Cas. No. 16,480.

[e] (Ala. 1849) A witness, sworn in support of an indictment founded on a statute which, in case of conviction, gives one-half the penalty to the informer, is not to be considered the informer, from the mere fact that he is the only witness in the case.—Williamson v. State, 16 Ala. 431.

[f] (Conn. 1786) Where the prosecutor in a qui tam action for breach of the peace by assault and battery committed on him demands personal damages, he is incompetent as a witness in the action.—Bill v. Scott, Kirby, 62.

[g] (Conn. 1792) In an action on the statute for passing a counterfeit certificate, the prosecutor can testify only touching defendant's passing the certificate to him.—Bradley v. Couch, 1 Root, 361.

[h] (Conn. 1792) On a qui tam prosecution for larceny, the prosecutor may be admitted to testify to the loss of the goods and the identity of them.—Gilbert v. Steadman, 1 Root, 403.

[i] (Me. 1848) Where a declaration in an action to recover a penalty alleges that the plaintiffs, being the inhabitants of a town, prosecute the action by certain persons named, one of the persons so named does not thereby become a party to the suit, and is not in consequence thereof rendered incompetent as a witness; and, even if he were to be considered a party, he is still made a competent witness in such case by Laws 1846, c. 205, § 6.—Inhabitants of New Gloucester v. Bridgham, 28 Me. (15 Shep.) 60.

[j] (Miss. 1855) The rule which excludes a prosecutor or informer from testifying in a case when the whole or part of the penalty is given by the statute to him, and thus rendering him interested in the event of the suit, has several exceptions, to wit: (1) When the statute cannot be enforced without the aid of such a witness. (2) In cases of necessity, when no other evidence can reasonably be expected. (3) Where, though a person is to receive a reward on the conviction of an offender, it can be inferred from the language or the professed objects of the statute which gives the penalty to the informer that it was intended to make him a competent witness.—Murphy v. State, 28 Miss. (6 Cushm.) 637.

[k] (Pa. 1831) A prosecutor for the penalties imposed by Act April 22, 1794, entitled "An act for the prevention of vice and immorality," is not a competent witness, and cannot become such by an assignment of the interest he may have in the penalties.—Commonwealth v. Hargesheimer, 1 Ashm. 413.

[l] (Pa. 1847) Act March 16, 1848, provides that any person who shall disturb a religious meeting shall be liable to a fine, to be collected for the benefit of the state. *Held* that, since no part of the fine imposed was payable to the complainant in a prosecution under such statute, he was a competent witness for the state.—Commonwealth v. Cane, 2 Pars. Eq. Cas. 265.

[m] (S. C. 1806) An informer, who is to have the whole or any part of the penalty imposed by a penal statute, cannot be a witness in any action or proceeding to recover the penalty.—City of Charleston v. Sibley, 2 Brev. 34.

§ 413. Officer.

[a] (U. S. 1896) An officer of the United States, who carries on a correspondence with one suspected of using the mails for illegal purposes in order to obtain evidence on which to base a prosecution, is not thereby disqualified from testifying in respect to an offense committed by defendant in the course of such correspondence.—Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023, following Grimm v. United States (1895) 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550.

[b] (Ky. 1846) An officer, whose fees depend on the contingency of the conviction of one accused, is an incompetent witness on his trial.—Bridgeford v. City of Lexington, 46 Ky. (7 B. Mon.) 47.

[c] (Me. 1838) The militia acts of 1834 and 1837, making the captain of a company a competent witness in an action for fine or forfeiture by the clerk, does not prevent him from rendering himself incompetent by the assumption of interest not imposed by his official station.—Bean v. Lane, 15 Me. (3 Shep.) 190.

[d] (Mass. 1823) Where an officer would be liable as a trespasser for arresting a prisoner, if arrested wrongfully, the objection to the officer as a witness on the trial of the prisoner goes only to his credibility, and not to his competency.—Commonwealth v. Merrill, Thacher, Cr. Cas. 1.

[e] (Mass. 1826) The clerk of a militia company, being interested in the fine to be imposed in a suit by him against a private for neglect of militia duty, is incompetent to testify to any other fact than that he gave notice to the private to appear for duty, as St. 1809, c. 108, § 18, does not allow him to testify to other facts.—Commonwealth v. Paull, 21 Mass. (4 Pick.) 251.

[f] (Mass. 1831) The commander of a company has no interest in the money collected for fines, and he may therefore be a witness on a prosecution for a fine.—Burt v. Dimmock, 28 Mass. (11 Pick.) 355.

[g] (N. H. 1835) The fact that three-fourths of a military fine is by the statute to be paid over to the captain, to be expended in defraying the necessary expenses of the company, does not constitute such an interest as to disqualify him as a witness in a prosecution for such fine.—State v. Wilson, 7 N. H. 543.

[h] (Ohio, 1849) In a suit in the name of the state against an individual to recover a penalty incurred by a violation of the canal law, a collector of tolls who has instituted the prosecution is a competent witness, notwithstanding he may be liable in damages to the party aggrieved where he has commenced the suit without probable cause.—Smith v. State, 18 Ohio, 89.

§ 414. Liability for costs.

[a] (U. S. 1806) A mere honorary obligation to indemnify a prosecutor, who is liable for costs, is not a sufficient interest to exclude the testimony of the witness.—United States v. Lyles, Fed. Cas. No. 15,645 [1 Cranch, C. C. 322].

[b] (U. S. 1809) The prosecutor whose name is indorsed on an indictment for a misdemeanor is not a competent witness for the prosecution, where the prosecutor is made liable by statute for costs, where the defendant is not found guilty.—United States v. Birch, Fed. Cas. No. 14,595 [1 Cranch, C. C. 571].

[c] (Ky. 1835) The fact that a witness in a criminal case feels himself bound to save the prosecutor harmless from any costs incurred goes to his credit, but not to his competency.—Commonwealth v. Gore, 33 Ky. (3 Dana) 474.

[d] (Miss. 1818) A prosecutor in an indictment is a competent witness for the state upon the trial, though liable for costs if the prosecution be found frivolous or malicious.—State v. Blennerhassett, Walk. 7.

[e] (Va. 1823) The prosecutor in an information for assault and battery who is liable for the costs is a competent witness for the commonwealth.—Baker v. Commonwealth, 2 Va. Cas. 353.

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[f] (Va. 1834) On an indictment for an assault and battery, on the voluntary information of the person assaulted, the informer and prosecutor is a competent witness, though liable for costs, in case defendant is acquitted.—Gilliam v. Commonwealth, 4 Leigh, 688.

13. HUSBAND OR WIFE OF PARTY OR OTHER PERSON INTERESTED AND WIDOW OF DECEASED.

IN GENERAL, § 415.
NATURE AND EXTENT OF INTEREST IN GENERAL, § 416.
INTEREST IN PROPERTY, § 417.
HUSBAND OF LEGATEE OR HEIR, § 418.
HUSBAND OR WIFE OF PARTY TO BILL OR NOTE, § 419.
CRIMINAL PROSECUTIONS, § 420.
—— HUSBAND OR WIFE OF CODEFENDANT IN GENERAL, § 421.
—— HUSBAND OR WIFE OF ACCOMPLICE, ACCESSORY, OR PRINCIPAL, § 422.
—— SEPARATE TRIALS OF DEFENDANTS JOINTLY INDICTED, § 423.
WIDOW, § 424.

Competency in actions involving joint or separate interests, see ante, §§ 142–152.
—— *of husband and wife in general, see* ante, §§ 124–182.
Determination of liability, see post, § 490.
Privileged communications, see post, §§ 734–743.
Proof as to damages, see ante, § 214.
Statutory removal of incompetency, see post, § 521.
Transfer, release, or extinguishment of interest, see post, § 460.

§ 415. In general.

[a] Where a husband or wife is an incompetent witness by reason of interest, the other is also incompetent.
—(Ky. 1856) Smead v. Williamson, 55 Ky. (16 B. Mon.) 492;
(Mass. 1824) Griffin v. Brown, 19 Mass. (2 Pick.) 304;
(Mo. 1885) Swift v. Martin, 19 Mo. App. 488;
(S. C. 1853) Vandiver v. Glaspy, 7 Rich. Law, 14;
(Tex. 1873) Bell v. Byington, 37 Tex. 510.

[b] (Ky. 1867) A husband's testimony against his own interest and against the interest of his divorced wife is competent if it divulges no communication between them during coverture.—Storms v. Storms, 66 Ky. (3 Bush) 77.

[c] (Mo. 1862) The wife of one of the defendants is not a competent witness for the other defendants who have joined in the defense.—Tomlinson v. Lynch, 32 Mo. 160.

[d] (N. H. 1849) The testimony of the wife of one defendant in equity is not admissible upon a question of fact, in which all the defendants are jointly interested.—Craig v. Kittredge, 20 N. H. 169.

[e] (Pa. 1860) An executor being an incompetent witness in a suit in which he is a party, notwithstanding he has no interest, his wife is also incompetent; husband and wife being so far identical in interest that when one is a party to the record the other is not competent.—Harwood v. Steel, 4 Phila. 88.

[f] (Tex. 1884) A wife need not be a party to a suit wherein her husband is a party, in order that she shall be incompetent, under the statute, to testify. If she has with him a community interest in the subject-matter of the litigation, she is incompetent.—Simpson v. Brotherton, 62 Tex. 170.

[g] (Vt. 1847) A married woman can only be admitted as a witness in a case when her husband would be a competent witness in the same case.—Abbott v. Clark, 19 Vt. 444.

§ 416. Nature and extent of interest in general.

[a] (Ala. 1841) It is no objection to a witness, in a trial of the right of property between an attaching creditor and a claimant, that he married the widow of the coexecutor of the claimant, unless it be shown that her former husband wasted the estate of his testator, and that the witness obtained by the marriage an estate chargeable with such devastavit.—Harrell v. Floyd, 3 Ala. 16.

[b] (Ala. 1845) When, by the terms of a written contract, money is to be paid to one as the agent of a married woman, the husband is not a competent witness to sustain the contract, in a suit by the agent to enforce payment.—Wier v. Buford, 8 Ala. 134.

[c] (Ill. 1890) The wife of a person who had given bonds for costs as next friend, in an action of trespass vi et armis, is a competent witness for plaintiff.—Belk v. Cooper, 34 Ill. App. 649.

[d] (Ill. 1893) In an action to determine the rights of the parties to wall space for advertising under contracts from the same person, who is not a party to the action, the wife of such person is a competent witness.—R. J. Gunning Co. v. Cusack, 50 Ill. App. 290.

[e] (La. 1888) A wife who transfers a judgment, selling all her rights to it, and to all suits arising from it, warrants the existence of the debt, and has such an interest in a suit to revive said judgment as renders her husband incompetent as a witness, under Rev. Civ. Code, art. 2281, making a husband an incompetent witness when the wife has an interest in the suit.—Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528.

[f] (Mass. 1839) Although the effect of a husband's testimony may be to increase a fund given to trustees for the benefit of his wife, and the income of which is to be paid over to her for her sole use, and upon her own receipts under her hand, he is not therefore an incompetent witness, his interest being contingent.—Dyer v. Homer, 39 Mass. (22 Pick.) 253.

[g] (Miss. 1849) In an action by a bank, a man whose wife is a stockholder in the bank is not a competent witness for the bank.—Routh v. Agricultural Bank, 20 Miss. (12 Smedes & M.) 161.

[h] (N. J. 1840) A wife may not testify in a suit in which the rights of her husband, though not a party, would be concluded by any verdict that could be rendered therein.—Stewart v. Johnson, 18 N. J. Law (3 Har.) 87.

[i] (N. J. 1855) At the trial of an action brought by a copartnership, a witness is incompetent to testify whose wife has money invested in the business of the firm.—Jackson v. Miller, 25 N. J. Law (1 Dutch.) 90.

[j] (N. Y. 1854) The wife of the assignor of a claim is a competent witness for the assignee.—Prince v. Down, 2 E. D. Smith, 525.

[k] (Pa. 1890) An executor's executor may establish his decedent's account from declarations of the two decedents, though the wife of such living executor is administratrix d. b. n. of the original testator and interested in the estate.—In re Law's Estate, 8 Pa. Co. Ct. R. 296.

[l] (Tex. 1866) The testimony of a wife is not admissible when her husband has a contingent interest in the result of the suit favorable to the party for whom her testimony is offered, e. g., when the husband's fees as attorney depend upon it.—Whitehead v. Foley, 28 Tex. 268.

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[m] (Vt. 1857) In a suit against an intestate estate, the testimony of a married woman, who is an heir at law, and whose husband has signed a bond with the administrator to prosecute the suit on appeal, is not inadmissible on account of the interest of her husband, under the present law, no confidence between husband and wife appearing to be violated.—Rutland & B. R. Co. v. Lincoln's Estate, 29 Vt. (3 Williams) 206.

[n] (Vt. 1882) Where one not a party to a suit is interested in its result, his wife cannot testify; and he is so interested if the judgment can be used for or against him in another case to which he may be made a party.—Labaree v. Wood, 54 Vt. 452.

[o] (Va. 1891) The fact that a bond and trust deed have been assigned to the wife of the grantor renders the latter incompetent as a witness in an action by creditors to set aside the conveyance as fraudulent.—Thornton v. Gaar, 87 Va. 315, 12 S. E. 753.

[p] (Va. 1891) The husband's interest in a suit by his creditors to set aside a deed of trust from him for his wife's benefit renders the wife incompetent as a witness.—De Farges v. Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659.

§ 417. Interest in property.

[a] (U. S. 1844) On a motion to dismiss an ejectment, on the ground that the lessor of plaintiff was dead at the time of its institution, the wife is not a competent witness to prove that her husband is living.—Gilleland v. Martin, Fed. Cas. No. 5,433 [3 McLean, 490].

[b] (Ala. 1843) Where the claimant of property attached is the trustee of a wife, the husband is not a competent witness for the claimant.—Hall v. Dargan, 4 Ala. 696.

[c] (Ala. 1845) The wife of defendant in execution is a competent witness for the claimant, on a trial of right of property under the statutes.—Hemphill v. Townsend, 7 Ala. 853.

[d] (Ark. 1860) The wife of a grantor in a deed for a valuable consideration with general warranty is an incompetent witness to sustain the title of the grantee.—Leach v. Fowler's Devisees, 22 Ark. 143.

[e] (Cal. 1863) A. and B., married women, sole traders, each brought suits against a sheriff for seizing their property on execution against their husbands, who had been partners, and all parties agreed that B.'s suit should be determined by the result of A.'s. *Held*, that B.'s husband was admissible as a witness in A.'s suit, she calling him, his interest being adverse to hers.—Abrams v. Howard, 23 Cal. 388.

[f] (Ga. 1860) A husband is not a competent witness to testify in respect to the separate estate of his wife, when she is the direct beneficiary of the suit, although she is not a party to the record.—Cobb v. Edmondson, 30 Ga. 30.

[g] (Ill. 1878) In a suit for the partition of lands, in which the question of advancements made by the common ancestor was involved, *held*, that the clause of a statute which inhibited parties in interest or of record in such cases from becoming witnesses on their own motion had no application; and that, as the litigation concerned the separate property of married women in a case where they might properly be witnesses, their husbands were also competent witnesses in their behalf.—Pigg v. Carroll, 89 Ill. 205.

[h] (Ky. 1842) A feme covert has no legal interest in giving her husband an estate for life rather than a fee simple, and is a competent witness to establish a limitation in favor of her own children.—Knight v. Donahoo's Heirs, 42 Ky. (3 B. Mon.) 277.

[i] (La. 1847) Where a party to a petitory action is in joint possession of the property with a wife, whose husband ships and controls the crops, the latter is not a good witness for such party.—Beard v. Morancy, 2 La. Ann. 347.

[j] (Md. 1790) In ejectment, the wife of plaintiff's father is a competent witness to prove that her husband destroyed his father's will.—Wilmot's Lessee v. Talbot, 3 Har. & McH. 2, 1 Am. Dec. 374.

[k] (Md. 1824) In an action of replevin brought by A. against B. to recover two slaves held by B. under a bill of sale from C., the wife of C. is an incompetent witness to prove title in C. at the time of the execution of the bill of sale.—Corse v. Patterson, 6 Har. & J. 153.

[l] (N. H. 1848) On the trial of an issue between plaintiff and a trustee, the wife of the debtor is not a competent witness for plaintiff.—Coburn v. Mellen, 19 N. H. 198.

[m] (N. Y. 1809) A feme covert, who has executed a deed with her husband, is a competent witness to prove that the deed has been antedated; for, although antedated, an acknowledgment made by her at any time would bar her right to dower, and, if not acknowledged, her signing is no bar in New York, so that in neither way is she interested.—Jackson v. Bard, 4 Johns. 230, 4 Am. Dec. 267.

[n] (N. Y. 1832) The contingent right of the wife, during the life of her husband, to dower in land to which he never had the legal title, is not such an interest as to disqualify her as a witness, in a suit by the assignee of the husband's right under a contract to convey, for a specific performance of such contract.—Town v. Needham, 3 Paige, 545, 24 Am. Dec. 246.

[o] (N. C. 1799) The husband of the widow of the lessor of plaintiff's ancestor may be a witness for plaintiff.—Beatty's Heirs v. ——, 1 N. C. 104.

[p] (Pa. 1827) A tenant's wife is not a witness for the defendant in ejectment, where such tenant is in possession of the premises, and a general defense has been entered.—Pipher v. Lodge, 16 Serg. & R. 214.

[q] (Pa. 1863) Where property claimed by a wife is attached for the debt of her husband, he is not a competent witness for the garnishee on the trial of the attachment.—Gross v. Reddig, 45 Pa. (9 Wright) 406.

[r] (S. C. 1841) The wife of a tenant is a competent witness between the landlord and a third person, where such tenant is a competent witness.—Seigling v. Main, 1 McMul. 252.

[s] (Vt. 1892) In trover for certain hay, where the testimony of a man and his wife tends to show that the hay in question belonged to the wife, and that defendant fed it to her stock by her direction, the wife is a party in interest, and hence her husband is an incompetent witness.—Banister v. Ovitt, 64 Vt. 580, 24 Atl. 1117.

[t] (Va. 1806) In trover by R. against B. for goods which had been lent by B. to the wife of C., and conveyed by C. to R., the wife of C. is a competent witness, since in suits in which the husband is not immediately and certainly interested, but may be so eventually, the wife is a competent witness.—Baring v. Reeder, 1 Hen. & M. 154.

[u] (Va. 1836) Land, being subject to two successive mortgages, the first being unrecorded, was sold under the provisions of the second mortgage, the second mortgagee becoming the purchaser. In a proceeding by the first mortgagee against the mortgagor and second mortgagee to enforce his mortgage, the mortgagor's wife is not a competent witness to prove notice of the first mortgage to the sec-

end mortgagee.—Sitlington v. Brown, 7 Leigh, 271.

[v] (Va. 1894) A woman whose husband is tenant by curtesy initiate of her property cannot testify in a suit in which his interest in said property is involved.—Ginter v. Breeden, 90 Va. 565, 19 S. E. 656.

§ 418. Husband of legatee or heir.

[a] (U. S. 1886) In a suit by the receiver of a national bank against husband and wife jointly, to reach assets in the hands of the husband as executor of a deceased shareholder, and, on failure of such assets, to reach the interest of the wife as residuary legatee, such wife is the real party defendant in interest, and, under the laws of Vermont, the husband is not a competent witness.—Witters v. Sowles (C. C.) 28 Fed. 121.

[b] (Ala. 1859) The husband of a distributee who would gain by setting aside the will is not a competent witness against it.—Walker v. Walker's Ex'r, 34 Ala. 469.

[c] (Cal. 1859) The husband of an heiress is incompetent as a witness for the administrator in a foreclosure suit on a mortgage to the testator.—Lisman v. Early, 12 Cal. 282.

[d] (Conn. 1831) The defendant, in an action for the diversion of a water course by means of a dam on land occupied by him, offered as a witness, to establish his right, the husband of one of the heirs of A. It appeared that the land on which the dam was erected, and the water used, was held by B., the widow of A., as tenant in dower, and that the witness, if living at the death of B., would be entitled to a distributive share in such land. *Held*, that he was a competent witness, having no vested interest in the land.—Adams v. Butts, 9 Conn. 79.

[e] (Ga. 1860) In a suit by a distributeee against his ancestor's administrator to recover his share of property of the estate purchased by the administrator at his own sale, the husband of another distributee is a competent witness.—Shine v. Redwine, 30 Ga. 780.

[f] (Ind. 1861) In a suit between A. and B. relating to the boundaries of their adjoining lots, bought of C., a common grantor, B. filed a counterclaim, making the heirs of C. parties, alleging a mistake in the description in his deed, and asking to have it reformed, or for a proper rebatement of the purchase money by the heirs of C. A. offered D., the husband of one of C.'s heirs, as a witness in the suit. *Held* that, as between A. and B., D. was a competent witness, though he might not be so between B. and the heirs of C.—Charles v. Cones, 16 Ind. 492.

[g] (Md. 1856) The husband of a daughter of an intestate whose estate is not shown to be solvent is a competent witness in favor of the estate without a release.—Mitchell v. Clagett, 9 Md. 42.

[h] (Pa. 1791) In a suit against executors for money devised to plaintiff, defendants gave in evidence an agreement signed by the children and devisees referring the division to arbitrators, and gave evidence of an acceptance of the award. Plaintiff contended that the arbitrators had agreed on a prior award which was materially variant from the one shown, and that plaintiff and F., who had married a daughter of the testator, understanding that the arbitrators were about to reconsider the award, had revoked their authority. *Held*, that F. was a competent witness, as, not being directly interested in the event in the sense that the verdict could be used against him, his interest went to his credibility and not to his competency.—Cornogg v. Abraham, 1 Yeates, 84.

[i] (Pa. 1869) On the trial of an issue between the administrator and a party to whom the intestate has assigned bonds, to decide whether such assignments were delivered during the lifetime of the intestate, the husbands of daughters of the intestate are not competent witnesses, because of the interest of the daughters in the result.—Pringle v. Pringle, 59 Pa. (9 P. F. Smith) 281.

[j] (Pa. 1878) At a hearing on an administration account, the husband of an exceptant testified before and after objection made. *Held*, that his testimony after objection was incompetent.—In re Bierly's Estate, *81 Pa. (32 P. F. Smith) 419.

[k] (S. C. 1837) Where a tenant for life of slaves loaned them to her son, and, after her death, the residue of her property was divided between her son and a daughter, *held*, on a bill by the remainderman to recover the slaves specifically of the son, that the husband of the daughter was a competent witness to prove the identity of the slaves, although, in case of a failure of complainant to prove their identity, and of defendant to prove that they had perished, the witness might be liable to contribute to their value, on the estate of the tenant for life being held liable.—Horry v. Glover, 2 Hill, Eq. 515.

[l] (Tex. 1859) Where the wife is a distributee, the husband is not a competent witness for the administrator in an action against him.—Gilkey v. Peeler, 22 Tex. 663.

[m] (Va. 1889) The husband of a distributee of an estate is incompetent to testify on his wife's behalf, in a suit involving the settlement of the administration accounts to which he and his wife are parties, as to a question of the allowance of disbursements made by the administratrix, as the wife would be directly benefited by its disallowance.—Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817.

§ 419. Husband or wife of party to bill or note.

[a] (Ill. 1889) In a suit against the surety on a note, where the defense is payment, the maker is directly interested in the event, and his wife is therefore incompetent to testify either for or against his interest, notwithstanding he is not a party to the suit.—Craig v. Miller, 34 Ill. App. 325, affirmed (1890) 133 Ill. 300, 24 N. E. 431.

[b] (Ill. 1890) In an action against one of two joint makers of a note, where the defense is payment by the other maker, the wife of such other maker is not a competent witness, since her husband is directly interested in the result of the action.—Craig v. Miller, 133 Ill. 300, 24 N. E. 431, limiting Lincoln Ave. & Niles Center Gravel-Road Co. v. Madans (1882) 102 Ill. 417.

[c] (Ill. 1894) In an action on a note by an assignee, where defendant denies its execution, the wife of the assignor and payee is not a competent witness for plaintiff to prove the genuineness of the note.—Woolverton v. Sumner, 53 Ill. App. 115, following Craig v. Miller (1890) 133 Ill. 300, 24 N. E. 431.

[d] (Ind. 1878) The assignor's wife is a competent witness for the assignee in his action against the maker of a note to recover thereon, and to foreclose a mortgage given to secure it, where no question is raised as to the assignment.—Morgan v. Hyatt, 62 Ind. 560.

[e] (Md. 1832) In an action on the special guaranty of a note, brought by the payee of the note against the guarantor, the wife of the maker is not a competent witness to prove the note void for usury in its inception, without a sufficient release.—Thomas v. Catheral, 5 Gill & J. 23.

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[f] (Mass. 1814) In an action on a note given to a wife when she was sole, and indorsed by her husband, she is admissible to prove payment before indorsement.—Fitch v. Hill, 11 Mass. 286.

[g] (N. Y. 1854) In an action by the holder on a note transferred after maturity, the payee is a competent witness for plaintiff, though there is no evidence that he paid value for the note, the presumption being that he did; and, therefore, in such a case, the wife of the payee is competent to testify for plaintiff.—Seeley v. Engell, 17 Barb. 530.

[h] (N. Y. 1859) A person offered as a witness for defendant was rejected on the ground that defendant had signed the notes, on which the action was brought, as surety for the witness' wife, who was not joined in the suit, and, if defendant should succeed, the record would be evidence in favor of the wife in an action to charge her. *Held*, that the witness offered was competent, notwithstanding his relation to the principal debtor, though he would not have been competent had she been a party.—Deck v. Johnson, 30 Barb. 283.

[i] (Vt. 1883) The wife of the payee of a note which has been transferred may testify in behalf of the maker in a suit brought by the holder, her testimony involving no breach of marital confidence, and it not appearing that her husband has any interest in the event of the suit.—Armstrong v. Noble, 55 Vt. 428.

§ 420. Criminal prosecutions.

[a] (U. S. 1806) The wife of one whose goods are stolen is not a competent witness for the prosecution unless the husband has released to the United States his share of the fine.—United States v. Shorter, Fed. Cas. No. 16,283 [1 Cranch, C. C. 315].

[b] (Ala. 1877) The wife of one who had been charged with the murder for which defendant alone was indicted and tried is competent to testify as to facts exculpatory of her husband, whom the defense seeks to prove the guilty agent in the murder.—Fincher v. State, 58 Ala. 215.

[c] (Ark. 1894) Where two persons are charged, in separate indictments, with the same murder, and it does not appear which is charged as principal, or that a conspiracy was formed by them to commit the murder, the wife of one is a competent witness for the other, unless her testimony tends directly to acquit her husband.—Gill v. State, 59 Ark. 422, 27 S. W. 598.

[d] (Ind. 1826) On the trial of an indictment against A. for receiving goods knowing them to be stolen, the wife of C. was offered as a witness for the prosecution. The evidence was objected to on the ground that C. had been charged on affidavit before a justice with stealing the same goods before A. was accused of receiving them; that the charge still existed; that the officers of justice were in pursuit of C., and that the witness had frequently expressed fears that C. would be taken and convicted of larceny. *Held*, that the objection was insufficient.—Redman v. State, 1 Blackf. 29.

[e] (N. Y. 1860) The wife of one who is himself a competent witness is competent.—Wixson v. People, 5 Parker, Cr. R. 119.

[f] (Pa. 1871) The evidence of the prosecutor's wife is admissible to prove a defense.—Commonwealth v. Paterson, 8 Phila. 609.

[g] (R. I. 1860) The wife of one who prosecutes criminally for an assault and battery committed on her person is a competent witness to sustain the complaint, notwithstanding her husband has entered into a recognizance, as required by statute, to pay costs in the event that the prosecution fails.—State v. Borden, 6 R. I. 495.

§ 421. —— Husband or wife of codefendant in general.

[a] On trial of several defendants jointly, the wife of one is not a competent witness for the others.

—(Ala. 1876) Childs v. State, 55 Ala. 25; (1894) Holley v. State, 105 Ala. 100, 17 South. 102;

(Ark. 1881) Casey v. State, 37 Ark. 67; (1883) Carr v. State, 42 Ark. 204;

(Mass. 1804) Commonwealth v. Easland, 1 Mass. 15; (1854) Commonwealth v. Robinson, 67 Mass. (1 Gray) 555.

[b] (U. S. 1826) If two be indicted jointly for assault and battery, the wife of one of them cannot be a witness for the other, although they sever in their pleas.—United States v. Wade, Fed. Cas. No. 16,629 [2 Cranch, C. C. 680].

[c] (Ala. 1878) The husband of a woman, jointly indicted with her paramour for living in adultery, is incompetent to testify against either of them.—Cotton v. State, 62 Ala. 12.

[d] (Ala. 1885) On indictment under Code, § 4184, against two persons for living together in adultery, when both are on trial together, the husband of the woman is not a competent witness for the man.—Birge v. State, 78 Ala. 435.

[e] (La.) In a trial of two persons jointly indicted for murder, the testimony of the wife of one of them is admissible for or against the other, under instructions to the jury to restrict such testimony to the case of the other defendant.—(1888) State v. Adams, 40 La. Ann. 213, 3 South. 733; (1889) Same v. Wright, 41 La. Ann. 600, 6 South. 135.

[f] (Me. 1838) In the case of an indictment against several for a conspiracy to charge the wife of one of them with adultery, such wife is not a competent witness.—State v. Burlingham, 15 Me. (3 Shep.) 104.

[g] (Miss. 1856) The wife of one of several defendants, jointly indicted and on trial for murder, is not a competent witness for the others, to show that there was no conspiracy on their part to do any act connected with the murder of the deceased.—Mask v. State, 32 Miss. 405.

[h] (N. Y. 1816) Where defendants are jointly indicted, the wife of one may be permitted to testify in behalf of her husband's codefendant where the latter made no application for a separate trial.—In re Shaw, 1 City Hall Rec. 177.

[i] (N. Y. 1823) Where two witnesses are charged in the same indictment, but one of them is not taken, on the trial of the other, the husband of the defendant not taken is not a competent witness, though a nolle prosequi is entered as to the wife.—People v. Colbern, 1 Wheeler, Cr. Cas. 479.

[j] (N. C. 1886) When two are indicted in the same bill for an affray and mutual assaults on each other, the wife of neither is a competent witness for the state or for the other defendant.—State v. Harbison, 94 N. C. 885.

[k] (S. C. 1866) On the trial of an indictment for larceny, the wife of one of the defendants is an incompetent witness.—State v. McGrew, 13 Rich. Law, 316.

[l] (S. C. 1881) Two men being jointly tried for the same crime, the wife of one of them is not a competent witness for her husband, nor as to any common defense for the other defendant.—State v. Workman, 15 S. C. 540.

[m] (Tex. 1876) The wife of one of three defendants in an indictment is an incompetent witness against the other two, unless the indictment has been dismissed as to her husband.—Dill v. State, 1 Tex. App. 278.

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§ 422. —— Husband or wife of accomplice, accessory, or principal.

[a] (U. S. 1862) When an accomplice and his wife are witnesses for the prosecution in a criminal trial, the wife is a competent witness to prove any independent facts not sworn to by her husband and not forming any part of his acts, although those facts fasten a guilty knowledge on the defendant.—United States v. Horn, Fed. Cas. No. 15,389 [5 Blatchf. 102].

[b] (Ala. 1877) Although a husband's testimony in a criminal case has tended to show that he was an accomplice of defendant, his wife may testify against the accused, the husband not being indicted.—Powell v. State, 58 Ala. 362.

[c] (Ark. 1859) The wife of an accessory before the fact, who is jointly indicted with the principal, is an incompetent witness for such principal.—Collier v. State, 20 Ark. 36.

[d] (Ga. 1885) The wife of an accomplice may testify against the principal if the accomplice is not on trial and not affected by the testimony.—Askea v. State, 75 Ga. 356.

[e] (Nev. 1865) The wife of an accomplice in a robbery jointly indicted with others for the offense is a competent witness on the trial of the indictment, if her testimony does not affect her husband.—State v. Waterman, 1 Nev. 543.

[f] (N. C. 1868) The husband of one charged as accessory is not a competent witness in favor of one charged as the principal.—State v. Ludwick, 61 N. C. 401.

[g] (N. C. 1870) The wife of an accessory to a battery is a competent witness for the principal. —State v. Mooney, 64 N. C. 54.

[h] (Tex. 1893) Where, on a trial for arson, charging defendant as an accomplice, it appears that the principal has testified as to his own guilt, error cannot be predicated on the subsequent admission of the testimony of the wife of the principal as to a conversation overheard by her, between her husband and defendant, in reference to the burning.—Bluman v. State, 33 Tex. Cr. App. 43, 21 S. W. 1027; Id., 26 S. W. 75.

§ 423. —— Separate trials of defendants jointly indicted.

[a] Where two persons jointly indicted are tried separately, the wife of the one not on trial is a competent witness.
—(U. S. 1868) United States v. Addatte, Fed. Cas. No. 14,422 [6 Blatchf. 76];
(Ga. 1885) Whitlow v. State, 74 Ga. 819;
(Ky. 1858) Thompson v. Commonwealth, 58 Ky. (1 Metc.) 13; (1861) Cornelius v. Commonwealth, 60 Ky. (3 Metc.) 481;
(Mo. 1866) State v. Burnside, 37 Mo. 343;
(Tenn. 1840) Moffit v. State, 21 Tenn. (2 Humph.) 99, 36 Am. Dec. 301;
(Va. 1894) Smith v. Commonwealth, 90 Va. 759, 19 S. E. 843.

[b] (Fla. 1891) The wife of an accomplice, jointly indicted, and as to whom the indictment has not been disposed of, can testify on behalf of the state against his codefendant on a separate trial.—Adams v. State, 28 Fla. 511, 10 South. 106.

[c] (Ga. 1882) Although A. be jointly indicted with B., A.'s wife may, on the separate trial of B., testify as to matters not affecting A.'s guilt.—Williams v. State, 69 Ga. 11.

[d] (Ky. 1861) Two persons, jointly indicted for stealing a cow, were tried separately. *Held*, that evidence by the wife of one, offered at the trial of the other, that this other had paid for the cow when he took her, was admissible evidence.—Cornelius v. Commonwealth, 60 Ky. (3 Metc.) 481.

[e] (Mich. 1843) Where two persons are jointly charged, in the same complaint, with the commission of the same offense, and neither of them has been either convicted or acquitted, the husband of one is not a competent witness for the other, who, by leave of the court, is tried separately.—Pullen v. People, 1 Doug. 48.

[f] (Pa. 1833) A wife cannot be a witness in a case where a joint charge is jointly tried against her husband and others; yet, if they are separately tried, she is a competent witness for the other codefendants; and to give them the benefit of her testimony, separate trials will be awarded them by the court in all cases except that of criminal conspiracy.—Commonwealth v. Manson, 2 Ashm. 31.

[g] (Tenn. 1857) Two persons were jointly indicted for murder—one as principal, the other as aiding and abetting. They were separately tried. The wife of the second was offered as a witness for the first. *Held*, that she was competent.—Workman v. State, 36 Tenn. (4 Sneed) 425.

§ 424. Widow.

Statutory removal of incompetency, see post, § 522.

Transfer, release, or extinguishment of interest, see post, § 461.

[a] (Ala. 1848) The widow of a decedent is a competent witness in a controversy involving the amount of advancements for which each of the several distributees is accountable.—Andrews v. Hall, 15 Ala. 85.

[b] (Ala. 1853) The widow of a grantor in a trust deed, who was also, when it was executed, defendant in an execution in the hands of the sheriff on which the sheriff had advanced the money, is not debarred by interest from being a witness for the trustee in an action against him by the beneficiary under the deed to require him to account for trust property which he allowed to be sold under an alias execution to reimburse the sheriff, to prove that the beneficiary knew of and assented to, such sale, such testimony being against her interest.—Houston v. Crutchfield's Adm'r, 22 Ala. 76.

[c] (Ala. 1853) In an action at law, between the administrators of two estates, concerning the title to slaves, a woman who was the widow of both of the decedents is an incompetent witness for the administrator of the estate which has the smaller number of distributees.—Lay's Ex'r v. Lawson's Adm'r, 23 Ala. 377.

[d] (Conn. 1836) Where it appeared, in a suit on a note given to B. as administrator of A., that there was a memorandum on it in the handwriting of B., that it belonged to C., the widow of A., and administratrix of his estate, jointly with B., such memorandum was an admission by the party that C. was interested in the event of the suit, and she was therefore an incompetent witness for such party.—Cook v. Mix, 11 Conn. 432.

[e] (Ga. 1855) A widow, being entitled to provision for herself and family for one year out of her husband's estate, even if insolvent, is in no case a competent witness for the administrator in a suit to recover lands for the estate. —Johnson v. Worthy, 17 Ga. 420.

[f] (Ill. 1864) The widow of an intestate is a competent witness in an action of ejectment brought by the heirs against a purchaser at a sale by the administrator.—Lockwood v. Mills, 39 Ill. 602.

[g] (Ind. 1856) Part of the heirs of A. sued the heir and legatee of A.'s administrator for an account of administration, charging a failure on the part of the administrator to account for assets, and to make final settlement, and alleging the amount of assets to be greater than

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the debts. Plaintiffs offered A.'s widow as a witness to prove maladministration. *Held* that, the suit not being for her benefit, A.'s widow was competent.—Lapreese v. Falls, 7 Ind. 692.

[h] (Ind. 1856) In a suit against A. as surviving partner, B., the other partner, having died insolvent, the wife of B. is a competent witness to prove the liability of A.—Jack v. Russey, 8 Ind. 180.

[i] (Ky. 1858) The testimony of a widow, to facts of her own knowledge, is competent to show that a conveyance by the husband was made in fraud of creditors, but not to diminish the husband's liability to creditors to whom the conveyance was made.—Short v. Tinsley, 58 Ky. (1 Metc.) 397, 71 Am. Dec. 482.

[j] (Me. 1841) A widow, being entitled to a distributive share of the personal estate of her husband, is not a competent witness in a bill brought to establish a mortgage, by which notes, belonging to his estate, are secured.—Felch v. Hooper, 20 Me. (2 App.) 159.

[k] (Me. 1844) As a widow is not entitled to dower in a tract of unimproved wild land, she is a competent witness for the heirs of her deceased husband, in relation to such land.—Wallingford v. Fiske, 24 Me. (11 Shep.) 386.

[l] (Miss. 1848) The wife of a deceased principal in a note is not a competent witness for the surety, in an action on the note against him, to prove payment of the note.—Payne v. Devinal, 19 Miss. (11 Smedes & M.) 400.

[m] (Mo. 1854) The widow of a decedent may be a witness for or against the administrator or executor of the estate of her deceased husband, whether solvent or insolvent, as to all such facts as the policy of the law does not require to be kept sacred and secret between husband and wife during the marriage.—Stein v. Weidman's Adm'r, 20 Mo. 17.

[n] (Mo. 1857) The widow of a testator is a competent witness to show that goods were received by the executor, for which he has not accounted.—Sherwood's Adm'r v. Hill, 25 Mo. 391.

[o] (Mo. 1860) A widow is a competent witness for her children, in a suit brought by them for the recovery of land, notwithstanding that she will be entitled to dower therein in case they succeed in the suit.—McCullough v. McCullough, 31 Mo. 226.

[p] (Mo. 1860) That the judgment in their favor may be evidence for her in a future action will not disqualify her, under the seventh section of the act concerning witnesses.—McCullough v. McCullough, 31 Mo. 226.

[q] (N. H. 1859) Where the estate of a deceased person is interested in the result of a suit, his wife, if she have no interest in the estate, is a competent witness, unless the facts to which she testifies came to her knowledge through confidential communications from her husband.—Jackson v. Barron, 37 N. H. 494.

[r] (N. H. 1859) If the estate of a person deceased is interested in the result of a suit, and his wife, being entitled to a distributive share of the surplus after the payment of debts, is offered as a witness, evidence may be received by the court to show the condition of the estate to be such that the wife can receive nothing from it in any event of the suit on trial; and if the evidence satisfies the court of that fact, she is a competent witness.—Jackson v. Barron, 37 N. H. 494.

[rr] (N. Y. 1837) A widow is not competent to prove that what purports to be an absolute deed, given by herself and her husband, of land in which she was otherwise entitled to dower, is in fact a mortgage.—Eckford v. De Kay, 6 Paige, 565.

[s] (N. C. 1824) The widow of a grantor in a deed of conveyance, who joined her husband therein, is a competent witness to prove that the deed was intended as a mortgage, as in either event her right of dower is gone.—Price v. Joyner, 10 N. C. 418.

[ss] (Pa. 1823) Where grants are made of the same land to contending claimants, with general warranty, the widow of the grantor is a competent witness in the suit between the claimants.—Brindle v. McIlvaine, 10 Serg. & R. 282.

[t] (Pa. 1824) The testator's widow, who has no interest in the result, is a competent witness for the executors.—Gebhart v. Shindle, 15 Serg. & R. 235.

[tt] (Pa. 1865) A widow who has conveyed to her sons after her husband's death, without covenant or warranty of title, land purchased for and conveyed to her in the lifetime of her husband, is a competent witness, in their behalf, in an ejectment suit brought by them against one buying the land at a sheriff's sale, under an execution against the husband.—Thomas v. Maddan, 50 Pa. (14 Wright) 261.

[u] (Pa. 1888) The widow of a decedent in making claim for the widow's exemption is a competent witness to prove the family relation. —In re Burkett's Estate, 5 Pa. Co. Ct. R. 501.

[uu] (Pa. 1896) In an action by a widow to set aside as fraudulent the forfeiture of an insurance policy issued on the life of her husband, and forfeited by the company in order to issue a substituted policy to a bank to secure a debt due from the husband, the widow is not rendered incompetent as a witness for the reason that her husband, if alive, would be a party in interest.—Matlack v. Mutual Life Ins. Co. (Com. Pl.) 37 Wkly. Notes Cas. 526, 5 Pa. Dist. R. 113.

[v] (S. C. 1838) The widow of a testator, who is not interested in a will, is admissible to prove that property was a gift or sold.—Gist v. Rodgers, Rice, 79.

[vv] (Tenn. 1844) A widow is not a competent witness, in a suit by the heir for a portion of the real estate of her deceased husband, where a recovery by the heir would increase her dower interest, or a loss reduce it.—Wade v. Johnson, 24 Tenn. (5 Humph.) 117, 42 Am. Dec. 422.

[w] (Tenn. 1860) A widow who would become entitled to dower in the event of a recovery by the heirs at law of her deceased husband is not a competent witness for them. — Chaney v. Moore, 41 Tenn. (1 Cold.) 48.

[x] (Tex. 1871) Plaintiff sued for a wagon or its value, claiming to have bought it from C., who was since deceased. Defendants had purchased it from the widow of C. after his decease, and offered her testimony to prove that the pretended purchase by plaintiff was never consummated. *Held*, that she was a competent witness, and it was error to exclude her testimony on the ground of interest.—Keys v. Baldwin, 33 Tex. 666.

[xx] (Vt. 1833) A widow will not be rejected as a witness because her husband was interested, unless she has herself an interest in the suit.—Edgell v. Bennett, 7 Vt. 534.

[y] (Vt. 1833) The widow has an interest to increase the personal fund and prevent debts coming against her husband's estate; but to show such interest, it must appear that he died in the state, leaving personal property to be administered upon her.—Edgell v. Bennett, 7 Vt. 534.

[yy] (Vt. 1845) The widow of a mortgagor, being directly interested to defeat the mortgage, is not a competent witness for parties claiming under him, on a bill to foreclose the mortgage, to prove that he was insane when it was executed.—Day v. Seely, 17 Vt. 542.

[z] (Vt. 1855) A widow may testify in a case in which her husband was interested, if she

does not disclose his confidential communications.—Smith v. Potter, 27 Vt. (1 Williams) 304, 65 Am. Dec. 198.

[zz] (Va. 1811) The widow of one of two joint obligors is a competent witness in support of a plea of infancy, in a suit against the other, or his representatives, although her husband died intestate.—Braxton's Adm'x v. Hilyard, 2 Munf. 49.

14. TRANSFER, RELEASE, OR EXTINGUISHMENT OF INTEREST OR LIABILITY, AND INDEMNITY AGAINST LIABILITY.

(a) IN GENERAL, §§ 425-429.
(b) NATURE OF INTEREST OR LIABILITY IN GENERAL, §§ 430-440.
(c) INTEREST ARISING FROM PARTICULAR OBLIGATIONS OR TRANSACTIONS, §§ 441-448.
(d) INTEREST ARISING FROM STATUS OR RELATION OF PARTIES IN GENERAL, §§ 449-461.
(e) BANKRUPT OR INSOLVENT, ASSIGNOR AND ASSIGNEE FOR CREDITORS, AND CREDITORS, §§ 462-465.
(f) PRINCIPAL AND SURETY, INDEMNITORS, AND RECEIPTORS, §§ 466-471.
(g) EXECUTORS OR ADMINISTRATORS, AND LEGATEES, DEVISEES, OR HEIRS, §§ 472-475.

Evidence as to transfer or release of interest, see post, §§ 540, 543.

Authority of attorney, to release client's debtor to make him a competent witness, see "Attorney and Client," vol. 5, c. 1657, § 213.

Release of party as guarantor to make him competent witness, constituting maintenance, see "Champerty and Maintenance," vol. 9, cc. 1974, 1975, § 10.

(a) IN GENERAL.

IN GENERAL, § 425.
SUFFICIENCY OF ASSIGNMENT OR RELEASE IN GENERAL, § 426.
TIME OF MAKING, INTENT, AND GOOD FAITH, § 427.
ASSENT AND DELIVERY, § 428.
INDEMNITY AGAINST LIABILITY IN GENERAL, § 429.

§ 425. In general.

[a] A release of all interest by a witness will render him competent, if there are no other objections but interest.

—(Iowa, 1856) Ayres v. Campbell, 3 Iowa (3 Clarke) 582;

(Ky. 1810) Gillespie v. Gillespie's Heirs, 5 Ky. (2 Bibb) 89;

(Mo. 1828) Evans v. Hays, 2 Mo. 97;

(S. C. 1845) City Council of Charleston v. Welkman, 1 Rich. Law, 240.

[b] If the witness is protected from liability by the act of limitations, he is a competent witness without a release from the party to whom he was liable.

—(U. S. 1835) Waller v. Stewart, Fed. Cas. No. 17,109 [4 Cranch, C. C. 532];

(Pa. 1815) Ludlow v. Union Ins. Co., 2 Serg. & R. 119.

[c] (Conn. 1792) The judgment will be erroneous, if a witness, discharged of his interest, is not permitted to testify.—Humes v. Day, 1 Root, 466.

[d] (Conn. 1814) A witness who had received a release, but who, upon being asked if he did not expect to pay the judgment and expenses, provided the plaintiff recovered, replied, "I certainly do," was incompetent to testify for defendant.—Skillenger v. Bolt, 1 Conn. 147.

[e] (Ind. 1853) The interest of a witness in the event of a suit after executing a release goes to his credibility, and not to his competency.—Madison Ins. Co. v. Lostutter, 4 Ind. 558.

[f] (Iowa, 1859) After a release given to render a witness competent has been executed and ruled sufficient by the court, there is no error in a refusal to allow defendant to introduce other testimony, showing an interest in the witness existing prior to the release.—White v. Tucker, 9 Iowa, 100.

[g] (Md. 1831) It was no objection to the competency of a witness that he had been heard to say, some months before the trial, that he felt himself bound to pay plaintiff the amount of the controversy, if plaintiff did not recover, the witness having been since released by plaintiff.—Stimmel v. Underwood, 3 Gill & J. 282.

[h] (Miss. 1843) It is error for the court to refuse a release of interest offered by a witness in order that he might be competent to testify.—Englehard v. Slater, 8 Miss. (7 How.) 538.

[i] (Miss. 1859) Where a person has released, by deed, all his interest in a suit in which he is offered as a witness, it is error to reject him; and such error is not afterwards cured by permitting him to testify, as a person interested, under Rev. Code, p. 510, art. 190.—Fairly v. Fairly, 38 Miss. 280.

[j] (N. H. 1839) Where an individual is collaterally interested in the event of a suit, in any given sum, so as to render him incompetent as a witness, such incompetency may be removed by the payment of the amount of the liability.—Dearborn v. Dearborn, 10 N. H. 473.

[k] (N. Y. 1812) If a witness have a present beneficial interest in the subject-matter of the suit, although the reducing it into possession be future and contingent, he may extinguish it by release.—Woods v. Williams, 9 Johns. 123.

[l] (Pa. 1854) A person having a chose in action cannot, by any sale of his claim, or by any other means whatever, make himself a competent witness to support it.—Appeal of Hottenstein, 2 Grant, Cas. 301.

[m] (Pa. 1854) One interested in a chose in action at the time of its origin cannot, by assigning his interest to a mere volunteer, become a competent witness for the assignee as to matters which preceded the assignment.—Lindsley v. Malone, 23 Pa. (11 Harris) 24.

[n] (Pa. 1854) A witness, not a party to the original contract and cause of action, who subsequently bought an interest in it, which he afterwards resold, with an agreement that he was to be cleared from the same, is not incompetent.—Beaver v. Beaver, 23 Pa. (11 Harris) 167.

[o] (Pa. 1856) When the interest of a witness is collateral, his competency may be restored by a release or transfer of it.—Commonwealth v. Ohio & P. R. Co., 1 Grant, Cas. 329.

[p] (S. C.) Where a witness, supposed to be interested, gives a release of his interest, he is placed on the same footing with other witnesses, and is not confined to any particular point.—(1798) Luyten v. Haygood, 2 Bay, 177; (1802) Carroll v. McWhorter, Id. 463.

[q] (S. C. 1830) The general rule is that no one can be admitted as a witness who, at the time when he is called to testify, has a direct and certain interest in the event of the suit, whether the interest arise from a benefit or a liability dependent on its determination. If of benefit alone, then the witness may render himself competent by releasing that interest; but if of liability, a release from those to whom

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he is liable is absolutely necessary to remove the disability.—Pickett v. Cloud, 1 Bailey, 362.

[r] (S. C. 1834) The competency of a witness may be restored as well by an assignment without warranty as by a release of his interest.—Cates v. Wacter's Heirs, 2 Hill, 442.

[s] (Va. 1823) The interest of a witness in a suit may be released by the party calling him.—Richardson v. Carey, 2 Rand. 87.

[t] (Va. 1826) An interested witness, who has been examined on a former trial, without being released, may be rendered competent on a subsequent trial by a release, and the objection will only go to his credit.—Jones v. Raine, 4 Rand. 386.

§ 426. Sufficiency of assignment or release in general.

[a] (U. S. 1826) A release of a witness may be executed by the party, leaving a blank for the name of the witness to be filled up by the party's attorney.—Hall v. Fox, Fed. Cas. No. 5,932 [3 Cranch, C. C. 64].

[b] (Ala. 1835) A release entered on the minutes of the court, not signed, sealed, or delivered to the witness, and implying a mere discharge as to witness' interest in the particular suit, is not sufficient to render an interested witness competent.—Kennon v. McRae, 2 Port. 389.

[c] (Ala. 1848) A technical release, to make an interested witness competent, must be under seal.—Governor v. Daily, 14 Ala. 469.

[d] (Cal. 1859) A release of property by the witness, after his deposition has been taken, does not render the deposition admissible, as he still may have a claim for damages to the property which accrued previous to the release, and because he was interested when his testimony was given, which is the material time.—Kimball v. Gearhart, 12 Cal. 27.

[e] (Cal. 1859) Where the purchaser of wheat in order to render his vendor a competent witness released him from all damages by reason of any implied warranty of the title, which was then in litigation between the vendee and a third party, nonpayment of the consideration expressed in the release did not render it invalid.—Paige v. O'Neal, 12 Cal. 483.

[f] (Del. 1858) Property was sold under a junior judgment, and the money brought into court, and on an issue framed to try what amount was due on the older judgment defendant was offered as a witness to prove that it had been paid. *Held*, that a release to him, stipulating that, in case it should be found that he was bound on the older judgment for any sum whatever, he should be discharged from a corresponding amount on the junior judgment, was not a proper release, but merely an indemnity, and did not render him competent.—Union Bank of Delaware v. Prettyman, 2 Houst. 16.

[g] (Ga. 1854) A general release of all actions will make the person released a competent witness.—Bond v. Carter, 14 Ga. 697.

[h] (Ky. 1842) A witness incompetent from interest cannot be made competent by parol.—Richardson v. Bartley, 41 Ky. (2 B. Mon.) 328.

[i] (Me. 1839) A release of a witness of his interest in the suit, signed only by one of several defendants, discharges the joint interest, and renders the witness competent.—Haley v. Godfrey, 16 Me. (4 Shep.) 305.

[j] (N. Y. 1817) A witness on the part of plaintiff was objected to on the ground that the witness and A., one of the defendants, were separately liable for plaintiff's claim. Plaintiff thereupon released the witness from all claim which he had against him, either alone or in conjunction with defendant A., but excepting such claims as he might have against the witness in conjunction with all the defendants. *Held*, that such release rendered the witness competent.—Bulkley v. Dayton, 14 Johns. 387.

[k] (Pa. 1832) Where one has not assigned all his interest in the suit, remote as well as immediate, he cannot become a witness.—Kimball v. Kimball, 3 Rawle, 469.

[l] (S. C. 1829) An attorney of record cannot, without special authority, execute a valid release to one who is liable over to his client, in order to render him a competent witness.—Marshall v. Nagel, 1 Bailey, 308.

[m] (S. C. 1859) A paper, not under seal, in the nature of an acquittance or acknowledgment of satisfaction, is sufficient to make a witness competent, who was liable over to defendant, in case plaintiff should recover.—Boland v. Greenville & C. R. Co., 12 Rich. Law, 368.

[n] (Tenn. 1856) A mere technical release without consideration must be under seal in order to remove the incompetency of an interested witness.—Smith v. Harris, 35 Tenn. (3 Sneed) 453.

[o] (Tenn. 1858) Where releases are necessary to render a witness competent, they are insufficient, unless moving from all the parties interested on the record.—Ingram v. Smith, 38 Tenn. (1 Head) 411.

[p] (Vt. 1854) To remove the interest of a witness, he must be released from all liability for costs for the money recovered, and from all claims in discharge of which the money recovered in the suit would go.—Wills v. Judd, 26 Vt. 617.

§ 427. Time of making, intent, and good faith.

[a] A colorable assignment to make a plaintiff a witness does not devest his interest. And every assignment is deemed colorable until the contrary appears.

—(Md. 1855) Pegg v. Warford, 7 Md. 582;
(Pa. 1843) Post v. Avery, 5 Watts & S. 509; (1844) Leiper v. Peirce, 6 Watts & S. 555; (1845) Phinney v. Tracey, 1 Pa. (1 Barr) 173, 44 Am. Dec. 116.

[aa] A release of a witness' interest in a suit, made after his testimony has been given, does not legalize such testimony.

—(Ala. 1823) Wynn v. Williams, Minor, 136;
(N. Y. 1830) Ten Eyck v. Bill, 5 Wend. 55.

[b] (U. S. 1826) An interested witness who has been sworn in chief and examined, and whose interest is disclosed upon cross-examination, may be released, and re-examined.—Hall v. Fox, Fed. Cas. No. 5,932 [3 Cranch, C. C. 64].

[bb] (Ill. 1860) A release in good faith, though for the express purpose of rendering the witness competent, makes him competent.—Robbins v. Butler, 24 Ill. (14 Peck) 387.

[c] (Md. 1855) The practice of witnesses restoring their competency by deed executed at the trial is firmly established by long custom.—Pegg v. Warford, 7 Md. 582.

[d] (Md. 1860) A release to qualify a witness must be given before the testimony is closed, or it comes too late; but, if the trial is not over, the court will permit the witness to be re-examined after he is released.—National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289.

[e] (Md. 1860) The fact that a party transferred his interest for the purpose of becoming a witness does not disqualify him, however it may affect his credibility.—National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289.

[f] (Md. 1860) Where one of the defendants is released by plaintiff after he has testified in the latter's behalf, he may be re-examined, and it will generally be sufficient to ask him if his testimony, already given, is true, the circumstances under which it was given going only to his credibility.—National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289.

[g] (Mass. 1804) The court cannot refuse to give a release full effect in making a witness competent, merely because it is given at the time of trial, and under circumstances making it of little effect, so far as the witness' credibility is concerned.—Barnes v. Ball, 1 Mass. 73.

[h] (N. Y. 1817) A release, given after the examination of an interested witness, is too late to validate his testimony; and where an objection is made to the sufficiency of a release, the judge ought not to allow the witness to proceed, and to direct that his testimony should be relied on, if the party should afterwards give a sufficient release; but where an objection has been made on account of some informality in the release, the judge may allow the examination to proceed, while a new release is preparing, no objection being made by the opposite party.—Doty v. Wilson, 14 Johns. 378.

[i] (N. Y. 1831) Where, on the examination of a witness in chief, it is discovered that he is interested in the event of the suit, his interest may be removed by a release, and then he may be re-examined.—Tallman v. Dutcher, 7 Wend. 180.

[j] (N. Y. 1838) Where the former holder of an unpaid note has guarantied its payment, and is afterwards released by the guaranty of another person, he is a competent witness in an action to recover the note, although the release was obtained for the express purpose of making him a witness, and by his procurement.—Mott v. Small, 20 Wend. 212, affirmed Small v. Mott (1839) 22 Wend. 403.

[k] (N. Y. 1855) An assignor is not a competent witness, except as a party, when the assignment of the claim is merely colorable, made only for the purpose of enabling him to testify, and with the clear intent that he shall receive the benefit of the recovery.—Bell v. Drew, 4 E. D. Smith, 59.

[l] (N. Y. 1856) The fact that the claim in suit was assigned to plaintiff merely to enable the assignor to testify does not render him incompetent, but merely goes to his credibility.—Nelson v. Smith, 3 Abb. Prac. 117.

[m] (Pa. 1812) The nominal plaintiff, in an action of book account, who had assigned the account for a valuable consideration before the action was brought, was a competent witness, though he admitted that the assignment was made for the purpose of rendering him competent.—Wistar v. Walker, 2 Browne, 166.

[n] (Pa. 1845) The assignor of a chose in action for which suit is brought cannot be a witness for the assignee, on the trial of the cause, unless the assignment was made in the usual course of business, and without any intention, either expressed or understood, at the time of supporting the claim by the oath of the assignor.—Phinney v. Tracey, 1 Pa. (1 Barr) 173, 44 Am. Dec. 116.

[o] (Pa. 1846) To render an assignor of a chose in action, not party to the record, incompetent as a witness, it must appear that the assignment was for the purpose of making him a witness to support the claim; and if there are circumstances of that character, it lies on the party objecting to show them.—Roshing v. Chandler, 3 Pa. (3 Barr) 375.

[p] (Pa. 1847) Where a person, for a nominal consideration, releases her interest in the fund sought to be recovered, although for the purpose of becoming a witness, she is competent.—Carter v. Trueman, 7 Pa. (7 Barr) 315.

[q] (Pa. 1854) The assignment of a chose in action, which must be supported by the oath of the assignor, is to be deemed colorable so as to exclude the assignor's testimony, unless some other motive for it is clearly shown.—Beidler v. Miller, 1 Woodw. Dec. 223.

[r] (Tenn. 1822) A witness whose interest is released is competent, though he states on his voir dire that he feels himself bound in honor to indemnify the person calling him, and intended to do so should judgment go against him.—Tilford v. Hayes, 10 Tenn. (2 Yerg.) 89.

[s] (Vt. 1853) A witness who assigned all claim and interest in a suit which he was prosecuting, by consent of plaintiffs, for his own benefit, for a consideration, before the hearing, is admissible, notwithstanding he assigned the same but a day or two before trial, and with the intent of being a witness to the claim.—Bank of Woodstock v. Clark, 25 Vt. 308.

[t] (Vt. 1853) A witness is admissible when discharged from all interest, though interested up to the time of the trial, and then discharged for the purpose of being a witness.—Fletcher v. Cole, 26 Vt. 170.

§ 428. Assent and delivery.

[a] A witness must know that he is released before he gives his testimony.

—(Ala. 1858) Fitzpatrick's Adm'r v. Baker, 31 Ala. 563;

(N. Y. 1843) Seymour v. Strong, 4 Hill, 255.

[b] (Ala. 1843) The release of a witness' interest need not be delivered personally; it is sufficient to deposit it in court.—Brown v. Brown, 5 Ala. 508.

[c] (Ala. 1846) When a release is proved to have been made before a deposition was taken, and that the witness knew it, the fact that the release is on file, among the papers in the case, is prima facie evidence of its delivery.—Kyle v. Bostick, 10 Ala. 589.

[d] (Ala. 1853) Although it is not necessary that a release should be delivered personally to a witness, in order to restore his competency, yet it is necessary that he should be apprised of its existence when his deposition is taken; and where the release is attached to the deposition by the commissioner, but there is no proof that the witness ever saw it or knew of its existence, it is not sufficient to restore his competency.—Gray's Ex'rs v. Brown, 22 Ala. 262.

[e] (Ga. 1866) The assignment of a plaintiff's interest may be completed by depositing the instrument in court in the absence of the assignee; acceptance will be presumed.—Smith v. Bell, 35 Ga. 238.

[f] (Ind. 1853) A release, executed by a person to render him competent as a witness, is available if filed in court, and need not be delivered to the person released.—Madison Ins. Co. v. Lostutter, 4 Ind. 558.

[g] (Ind. 1857) A release, deposited in court for the use of a witness disqualified by reason of interest, is sufficient to restore his competency.—Petro v. Cassiday, 9 Ind. 63.

[h] (La. 1857) The usual and proper course is for the release to be tendered to the witness before he is sworn in the cause; and when the testimony is taken under commission, to insert it in the return, with the commissioner's certificate that it was so tendered.—Delee v. Sandel, 12 La. Ann. 208.

[i] (Miss. 1857) A release by a grantee to the grantor, appearing in the deposition of the latter taken in behalf of the grantee, will be presumed, in the absence of a showing to the contrary, to have been duly delivered to the grantor

so as to make him a competent witness.—Cooper v. Granberry, 33 Miss. 117.

[j] (N. H. 1839) A delivery of a release, by a witness, to the attorney employed to conduct the cause, is a good delivery to the party who employed him. If the witness employed the attorney, such delivery would be a delivery to himself; but where, upon such delivery, the witness is admitted to testify, it may be shown to the court, after verdict, that the attorney was, in fact, employed by the plaintiff of record. —Stevenson v. Mudgett, 10 N. H. 338, 34 Am. Dec. 155.

[k] (N. H. 1839) If a witness who appears to be interested executes a release which is not well delivered, his testimony, upon being admitted, that he never had any interest in the suit, cannot be received to show his competency.—Stevenson v. Mudgett, 10 N. H. 338, 34 Am. Dec. 155.

[l] (N. C. 1818) If before trial a witness removes his interest by releasing it, or files a release in a clerk's office, the party not being present to receive it, his competency is restored. —Perry v. Fleming, 4 N. C. 344.

[m] (N. C. 1838) A party cannot, by refusing his assent to a release or surrender tendered by a witness on the other side, exclude his testimony. The depositing the release in the clerk's office will be sufficient to enable the witness to testify.—Mathews v. Marchant, 20 N. C. 33.

[n] (Pa. 1845) An acknowledgment by a witness, in his deposition, that a release had been delivered to him before he was sworn, does not remove a well-founded objection to his competency.—Myre v. Ludwig, 1 Pa. (1 Barr) 47.

[o] (Tex. 1866) The mere filing of a release of a witness from all liability, without any showing that the witness had notice thereof before deposing, is not such a delivery, either actual or constructive, to the witness as will remove the objection of interest.—Evans v. Pigg, 28 Tex. 586.

[p] (Vt. 1832) The production of a release in court, where the witness is objected to, in order to qualify him, amounts to a delivery to him which will bind the releasor, though he immediately destroyed it on the rejection of the witness; and where such release is fraudulent as to both parties thereto, the releasor will not be relieved from it.—Walker v. Ferrin, 4 Vt. 523.

[q] (Vt. 1850) Where one offered as a witness is incompetent through interest, and he executes a release of his interest to the party calling him, and the act is apparently for the advantage of the party, the law will presume his assent to it, and a delivery of the instrument to his attorney will be sufficient.—Porter v. Munger, 22 Vt. 191.

[r] (Vt. 1854) Nothing appearing to the contrary, a delivery of the assignment of the interest of a witness will be presumed.—Hough v. Patrick, 26 Vt. 435.

§ 429. Indemnity against liability in general.

[a] (Ala. 1845) Where a party offers a witness who will be liable over, if he is unsuccessful, he cannot divest the witness' interest, and make him competent, by depositing with the clerk of the court a sum of money equal to what would be the amount of the recovery against him. The common law or statute neither confer upon the clerk of a court, virtute officii, the authority to receive money which may be recovered upon a suit afterwards to be brought; and such payment cannot be pleaded in bar of action.—Ball v. Bank of State, 8 Ala. 590, 42 Am. Dec. 649.

[b] (Ga. 1860) A bond of indemnity, to protect a witness from all liability of whatsoever kind, will not remove his incompetency on account of interest.—Molyneaux v. Collier, 30 Ga. 731.

[c] (Me. 1840) Giving a bond to an interested witness, to indemnify him against his liability, does not render him competent.—Paine v. Hussey, 17 Me. (5 Shep.) 274.

[d] (S. C. 1858) A bond of indemnity from a third person will not make an interested witness competent.—Josey v. Wilmington & M. R. Co., 11 Rich. Law, 399.

[e] (Wis. 1853) An offer of indemnity from the consequences of the suit will not render a party to the record a competent witness.—Eaton v. White, 2 Wis. 292.

(b) NATURE OF INTEREST OR LIABILITY IN GENERAL.

IN GENERAL, § 430.
PARTIES IN GENERAL, § 431.
LIABILITY FOR COSTS IN GENERAL, § 432.
REPRESENTATIVE OR OFFICIAL CAPACITY, § 433.
INTEREST IN PROPERTY IN GENERAL, § 434.
OWNER OF VESSEL OR CARGO, § 435.
GRANTOR OR VENDOR AND WARRANTOR, § 436.
LANDLORD AND TENANT OR TERRE-TENANT, § 437.
INTEREST IN MORTGAGE OR OTHER SECURITY, § 438.
INTEREST IN INVENTION, § 439.
INTEREST IN PENALTY OR FINE, § 440.

§ 430. In general.

[a] (Ala. 1853) When a debtor delivers property to one of his creditors to be sold, and the proceeds to be appropriated, first, to the payment of his own debt, and the balance to a debt due another creditor, and the latter creditor brings suit against the former to recover this balance, the debtor may be rendered a competent witness for plaintiff by a release.—Loftin v. Lyon, 22 Ala. 540.

[b] (Ga. 1857) A stakeholder who has transferred the thing wagered, after notice not to do so from the loser, and has received a bond of indemnity, is a competent witness in a suit between the parties.—Leverett v. Stegall, 23 Ga. 257.

[c] (Ill. 1861) A defendant in an execution, upon which property has been seized, and which property has been replevied, who has been released from the judgment against him, is a competent witness for defendant in the replevin suit, without producing his release.—Gray v. Morey, 26 Ill. (16 Peck) 409.

[d] (Ind. 1851) Where the account against an assignor, pleaded in set-off, is larger than the amount of the note, plaintiff cannot release the assignor from liability upon the assignment, so as to render him a competent witness.—Sample v. Lamb, 3 Ind. 180.

[e] (Ky. 1864) An assignor, who is not liable on his assignment of his interest, and who has been released from "all responsibility in every way," on account of the debt he had transferred, is not incompetent to testify in favor of the assignee.—Price v. Caperton, 62 Ky. (1 Duv. 207.

[f] (Me. 1834) T. sued M. and summoned H. as his trustee, against both of whom he recovered judgment—the latter on disclosure. No execution issued, the trustee promising to pay on that condition. About three years afterwards, the note on which H. was adjudged the trustee of M., not being negotiable, was sued in the name of M. for the benefit of another, to whom it had been bona fide assigned. After the commencement of this suit, H. gave his

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note to T. for the amount of his (T.'s) judgment. *Held*, that T. was a competent witness for H. in a suit against the latter.—Matthews v. Houghton, 11 Me. (2 Fairf.) 377.

[g] (N. H. 1826) In a foreign attachment, the principal, having from plaintiff a release of all the debts due plaintiff except so much as may be found in the hands of the trustee, is a competent witness for plaintiff, on the trial of the issue between plaintiff and the trustee.—Wallace v. Blanchard, 3 N. H. 395.

[h] (N. Y. 1807) Where a common right of fishery is in all the inhabitants of a place, a release, by one of them, of all his interest in the right, to any person whatever, is inoperative, such interest being a personal right not assignable, and does not render him a competent witness to prove such common right.—Jacobson v. Fountain, 2 Johns. 170.

[i] (N. Y. 1829) A release by one to the other of two parties jointly liable to the payment of a sum of money renders the party released a competent witness for the releasor.—Bagley v. Osborn, 2 Wend. 527.

[j] (N. Y. 1848) A release of the personal liability of one of several defendants, on a judgment in favor of the releasor, executed in pursuance of the New York act of April, 1838, for the relief of partners and joint debtors, but which release leaves the judgment, and the debt for which it was recovered, in full force against the other defendants, will not render the defendant thus released a competent witness for plaintiff, in such judgment, in a suit in which plaintiff claims title to premises under such judgment; but to render him competent, the other judgment debtors should also be released from their contingent liability for the judgment debt.—Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

[k] (N. C. 1805) Where a witness states that he has been promised a part of the recovery by plaintiff, a release will not render him competent.—Anonymous, 3 N. C. 340.

[l] (Pa. 1831) A person who at the time of the commencement of a suit was entitled to a portion of the money sued for, and was liable for costs, was incompetent as a witness, although he released his interest to plaintiff of record.—Gallagher v. Milligan, 3 Pen. & W. 177.

[m] (Pa. 1845) Where a person has acquired an interest in a debt by assignment, he is an incompetent witness in a suit for its recovery, even though he has reassigned his interest, and pays all the costs into court.—Clover v. Painter, 2 Pa. (2 Barr) 46.

[n] (Pa. 1870) In an action of attachment against a garnishee, a release of the judgment debtor by plaintiff by an agreement not to seek to recover against him, except by the attachment then trying, renders him a competent witness.—Knerr v. Hoffman, 65 Pa. (15 P. F. Smith) 126.

[o] (Vt. 1831) An execution debtor is disqualified by interest as a witness for one claiming under a levy against him; and this, though defendant claim under a warranty deed from him of the same premises. But plaintiff, though suing as administrator of the levying creditor, may qualify him by discharging him from any liability on account of the judgment.—Seymour's Adm'r v. Beach, 4 Vt. 493.

[p] (Vt. 1854) A judgment held by assignment may be reassigned so as to render a witness competent.—Hough v. Patrick, 26 Vt. 435.

§ 431. Parties in general.

[a] A plaintiff, who has assigned his interest in a chose in action before suit, cannot be a witness for the defendant, as to his demands, so as to impair the assignee's rights.
—(Me. 1831) Hackett v. Martin, 8 Me. (8 Greenl.) 77;
(N. Y. 1822) Frear v. Evertson, 20 Johns. 142;
(S. C. 1797) Canty v. Sumter, 2 Bay, 93.

[b] A defendant in a suit in chancery, against whom no decree was sought, and none could properly be passed, was offered by his codefendant as a witness, after he had executed a release of all claim for costs, and he thereupon gave material evidence. *Held*, that he was not incompetent, either by reason of his character as a party on the record, or as being interested in the event of the suit.
—(Del. 1834) Ridgeway v. Newbold, 1 Har. 385;
(Ky. 1845) Oldhams v. Jones, 44 Ky. (5 B. Mon.) 458.

[c] (U. S. 1816) One of the plaintiffs in a suit may be examined as a witness, who had assigned all his interest in the subject in controversy, to his coplaintiff, after the costs of the suit, as estimated by the clerk of the court, had been deposited with the clerk and an offer made to pay to the clerk any further sum, which he or the counsel for the defendant might require to cover the costs, and a release executed by the remaining plaintiffs, of all claims on him for the costs which had or might accrue, and for any claims for contribution to any sum which the defendant might recover against those who executed the release, and also a covenant, by the remaining plaintiffs, to indemnify him against all costs, charges, and damages which might accrue, in prosecuting the suit.—Willings v. Consequa, Fed. Cas. No. 17,767 [Pet. C. C. 301].

[d] (U. S. 1827) In an action against several defendants where one of them is released by plaintiff, he is a competent witness for plaintiff.—Patriotic Bank v. Coote, Fed. Cas. No. 10,807 [3 Cranch, C. C. 169].

[e] (U. S. 1847) The court can, against the consent of the libelant in admiralty, discharge a claimant from the action, and render him admissible as a witness, where he has parted with all his interest, holds security from his co-claimants against liability for costs, and new stipulators are substituted.—Lane v. The Buck, Fed. Cas. No. 8,048.

[f] (U. S. 1847) A person, while remaining a party claimant upon the proceedings in court, cannot, by an arrangement with his co-claimants, discharge himself from liability to the libelant, so as to become a competent witness for them.—Lane v. The Buck, Fed. Cas. No. 8,048.

[g] (U. S. 1853) A party who, pending an interference proceeding, assigns all his interest in the subject-matter, and remains merely a nominal party, is nevertheless incompetent to testify therein.—Yearsley v. Brookfield, Fed. Cas. No. 18,131 [1 McArthur, Pat. Cas. 193], following Scott v. Lloyd (1838) 37 U. S. (12 Pet.) 145, 9 L. Ed. 1033.

[h] (Fla. 1852) A party to the record is not a competent witness, even though, before his examination, he has surrendered all his right, title, and interest, both at law and in equity, to the sums of money sued for.—Patterson v. Cobb, 4 Fla. 481.

[i] (Ga. 1855) A joint defendant, upon being released from liability to certain parties, cannot be permitted to testify that a judgment is dormant, as the result would be the release of all parties from liability on the judgment, and he would, therefore, be interested.—Neal v. Lamar, 18 Ga. 746.

[j] (Ga. 1856) A party to the record, if at the time of the trial he has parted with all in-

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terest in the event of the suit, is a competent witness.—Central R. & Banking Co. v. Hines, 19 Ga. 203.

[k] (Ga. 1866) A plaintiff who pays into court the costs, and assigns all interest in the action, becomes a competent witness.—Smith v. Bell, 35 Ga. 238.

[l] (Ind. 1858) In an action for land, and its detention, a defendant who has released to his codefendants may yet be interested in the damages for the detention, and therefore incompetent.—Dearmond v. Dearmond, 10 Ind. 191.

[m] (Ky. 1820) A defendant who conveys the matter in dispute, pendente lite, and takes a bond of indemnity for costs from his grantee, does not thereby make himself a competent witness.—Shelby v. Smith's Heirs, 9 Ky. (2 A. K. Marsh.) 504.

[n] (Ky. 1837) A party who has transferred all his interest to another without recourse is a competent witness for the latter.—Blackerby v. Holton, 35 Ky. (5 Dana) 520.

[o] (La. 1831) A party to a suit is incompetent from interest; if that cease, the objection is removed.—Spencer's Syndics v. Lee, 2 La. 472.

[p] (Me. 1841) Where one of the plaintiffs was stricken out of the bill by amendment, and subsequently released and assigned his interest to the other plaintiffs, which release was accepted by their guardian (they being minors), such person was a competent witness.—Hanly v. Sprague, 20 Me. (7 Shep.) 431.

[q] (Mich. 1856) In an action of assumpsit brought against two, one, who was not served with process, and did not appear, is not, though released by the other, made a competent witness by chapter 102 of the Revised Statutes.—Brooks v. McIntyre, 4 Mich. 316.

[r] (N. C. 1835) Where a bill claims a conveyance from several persons charged to be jointly interested, a release, pendente lite, by one of them, of all his interest to the others, will not make him a competent witness against plaintiff.—Falls v. Carpenter, 21 N. C. 237, 28 Am. Dec. 592.

[s] (Pa. 1811) A plaintiff is a competent witness who has, after the commencement of a suit, made a voluntary assignment of all his property for the benefit of creditors, and been released by his assignees from all interest in the money to be collected in the suit, and all costs are paid by the assignees before he is sworn.—Steele v. Phœnix Ins. Co., 3 Bin. 306, overruled Post v. Avery (1843) 5 Watts & S. 509, and McClelland v. Mahon (1845) 1 Pa. (1 Barr) 364.

[t] (Pa. 1835) Where a party has devested himself of interest so that he cannot resume his title by compulsion of law, he is a competent witness.—Dellone v. Rehmer, 4 Watts, 9.

[u] (Pa. 1838) The nominal plaintiff of record who had assigned his claim before suit brought for the consideration of $1 is a competent witness to support the claim, though not released by the assignee.—Martin v. Stille, 3 Whart. 337.

[v] (Pa. 1845) Where the nominal plaintiff, before suit brought, had, in good faith, assigned a claim for personal services, alleged by him to have been admitted by the defendants at a general settlement of their accounts, which was valueless in his own hands because he could make no proof thereof except by his own testimony, his testimony was not admissible to sustain it after the assignment, notwithstanding the assignee had executed a release to him.—McClelland v. Mahon, 1 Pa. (1 Barr) 364.

[w] (S. C. 1837) On appeal from the decree of the ordinary, establishing a will, after the appellants had commenced their case and examined several witnesses, they moved to strike from the record one of their number, who had released to the other appellants all of his interest, with a view of examining him as a witness. *Held*, that the motion was properly refused.—Boyd v. Boyd, 3 Hill, Law, 341.

[x] (Vt. 1854) One of several plaintiffs is a competent witness for defendant, when fully released from all interest and willing to testify, though others object who are interested on the part of plaintiffs.—Wills v. Judd, 26 Vt. 617.

[y] (Va. 1808) A party appellee cannot be received as a witness for his co-appellees, either upon his releasing to them his interest in the subject in controversy, or upon his or their depositing with the clerk a sum of money sufficient to cover the costs.—Cogbill v. Cogbill, 2 Hen. & M. 467.

[z] (W. Va. 1874) Where the assignor and assignee of a chose in action are both parties to a suit thereon, and the debtor is not living, a release by the assignee to the assignor does not make him a competent witness.—White v. Heavner, 7 W. Va. 324.

§ 432. Liability for costs in general.

[a] (U. S. 1809) If a witness be surety for costs, the court will permit other security to be substituted, so as to remove his interest.—Virginia v. Evans, Fed. Cas. No. 16,969 [1 Cranch, C. C. 581].

[b] (Ark. 1843) A new bond for costs may be substituted for the old, in order to render the original obligor competent to testify for the plaintiff.—McLain's Adm'x v. Churchill, 5 Ark. (5 Pike) 239.

[c] (Ark. 1847) Where the surety in a cost bond is needed as a witness, plaintiff may substitute a new bond, release such surety, and use him as a witness.—Hoys v. Tuttle, 8 Ark. (3 Eng.) 124, 46 Am. Dec 309.

[d] (Ill. 1863) A defendant in chancery, desiring to call his codefendant as a witness in his behalf, sought to remove his interest in the suit, which arose by reason of his liability for costs, by giving him a bond of indemnity against loss. *Held*, that this did not avail; such indemnity was not regarded a release.—Kennedy v. Evans, 31 Ill. 258.

[e] (Ind. 1844) A person for whose use a suit is brought, being liable, by statute, for costs, if the suit fails, is not a competent witness for plaintiff; nor can he be rendered competent, in such case, by his release of his interest in the cause of action to plaintiff.—Ellison v. Johnson, 7 Blackf. 217.

[f] (Ky. 1863) In a suit by partners for a debt in the court below, the name of one of the plaintiffs was stricken from the action, and security was found for the costs. *Held*, that the party so released was still liable for past costs, and therefore incompetent as a witness, on the ground of interest.—Dougherty v. Smith, 61 Ky. (4 Metc.) 279.

[g] (La. 1820) A party to a suit cannot make himself competent by assigning his interest to his partner, and depositing in court the amount of costs which, if condemned, he would probably have to pay.—Meeker's Assignee v. Williamson's Syndics, 8 Mart. (O. S.) 365.

[h] (La. 1823) A surety for costs may be made competent by the substitution of another, and his release which the court may order.—Butler v. De Hart, 1 Mart. (N. S.) 184.

[i] (La.) A witness responsible for costs, but secured for their payment, is competent.—(1824) Collins v. McCrummen, 3 Mart. (N. S.) 166; (1832) Trenchard v. Elderkin, 3 La. 294.

[j] (La. 1861) One of several plaintiffs cannot release his coplaintiffs from the payment of costs, in order to make them disinterested witnesses.—Roselius v. Barelli, 16 La. Ann. 386.

[k] (Me. 1832) The incompetency of the indorser of a writ, to testify as a witness for plaintiff, arising from his liability for costs, may be removed by plaintiff, by depositing with the clerk such sum as the court shall deem sufficient for the purpose, out of which defendant's costs are to be satisfied, in case he should finally prevail.—Roberts v. Adams, 9 Me. (9 Greenl.) 9.

[l] (Me. 1850) The interest of a witness as indorser of a writ for a nonresident plaintiff for costs may be removed by the deposit with the clerk of a sufficient amount to cover the costs, though made by a stranger to the action, without plaintiff's knowledge.—Ammidown v. Woodman, 31 Me. 580.

[m] (Md. 1831) The undertaking of a security upon the record may be struck out, and a new one substituted, in the discretion of the court, to make the first security a competent witness. —Stimmel v. Underwood, 3 Gill & J. 282.

[n] (Md. 1848) A legal plaintiff on the record is not a competent witness, even though the party for whose use the suit is brought offers to deposit in court any sum which the court may direct, to cover the liability of such plaintiff for costs.—Owings v. Emery, 7 Gill, 405.

[o] (Mass. 1834) An indorser of a writ is a competent witness for plaintiff where a sum of money sufficient to indemnify him against his liability for costs has been placed in his hands. —Beckley v. Freeman, 32 Mass. (15 Pick.) 468.

[p] (Mo. 1846) It is in the discretion of the court to refuse or to permit a party to give a new bond for costs, for the purpose of using the surety in the old one as a witness, after witnesses have been examined on the trial.—Matthews v. Coalter, 9 Mo. 705.

[q] (N. Y. 1837) A party liable for the costs of the defense, in case plaintiff fails to recover, is a competent witness for plaintiff, if he hold a bond of indemnity against such costs from a solvent obligor.—Lake v. Auborn, 17 Wend. 18.

[r] (Pa. 1868) A person who is beneficially interested under a will at the commencement of a proceeding to test its validity is substantially a party to the issue, although not so named, and cannot, by a subsequent release, discharge himself from liability for costs, and is not thereby restored to competency as a witness.—Montgomery v. Grant, 57 Pa. (7 P. F. Smith) 243.

§ 433. Representative or official capacity.

[a] (Ala. 1841) A plaintiff of record cannot, although he is shown to be a mere trustee, be made competent by the deposit of a sum of money sufficient to cover the costs of the suit, although he at the same time releases all his interest in the sum to be recovered to the person beneficially entitled to it.—Stone v. Bibb, 2 Ala. 100.

[b] (Ind. 1841) A prochein ami may be discharged for the purpose of using him as a witness in the suit.—Harvey v. Coffin, 5 Blackf. 566.

[c] (Ind. 1858) A suit against a guardian on a contract made by him touching his ward's estate is personal against the guardian, and hence he cannot, by resigning, cease to be a party to the suit and become a competent witness.—Stevenson v. Bruce, 10 Ind. 397.

[d] (Ky. 1811) The court may suffer the prochein ami of an infant plaintiff to be changed, and the first friend, being thereby released from responsibility for costs, is a competent witness for plaintiff.—Burks v. Shain, 5 Ky. (2 Bibb) 341, 5 Am. Dec. 616.

[e] (Md. 1830) Where a suit is brought by next friend, he may be discharged, and another appointed, for the purpose of making him a witness, on securing the costs which have accrued. —Helms v. Franciscus, 2 Bland, 544, 20 Am. Dec. 402.

[f] (Md. 1864) Plaintiff on the record is incompetent to testify for his cestui que use, and a release to his cestui que use, devesting himself of all interest in the cause, will not restore his competency.—Wade v. Lynch, 21 Md. 534.

[g] (Md. 1864) Where it is discovered, during the hearing upon a caveat to the probate of a will filed for infant heirs by their prochein ami, that such prochein ami is a material witness for the infant caveators, he may, upon petition, be discharged, and another appointed in his place, and it is error in the orphans' court to refuse the application.—Humes v. Shillington, 22 Md. 346.

§ 434. Interest in property in general.

[a] (U. S. 1864) A man may lawfully transfer all his interest in property which is about to become the subject of a suit for the purpose of making himself competent as a witness in such suit.—Tobey v. Leonard, 69 U. S. (2 Wall.) 423, 17 L. Ed. 842.

[b] (Cal. 1863) In an action of trespass against T. "and the other owners" of a certain lode, T. alone was served with process and appeared. At the trial he offered a witness who stated that at the commencement of the suit he owned an interest in said lode, but that before trial he had sold it contingently upon his giving a good title, that T. had released him from all liability in said action. *Held*, that T. was the only defendant whose release was necessary, and that the witness had no interest to disqualify him from testifying, as it did not appear that judgment in this action would affect his title to the interest thus sold.—Real Del Monte Consol. G. & S. Min. Co. v. Thompson, 22 Cal. 542.

[c] (Ga. 1852) A purchaser of a lot fronting on an alleged street is a competent witness to prove the dedication after a conveyance of the lot to a third person with or without a warranty.—City of Macon v. Franklin, 12 Ga. 239.

[d] (Ill. 1865) In an action by a mortgagor against his mortgagee, to recover back money paid upon the mortgage, upon the ground of a failure of the consideration of the mortgage, a subsequent purchaser from the mortgagor, who had sold the premises to the mortgagee and taken the mortgage as a part payment therefor, is a competent witness for plaintiff, since he has no interest in the result of the suit.—Town v. Wood, 37 Ill. 512.

[e] (Ind. 1859) In a suit to cancel a deed, defendant, after suit, but before trial, conveyed. *Held*, that the purchasers, now joined as defendants, could not use him as a witness while he was a party to the record.—Dearmond v. Dearmond, 12 Ind. 455.

[f] (Ky. 1816) A coparcener who has executed a deed of release to another coparcener is a competent witness for the latter in a contest for the possession of the land released.—Rogers v. Turley, 7 Ky. (4 Bibb) 355.

[g] (Ky. 1842) A witness offered by a plaintiff in ejectment had purchased of him part of the land in contest in case of success. On his testimony being objected to, he was released from his notes given for the price of the land. *Held*, that he was thereby rendered competent.—Taylor's Heirs v. Whiting's Heirs, 41 Ky. (2 B. Mon.) 268.

[h] (Ky. 1867) M., nine years before his death, advanced and conveyed lands to four of his children, upon their parol agreement to pay at his death to W. and sister, two other children, as much pro rata in money as would equalize the advancements in land. *Held*, that in an action by W. to enforce the promise making the sister a defendant, she having con-

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veyed away her interest to an only child, and not answering, was a competent witness for the defendants who had joined issue.—Mason v. Mason, 66 Ky. (3 Bush) 35.

[i] (Me. 1852) In a suit by one having a special property in goods, against a common carrier, for negligence, the general owner, having released plaintiff, may be a witness for him.—Moran v. Portland Steam Packet Co., 35 Me. 55.

[j] (Md. 1850) A vendee, having sold the land, is a competent witness for his vendor in a proceeding by the latter against the purchaser to enforce the vendor's lien, to show notice of such lien to the purchaser.—Ringgold v. Bryan, 3 Md. Ch. 488.

[k] (Mass. 1840) Where, in a suit to recover pay for goods sold, plaintiff offers a witness whom defendant proves that plaintiff has declared to be jointly interested with him in the goods, a release to plaintiff by the witness of all his interest in the goods renders him a competent witness for plaintiff.—Bemis v. Charles, 42 Mass. (1 Metc.) 440.

[l] (N. Y. 1845) Where A. and B. are joint lessees, and A. sells out his interest to C. and D., who agree to pay the arrears of rent, but fail to do so, and the joint property on the premises is sold under a distress, and C. and D. buy in the property, and one of them procures a renewal of the lease, and C. and D. then sell the whole property to E., excluding B., A. and E. will both be competent witnesses for B. in a suit in equity against C. and D.—Burrell v. Bull, 3 Sandf. Ch. 15.

[m] (N. C. 1860) A party became interested in a covenant of warranty of a slave, by purchasing an interest in the slave, and had such interest at the time the suit was brought, but sold it to plaintiff previously to the examination. *Held*, that he was competent as a witness for plaintiff.—Henderson v. Crouse, 52 N. C. 623.

[n] (Tex. 1863) A remainderman may execute a release of his interest to the owner of the life estate, and thereby render himself a competent witness for the latter in a suit for injury to the property.—Clark v. Southern Pac. R. Co., 27 Tex. 100.

§ 435. Owner of vessel or cargo.

[a] (U. S. 1822) An owner of a vessel who has settled with his co-owner may testify against a passenger in a suit for passage money, where his co-owner has released him.—Massoletti v. Miller, Fed. Cas. No. 9,264 [2 Cranch, C. C. 313].

[b] (U. S. 1846) The sale by a part owner (who is also master) of his interest in a vessel before suit brought, and a release to him by his co-owners of all liability to them, because of any recovery of wages against them or their vessel, render him a competent witness in an action for wages against the vessel.—The Osceola, Fed. Cas. No. 10,602 [Olcott, 450].

[c] (Mass. 1807) A. and B. jointly ship goods, and consign them to the master for sales and returns, A. only being known to the master. After the ship's departure, A. and B. agree to sever their interest in the adventure, and A. gives B. a written direction to the master to account to B. for a moiety. Upon the ship's return, B. shows the direction to the master, and demands payment of him. The master, not having brought the proceeds in the ship, refuses to account with B., but, at the same time, says he is ready to account with the right owner, and, when the proceeds arrive, he will pay them to B., if they belong to him. In assumpsit by B. against the master for the moiety, *held*, that A. is a competent witness for plaintiff.—Austin v. Walsh, 2 Mass. 401.

[d] (Mo. 1853) An owner of the boat at the time of a collision, and when suit was commenced and the boat attached, who sold his interest with the understanding that the purchasers should run the risk of the suit then pending, is incompetent to testify.—Patrick v. The J. Q. Adams, 19 Mo. 73.

[e] (N. Y. 1831) A person, owning part of a cargo of a vessel, standing by and permitting another who owns the residue to sell the same, agreeing to look to such other for payment, and subsequently being paid for the same, is a competent witness to prove the contract of sale.—Outwater v. Dodge, 6 Wend. 397.

[f] (N. Y. 1850) A master of a vessel, who had agreed with the owner to become a joint owner on paying a certain sum, but who had never fulfilled the agreement, and worked the vessel for a certain part of the profits, was a competent witness for the owner on executing to him a release of all his rights under the contract.—Ward v. Whitney, 5 N. Y. Super. Ct. (3 Sandf.) 399, affirmed (1853) 8 N. Y. (4 Seld.) 442.

§ 436. Grantor or vendor and warrantor.

[a] A grantor in a deed with general warranty is a competent witness after the covenant of warranty has been released.

—(Conn. 1812) Clark v. Johnson, 5 Day, 373;
(Ill. 1865) Fash v. Blake, 38 Ill. 363;
(Ky. 1823) Wall v. Nelson, 13 Ky. (3 Litt.) 395;
(Mass. 1849) Field v. Snell, 58 Mass. (4 Cush.) 504;
(Miss. 1857) Cooper v. Granberry, 33 Miss. 117;
(Pa. 1839) Summers v. Wallace, 9 Watts, 161;
(Tex. 1870) Ellis v. Ponton, 32 Tex. 434.

[b] (U. S. 1850) Where an auctioneer, without the knowledge of the vendor, bids at the sale, enhancing the price, a release by the purchaser of all claims against the auctioneer for the latter's misconduct, so as to make him a competent witness, will not release the vendor.—Veazie v. Williams, 49 U. S. (8 How.) 134, 12 L. Ed. 1018, reversing (1845) Fed. Cas. No. 16,907 [3 Story, 611].

[c] (Cal. 1859) After the vendee has released the vendor from all damages for breach of a warranty of title, the vendor is a competent witness for the vendee in a suit against him by a subvendee for a breach of the warranty.—Paige v. O'Neal, 12 Cal. 483.

[d] (Conn. 1793) A discharge to a grantor of lands, who conveyed with covenants of seisin to the grantee and his assigns, given by the grantee, after he has conveyed part of the premises to other persons, will not remove the interest of the grantor.—Sherwood v. Hubbel, 1 Root, 498.

[e] (Conn. 1809) A. conveyed to B., with covenants of seisin and warranty, a piece of land containing 13 acres, bounded east by the land of C., and west by that of A. In an action of trespass quare clausum fregit, brought by B. against C., the defendant pleaded title, and claimed that the dividing line between his land and that conveyed to the plaintiff was west of the locus in quo. The grantor was offered as a witness to disprove the defendant's claim, having been released by the plaintiff from the covenants in his deed. *Held*, that the grantor was an incompetent witness, being interested to establish the dividing line as far eastward as possible, and that the release did not restore his competency, the covenants in his deed running with the land.—Abby v. Goodrich, 3 Day, 433.

[f] (Ga. 1854) In an ejectment by A. against B., both parties deriving title from C., C.,

being released by defendant from his liability over, on account of his warranty, is a competent witness to prove plaintiff's deed a forgery. Nor is defendant obliged to resort first to the ostensible witnesses to plaintiff's deed. —Jordan v. Faircloth, 14 Ga. 544.

[g] (Ill. 1861) Where a quitclaim deed of land is obtained from the owner by fraud, and he afterwards releases his interest in the land to another person, he is a competent witness in a suit between the two grantees to prove the fraud.—Lloyd v. Higbee, 25 Ill. (15 Peck) 603.

[h] (Ky. 1845) Where a person had transferred his interest in a tract of land to A., with notice, and subject to a prior conveyance to B., he is a competent witness for B.; or, if he had sold to A. without notice of the previous sale, he would be competent, as his interest would lie on the other side.—Waller v. Logan's Heirs, 44 Ky. (5 B. Mon.) 515.

[i] (La. 1823) Defendant may, by a release, make his vendor competent to prove the loss of a bill of sale to witness from plaintiff.—Vannorght v. Foreman, 1 Mart. (N. S.) 352.

[j] (Me. 1849) On a writ of entry, where defendants vouched in their immediate warrantors, who appeared and defended, the fact that they executed a release to the original warrantor of all liability on his covenant of warranty will not render such original warrantor a competent witness.—Crooker v. Jewell, 29 Me. (16 Shep.) 527.

[k] (Me. 1854) A grantor of land, having been released from his covenants of warranty, is a competent witness for the grantee, although the grant contain a reservation of a right in behalf of the grantor to resume the land in case he should fall into need; his rights not being affected by the result of the suit.—Gilbert v. Curtis, 37 Me. 45

[l] (Mass. 1835) The grantee of land, which had been previously attached in an action against the grantor, conveyed it with covenants of warranty. *Held*, that he was an incompetent witness for the grantor in such action, notwithstanding the grantee testified, on his voir dire, that he considered himself fully indemnified against his covenants, and felt no interest in the action.—Pond v. Hartwell, 34 Mass. (17 Pick.) 269.

[m] (Miss. 1856) In a suit between parties claiming under two conveyances from the same grantor, one of which contains an implied warranty and the other does not, a release to the grantor will make him competent as a witness for the party claiming under the former.—Fatheree v. Fletcher, 31 Miss. 265.

[n] (N. H. 1822) A. conveys land to B. with a covenant of warranty, and B. conveys the same land to C. with a covenant of warranty. A release, by C., of A.'s covenant, is in law a release of B.'s covenant, and such release makes A. a competent witness for C. in a writ of entry brought by C. to recover the land.—Leighton v. Perkins, 2 N. H. 427.

[o] (N. H. 1843) Prior to the sale of land to plaintiff, the vendor informed him that defendant had no right to float the land, and the deed to plaintiff contained covenants of warranty. *Held*, that the vendor was a competent witness for plaintiff in the subsequent action for flowing the land, on being released from his covenants, though at the date of the release some damage had been done by the water.—Sargent v. Gutterson, 13 N. H. 467.

[p] (N. H. 1846) P. conveyed land to W., and W. conveyed to M., taking a mortgage back for the purchase money. *Held*, that M.'s written admission that he was tenant at will to W., and W.'s release of covenants of warranty to P., rendered the latter a competent witness in an action against M., to recover the land.—Bellows v. McCartee, 20 N. H. 515.

[q] (N. J. 1820) In an action by the vendee of goods, against a mere depository of such goods, for the recovery of them, the vendor is a competent witness for plaintiff, if released by him.—Hendricks v. Mount, 5 N. J. Law (2 Southard) 738, 8 Am. Dec. 623.

[r] (N. Y. 1820) A grantor who has given a deed with full covenants is a competent witness for a person deriving title under him, but not as his immediate grantee, on being released; the release precluding the party from resorting to him as his immediate grantor.—Jackson v. Root, 18 Johns. 60.

[s] (N. Y. 1836) Though in an action of ejectment it appeared that the deed, under which plaintiff claimed, was void as to third persons under the statute to prevent champerty and maintenance, plaintiff's grantor was nevertheless a competent witness for plaintiff when duly released from liability on his covenants, as the deed was valid between the grantor and plaintiff.—Van Hoesen v. Benham, 15 Wend. 164.

[t] (N. Y. 1838) In an action of ejectment against a husband, to recover real estate belonging to his wife, he may release a witness objected to as incompetent on the ground of his liability to the wife under a covenant for quiet enjoyment.—Ford v. Walsworth, 19 Wend. 334.

[u] (N. Y. 1847) A. conveyed land to B., B. conveyed the same land to C. with warranty, and C. to D., also with warranty. In a suit for dower of the land, brought by the widow of A. against D., *held*, that B. was a competent witness for defendant, on being released by him.—Cunningham v. Knight, 1 Barb. 399.

[v] (N. C. 1860) The grantor of a slave, by deed, can, by means of a release from his grantee, be made competent to testify for him.—Buie v. Wooten, 52 N. C. 441.

[w] (Pa. 1809) A grantor, when released from liability, and without interest in the suit, may be a witness in favor of one claiming under him.—Balliot's Lessee v. Bowman, 2 Bin. 162, note.

[x] (Pa. 1852) A grantor with general warranty, being released from the warranty, and not interested, is a competent witness for the grantee, in favor of his title, and against a conveyance previously made by him to a grantee in trust.—Dayton v. Newman, 19 Pa. (7 Harris) 194.

[y] (Tenn. 1816) A release of a warrantor, where the covenant is merely personal, makes him a good witness, without registration, on the trial of an ejectment by the vendee.—Pile v. Benham, 4 Tenn. (3 Hayw.) 176.

[yy] (Vt. 1846) A witness, offered on the part of plaintiff, in an action of ejectment, had formerly been a joint owner with plaintiff's grantor of a lot of 100 acres of land, and had agreed with him, within 15 years before the trial of the action, upon the division of the lot into moieties by a line running east and west, and had conveyed the north half of the lot by metes and bounds, warranting it to contain 56 acres, and plaintiff became the owner of the south part of the lot, and this action was brought to recover a strip of land lying upon the west side of his lot, to a line, which he claimed had been acquiesced in by his grantors and defendant for more than 15 years before the commencement of the action; and if plaintiff recovered to this line, his lot would contain 50 acres, and otherwise less than that. *Held*, that if these facts disclosed any interest in the witness, that interest was fully removed by a release executed by plaintiff to him, discharging him and his assigns from all rights of

action accruing at any time to plaintiff, by reason of the division of the original lot between the witness and plaintiff's grantor.—Ackley v. Buck, 18 Vt. 395.

[z] (Vt. 1853) A witness who was the assignee of defendant and had conveyed with warranty a part of defendant's real estate, which had been attached by plaintiff, the witness holding a sufficient indemnity to meet the judgment if recovered, is too remotely interested to be incompetent.—Linsley v. Lovely, 26 Vt. 123.

[zz] (Va. 1855) Where one conveys with covenant of warranty, and in a suit brought against those claiming under his grantee a release from his covenant is executed to him by the administrator of his grantee, he is thereby made a competent witness (although some of the defendants did not join in such release), since the personal representative alone can maintain an action for breach of covenant.—Unis v. Charlton's Adm'r, 12 Grat. 484.

§ 437. Landlord and tenant or terre-tenant.

[a] (La. 1864) One party leased a livery stable and premises to two parties in partnership, and one of the lessees purchased the interest of the other, and gave a warranty against all liability, and the lessor recognized the sale and the release of one of the lessees by the other, by receiving the rent and giving him written notice that his lease would terminate at a certain date. *Held*, that the lessee who was released was a competent witness to testify in a suit for damages between the lessor and lessee.—Crane v. Harris, 19 La. Ann. 114.

[b] (Me. 1844) The lessor of plaintiff, in an action of trespass quare clausum, wherein soil and freehold in the premises are pleaded by defendant in himself, on being released from all claims under the covenants of the lease, is a competent witness for plaintiff to disprove the title set up by defendant.—Jordan v. Symonds, 23 Me. (10 Shep.) 407.

[c] (Pa. 1818) A release, by a tenant in possession, of all his interest, will not make him a competent witness for the landlord, nor will he be competent if the title is proved not to be in his landlord.—Vincent v. Huff's Lessee, 4 Serg. & R. 298.

[d] (Pa. 1826) A release by two lessees will not bar a third from an action against a landlord, unless the covenant was joint, so as to render the landlord competent to testify for the former.—Eisenhart v. Slaymaker, 14 Serg. & R. 153.

[e] (Pa. 1852) A person who had an interest in the property when scire facias was brought to enforce a mechanic's lien, and was notified of the suit as terre-tenant, but who sold out his interest before the trial, is a competent witness for defendant, the proceeding being in rem.—Holden v. Winslow, 19 Pa. (7 Harris) 449.

[f] (Pa. 1868) A firm, the lessees of a coal mine, confessed judgment to three creditors for themselves and in trust for other creditors, and under this judgment the fixtures, mining machinery, tools, teams, etc., were levied upon and sold to the judgment creditors. Subsequently the lessees sold and surrendered to the lessors the lease and all their interest in the "colliery," and the latter took possession of the fixtures, etc., to recover which the sheriff's vendees brought trover. *Held* that one of the lessees, who had released to plaintiffs all his interest in the property in controversy, was not a competent witness for them. His release could only reach his right to the surplus after the object of the trust had been accomplished, and left him still as directly interested as before in increasing or preserving the fund so as to discharge by means of it his personal liability to his creditors.—Carey v. Bright, 58 Pa. (8 P. F. Smith) 70.

§ 438. Interest in mortgage or other security.

[a] (U. S. 1845) In a suit in equity, brought by the vendor of land, to set aside the conveyance for fraud, a mortgagee of the vendee was brought in to defend, but it was shown that the mortgage was discharged before the bill was filed, and there was no evidence of any collusion. *Held*, that the mortgagee was a competent witness for the respondent, but that he would not have been if he had remained interested.—Warner v. Daniels, Fed. Cas. No. 17,181 [1 Woodb. & M. 90].

[b] (Ala. 1849) Where a note is made by A. and indorsed by B. and C. for the exclusive benefit of D., and C. at the time of the transaction agrees to be bound equally with the maker and first indorser, and D. afterwards, with the assent of the parties, executes a deed of trust to A. to secure them, and the property conveyed is levied on and claimed by the trustee under the deed, C. on the trial of the right of property is an incompetent witness for the claimant, nor is his competency restored by a subsequent release to the claimant and B. of all his interest in the security and a bond of indemnity from them to him against all further losses on account of D.—Scales v. Dersha, 16 Ala. 308.

[c] (Ark. 1856) In a suit by the trustee to recover possession of the trust property, it appeared that one of the notes secured by the deed was for the benefit of a person summoned as a witness. He swore that he had no interest in the result of the suit, and that he had delivered the note to a third person, who was security for the debt, had given his own note for the amount, who was solvent, and to whom alone he looked for payment. *Held*, that the witness was competent.—Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458.

[d] (Ill. 1863) The holder of notes secured by a mortgage obtained insurance on the mortgaged premises, and afterwards assigned the notes and mortgage, and the policy of insurance, and while the interests were thus held by the assignee the house on the premises was destroyed by fire. *Held*, in an action in the name of the party originally insured to recover the insurance money, that his assignee, holding the interests at the time of the loss, having, in the meantime, assigned the notes and mortgage and the policy to the insurers, in compliance with one of the conditions of the policy, thereby became divested of his interest in the suit, and was a competent witness therein, on behalf of the party suing.—New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221.

[e] (Ill. 1865) The competency of a witness who is an interested party by reason of the assignment of a note and mortgage, the validity of which is at issue, may be restored by a release from all liability by defendant, who is the holder and assignee.—Smith v. Newton, 38 Ill. 230.

[f] (Ky. 1848) A father, who has assigned a mortgage to his son, in consideration of natural affection, and who intended to charge it as an advancement, if realized, is a competent witness to sustain the mortgage, however his position might affect his credibility.—Vanmeter v. McFaddin, 47 Ky. (8 B. Mon.) 435.

[g] (Me. 1827) In a writ of entry by the mortgagee against a stranger, the mortgagor will be admitted a competent witness for the mortgagee, the latter having released him from so much of the debt as should not be satisfied by the land mortgaged, and covenanted to resort to the land as the sole fund for payment of the debt.—Howard v. Chadbourne, 5 Me. (5 Greenl.) 15.

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[h] (N. H. 1844) Upon the trial of a writ of entry, brought by a mortgagor against a person to whom the mortgagee had conveyed the land with warranty, the mortgagee upon being released from his covenants is a competent witness for the tenant.—Smith v. Smith, 15 N. H. 55.

[i] (N. J. 1826) A purchaser of a portion of mortgaged premises from the mortgagor executed a bond to pay the mortgage, and afterwards mortgaged the land to a third person. The mortgagor subsequently conveyed the remaining portion of the mortgaged premises to another person with covenants of warranty. *Held*, that the mortgagor on being released by the second purchaser from his covenants was a competent witness to show that the purchaser from the first grantee took with notice of the agreement on the part of such grantee to pay the entire mortgage.—Black v. Morse, 7 N. J. Eq. (3 Halst. Ch.) 509.

[j] (N. Y. 1828) A mortgagor, who is insolvent, by whom all his interest in the mortgaged premises has been sold to plaintiff, is competent to prove payment of the mortgage debt, on receiving from plaintiff a release of all claim against him on account of the mortgaged premises.—McLaren v. Hopkins, 1 Paige, 18.

[k] (Pa. 1852) A. gave a mortgage to B. without warranty or bonds, and subsequently released the land to C. On a scire facias being issued on the mortgage naming A. as defendant, C. appeared, showed title, and had himself substituted as defendant in place of A. *Held*, that A. was a competent witness for C. to show that the mortgage had been paid; the action being in rem and not in personam.—Perkins v. Johnson, 19 Pa. (7 Harris) 510.

[l] (Vt. 1846) A. purchased goods professedly for B., and took a bill of sale of them to B., but in reality paid for them himself, and made the purchase for his own benefit. Subsequently A. sold the goods to C., and procured C. to execute a receipt, acknowledging that he had received the goods of B., and agreeing that they should remain the property of B. until paid for. An action of trover was commenced by the holder of the receipt of C. in the name of the original nominal owner of the goods, against one who held the goods under C., and a witness was offered on the part of plaintiff, who had been an intermediate owner of the receipt, and who had conveyed the same to plaintiff in interest, as collateral security for a debt which plaintiff in interest held against him, and, upon an objection being taken to the witness on the ground of interest, the bill of exceptions showed that plaintiff in interest executed a discharge, which was held by the county court sufficient to remove the interest of the witness, and which was acquiesced in by defendant, and the discharge was not produced on the trial in the supreme court. *Held*, that the latter court would presume that the discharge executed was a release of the debt, for the security of which the conveyance of the receipt by the witness was made, and that the witness could not be held incompetent, by reason of its having been shown, on his cross-examination, and by other testimony, that a third person had in fact a claim upon the debt in favor of plaintiff in interest against the witness, and that, upon the conveyance of the receipt by the witness to plaintiff in interest, it was agreed between such third person and plaintiff in interest, that such third person should hold the receipt in lieu of his claim upon the other debt, it not appearing that the witness was aware of this last agreement.—Lord v. Bishop, 18 Vt. 141.

[m] (Vt. 1846) A. and B. agreed to mortgage certain real estate owned by them jointly, and also certain real estate owned by them individually, to secure the mortgagees for signing a note with them to a third person, it being understood that A. was to secure one-third and B. two-thirds of the amount, and, by mistake, a portion of B.'s real estate, intended to be mortgaged, was not included in the mortgage deed, and A. had paid to the mortgagees his portion of the mortgage debt, and had received from them a release of his individual real estate. *Held*, in a suit in chancery brought by the mortgagees, against B., to reform the mortgage, that A. was a competent witness for complainants, especially as no objection had been taken by defendant for want of parties.—Blodgett v. Hobart, 18 Vt. 414.

§ 439. Interest in invention.

[a] (U. S. 1853) Two witnesses who had owned an interest in an invention claimed to have sold out about a month before testifying. But one of them admitted that if the machine proved successful part of the proceeds were to be applied to the payment of certain debts of theirs, and the other stated that if it were successful he might or might not get a pecuniary benefit therefrom. *Held*, that both were disqualified, as interested parties.—Marshall v. Mee, Fed. Cas. No. 9,129 [1 MacArthur, Pat. Cas. 229].

[b] (U. S. 1857) An inventor who is a party to the record, and who has a real interest in the case until a short time before he is to be examined as a witness, cannot become a competent witness by assigning his invention.—Hill v. Dunklee, Fed. Cas. No. 6,489 [1 MacArthur, Pat. Cas. 475].

[c] (U. S. 1860) An assignor who has sold his invention is not a competent witness to prove priority upon an interference declared.—Barstow v. Swan, Fed. Cas. No. 1,065.

§ 440. Interest in penalty or fine.

[a] (U. S.) The owner of the goods stolen, after having released to the United States and to the prisoner all his interest in the fine, is a competent witness for the United States, and may be examined generally.—(1801) United States v. Clancey, Fed. Cas. No. 14,800 [1 Cranch, C. C. 13]; (1802) Same v. Hare, Fed. Cas. No. 15,302 [1 Cranch, C. C. 82]; (1804) Same v. Brown, Fed. Cas. No. 14,657 [1 Cranch, C. C. 210]; (1804) Same v. McCann, Fed. Cas. No. 15,655 [1 Cranch, C. C. 207]; (1805) Same v. Tolson, Fed. Cas. No. 16,530 [1 Cranch, C. C. 269]; (1824) Same v. Carnot, Fed. Cas. No. 14,726 [2 Cranch, C. C. 469].

[b] (N. H. 1843) Although upon the trial of an indictment for larceny the party injured is not a competent witness for the prosecution, if he be entitled to treble the value of the property stolen upon the conviction of the prisoner, yet, as the payment of treble damages is a part of the sentence, and as there is no mode of enforcing it if it be not included in the sentence, if the witness agree to release all claim to it, and an entry be made on the record accordingly, the court would not be warranted in including it in the sentence, and the competency of the witness will be restored.—State v. Pray, 14 N. H. 464.

[c] (Pa. 1782) An informer is not a competent witness if he release his interest as to the part of the penalty given him by statute; he being liable for the costs in any event.—Rapp v. Le Blanc, 1 Dall. 63, 1 L. Ed. 38.

[d] (Pa. 1800) On prosecution for violation of election laws, the prosecutor, who was entitled to a moiety of the fine, was a competent witness on executing a release.—Respublica v. Ray, 3 Yeates, 65.

[e] (S. C. 1820) An informer is a competent witness if he release his interest as to the part of the penalty given him by statute.—City Council v. Haywood, 2 Nott & McC. 308.

[f] (S. C. 1820) Where on an indictment it is discovered after a witness has testified that he

is interested in the penalty, he may release his interest and be re-examined.—State v. Van Evour, 2 Nott & McC. 309.

[g] (S. C. 1836) A witness, who may be incompetent from being interested in an action to recover a penalty, may restore his competency by a release of his interest to plaintiff.—City of Charleston v. England, Riley, 50.

(c) INTEREST ARISING FROM PARTICULAR OBLIGATIONS OR TRANSACTIONS.

INTEREST IN CONTRACT IN GENERAL, § 441.
PROCEEDINGS TO ENFORCE MECHANIC'S LIEN, § 442.
INTEREST IN BILL OR NOTE, § 443.
—— MAKER OR DRAWER, § 444.
—— INDORSER AND INDORSEE, § 445.
—— PAYEE OR ACCEPTOR, § 446.
USURIOUS TRANSACTIONS, § 447.
TRANSACTIONS FRAUDULENT AS TO CREDITORS, § 448.

§ 441. Interest in contract in general.

[a] (Ill. 1864) A. sold B. a quantity of corn under an agreement that he should be credited for its value upon his indebtedness to B., and B. gave him such credit. *Held*, that A. was a competent witness for B. in a suit by him to recover the price of the same corn which he had subsequently sold to defendant.—Hodgen v. Latham, 33 Ill. 344.

[b] (Me. 1825) A party who had contracted to furnish a quantity of goods afterwards admitted another to aid him in supplying the requisite quantity, for which he was to receive the same price, and was paid accordingly. *Held*, that the person thus subsequently admitted was a competent witness for the party with whom he had contracted, in a suit brought by the latter to recover the price of the goods sold.—Barstow v. Gray, 3 Me. (3 Greenl.) 409.

[c] (Me. 1854) A physician, who by his contract with a town receives all fees they recover of other towns for his attendance on paupers, is a good witness in a suit for such fees and other supplies if he have previously received said fees from the town.—Inhabitants of Richmond v. Inhabitants of Thomaston, 38 Me. 232.

[d] (Mass. 1835) In an action on a book account, defendant introduced a witness, who testified that, upon the sale of a horse by him to plaintiffs, it was agreed between them that a portion of the price should be applied in part payment of this account, and that defendant should pay the amount of such portion to the witness, and that it was paid accordingly. *Held*, that the witness was competent.—Burt v. Nichols, 33 Mass. (16 Pick.) 560.

[e] (Mass. 1846) B. contracted with a railroad corporation to construct a section of the road, and afterwards underlet the section to C., D., and E. jointly, and not jointly and then severally, and C. underlet it to D. and E., who proceeded in the work for a short time, and then stopped; the corporation then assumed the work, and finished it, and were sued by S. for articles furnished, under a contract with C. and D., for the completion of the work, and used by the corporation. S. released B. and C. from all liability for the articles, and introduced the testimony of D. in support of the claim. *Held*, that D. was a competent witness.—Stiles v. Western R. Corp., 52 Mass. (11 Metc.) 376.

[f] (Mass. 1851) Since Rev. St. c. 92, §§ 12, 13, one of several joint contractors, who by reason of his absence from the commonwealth is not served with process in an action brought against them on the contract, cannot be rendered a competent witness for the others, by a release from them of his liability to contribute toward the payment of the debt, in case plaintiff should recover against them, and they should be obliged to pay it.—Jennings v. Fisher, 61 Mass. (7 Cush.) 239.

[g] (N. C. 1856) As one of two persons jointly entitled to damages for a deceit in a sale of property cannot release or assign his interest to the other so as to enable him to sue alone, such release to a joint purchaser will not render him a competent witness for his co-purchaser.—Scott v. Brown, 48 N. C. 541, 67 Am. Dec. 256.

[h] (Pa. 1852) Money in process of collection by an attorney was claimed by four persons. It was agreed by them that it should be received by three of them. The other brought suit against the attorney after he collected and paid over the money. *Held*, that the three were competent witnesses to prove the agreement, they having been released by defendant from liability over to him.—Strohecker v. Hoffman, 19 Pa. (7 Harris) 223.

[i] (Pa. 1861) A county proposing to build a bridge, G. agreed to pay $150 toward it if placed at his mill, at which place it was built by R., the contractor, who, having agreed to take G. for payment for so much of the sum due by the county, received from the commissioners an order on G. for $150 and the balance in money; the order not being accepted or paid, it was returned, and afterwards suit brought for that amount against the county by R., on the trial of which G., to whom the money recovered was to go in payment for a lumber bill, was rejected as a witness, though released by the plaintiff. *Held*, that G., though released by R., was still interested, and was not competent, until he had released plaintiff.—Rhoads v. Armstrong County, 41 Pa. (5 Wright) 92.

[j] (Tex. 1863) A party to an action directly interested in the contract upon which the cause of action arises wherein he is called to testify cannot have his competency as a witness restored by release, substitution, or deposit.—Gould v. Beal, 26 Tex. 665.

[k] (Vt. 1840) A witness who had no interest in a contract when made, and who was discharged of all interest at the time of trial, is admissible, though he was part owner of the contract shortly after it was made and up to the day of the trial.—Moore v. Rich's Adm'r, 12 Vt. 563.

[l] (Vt. 1850) Plaintiff furnished money to be expended by S. in the purchase of flour, and S. was to repay the money, with interest, and to allow plaintiff a barrel of flour for every 100 barrels purchased; and the flour was purchased and invoiced in the name of plaintiff and was to remain his until sold and paid for. In an action brought by plaintiff to recover the price of the flour, when sold, S. having released to plaintiff all claim which he had in the suit, both to the damages and costs, and plaintiff having released to S. all claim on account of the costs, and expenses in the suit, and the attorney who commenced the suit having released his lien upon the costs for his services and expenditures, *held*, that S. was thereby rendered a competent witness for plaintiff.—Heald v. Warren, 22 Vt. 409.

§ 442. Proceedings to enforce mechanic's lien.

[a] (N. Y. 1844) In an action by the claimant of a mechanic's lien against the owner, the builder is a competent witness for the former, on being released by him.—Hoyt v. Miner, 7 Hill, 525, affirming Miner v. Hoyt (1843) 4 Hill, 193.

[b] (Pa. 1841) In a proceeding on a mechanic's lien against the owner of a building and contractor, in which it appeared that the contractor had been fully paid for his work and

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materials, he is a competent witness for the owner on being released by the owner from his liability over to him for costs.—Dickinson College v. Church, 1 Watts & S. 462.

[c] (Pa. 1842) In scire facias upon a mechanic's lien against the owner and contractor, the latter may be made a competent witness by a release, from his sureties and the owner, from all personal liability for the sum claimed by plaintiff.—Church v. Dickinson College, 3 Watts & S. 221.

[d] (Pa. 1850) On the trial of a scire facias on a mechanic's lien filed against a reputed owner and two contractors, such owner and one contractor cannot make the other a competent witness by a release, as they have no power to release him from his liability to plaintiff's costs.—Haworth v. Wallace, 14 Pa. (2 Harris) 118.

[e] (Pa. 1859) The interest of a contractor who constructed a building would stand balanced on a sci. fa. on a mechanic's lien were it not for his liability to indemnify the owner against the costs of the action, and he may consequently be rendered a competent witness for the defense by release of the obligation forming his disqualification.—Spackman v. Caldwell, 3 Phila. 375.

§ 443. Interest in bill or note.

[a] (Ala. 1852) When an accommodation indorser of a note, on which judgment is recovered against him, files his petition for a supersedeas of an execution issued thereon, alleging satisfaction of the judgment, and issue is taken on the facts set forth in the petition, the party for whose accommodation he indorsed the note may be rendered a competent witness for the petitioner by the execution of a release to him by the latter previous to the trial; and it is no objection to the release that it was delivered to the witness by the petitioner's attorney, when it is shown that after its delivery the petitioner acknowledged that he had released the witness.—Branch Bank at Mobile v. Coleman, 20 Ala. 140.

[aa] (Ala. 1855) The exception contained in section 12 of the Code will be so construed in connection with section 2290 as to authorize the transferrer of a note to be a witness for his transferee on his receiving a release.—Hiscox v. Hendree, 27 Ala. 216.

[b] (Ill. 1861) In a replevin suit, a person to whom plaintiff has given a note for his advance of money with which to purchase the property replevied, and out of the proceeds thereof to pay the note, and which note has been paid, is a competent witness for plaintiff.—Gray v. Morey, 26 Ill. (16 Peck) 409.

[c] (Ill. 1866) Where M. agreed to aid three persons, who were about to form a partnership, in purchasing a certain factory, at a specified price, in consideration of the surrender to him of his notes, held separately by two of them, and having performed his agreement, one of them surrendered the note held by him, but the other assigned his before maturity, and the assignee recovered judgment thereon against M., the one who surrendered his note was a competent witness in an action by M. against the other for breach of his agreement to prove the agreement.—Pollock v. McClurken, 42 Ill. 370.

[d] (Ky. 1829) One obligor on a joint and several note cannot, by releasing his co-obligor from contribution, render him a competent witness, although the suit has abated as to the latter.—Pendleton v. Speed, 25 Ky. (2 J. J. Marsh.) 508.

[e] (N. H. 1857) A witness testified on the trial that he did not know whether he was interested in the suit or not; that he owned the note on which the execution was founded; that the suit on the note was brought by his direction, in plaintiff's name as indorsee, with his consent, against the principal alone, one M. being surety on it; that the witness had agreed with M. that he might manage the suit on the note, and the judgment and execution which might be recovered therein, in his own way, as the witness looked to M. alone for his pay, and was sure of it from him; that M. had taken the direction and control of the suit on the note, and of the execution which issued therein; had instituted this suit in plaintiff's name by the consent of the witness, and had agreed to conduct it at his own expense. *Held*, that on these facts the witness had no interest to exclude him from testifying for plaintiff.—Benson v. Ela, 35 N. H. 402.

[f] (N. Y. 1832) The holder of a note, if he has parted with his interest, is a competent witness for the assignee.—Soulden v. Van Rensselaer, 9 Wend. 293.

[g] (N. Y.) A. assigned a note to B., and received in exchange B.'s note of the same date and amount, and payable at the same time, without any understanding that the payment of B.'s note was to depend on the payment to him of the assigned note. *Held*, that it was an exchange of the notes, and that the title of the assigned note was vested in B., and that A. was not incompetent to testify in an action brought by B. on the assigned note, by reason of Code 1848, § 352. Where a party has no interest in the event of the suit, the assignment of the note in suit, even for the purpose of procuring his competency, does not affect his competency.—(1849) Evarts v. Palmer, 7 Barb. 178; (1850) Everts v. Same, 3 Code Rep. 51.

[h] (N. C. 1856) A subscribing witness to a negotiable instrument, who acquires by his own act an interest therein, either legal or equitable, may devest himself of that interest, and thus restore his competency in regard to it.—Purvis v. Albritton, 49 N. C. 170.

[i] (Pa. 1844) Where defendant, sued alone on a note signed by him and another, pleaded in abatement the nonjoinder, the other signer, though released from liability for costs or damages, was not a competent witness on the issue presented.—Graham v. Eichbaum, Brightly, N. P. 439.

[j] (Pa. 1849) On a feigned issue to try the right of claimants to the proceeds of a sealed note, which has been successively assigned, an assignor, having been released, is a competent witness for his assignee.—Taylor v. Gitt, 10 Pa. (10 Barr) 428.

[k] (Pa. 1851) No one who, at the happening of the right of action on notes, is a party in interest to the transaction, can, by transferring his interest to a mere volunteer, become a witness in the action in order to enforce the right.—Miley v. Todd, 17 Pa. (5 Harris) 101.

[l] (Pa. 1860) In an action on a note, a party who had been the holder of it before maturity, but had passed it by delivery, without his indorsement, is a competent witness for plaintiff to prove the consideration.—Evans v. Dela, 35 Pa. (11 Casey) 451.

[m] (Pa. 1866) Y. purchased land, and, as part of the consideration, agreed to pay a note of R., the vendor, to S. Y. had already paid a judgment upon the note, but he did not have satisfaction entered upon it, or give up the note to R. Four years afterward Y. had the judgment assigned by S. to B. *Held*, in an action upon the judgment against R.'s estate, that Y. was not a competent witness for plaintiff.—Selover v. Rexford's Ex'r, 52 Pa. (2 P. F. Smith) 308.

[n] (S. C. 1831) Where a note was taken for a debt due to the subscribing witness, and was made payable to a third person for the purpose of enabling the real creditor to become a witness, a release of his interest to the nominal payee rendered the subscribing witness compe-

tent to prove its execution, and an objection to his testimony went only to his credibility.—Crosby v. Floyd, 2 Bailey, 133.

[o] (Tex. 1852) A witness is competent, on being released by the payor, to prove that a note, sued on by a subsequent holder, who claims under the payee's indorsement in blank, was transferred by the payee to him, the witness, and that the payor settled it with him in full.—Shackelford v. Wheeler, 7 Tex. 553.

[p] (Vt. 1831) One having a beneficial interest in a note, but not the plaintiff of record in the suit on it, in order to qualify as a witness at the trial, assigned his interest to a third person. *Held*, that this did not qualify him.—Jarvis v. Barker's Adm'r, 3 Vt. 445.

[q] (Vt. 1841) Witness had covenanted with defendant to pay certain notes which were pleaded as an offset to plaintiff's demand. *Held*, although plaintiff had acquired an interest in the testimony of the witness before the making of the covenant, yet, if the covenant was made by the consent or procurement of plaintiff, the witness was still incompetent, notwithstanding releases from the witness to the parties.—Newton v. Booth, 13 Vt. 320, 37 Am. Dec. 596.

§ 444. —— Maker or drawer.

[a] In an action by the indorsee of a note against the indorser, the maker, when released by defendant, is a competent witness for him.
—(Me. 1850) Franklin Bank v. Pratt, 31 Me. 501; Same v. Dennis, Id. 521;
(Mass. 1847) Wheaton v. Wilmarth, 54 Mass. (13 Metc.) 422;
(Pa. 1848) Bank v. Fordyce, 9 Pa. (9 Barr) 275, 49 Am. Dec. 561.

[b] (U. S. 1845) The prayer of the bill being that the purchaser should take up and pay certain notes given by A. and B., jointly for the purchase money, which were in the hands of an indorsee, a covenant by the indorsee to A. not to sue him on the notes will not render him a competent witness, for he would be liable over to the indorser on his taking up the notes.—Ferson v. Sanger, Fed. Cas. No. 4,751 [2 Ware (Dav. 252) 256].

[c] (Ark. 1860) In a suit against one of several makers of a note, one of the makers having received a release from defendant of all liability on account of the suit, *held*, that his interest was not thereby discharged, so as to render him a competent witness for defendant, under the statute.—Gould v. Tatum, 21 Ark. 329.

[d] (Me. 1842) In an action by an indorsee against an indorser of a note for the accommodation of the maker, the latter, on being released by the indorser from all claim for costs, is a competent witness for him.—Darling v. March, 22 Me. (9 Shep.) 184.

[e] (Me. 1850) In an action by the holder of a draft against the acceptor, the drawer, if released by defendant, is a competent witness for him.—Franklin Bank v. Pratt, 31 Me. 501.

[f] (Mass. 1838) By St. 1779, c. 57, upon the death of one of two makers of a joint note, the promise becomes several; and in an action upon such a note against the executor of the deceased promisor the survivor is a competent witness for the executor, being first released by him.—Reed v. Boardman, 37 Mass. (20 Pick.) 441.

[g] (Mo. 1880) Where a note secured by a trust deed was paid, but transferred to the owner of the land to protect the maker against an outstanding judgment, and the judgment was paid, and an action was brought for the cancellation of the note, the maker of the note, who was a party defendant, was a competent witness.—Dolan v. Kehr, 9 Mo. App. 351.

[h] (N. H.) In an action on a note against one of several makers, another of the makers is a competent witness for defendant, being released by defendant from all claim to contribution.—(1824) Ames v. Withington, 3 N. H. 115; (1830) Carleton v. Whitcher, 5 N. H. 196.

[i] (N. Y. 1828) One of several makers of a note, who has been discharged as an insolvent and released from all liability by the joint makers, but is a party on the record, is incompetent as a witness.—Schermerhorn v. Schermerhorn, 1 Wend. 119.

[j] (Pa. 1845) Where, in a suit against one of two persons whose names are signed to a note, there is a plea in abatement for nonjoinder of the other party to the note, he is not a competent witness, though released by the signer from all costs or damages growing out of the suit.—Graham v. Eichbaum, 4 Clark, 28, 6 Pa. Law J. 280.

[k] (Pa. 1846) A., B., and C. drew a note payable to the order of D., which was regularly discounted and the proceeds paid to D. The note was protested, and a suit commenced, and judgment recovered against the drawers. B. paid the judgment, and obtained an assignment of it. A. and B., who were partners, then brought a suit against D., who was also one of the indorsers of the note. *Held*, that C. was not a competent witness to prove that D. was to pay the note when it became due, and that they became drawers on that condition; that the note was the written engagement of the drawers to pay its amount at maturity, and it was not competent for one of them to relieve himself from contribution by his own testimony, in direct opposition to such engagement; and that on the ground of public policy no release to C. from A. and B. could make him a competent witness to invalidate his own written engagement.—Alexander v. Alexander, 8 Pa. (3 Barr) 56.

[l] (Pa. 1847) In an action against one of two joint and several makers of a sealed note, the maker not sued is a competent witness for defendant on being released by him.—Cameron v. Paul, 6 Pa. (6 Barr) 322.

[m] (Pa. 1850) In a suit by a holder of a draft against an acceptor, the drawer, having been released from the costs of the suit and from responsibility on the draft, is a competent witness for the acceptor to prove facts, occurring after the negotiation of the draft, tending to show that the holder was not the owner of the draft and was making a fraudulent use of it.—Snyder v. Wilt, 15 Pa. (3 Harris) 59.

[n] (Pa. 1851) In a suit on a note given by defendant in lieu of another note signed by defendant and another person, whose name was omitted in the making of the note in suit, the party whose name was omitted, on being released by defendant, was a competent witness in his favor to prove failure of consideration of the original note.—Kirkpatrick v. Muirhead, 16 Pa. (4 Harris) 117.

[o] (Pa. 1852) In a suit by the holder against the indorser of a note which had been discounted for the accommodation of the maker, the latter, if released from liability over for costs, may be a witness for defendant to testify that the date, which had been altered, was not altered when he negotiated it, and also that the alteration was made without the knowledge or consent of the indorser.—Kennedy v. Lancaster County Bank, 18 Pa. (6 Harris) 347.

[p] (Pa. 1860) One of the makers of a note, whose liability thereon has been barred by the statute of limitations, is a competent witness to prove an assumption by defendants of the firm debts of the makers of the note, in consideration of an assignment to them of the property of the firm.—Breitenbach v. Houts, 35 Pa. (11 Casey) 153.

[q] (Va. 1860) An agreement by plaintiff, in a suit on a note against the maker and indorsers, not to take judgment against the last indorser unless he recovered against all, does not release him, so as to render the maker a competent witness when released by the prior indorsers.—Hogshead v. Baylor, 16 Grat. 99.

§ 445. —— Indorser and indorsee.

[a] The indorser of a note, having been released from all liability on the indorsement, is a competent witness for the indorsee in an action on the note.

—(N. H. 1838) Lock v. Noyes, 9 N. H. 430;
(N. Y. 1843) Farmers' & Mechanics' Bank v. Griffith, 5 Hill, 476; (1845) Bay v. Gunn, 1 Denio, 108.

[b] (Ala. 1836) An indorsee of a note, whose liability has in any event ceased, is competent to prove the execution of the note.—Carroll v. Meeks, 3 Port. 226.

[c] (Ala. 1839) An indorser of any instrument whose liability has been in any way discharged is a competent witness in an action by the holder against the maker.—Todd v. Hardy, 9 Port. 846.

[d, e] (Ill. 1844) An indorser of a bill of exchange was sued by the third indorsee. At the trial the first indorsee was called as a witness, his name still remaining on the bill. Being objected to by defendant, plaintiff's counsel erased his name by permission of the court, and defendant excepted, because plaintiffs were not present, and the counsel produced no authority to erase his name. *Held*, that he became a competent witness, and, not being liable to defendant, the latter could not object to the erasure, nor call for the authority of counsel to make it.—Bradshaw v. Hubbard, 6 Ill. (1 Gilman) 390.

[f] (Iowa, 1859) A. assigned a note to B. October 24, 1841, and on the 18th of December following B. assigned the same to C. without recourse. Some time after C. assigned it in the same way to D., from whom the note came to the possession of E. *Held*, that as D. had no recourse upon C., and C. none upon B., and B. was not responsible to any subsequent indorsee, and as A. had been discharged from all liability as an indorser to all the indorsees, except E., by lapse of time and negligence to collect, A. was a competent witness for E. in a suit upon the note, upon being released by E. —Wilkerson v. Daniels, 1 G. Greene, 179.

[g] (Ky. 1816) In a suit by the indorsee of a note against the maker, who pleaded accord and satisfaction, the indorsee introduced the indorser to prove that the accord and satisfaction were not made before notice of the indorsement. The indorsee had executed a release of the indorser, but the indorser, being examined on his voir dire, said that he felt bound in honor to compensate the indorsee in case he did not recover, and also that, if the maker had the demand to pay, he expected to reimburse him. *Held*, that he was a competent witness.—Duncan v. Pindell, 7 Ky. (4 Bibb) 330.

[h] (La. 1830) An indorser, discharged for want of notice, may prove payment for the maker.—Bourg v. Bringier, 8 Mart. (N. S.) 507.

[i] (Me. 1852) An indorser "without recourse" of a negotiable note, having been released from all liabilities in relation thereto by the indorsee, is a competent witness to prove a payment of part of it before the indorsement.—Evans v. Smith, 34 Me. 33.

[j] (Me. 1853) One who has indorsed a note with qualifications, and under circumstances rendering his liability to the indorsee doubtful, may compound with such indorsee for his release, and so become a competent witness for the latter in an action against the maker, and without acquiring an interest in the result of the action by reason of the money paid for such release.—Hankerson v. Emery, 37 Me. 16.

[k] (Miss. 1870) Where the indorsee of a note has not been notified of its dishonor, he is competent as a witness for either party.—Partee v. Silliman, 44 Miss. 272.

[l] (N. H. 1836) The indorser of an accommodation note, which was made for his benefit, having a release from the maker, is a competent witness to prove that it has been paid by the maker to the indorsee.—Greenough v. West, 8 N. H. 400.

[m] (Pa. 1788) In an action by the indorsee of a bill of exchange against the first indorser, plaintiff's immediately preceding indorser cannot be made a witness by striking his name off the first and third bills of the set, although it is suggested that the second bill is lost.—Steinmetz v. Currie, 1 Dall. 270, 1 L. Ed. 132.

[n] (Pa. 1819) Where a note is indorsed by three, and afterwards given up to one of them, on taking a bond from the three, on a suit for the benefit of the indorser to whom the note was given, the other indorser is a good witness. —Juniata Bank v. Brown, 5 Serg. & R. 226.

[o] (Pa. 1820) One whose interest is removed may be called as a witness to impugn a note which he has indorsed.—Hepburn v. Cassel, 6 Serg. & R. 113.

[p] (Pa. 1832) One of two plaintiffs, in assumpsit brought by them as indorsees of a note, having on trial assigned all his interest in the suit to the other, who has paid into court all the costs of the suit, is a competent witness for plaintiff, to whom he has assigned.—Hart v. Heiiner, 3 Rawle, 407.

[q] (Pa. 1840) In an action by the indorsee of a note against the maker, the indorser is a competent witness, on being released by defendant, to prove an agreement between plaintiff and himself, after the note had come into plaintiff's hands, whereby plaintiff agreed that he would not sue or trouble defendant, whom he knew to be merely an accommodation party, if the indorser would give him (plaintiff) a judgment bond for the amount of the note and other money due by the indorser to him, and to prove that the bond was accordingly given by him (the witness) and accepted by plaintiff.—Mitchell v. Conrow, 5 Whart. 572.

[r] (Pa. 1840) The indorser is incompetent, in a suit between the holder and drawer of a note, though the note was not protested, provided this arose from agreement between the holder and indorser.—Hinckly v. Walters, 9 Watts, 179.

[s] (Pa. 1850) A. transmitted a bill of exchange to B., his agent, for collection, who indorsed it to C. In an action by A. against C. for the money received on the bill, *held*, that B. was a competent witness for A., after having been released by him, to prove that he gave the bill to C. merely for collection, and not to pay his indebtment to C.—Weaver v. Beckett, 15 Pa. (3 Harris) 248.

[t] (Pa. 1851) An indorsee of a note, by transferring the same to an indorser, who, after being discharged for want of demand and notice, takes up the note, does not become a competent witness in an action thereon brought by his transferee, who is a mere volunteer.—Miley v. Todd, 17 Pa. (5 Harris) 101.

[u] (Pa. 1853) In an action on one of two notes taken by the holder of a former note, which had been indorsed to him, the indorser of the original note is a competent witness for plaintiff to show that it was not received by plaintiff as collateral security, as alleged by defendant, but was indorsed to him in payment of an existing liability; the indorser having

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been discharged from liability by reason of an extension of time having been allowed by the receipt of the substituted notes, as well as by the omission of one of the makers of the original note to sign the one in suit.—Muirhead v. Kirkpatrick, 21 Pa. (9 Harris) 237.

[v] (Pa. 1866) An indorser who has been compelled to pay part of the amount due on a note is incompetent from interest to testify in a suit by a subsequent indorser against the maker, although plaintiff has released him from liability to him.—Ward v. Tyler, 52 Pa. (2 P. F. Smith) 393.

[w] (Va. 1856) The last of several indorsers of an accommodation note, being obliged to take it up at maturity, sued his immediate indorser, who at the trial offered as a witness the indorser immediately preceding him on the note to prove that all the indorsers had agreed at the time of executing the note to be liable as joint securities only. The court below ruled that, whether plaintiff recovered or not, the witness' interest would be the same, except as to the costs of the action, and that a release by defendant for costs only would render him competent. While the release was preparing it was discovered that in consequence of the time elapsed since the payment of the money on the note by plaintiff the witness was protected by the statute of limitations against any recovery on his part, and the witness was not permitted to testify. *Held* that, though the right of the witness to plead the statute in such an event disturbed his equality of interest in the suit and rendered him incompetent to testify, yet his competency might be restored by an entire release to him by defendant of all claim against him on account of his indorsement.—Chapman v. Hiden, 2 Pat. & H. 91.

§ 446. — Payee or acceptor.

[a] (U. S. 1824) The acceptor of an inland bill of exchange is a competent witness to prove that the bill was drawn by defendant for the accommodation of plaintiff, without any consideration, after being released by defendant from liability for the costs of this action in case plaintiff should recover.—Knowles v. Stewart, Fed. Cas. No. 7,900 [2 Cranch, C. C. 457].

[b] (Ind. 1838) In an action by the assignee of a note against the maker, the payee, on being released, is a competent witness to prove the execution of the note.—Matheny v. Westfall, 4 Blackf. 491.

[c] (Me. 1853) The indorsee of a note, on which one has signed his name and thus made himself liable as an original promisor, may, after releasing the payee, call him as a witness in a suit against such original promisor.—Leonard v. Wildes, 36 Me. 265.

[d] (Pa. 1867) In a suit by the indorsee of a note against the maker, the payee cannot testify, although released from the liability of his indorsement.—Foreman v. Ahl, 55 Pa. (5 P. F. Smith) 325.

§ 447. Usurious transactions.

[a] (U. S. 1838) Where the grantor of an annuity by deed has conveyed all his interest in the property charged therewith, and an allegation of usury in the granting thereof is afterwards made, he is a competent witness on the question of usury, if he is not a party to the suit and has become devested of all his interests and liability for costs therein.—Scott v. Lloyd, 37 U. S. (12 Pet.) 145, 9 L. Ed. 1033.

[b] (U. S. 1814) In an action against a surety on a bond, the principal obligor is a competent witness for the surety to prove the bond usurious, where it appears that the surety has released such obligor from the costs of the suit.—Peirce v. Reintzel, Fed. Cas. No. 10,908 [2 Cranch, C. C. 101].

[c] (Ala. 1848) Where one of two partners makes a usurious contract without the knowledge of his copartner, and this debt becomes merged in the individual debt of the other partner, who assumes to pay it and relieves the partner who contracted the debt, in an action on such individual debt, the partner contracting the usurious debt is a competent witness for his copartner.—Jackson v. Jones, 13 Ala. 121.

[d] (Conn. 1814) A party to a negotiable instrument, who is devested of his interest therein, is a competent witness to prove it usurious in its inception.—Townsend v. Bush, 1 Conn. 260.

[e] (Ga. 1846) The maker of a usurious note is a competent witness for defendant to prove the usury, in an action by an indorsee against an indorser, on being released.—Winkler v. Scudder, 1 Ga. (1 Kelly) 108.

[f] (Ga. 1850) In an action against the security of a note, to which the defense was usury, the maker, upon being relieved from all liability, was a competent witness for defendant.—Barnett v. Troutman, 9 Ga. 36.

[g] (Ill. 1861) The payee of a usurious note, who has assigned it, is a competent witness, in a suit by his assignee against the maker, to prove the usury.—Harvey v. Ellithorpe, 26 Ill. (16 Peck) 418.

[h] (Me. 1841) The surety on a note, which has been paid, is competent to prove usury, in an action to recover back the amount paid on the ground of usury.—Webb v. Wilshire, 19 Me. (1 App.) 406.

[i] (Mass. 1810) The maker of a usurious note is not a competent witness to defeat a recovery against an indorser on the ground of usury, although he has been released from liability.—Widgery v. Munroe, 6 Mass. 449.

[j] (Mass. 1810) In an action by an indorsee of a note against one of two joint and several promisors, the other promisor is not competent as a witness to prove usury, though defendant has released him.—Jones v. Coolidge, 7 Mass. 199.

[k] (Mass. 1832) In an action by a plaintiff against the payee of a note, the maker, being released by defendant, is competent to prove usury.—Van Schaack v. Stafford, 29 Mass. (12 Pick.) 565.

[l] (N. Y. 1803) In a qui tam action under the statute of usury, the borrower, after having paid the principal, is a competent witness.—Pettingal v. Brown, 1 Caines, 168.

[m] (N. Y. 1840) A mortgagor cannot be made a competent witness, in a suit to foreclose, to prove the mortgage usurious, in favor of a subsequent mortgagee, by a release from all liability in that suit; the mortgagor still remaining liable on his bond.—Bardwell v. Howe, 1 Clarke, Ch. 281.

[n] (N. Y. 1841) The maker of a note and his accommodation indorser were sued together. *Held*, that the maker, after a release from all costs and charges, was a witness for the indorser to prove the note usurious.—Starkweather v. Mathews, 2 Hill, 131.

[o] (S. C. 1828) In an action against the surety on a note, the principal, on being released by the surety, is a competent witness to prove the note usurious.—Harmon v. Arthur, 1 Bailey, 83.

[p] (Tenn. 1821) The maker of a note, who has been released by defendant, the payee and first indorser, is a competent witness to prove that the note was usurious in its inception.—Stump v. Napier, 10 Tenn. (2 Yerg.) 35.

§ 448. Transactions fraudulent as to creditors.

[a] (U. S. 1839) The grantee of a deed alleged to be fraudulent is a competent witness in sup-

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port of the deed, in an action against the person to whom he has conveyed the property, upon receiving from him a release.—Linthicum v. Remington, Fed. Cas. No. 8,377 [5 Cranch, C. C. 546].

[b] (N. H. 1838) A person had made a voluntary note and mortgage with intent to defraud creditors, and subsequently conveyed the same premises to a bona fide purchaser, and, being released from the covenants in the latter deed, was offered as a witness. *Held*, that he was competent to show that, before the making of this deed, the note upon which the mortgage was predicated was given up to be canceled: and that the mortgagee, after he had executed the latter deed, induced him to give a new note, similar to the first, in order to set up the mortgage against the subsequent purchaser.—Marston v. Brackett, 9 N. H. 336.

[c] (N. Y. 1810) A grantor in a deed which is impeached as fraudulent, on being released by the grantee from all claims and demands whatsoever on account of the covenants, is a competent witness to prove as well as disprove the fraud: The objection goes to his credit, not to his competency.—Jackson v. Frost, 6 Johns. 135.

[d] (N. Y. 1838) In a contest between a vendee and the creditors of the vendor respecting the validity of the sale, the release of the vendor by the officer sued for the taking of the property at the instance of the creditors did not render the vendor a competent witness.—Rea v. Smith, 19 Wend. 293.

[e] (Pa. 1847) Where a vendor of chattels has been released from his warranty of title to them, he is a competent witness to support his title, in a contest between his vendee and creditors of his vendor, who are seeking to avoid the sale to him on the ground that it was fraudulent as to them.—Cadbury v. Nolen, 5 Pa. (5 Barr) 320.

[f] (S. C. 1833) A debtor who has delivered property to another in order to defraud his creditors, and afterwards sells the property to a bona fide purchaser, on being released, is a competent witness to sustain the purchase.—Caston's Ex'rs v. Ballard, 1 Hill, 406.

(d) INTEREST ARISING FROM STATUS OR RELATION OF PARTIES IN GENERAL.

TRUSTEE AND BENEFICIARY, § 449.
PARTNERS, § 450.
—— ACTIONS ON BILLS AND NOTES, § 451.
PUBLIC OFFICERS, § 452.
—— DEPUTIES, § 453.
MEMBER, STOCKHOLDER, OR OFFICER OF CORPORATION, § 454.
—— CASHIER OF BANK, § 455.
MEMBERS OF RELIGIOUS SOCIETY, § 456.
PRINCIPAL OR AGENT, § 457.
EMPLOYÉ, § 458.
CAPTAIN, MASTER, OR CREW OF VESSEL, § 459.
HUSBAND OR WIFE, § 460.
WIDOW, § 461.

§ 449. Trustee and beneficiary.

[a] (Ark. 1856) After the execution and termination of a trust, the trustee is a competent witness in an action relating to the title to the trust property.—McNeill v. Arnold, 17 Ark. 154.

[b] (Ky. 1851) A trustee of property, from whom the property has passed under a decree in chancery, is a competent witness to prove a demand against the cestuis que trust.—Southard v. Cushing's Adm'r, 50 Ky. (11 B. Mon.) 344.

[c] (Ky. 1872) A trustee is made a competent witness by substituting his beneficiary as plaintiff in his stead and giving a bond for costs.—Arnold v. Bryant, 71 Ky. (8 Bush) 668.

[d] (Miss. 1840) A trustee in a deed of trust cannot release his interest in the deed to his co-trustee without the consent of the cestui que trust, so as to make him a competent witness for his co-trustee.—Ferriday v. Selser, 5 Miss. (4 How.) 506.

[e] (N. Y. 1841) A person holding the legal title to land in trust, who sold the land and took mortgages to himself with the assent of the cestui que trust, was a competent witness, after assigning the mortgages, to prove the facts connected therewith, as against an agent to whom one of the mortgages had been assigned, in pursuance of a previous agreement, as a compensation for his services in effecting the sale.—Douglass v. Peele, Clarke, Ch. 563.

[f] (Pa. 1834) A person for whom a tract of land was conveyed in trust, and who paid a small part of the purchase money, was present and made no objection when the trustee conveyed the property to another. *Held*, in an action of ejectment by the grantee of the trustee against one who claimed under the same trust, that the trustee, on being released by plaintiff, was a competent witness.—Taylor v. Taylor, 2 Watts, 357.

[g] (Pa. 1848) Cestuis que trust brought suit for the use of the trustee, who afterwards, with the consent of cestuis que trust, conveyed the trust estate to another, paid all the costs which had accrued and a sum into court sufficient to cover future accruing costs, and released all claim for commissions. *Held*, that he should be allowed to have his name stricken from the record, and that he was a competent witness for plaintiff.—King v. Cloud, 7 Pa. (7 Barr) 467.

[h] (Tex. 1855) The beneficiary of a resulting trust in lands, who has conveyed his interest by quitclaim, is a competent witness for the vendee in a suit by the latter to establish the trust.—Hodges v. Johnson, 15 Tex. 570.

§ 450. Partners.

[a] (U. S. 1829) In an action commenced against A. & B., as partners, upon an alleged engagement by the firm, and where A., who was not found or served with process, was offered as a witness in favor of B., having been released by B., *held*, that A. was a competent witness, inasmuch as he was hostile to the party in whose favor he testified. The rule excluding witnesses interested did not apply.—Le Roy v. Johnson, 27 U. S. (2 Pet.) 186, 7 L. Ed. 391.

[b] (Cal. 1858) One of two partners in an adventure may release in the name of both, so as to make the releasee a witness in trespass against one who has seized the goods.—Perlberg v. Gorham, 10 Cal. 120.

[c] (Cal. 1859) A demand for the price of goods sold is an "unliquidated" demand, within Prac. Act, § 4, as amended by St. 1855, p. 303, so that one partner cannot assign his interest therein to his copartner and then become a witness for him.—Cravens v. Dewey, 13 Cal. 40.

[d] (Conn. 1797) A partner with the defendant in the transaction for which he is sued cannot be qualified to be a witness by a discharge from defendant, being still liable to plaintiff.—Tomkins v. Beers, 2 Root, 498.

[e] (Conn. 1831) A release by one of two partners, who are sued, of all claims against a third partner not sued, will not render such third partner a competent witness for the others.—Bill v. Porter, 9 Conn. 23.

[f] (Ga. 1862) D. sued P. & R. as partners. It was shown that R. had executed to P., who was only a nominal partner, a release of partnership obligation and a bond of indemnity as to the consequences of this suit, and had deposited in court a sum in Confederate money

sufficient to cover the plaintiff's demands. *Held*, that by these acts, under section 3785 of the Code, P. was made a competent witness for the defendants.—Fleming v. Dorn, 34 Ga. 213.

[g] (Ind. 1840) On the trial of an action for work and labor, defendant offered a person, who was his partner at the time the work was done, as a witness, after executing a release to him of all claims for contribution. *Held*, that the witness was incompetent.—Cline v. Little, 5 Blackf. 486.

[h] (Iowa, 1856) A third party cannot so release a party to a suit as to render him a competent witness for his copartners.—Wise v. Patterson, 3 G. Greene, 471.

[i] (Iowa, 1859) Plaintiff brought suit upon a claim which at the commencement of the suit belonged jointly to him and his partner. *Held*, that proper mutual releases, executed between plaintiff and his partner, would render the latter a competent witness for the former.—White v. Tucker, 9 Iowa, 100.

[j] (La. 1826) A partner, who has sold his interest to his copartners and received their release from partnership obligations, may prove a partnership claim.—Meriam v. Worsham, 4 Mart. (N. S.) 198.

[k] (La. 1845) Defendant, sued as a dormant partner, on releasing the ostensible partner, who as an insolvent had placed plaintiff on his bilan, may prove by him that there was no partnership.—Lacaze v. Séjour, 10 Rob. 444.

[l] (La. 1859) The liquidating partner, to whom the assets have been assigned, cannot, by a release in favor of his late partner, render him a competent witness in his favor.—White v. Jones, 14 La. Ann. 681.

[m] (Me. 1836) A partner, who sells partnership property, is a competent witness for the purchaser, where the title to the property is brought in question, on being released by him; for the release discharges all the liability of the witness, whether it does that of the copartner or not.—Churchill v. Bailey, 13 Me. (1 Shep.) 64.

[n] (Md. 1862) In replevin by the vendor of goods against an assignee of the vendee, holding in trust for the benefit of creditors, when mutual releases have been executed between the assignee and a member of the vendee firm, such member is made a competent witness for the assignee.—Ratcliffe v. Sangston, 18 Md. 383.

[o] (Miss. 1834) A partner can never be so far devested of his interest in the partnership, by any act of himself and copartners, as to be a competent witness in a matter relating to the partnership while he was a member.—Collins v. Flowers, 2 Miss. (1 How.) 26.

[p] (N. Y. 1824) A dormant partner, not a party, may release his interest to his copartner, and be a competent witness for him.—Clarkson v. Carter, 3 Cow. 84.

[q] (N. Y. 1828) In an action on a limit bond against one of two defendants and the surety of the one for his escape from a ca. sa. issued on a judgment against him and his partner, *held*, that his codefendant in the original suit, the partner, was not a competent witness for defendant, unless released, being liable to contribute if the plaintiff recovers; and a release from the surety is not enough, but it must be directly from the defendant, to whom he is liable.—Ransom v. Keyes, 9 Cow. 128.

[r] (N. Y. 1834) Where a suit is brought by one of two attorneys, who are partners, against a client, for the recovery of the taxable costs of a suit prosecuted in the name of one of the attorneys alone as attorney of record, the other is a competent witness for plaintiff, on executing to him a release.—Ward v. Lee, 13 Wend. 41.

[rr] (N. Y. 1839) One of several partners is a competent witness in an action against the firm, in which he is not made a defendant, for a debt claimed of the firm, on being released by his copartners.—Lefferts v. De Mott, 21 Wend. 136.

[s] (N. Y. 1840) One partner, who had sold his interest in the firm to a copartner and had been released by the other members of the firm, was a competent witness for plaintiff in a suit to recover a debt due the firm before the witness retired.—Hosack's Ex'rs v. Rogers, 25 Wend. 313, affirming (1840) 8 Paige, 229.

[ss] (N. Y. 1841) Where partners are sued on a contract ex delicto, but really ex contractu, one of the firm cannot be a witness, unless he is released by all the other members.—Curtis v. Monteith, 1 Hill, 356.

[t] (N. Y. 1857) A witness offered at the trial was not a party to the action, and was only rendered incompetent on account of an agreement, made subsequent to the transactions which were the subject-matter of the trial, whereby he became a partner of one party as of a date earlier than the transactions. For the purpose of making him competent, he assigned all his interest in the suit and in the partnership down to the time of his actually becoming a partner, and was released by his partner from all liability on account of the claim, the subject of the action, and was indemnified from any liability on account of the claim and action. *Held*, that he was a competent witness.—Wilmot v. Richardson, 13 N. Y. Super. Ct. (6 Duer) 328.

[tt] (N. Y. 1858) Laws 1838, c. 257, p. 243, provides that, whenever any partnership shall be dissolved, any one or more of the partners may make a separate composition or compromise with any one or all of the creditors, which shall be a full discharge to the debtor making the same of all liability to the creditors with whom the same is made. *Held*, that this statute had no application to a suit by one partnership against another partnership, in which plaintiff claimed that the two partnerships had engaged in a joint venture, in which plaintiff had suffered a loss which defendant ought rightfully to share, and therefore one of the members of defendant firm, after effecting a separate compromise with plaintiff under said act, was not a competent witness for plaintiff.—Lewin v. Stewart, 17 How. Prac. 5.

[u] (Ohio, 1832) Where a contract to perform certain work was in fact a partnership agreement, but was executed under the seal of one partner alone, so that he alone was liable, the other partner was incompetent as a witness, notwithstanding a release from his copartner.—James v. Bostwick, Wright, 142.

[uu] (Pa. 1826) One who is interested in the profits, but is not liable for the losses, of a firm, may be a witness for the firm, after he has released all his interest in the suit.—Curcier v. Pennock, 14 Serg. & R. 51.

[uuu] (Pa. 1830) A partner is not a competent witness for his copartner in a partnership transaction, nor can he be made so by a release.—Black v. Marvin, 2 Pen. & W. 138.

[v] (Pa. 1836) One who is interested as a partner, though not named in the record, cannot be made a witness merely by release of his interest in the subject-matter of the action, being still liable for costs.—Culbertson v. Alexander, 5 Watts, 496.

[vv] (Pa. 1843) In assumpsit by three partners, where defendant pleads a set-off, one of the partners cannot be made a witness for plaintiffs by releasing all his interest in the suit to his coplaintiffs, and paying all costs which had accrued, or which might accrue, in the suit. He would still be interested to

make plaintiff's claim exceed the set-off.—Church v. Hampton, 6 Watts & S. 514.

[w] (Pa. 1852) The declaration in assumpsit against two as partners alleged that a third partner had retired from the concern and surrendered his interests therein to the other partners, in consideration that they should pay certain debts of the firm including the plaintiff's debt. *Held*, that such third partner was not a competent witness for plaintiff.—Bellas v. Fagely, 19 Pa. (7 Harris) 273.

[ww] (Pa. 1854) In an action for a partnership debt against the executors of a deceased partner, the testimony of another member of the same firm, to whom defendants had executed a release, was rightly excluded.—Wells v. Peck, 23 Pa. (11 Harris) 155.

[x] (Pa. 1856) In assumpsit on a quantum meruit for work done by two partners under a contract made by one of them prior to the formation of the partnership, one of them cannot be a witness for the other, though he has been fully paid, and has no interest.—Schnader v. Schnader, 26 Pa. (2 Casey) 384.

[y] (Pa. 1861) One who is incompetent as a witness by reason of a partnership interest in the suit is not rendered competent by a release by plaintiff, until the costs up to date are paid.—Rhoads v. Armstrong County, 41 Pa. (5 Wright) 92.

[yy] (Vt. 1841) Where two partners have assigned their joint and separate property to pay their joint and separate debts, and a suit is brought by the assignee to recover a debt due one of the partners, the other partner is interested, and cannot be a witness for plaintiff; and his release of the surplus will not render him competent, since the costs of the suit would be a charge upon the fund in the hands of the assignee.—Cummings v. Fullam, 13 Vt. 441.

[z] (Vt. 1853) A witness who is interested as a member of a firm may be rendered competent by releasing all claims which he had as an individual or a partner of the firm.—Linsley v. Lovely, 26 Vt. 123.

[zz] (Vt. 1854) Where a partner is coplaintiff on the record and interested in the result of the suit, he cannot remove his interest by his own act and become competent against the consent of defendant.—Loomis v. Loomis, 26 Vt. 198.

§ 451. —— Actions on bills and notes.

[a] (U. S. 1826) A partner upon whose individual check firm moneys have been paid, and who has been released from all liability by the other members of the firm, is not a competent witness for the bank in an action by the partnership to recover the amount of the money paid on the individual check; for, if defendant should succeed, it would relieve such partner from his liability to the bank for the amount of his individual check charged to the firm.—Coote v. Bank of United States, Fed. Cas. No. 3,203 [3 Cranch, C. C. 50].

[b] (Miss. 1844) Where a bill is drawn and accepted by two partners individually for the benefit of the partnership, in an action against the acceptor, upon the bill, the drawer is not a competent witness for defendant, on receiving a release of contribution from him.—Scott v. Watkins, 10 Miss. (2 Smedes & M.) 255.

[c] (Mo. 1850) Where an action against A. and B. as partners, upon a note signed in the partnership name, is discontinued as to A., B. may release A. and call him as a witness to prove that the note, which was made after the dissolution of the partnership, was given on the individual account of A.—Long v. Story, 13 Mo. 4.

[d] (Pa. 1841) In an action against a partnership, on a note made by one partner in the name of the firm after its dissolution, the partner signing the partnership name, if willing to testify, is a competent witness for plaintiff, if released from any other action on the note.—Whitehead v. Bank of Pittsburgh, 2 Watts & S. 172.

[e] (Pa. 1854) In an action on a note made by defendant to a partnership, and by it indorsed to plaintiff, who was a member of the firm, another member, who stated on his voir dire that he was a member of the firm at the time when the note was given, but had assigned it, and with it all his interest in the partnership property, was not incompetent on the ground of interest.—Patterson v. Fay, 1 Phila. 473.

[f] (Vt. 1850) A note was assigned to a firm as collateral security for a debt due to the firm from the payee, and, on the trial of a suit instituted by the firm in the name of the payee on the note, one member of the firm executed to his copartners an assignment of all his interest in the note, or suit, and in the debt due to the firm from the payee of the note, and his copartners thereupon released him from all liability for costs, etc., in the suit. *Held*, that he was thereby rendered a competent witness on the part of plaintiff.—Blake v. Buchanan, 22 Vt. 548.

§ 452. Public officers.

[a] (U. S. 1821) Defendant in replevin, who justifies under an execution directed to him as a constable, if indemnified by plaintiff in the execution, and having no other interest than the possibility of receiving commissions and fees upon an execution which may be issued again in the same cause, is a competent witness for defendant.—Wise v. Bowen, Fed. Cas. No. 17,905 [2 Cranch, C. C. 239].

[b] (U. S. 1824) If defendant in replevin be the bailiff of the landlord, and is indemnified by him, he may be examined as a witness in the cause.—Dixon v. Waters, Fed. Cas. No. 3,936 [2 Cranch, C. C. 527].

[c] (U. S. 1830) In replevin for goods taken by defendant, a constable, he may testify for himself, upon being indemnified by plaintiff in execution.—Hilton v. Beck, Fed. Cas. No. 6,509 [4 Cranch, C. C. 107].

[d] (Del. 1848) The sheriff is a competent witness in a suit on a replevin bond assigned by him.—Lambden v. Conoway, 5 Har. 1.

[e] (Me. 1832) In an action on the official bond of a collector of taxes, where the point in issue was whether the money collected had been paid over to the treasurer or not, the treasurer, being released by the town, was a competent witness to disprove the payment.—Ford v. Clough, 8 Me. (8 Greenl.) 334, 23 Am. Dec. 513.

[f] (Md. 1867) In an action by the board of school commissioners against one to whom a levy for the benefit of the school funds had been intrusted for collection as collector of county taxes to recover a balance of the amount collected, plaintiff by a release may remove an objection to its treasurer as a witness on the ground of his interest in the controversy.—O'Neal v. Washington County School Com'rs, 27 Md. 227.

[g] (N. J. 1795) The keeper of a jail, after release from the sheriff, is a competent witness for him in an action for an escape.—Patten v. Halsted, 1 N. J. Law (Coxe) 277.

[h] (Ohio, 1844) In an action on the bond of a township treasurer for default in failing to account for moneys received by him, his successor in office cannot be rendered a competent witness by the township trustees releasing him from liability for the sums for which, as such successor, he was liable.—State v. Williams, 13 Ohio, 495.

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[i] (Pa. 1838) In an action against the bailee to recover the amount of an execution for which a constable became liable, the constable, on being released from liability to defendants, is a competent witness.—Willard v. Wickham, 7 Watts, 292.

[j] (Vt. 1845) If an officer takes from the receiptor of property attached a note in discharge of the receiptor's liability for permitting the property to be wasted, if such note be sued in the name of a mere trustee, for the benefit of the officer, the officer, by an absolute and unconditional conveyance of his interest in the note to such trustee, taking back from the trustee a release from all liability on account of the suit, although such conveyance and release are wholly without consideration, is so devested of interest in the suit as to become a competent witness for plaintiff.—Boardman v. Roger, 17 Vt. 589.

§ 453. —— Deputies.

[a] In an action against a sheriff for the misfeasance of his deputy, the latter, when released, is a competent witness.

—(Me. 1831) Jewett v. Adams, 8 Me. (8 Greenl.) 30; (1842) Rice v. Wilkins, 21 Me. (8 Shep.) 558; (1843) Welcome v. Batchelder, 23 Me. (10 Shep.) 85;

(Mass. 1819) Turner v. Austin, 16 Mass. 181;

(Vt. 1843) Hopkinson v. Holmes, 18 Vt. 18.

[b] (Ala. 1833) On a motion against a sheriff for failure to return an execution, a release by him to his deputy, who had given the sheriff a bond, rendered the deputy a competent witness, notwithstanding the declaration of the deputy that his principal should not suffer by his acts, and that he felt in honor bound to secure him from injury.—McCausland v. Neal, 3 Stew. & P. 131.

[c] (Me. 1841) A deputy sheriff, who has been released by the sheriff, is a competent witness in a suit against the sheriff for his default, notwithstanding his sureties may have given a new bond, conditioned to indemnify the sheriff against the alleged default to which his testimony applies.—Jenney v. Delesdernier, 20 Me. (2 App.) 183.

[d] (Me. 1843) In an action of trespass against a sheriff for goods attached by his deputy on a writ, and removed, in favor of a third person claiming to be the owner, the deputy, on being released by the sheriff, is a competent witness for him.—Welcome v. Batchelder, 23 Me. (10 Shep.) 85.

[e] (Mass. 1839) A deputy sheriff delivered attached goods to a third person, who gave him an accountable receipt therefor, and then delivered them to the defendant in the action. *Held*, that his consequent incompetency as a witness for defendant was not removed by a release from the high sheriff.—Pollard v. Graves, 40 Mass. (23 Pick.) 86.

[f] (Tenn. 1870) A formal release by a sheriff of all liability of his deputy to him for official misconduct or negligence is sufficient to remove the disabilities of the deputy, as a witness for the sheriff, in an action against the latter for the official failure of the deputy. But the deputy, at the time he is offered as a witness and does testify in the case, must know that he has been released. The mere fact that a release has been properly signed cannot make him competent, unless that knowledge is brought home to him before his testimony is taken in the cause.—State v. Mosely, 47 Tenn. (7 Cold.) 576.

[g] (Vt. 1842) In an action against a sheriff for the default of his deputy in not taking bail, and for making a false return in a suit, where he returned that he had taken "sufficient bail," no person's name being indorsed on the writ or bail, the deputy, having been duly released by the sheriff, was a competent witness to prove that, when the writ was delivered to him for service, plaintiff directed him not to take bail.—Ordway v. Bacon, 14 Vt. 378.

[h] (Vt. 1843) In an action against a sheriff for the default of his deputy, a release from the sheriff to the deputy of all liability on account of such default will render the deputy a competent witness for the sheriff; and, if the sheriff have received an indemnity from a third person for giving such release, a release from such third person to the deputy of all liability to him will render the deputy a competent witness for the sheriff.—Hutchinson v. Lull, 17 Vt. 133.

[i] (Vt. 1846) A release by a sheriff to his deputy for a default releases the surety of the deputy. Therefore, in a suit against the sheriff for the default, the deputy, after receiving such release, is a competent witness for the sheriff, notwithstanding he may not have received a release from the person who is surety for him to the sheriff.—Hutchinson v. Pettes, 18 Vt. 614.

[j] (Vt. 1846) But if it appear, when the deputy is thus offered as a witness, that he has thus far defended the suit, and that he has employed attorneys, and is still holden to pay them, this will render him an incompetent witness; for his attorneys, if judgment is recovered against the sheriff, will have a lien upon that judgment for their fees, and the deputy will thus be relieved pro tanto upon his liability to them.—Hutchinson v. Pettes, 18 Vt. 614.

§ 454. Member, stockholder, or officer of corporation.

[a] (U. S. 1879) A transfer of stock in a corporation which is prosecuting a suit against the government does not leave the transferror in the character of an assignor of a claim, within the meaning of Rev. St. § 1079, which declares that no claimant, nor any person from or through whom such claimant derives his claim against the United States, shall be a competent witness in the court of claims in supporting the same.—Kellogg Bridge Co. v. United States, 15 Ct. Cl. 111.

[b] (U. S. 1879) A shareholder in a corporation ceases to be disqualified as a witness in an action in the court of claims the moment he transfers his stock.—Kellogg Bridge Co. v. United States, 15 Ct. Cl. 111.

[c] (Ala. 1857) The secretary of a corporation, who was also a stockholder, but had transferred all his stock after the institution of the suit, is a competent witness for the corporation in an action against a delinquent stockholder, though the corporation was indebted at the time of the transfer and at the date of the trial.—Smith v. Tallassee Branch of Central Plank Road Co., 30 Ala. 650.

[d] (Cal. 1856) In an action against a corporation, a witness, who was a member of the corporation when the liabilities were incurred on which the action is brought, but who had sold his shares before the commencement of the action, is incompetent for interest.—McAuley v. York Min. Co., 6 Cal. 80.

[e] (Cal. 1858) A stockholder, who has sold out before suit brought, is a competent witness for the company.—Tuolumne County Water Co. v. Columbia & S. R. Water Co., 10 Cal. 193.

[f] (Cal. 1859) A member of a corporation at the beginning of a suit by it cannot become a witness for it by selling his stock; but he is personally liable for his proportion of the costs, and his competency as a witness can only be restored by actual payment of the entire costs of the case.—Mokelumne Hill Canal & Mining Co. v. Woodbury, 14 Cal. 265.

[g] (Ill. 1844) A stockholder in a bank or insurance company may sell out his stock after

the commencement of the suit, and thereby become a competent witness.—Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co., 6 Ill. (1 Gilman) 236.

[h] (Me. 1841) Where a corporation was organized under an act of the legislature to collect and sell logs, the title to which was unascertainable from lack or defacement of mark, and the corporation as such derived no benefit from the sale of the logs, but the benefit was received by those members only who were owners of logs floating to market, the president of the corporation, who had sold all his logs after the commencement of the suit and before the trial, was a competent witness for the corporation in an action by it against the purchaser to recover the purchase price.—Kennebec Log Driving Co. v. Burrill, 18 Me. (6 Shep.) 314.

[i] (Me. 1841) If the transfer of bank stock, for the purpose of making the owner a witness, be unconditional, the contingency that he might again become the owner of the same is not such an interest as goes to his competency.—Snow v. Thomaston Bank, 19 Me. (1 App.) 269.

[j] (Miss. 1837) The release by a member of a corporation of his interest in it renders him a competent witness for the corporation.—Smith v. Natchez Steamboat Co., 2 Miss. (1 How.) 479.

[k] (N. H. 1840) Where an individual is shown to have been a stockholder in a bridge built by a corporation, which bridge went to decay and a new one was built, it is not sufficient evidence that the interest of the stockholder has ceased that he has been called on for no payment toward the new bridge and supposes his stock to have been sold. Such a fact must be clearly shown before he can be a witness in a suit in which the corporation is a party.—Ameriscoggin Bridge v. Bragg, 11 N. H. 102.

[l] (N. J. 1852) A stockholder of a company is made a competent witness, if, at the trial, he transfers his shares by an instrument in writing, although the regulations of the company require that, before the transfer is complete, it should be entered on the books of the company.—Delaware & A. R. Co. v. Irick, 26 N. J. Law (3 Zab.) 321.

[m] (N. Y. 1829) It is no objection to a witness, in an action by a moneyed institution, that, a few days before the trial, he had bona fide sold out his stock, although he stated that he supposed he could purchase it back if he chose; there being no agreement to repurchase at the time of the sale.—Utica Ins. Co. v. Cadwell, 3 Wend. 296.

[n] (N. Y. 1837) In an action by a bank to recover a note, it is no objection to the competency of a witness that he had been a stockholder, and had sold out his interest to avoid an objection to his competency, though he expects to repurchase the stock at the price at which he sold, where there is no understanding between him and his vendee that the stock should be retransferred.—Stall v. Catskill Bank, 18 Wend. 466.

[o] (N. Y. 1849) Code 1848, § 352, providing that the assignor of a thing in action for the purpose of making him a witness, was incompetent, does not apply to stockholders in corporations, to whom the common-law rule, that by an assignment of their interest they become competent witnesses, applies.—Hamilton & D. Plank Road Co. v. Rice, 7 Barb. 157.

[p] (Pa. 1834) A stockholder in a bank, who had assigned his stock to the bank in payment of a debt due by him, is a competent witness in an action by the bank.—Bank of Swatara v. Green, 3 Watts, 374.

[q] (Pa. 1853) Parties who have sold their stock and given up the policies they had obtained upon their own lives in a life insurance company are competent in behalf of the company in a suit against it.—Hartman v. Keystone Ins. Co., 21 Pa. (9 Harris) 466.

[r] (Pa. 1855) A stockholder may, after suit brought, assign his stock and testify in favor of the corporation.—Meighen v. Bank, 25 Pa. (1 Casey) 288.

[s] (Tenn. 1843) A stockholder, who sells his interest in the stock of a bank after a suit is instituted by the bank, is a competent witness in such suit. Acts S. C. 1821, c. 66, § 3, does not embrace such a case.—Union Bank v. Owen, 23 Tenn. (4 Humph.) 338.

[t] (Vt. 1846) A bona fide sale and transfer by a stockholder of his stock to the corporation, which is authorized to take the same, devests him of all interest arising from his ownership thereof, so as to render him a competent witness for the corporation.—Farmers' & Mechanics' Bank v. Champlain Transp. Co., 18 Vt. 131.

§ 455. —— Cashier of bank.

[a] (Me. 1850) The cashier of a bank, being released, is a competent witness for the bank to prove that through a mistake he had given too large a credit to a depositor in the bank book made for him by the cashier.—Lewis v. Eastern Bank, 32 Me. 90.

[b] (Vt. 1846) In a suit by a bank against a carrier to recover for the loss of bills intrusted to the carrier, the cashier of the bank, who was, at the time of the delivery of the bills to defendants, a stockholder in the bank, was a competent witness for the bank; it appearing that the bank had executed and delivered to the cashier a release of all liability to them on account of the loss of the bills in question.—Farmers' & Mechanics' Bank v. Champlain Transp. Co., 18 Vt. 131.

[c] (Vt. 1846) In an action brought by a bank against a common carrier to recover for a package of bank bills intrusted to the carrier and lost, the cashier of the bank, who at the time of the delivery of the bills to the carrier was a stockholder, is a competent witness for the bank upon a showing that he had sold his stock.—Farmers' & Mechanics' Bank v. Champlain Transp. Co., 18 Vt. 131.

§ 456. Members of religious society.

[a] (Me. 1825) In trespass quare clausum by the deacons of a society of Shakers for an injury to the common property, the members of the same society are competent witnesses, on releasing to plaintiffs their interest in the action and receiving releases from plaintiffs of all obligation to contribute to the costs of the suit.—Anderson v. Brock, 3 Me. (3 Greenl.) 243.

[b] (Me. 1826) In an action against the deacons of a society of Shakers, the members of the society are competent witnesses, on releasing to the plaintiffs their interest in the action, and receiving releases from the plaintiffs of all obligation to contribute to the costs of the suit.—Waite v. Merrill, 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238.

§ 457. Principal or agent.

[a] (U. S. 1845) An agent was given a power of attorney to purchase a vessel and to draw bills on the principal for the amount of the purchase money. The agent, contrary to the power of attorney, made himself one of the joint purchasers of the vessel. An action was instituted by the seller of the vessel against the principal, and the declaration contained special counts as to the bills of exchange and also the common counts for goods sold, etc., and the agent was offered as a witness for plaintiff. *Held*, that he was incompetent on the ground of interest, although he had been releas-

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ed from liability on the special counts, as it appeared that he had not been released from liability on the common counts.—Peckham v. Lyon, Fed. Cas. No. 10,899 [4 McLean, 45].

[b] (Ala. 1840) A principal is a competent witness, his interest having been released, to prove the object and purpose of sending an agent from Mobile to the country.—Kirksey v. Bates, 1 Ala. 303.

[c] (Cal. 1858) A commission merchant sued out an attachment in behalf of his employer, and gave the sheriff a bond of indemnity. Afterwards he procured the bond and all rights of action against him to be released by the sheriff. *Held*, that he would be allowed, in trespass against the sheriff by an adverse claimant of the property, to testify for plaintiff.—Perlberg v. Gorham, 10 Cal. 120.

[d] (Iowa, 1848) A. drew a bill as agent upon B., and obtained funds thereby for the use of his principal, C. *Held*, that A., on being released by B., was a competent witness for B. in a suit against C.—Thurston v. Mauro, 1 G. Greene, 231.

[e] (Ky. 1845) An agent of a turnpike road company, entitled to a commission on the amount of stock collected, by releasing such interest, is thereby rendered a competent witness for the company, and the attorney at law of the company is competent to receive such release.—Bardstown & G. R. Turnpike Co. v. Duncan, 44 Ky. (5 B. Mon.) 395.

[f] (La. 1860) Where a suit is brought on a duebill signed by an agent, and the answer specially denies the agency, the agent, being released from personal responsibility by plaintiff, may be heard as a witness to prove the fact that the money borrowed, for which the duebill was given, was applied to the payment of the debts of his principal.—Garland v. Scott's Estate, 15 La. Ann. 143.

[g] (N. H. 1851) Where an agent for plaintiff is interested in the event of the suit to the extent of a reasonable compensation for his services as agent, the assignment of his interest to plaintiff for a proper consideration obviates that objection.—Bailey v. Shaw, 24 N. H. (4 Fost.) 297, 55 Am. Dec. 241.

[h] (N. Y. 1811) In trespass for taking and impounding the beasts of plaintiff, defendant proved that he acted as the agent of G., and offered G., after having released him, as a witness to show that they were taken damage feasant. *Held*, that G. was a competent witness.—Hasbrouck v. Lown, 8 Johns. 377.

[i] (N. Y. 1816) In an action by a plaintiff, who was a nonresident, the party's attorney was offered as a witness, and objected to, on the ground that no security had been filed for the costs and the attorney might be liable for them. A bond was thereupon executed, and tendered to defendant's counsel, who admitted the sufficiency of the obligors, but refused to receive it, whereupon it was filed with the clerk. *Held*, that defendant might have availed himself of this bond, had the verdict gone in his favor, and that the competency of the witness was thereby restored.—Brandigee v. Hale, 13 Johns. 125.

[j] (N. Y. 1827) The attorney for a nonresident plaintiff, though liable for costs, if he be indemnified, is a competent witness for plaintiff.—Chaffee v. Thomas, 7 Cow. 358.

[k] (N. Y. 1846) A solicitor for a nonresident complainant being liable for costs, and his testimony being required, a bond for costs was executed by a surety, who justified ex parte. The defendants had 19 days within which to except to the surety, at the time the solicitor testified in favor of the complainant. *Held*, that he was presumptively a competent witness.—Van Wezel v. Wyckoff, 3 Sandf. Ch. 528.

[l] (Vt. 1853) The deposition by an agent who had lost money in gaming, which he had borrowed on his principal's credit, taken after his release by the principal and the latter's assignee, is admissible in evidence in an action for money had and received, brought by the principal against the winner.—Burnham v. Fisher, 25 Vt. 514.

§ 458. Employé.

[a] (Ill. 1865) The clerk of a person to whom a package of money was sent by express receipted for the package, supposing at the time he was receipting for some other articles, and did not in fact receive the money package. The loss of the money being discovered, and also that the clerk, who was a minor, had receipted for it, his father, upon being apprised of the facts, voluntarily paid to the owner the amount of the loss. In a suit subsequently brought by such owner against the express company to recover the money lost, his clerk was a competent witness in his behalf to prove that the money was not received. His liability to plaintiff was discharged, and he assumed none to his father, who paid the money voluntarily.—American Exp. Co. v. Haggard, 37 Ill. 465, 87 Am. Dec. 257.

[b] (Mass. 1837) A hired laborer, who has performed his work under the eye and immediate direction of his employer, if responsible to any one for negligence or unskillfulness, is responsible only to his employer; and, being released by him, he is a competent witness in an action for negligence and unskillfulness in the performance of contract under which the work was done.—Downer v. Davis, 36 Mass. (19 Pick.) 72.

[c] (Mass. 1852) In an action of assumpsit, a person in the employ of plaintiff, whose compensation is fixed at a certain percentage of net profits, is rendered a competent witness for plaintiff by a release of all interest in the amount which may be recovered in the suit; it not having been made to appear, by examination of the witness on the voir dire or otherwise, that plaintiff, if he should lose his case, would have a legal right to charge the costs and expenses thereof on the general fund, and thus diminish the compensation of the witness.—Rich v. Jones, 63 Mass. (9 Cush.) 329.

[d] (Pa. 1817) A clerk of the intestate, who is afterwards his administrator and plaintiff in the suit, may prove that he kept certain books for the intestate, after being released from all costs incurred and to be incurred in the suit.—Ash v. Patton, 3 Serg. & R. 300.

[e] (Tenn.) Though Code, § 1169, in actions against railroad companies, excludes as witnesses those employés whose tortious act or acts are drawn in question, and for which they would be liable over to the railroad company if the latter should be held responsible for the injury, the railroad company, by executing a proper release to such employés, restores their competency and may examine them as witnesses.—(1860) Horne v. Memphis & O. R. Co., 41 Tenn. (1 Cold.) 72; (1866) Nashville & C. R. Co. v. Fugett, 43 Tenn. (3 Cold.) 402.

§ 459. Captain, master, or crew of vessel.

[a] (U. S. 1844) The master of a vessel who hypothecated her on bottomry is a competent witness in favor of the holder of the bottomry, particularly if released by him.—Furniss v. The Magoun, Fed. Cas. No. 5,163 [Olcott, 55].

[b] (U. S. 1854) In a suit in rem against the vessel to recover the value of the goods lost or damaged, the master is an interested witness; but a release from some of the part owners renders him competent.—The Peytona, Fed. Cas. No. 11,058 [2 Curt. 21], affirming (1839) Fed. Cas. No. 11,059 [1 Ware, 541].

[c] (Ala. 1859) A release under seal, by a steamboat company, to the captain, mate, and engineer, makes them competent witnesses for the company in a collision case.—Weaver v. Alabama Coal Min. Co., 35 Ala. 176.

§ 460. Husband or wife.

[a] (U. S. 1809) In an action on a note signed by one person where plaintiff seeks to charge another as a secret partner, the wife of the former is not a competent witness for plaintiff to prove the existence of the secret partnership, although it appears that her husband has been discharged under the insolvent act.—Bank of Alexandria v. Mandeville, Fed. Cas. No. 851 [1 Cranch, C. C. 575].

[b] (Ala. 1846) A husband of a distributee, who releases his wife's claim to an unpaid portion of her distributive share, is a competent witness for the administrator in a suit against him by a creditor of the estate.—Hall v. Alexander, 9 Ala. 219.

[c] (Ga. 1859) If a husband and wife convey to their children all their interest under a devise to the wife, they are competent witnesses to sustain the will.—Meredith v. Hughes, 28 Ga. 571.

[d] (Ga. 1859) Where husband and wife convey all their interest under a devise to the wife, he is not a party to, nor interested in a proceeding to establish the will, and therefore he is a competent witness therein.—Meredith v. Hughes, 28 Ga. 571.

[e] (Me. 1842) Where a mortgage, with the note secured thereby, was given causa mortis by one to another, in an action on the mortgage by the administrator, the husband of the donee, having released all claim upon defendant, reserving his claim on the administrator for any money recovered, is a competent witness for defendant.—Borneman v. Sidlinger, 21 Me. (8 Shep.) 185.

[f] (Md. 1824) A. having intermarried with B., who was the administratrix of C., the personal estate of C. came into his possession; and upon a settlement of their administration account a distributive share of the balance against them was due to D., to whom A. was appointed guardian. *Held*, in an action on A.'s bond as guardian, that, B. and her sureties being exonerated from all liability on account of the default of A., B. was a competent and admissible witness.—Seegar's Ex'rs v. State, 6 Har. & J. 162, 14 Am. Dec. 265.

[g] (Md. 1863) Where the probate of a will is resisted on the ground of the testator's unsoundness of mind, a husband's release of a legacy to his wife under said will renders him a competent witness for the executor.—Weems v. Weems, 19 Md. 334.

[h] (N. Y. 1812) In an action by the administrator of the wife, a release by the husband of all right to any sum or sums of money which might be recovered in the cause renders him a competent witness in the cause.—Woods v. Williams, 9 Johns. 123.

[i] (N. Y. 1829) The wife of a special bail is an incompetent witness for defendant; but defendant has a right to avail himself of the testimony of special bail by substituting new bail.—Leggett v. Boyd, 3 Wend. 376.

[j] (N. Y. 1851) A husband is a competent witness, in behalf of a new plaintiff, in a suit which was commenced by a wife on an agreement for the payment of moneys, alleged in the complaint to be her separate property, which allegation was denied in the answer, and the claim assigned by her, with the consent of the husband, to a new plaintiff, who was substituted for her on the record.—Hastings v. McKinley, 1 E. D. Smith, 273.

[k] (N. Y. 1852) The rule that excludes a wife from being a witness applies only where she can be a witness for or against her husband, when he is a party to the suit. It does not apply when he has assigned the thing in action and has no interest in the claim.—Farley v. Flanagan, 1 E. D. Smith, 318.

[l] (Pa. 1795) A feme covert, in the absence of her husband, who has been released from all claims under an implied covenant of warranty, is a competent witness.—Peaceable v. Keep, 1 Yeates, 576.

[m] (Pa. 1849) A release for a nominal consideration by a husband of his wife's interest in a suit brought by the administrator of an intestate's estate, of which she is one of the distributees, will not render her competent as a witness for the administrator of the estate.—Mishler v. Merkle, 10 Pa. (10 Barr) 509.

[n] (Pa. 1849) The wife of the payee of a note, who has indorsed it to a third party and is released from liability thereon, is a competent witness for the holder.—Bisbing v. Graham, 14 Pa. (2 Harris) 14, 53 Am. Dec. 510.

[o] (Pa. 1863) Where the husband of an heir was called as a witness, his release does not render him competent; for he is incompetent, because of his wife's interest, which he cannot release.—Buchanan v. Buchanan, 46 Pa. (10 Wright) 186.

[p] (Pa. 1863) The incompetency of a married woman, also an heir, cannot be removed by her own release, without the joinder of her husband, and, where the release was in the nature of an assignment of her interest, it was invalid as well before as under the act of 1848; nor was the disability of coverture removed by Act April 11, 1856, for the assignment was not such an instrument as is referred to in the act.—Buchanan v. Buchanan, 46 Pa. (10 Wright) 186.

[q] (S. C. 1833) Under an assignment by a husband of his wife's chose in action, the assignee may release the claim, and thereby make her a competent witness in relation to the claim during the life of the husband.—Capehart v. Huey, 1 Hill, Eq. 405.

[r] (S. C. 1846) In an action against an administrator, a joint release to the administrator by husband and wife of all her interest as one of the distributees, and of all liability to account, will render them competent witnesses for such administrator.—Sheer v. Austin, 2 Rich. Law, 330.

[s] (Tenn. 1838) If husband and wife join in a conveyance, releasing her dower in the land of her first husband to his heir, the second husband is a competent witness for the heir of the first husband, or the heirs of such heir, though they be the children of such second husband, in an ejectment brought by them to recover the land.—Ross v. Blair, 19 Tenn. (Meigs) 525.

[t] (Tenn. 1860) Y. and wife, tenants for life in a slave, brought an action against K. for conversion, to recover the full value of the slave. *Held*, that W., the husband of one of the daughters who had a remainder interest, was a competent witness in behalf of plaintiffs, he, together with his wife, having executed a release of all their interest in the subject-matter of the suit; and this, although the release was inoperative as to her.—Kirk v. York, 41 Tenn. (1 Cold.) 446.

[u] (Vt. 1854) The interest of a witness, caused by a mortgage to his wife, can be removed by an assignment of the mortgage.—Hough v. Patrick, 26 Vt. 435.

[v] (Va. 1890) Where a right of action against a carrier has been assigned, the fact that the suit is thereafter prosecuted in the name of the assignor, a married woman, for the benefit of the assignee, does not disqualify the husband of the assignor from testifying, as the latter parted with all her interest in the

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action by the assignment.—Norfolk & W. R. Co. v. Read, 87 Va. 185, 12 S. E. 395.

§ 461. Widow.

[a] (Ala. 1846) The widow of a deceased person cannot, by conveying her interest in the estate to the other distributees, render herself a competent witness for them in a suit against the executor or administrator.—Powell v. Powell, 10 Ala. 900.

[b] (Ky. 1838) Where, in a suit to establish a will alleged to have been destroyed, the widow of the testator, being made a defendant, admitted that she had destroyed the will, but desired it to be established, and filed a release of all claim under it, she was a competent witness in support of the will.—Allison's Devisees v. Allison's Heirs, 37 Ky. (7 Dana) 90.

[c] (Ky. 1848) A widow, to whom her husband had devised his whole estate, in order to become a competent witness in an action on a note made by her husband, executed a release of her rights to her husband's estate to the amount of the note and costs. *Held*, that the release was insufficient to render her a competent witness.—Tyler v. Nelson, 48 Ky. (9 B. Mon.) 71.

[d] (Md. 1834) In replevin by executors for a negro, the wife of the deceased was offered to prove that such negro was loaned to defendant by her husband many years before, and that he declared he never would give the slave to defendant or any of his family. It appeared that the widow, in a contract with the executors, had renounced her rights in the real and personal estate of the deceased, and agreed to accept a compensation from the executors for such renunciation. The will of the testator was not in evidence, nor did it appear to the court that the widow had any special interest in such slave, and her contract with the executors was personal to them, and not binding on the assets of the estate. *Held*, that she was a competent witness.—Callis v. Tolson's Ex'rs, 6 Gill & J. 80.

[e] (Md. 1835) In replevin by A., as executor of B., to which, upon the death of A., the administrator de bonis non of B. was admitted as party plaintiff, the widow of B., who was entitled to one-third of the property in dispute, was offered as a witness for plaintiff. *Held*, that a release by her to plaintiff and the distributees of her husband of all claim to any part of the property replevied, and a release by plaintiff to her of any claim for costs, and a deposit at the same time in court by plaintiff, of a sum of money equal to the costs which had accrued while the suit was conducted by A., rendered her a competent witness.—Cole v. Hebb, 7 Gill & J. 20.

[f] (Md. 1850) A widow, who has received her dower by consent of the heirs, is a competent witness for the latter to prove seisin of her husband.—Morris v. Harris, 9 Gill, 19.

[g] (N. Y. 1825) Where a grantor of land with warranties dies insolvent, his widow, who joined with him in the deed, is a competent witness to support the title of the grantee, on being released by him, though her interest in the husband's personal estate is not released.—Jackson v. Delancey, 4 Cow. 427.

[h] (N. Y. 1827) The widow of a deceased partner is not a competent witness for the surviving partner, in an action by him as such; nor will a release from her to plaintiff of all her interest in the particular claim in suit render her competent.—Allen v. Blanchard, 9 Cow. 631.

[i] (N. Y. 1853) The widow of a mortgagee, who had acquired a title to the mortgaged premises, having released her right of dower, may be a witness in a suit between the heir of the mortgagor and the heirs of the mortgagee to redeem the premises.—Dobson v. Racey, 8 N. Y. (4 Seld.) 216.

[j] (N. C. 1833) A widow, who dissented from her husband's will and had her dower allotted, may state declarations made to her by her husband about a paper offered as his will, in an issue of devisavit vel non to which she is no party.—Hester v. Hester, 15 N. C. 228.

[k] (Pa. 1862) In a suit by R. against J., as surviving partner, for money sent by R. to his sister and by her loaned to C. on his individual note, and by him loaned to the firm of C. & J., *held*, that the widow of C. was a competent witness for plaintiff, after she had released her interest in her husband's estate.—Donnally v. Ryan, 41 Pa. (5 Wright) 306.

[l] (Pa. 1874) In a suit to have a deed absolute on its face converted into a mortgage, by offering parol evidence that it was taken as a mere security for a loan of money, a widow who was no party to the issue, and who had released her interest in the estate, was a competent witness at common law.—Perry v. Perry, 31 Leg. Int. 372.

[m] (Tenn. 1858) By St. 1852, c. 17, the personal representative of one whose death is caused by the act of another may recover damages for the benefit of the widow and next of kin of deceased. *Held* that, if the widow make a valid release of her interest to the other beneficiaries, she is a competent witness for plaintiff.—Gayle v. Morrissey, 37 Tenn. (5 Sneed) 445.

(e) BANKRUPT OR INSOLVENT, ASSIGNOR AND ASSIGNEE FOR CREDITORS, AND CREDITORS.

BANKRUPT OR INSOLVENT, § 462.
—— NATURE OF INTEREST, § 462.
ASSIGNOR AND ASSIGNEE OR TRUSTEE FOR BENEFIT OF CREDITORS, § 464.
CREDITORS, § 465.

§ 462. Bankrupt or insolvent.

[a] (U. S. 1847) If a person is declared a bankrupt when a suit is pending to which he is a party, his discharge would not be a bar to his liability for costs upon a judgment obtained subsequently to his discharge. Such liability, therefore, excludes him from being a witness in such suit, on the ground of interest.—Bridges v. Armour, 46 U. S. (5 How.) 91, 12 L. Ed. 64.

[b] (U. S. 1801) In an action by the United States against one who had received property belonging to a certificated bankrupt, the bankrupt is not a competent witness to prove the time of his insolvency; debts to the United States not being barred by a certificate.—United States v. King, Fed. Cas. No. 15,536 [Wall. Sr. 13].

[c] (Conn. 1846) On the trial of an action brought by A., the assignee of a bankrupt's estate, under the bankrupt law against B., to whom C., the bankrupt, had, previous to the proceedings in bankruptcy, conveyed estate, real and personal, with covenants of warranty, to recover the value of such estate, C. was offered as a witness for plaintiff. He was objected to by defendant as being interested in the event of the suit. To obviate this objection, plaintiff introduced C.'s certificate of discharge; and to rebut the effect of this, and to show that C. was still interested, defendant read in evidence C.'s schedule of property, which did not include the property in question. *Held*, that this omission did not show such fraud or willful concealment as would destroy the effect of C.'s certificate.—Steene v. Aylesworth, 18 Conn. 244.

[d] (Ill. 1848) Bankrupts, who by their discharge have been devested of all liability or

interest in the subject-matter of a suit, are competent witnesses in such suit, even though the demand on which it is founded was not scheduled by them, unless it was fraudulently omitted.—Strong v. Clawson, 10 Ill. (5 Gilman) 346.

[e] (Ind. 1844) A bankrupt is not a competent witness, in trover, by his assignee, to prove property in the latter, unless he release to plaintiff all claim to an allowance out of his estate, as well as to the surplus.—Cully v. Ross, 7 Blackf. 312.

[f] (Ind. 1844) To render a certified bankrupt a competent witness for his co-debtor in an action for the joint debt, the bankrupt must release to his assignees all claim to surplus and allowance.—Dean v. Speakman, 7 Blackf. 317.

[g] (Ind. 1847) To render a bankrupt competent as a witness to increase the assets in the hands of his assignee, it must appear, not only that he had no claim to a surplus of the estate, but also that he had received his allowance. —Oldham v. McCormick, 8 Blackf. 387.

[h] (Iowa, 1850) A joint debtor, who has been discharged in bankruptcy, is a competent witness for his co-debtor in an action to recover the joint debt.—Frentress v. Markle, 2 G. Greene, 553.

[i] (La. 1816) An insolvent is incompetent for the syndics, unless he release any surplus after paying all the debts.—Clay's Syndics v. Kirkland, 4 Mart. (O. S.) 405.

[j] (La. 1846) One who had made a cessio bonorum under the state law, and was afterwards discharged as bankrupt under the act of congress of August 19, 1841, is a competent witness to prove the correctness of the debts acknowledged by him in his schedule, filed at the time of his cession, unless disqualified on account of his personal relationship to his creditor, or where the debt is due to his wife. —West v. His Creditors, 1 La. Ann. 365.

[k] (Md. 1830) A certificated bankrupt, who has released all future claims upon his estate, is a competent witness.—Glenn v. Von Kapff, 2 Gill & J. 132.

[l] (Md. 1845) In an attachment suit against the goods of A., in which B. appears and claims the goods as his, A., having been discharged under the bankrupt law of the United States, and not being liable for costs, is a competent witness for B. to show that the goods are not his property; but otherwise, if it is shown that B. is a creditor of A. residing in England, that the debt to B. was contracted in England and so not discharged in bankruptcy, and that A.'s title to the property was hypothecated to B. to secure such debt.—Lizardi v. Cohen, 3 Gill, 430.

[m] (Mass. 1850) An insolvent debtor, who has obtained his discharge, is a competent witness for his assignee, on releasing the latter from all claim against him as such.—Greene v. Durfee, 60 Mass. (6 Cush.) 362.

[n] (N. Y. 1809) A., a discharged bankrupt, whose estate will pay not more than 25 per cent., is a competent witness in a suit brought by the assignees of B., a bankrupt, against whom A. had proved a debt under the commission.—Phœnix v. Dey, 5 Johns. 412.

[o] (N. Y. 1809) A. proved a debt against B. in bankruptcy, and afterwards was himself discharged under the bankrupt act; his estate paying about 25 per cent. *Held*, that he was a competent witness to prove that a preference given by B. was in fraud of creditors.—Phœnix v. Dey, 5 Johns. 412.

[p] (N. Y. 1817) A bankrupt, who has been discharged in Great Britain and against whose property in New York an attachment has issued under the absent and absconding debtor act, cannot be a witness in favor of his trustees under that act, although he has released his interest in the surplus of his estate to his assignees in Great Britain and to his trustees here.—Graves v. Delaplaine, 14 Johns. 146.

[q] (N. Y. 1826) An insolvent debtor, who has released all claim to a surplus, is a competent witness for his assignee.—Jaques v. Marquand, 6 Cow. 497.

[r] (N. Y. 1844) The incompetency of a witness for interest in the subject-matter of a suit, though he has been declared a bankrupt, is not removed until he has received his discharge. —Dickinson v. Codwise, 1 Sandf. Ch. 214.

[s] (N. Y. 1851) A bankrupt, after his discharge, is a competent witness for plaintiffs in an action brought by his sureties to avoid a note given by him and them on the ground of usury. —Morse v. Cloyes, 11 Barb. 100.

[t] (N. Y. 1851) To exclude the bankrupt as a witness, it must be shown that at least there may be a surplus of his estate to which he will be entitled.—Morse v. Cloyes, 11 Barb. 100.

[u] (Pa. 1804) The bankrupt, on obtaining his certificate, might have been a witness in a suit brought by himself before bankruptcy, though the names of the assignees were not substituted immediately, as his assignees by their own act over which he had no control, in not being substituted as parties, could not make him responsible for costs.—Browne v. Insurance Co. of Pennsylvania, 4 Yeates, 119.

[v] (Pa. 1843) If one of several defendants be discharged in bankruptcy after suit brought, this does not render him competent to testify in the suit.—Given v. Albert, 5 Watts & S. 333.

[w] (Pa. 1846) An insolvent debtor, in whose name a suit is brought by his assignee, is not rendered a competent witness by releasing his surplus to his assignee.—Bittinger v. Keys, 2 Pa. (2 Barr) 459.

[x] (Pa. 1847) A release by an insolvent debtor of his claim to the surplus of his estate does not render him competent, in a suit in behalf of the assignee in insolvency as such.— Wilkinson v. Pittsburgh Farmers' & Mechanics' Turnpike Co., 6 Pa. (6 Barr) 398.

§ 463. —— Nature of interest.

[a] (U. S. 1792) In an action against the acceptor of a bill, plaintiff, who had become a certificate bankrupt, might be admitted as a witness to prove a parol acceptance; he having released his interest at the bar, and the suit being prosecuted by his assignees, who had given security for costs.—McEwen v. Gibbs, 4 Dall. 137, 1 L. Ed. 774.

[b] (U. S. 1792) A certificated bankrupt is a witness to prove the parol acceptance of a bill of exchange, in an action brought by him against the acceptor before his bankruptcy.— McEwen v. Gibbs, 4 Dall. 137, 1 L. Ed. 774.

[c] (U. S. 1803) A bankrupt, who indorsed a note before his bankrupty and who has obtained his certificate, is a competent witness for the indorsee.—Murray v. Marsh, Fed. Cas. No. 9,965 [Brunner, Col. Cas. 22].

[d] (Ala. 1846) A certificated bankrupt is discharged from all surety debts, though paid by the surety after the bankrupt obtains his discharge, and is therefore a competent witness for the surety in a suit between him and the creditor.—Kyle v. Bostick, 10 Ala. 589.

[e] (Ala. 1846) A defendant in execution, though he is a certificated bankrupt, is not a competent witness upon a trial of right of property.—Carville v. Stout, 10 Ala. 796.

[f] (Ala. 1847) A bankrupt vendor, who has received his certificate, and who offers to release all his interest to his grantee and assignees, and to whom a release is offered by his grantee, is a competent witness.—Frow v. Downman, 11 Ala. 880.

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[g] (Ala. 1851) The maker of a deed of trust may be made a competent witness to sustain it, by showing his certificate of discharge under the bankrupt act, obtained subsequently to the execution of the deed, and also his release to the assignee in bankruptcy of all interest which he may have in the suit.—Kirksey v. Dubose, 19 Ala. 43.

[h] (Ala. 1852) Where a bill is filed by the secured creditors for the settlement of a deed of trust, the maker of the deed, although he is a defendant to the bill, is a competent witness for one of complainants to prove the bona fides of his debt and his assent to the deed; it being shown that after the execution of the deed he had obtained his discharge in bankruptcy.—Colgin v. Redman, 20 Ala. 650.

[i] (Ark. 1847) A release by a surety to his principal, a discharged bankrupt, renders the principal a competent witness for the surety.—Pogue v. Joyner, 7 Ark. (2 Eng.) 462.

[j] (Ind. 1849) One of several makers of a note, who has taken the benefit of the bankrupt law, is not, while the proceedings in bankruptcy are still open, a competent witness for the other makers to prove fraud in obtaining the note, in a suit against them by the payee.—Madison Ins. Co. v. Mitchell, 1 Ind. (1 Cart.) 384.

[k] (Ind. 1849) A certificated bankrupt, who has not released his claim to the surplus and allowance out of his assigned estate, and where the proceedings in bankruptcy have not been closed, is not a competent witness in an action against his co-makers of a note.—Madison Ins. Co. v. Mitchell, Smith, 228.

[l] (N. Y. 1826) Where one has transferred a note, and has subsequently been discharged from his debts under the insolvent act, he is a competent witness for the holder in an action on the note.—Murray v. Judah, 6 Cow. 484.

[m] (N. Y. 1843) A principal debtor, who has been discharged under the bankrupt law from the debt upon which his sureties are sued, is a competent witness for them to show usury in the contract.—Morse v. Hovey, 1 Sandf. Ch. 187, affirmed (1846) 1 Barb. Ch. 404; Fellows v. American Life Ins. & Trust Co., 1 Sandf. Ch. 203.

[n] (N. Y. 1850) Complainants, together with one A. and as his sureties, executed a note to B., alleged to be void for usury. An action at law was brought on the note in the name of C. against all the makers, and they pleaded thereto. A., the principal, after issue joined, obtained a discharge as a bankrupt, which he thereupon pleaded puis darrein continuance, and issue was taken on that plea. Complainants thereupon filed their bill for the purpose of procuring the evidence of A. in order to establish the usury and obtain relief against the note, alleging, among other things, that neither the usurer nor the borrower could be called as a witness at law. *Held*, that A., the borrower, being still a party to the action on the note, and not having released the surplus of his effects in bankruptcy, was interested, and incompetent as a witness to sustain the bill or action.—Morse v. Crofoot, 4 N. Y. (4 Comst.) 114.

[o] (Ohio, 1844) Where one partner, not served with process, has been discharged in bankruptcy, he is a competent witness for his copartner in an action for goods sold to defendant.—Searington v. Ellison, 1 Ohio Dec. 74.

[p] (S. C. 1844) A person sued as executor is not a competent witness for the estate, though he is a bankrupt and has obtained his discharge as such.—Osborn v. Black, Speers, Eq. 431.

[q] (Tenn. 1843) A party to a note, who was sued on it and afterwards obtained his discharge under the bankrupt law, is a competent witness, after such discharge, to prove the note usurious.—Carman's Ex'r v. White, 23 Tenn. (4 Humph.) 301.

[r] (Tenn. 1850) A surety upon a bill single, who is a certificated bankrupt, is not a competent witness in behalf of his co-surety; for, though discharged from liability as to the holder, yet he is liable to make contribution to his co-surety.—Keer v. Clark, 30 Tenn. (11 Humph.) 77.

§ 464. Assignor and assignee or trustee for benefit of creditors.

[a] (La. 1845) One of the parties to a policy sued on, who has assigned his interest therein for the benefit of his creditors, is not competent for the others, where the assignment, stipulating his release, is not shown and cannot be presumed to have been accepted by his creditors.—Wellington v. Merchants' Ins. Co., 11 Rob. 222.

[b] (La. 1845) Nor can such witness make himself competent by abandoning his interest in open court to his creditors. He is still interested that those who have not released him should receive their portion of the amount sued for; and he cannot release himself.—Wellington v. Merchants' Ins. Co., 11 Rob. 222.

[c] (Mass. 1833) In an action by an indorsee against W. on two notes, one of which was made by W. and indorsed by J., and the other was made by J. and indorsed by W., where it appeared that, after the execution of the notes, but before their maturity, J. had failed, and assigned his property for the benefit of his creditors, and W. had in consequence released J. from all claims, demands, and causes of action, J., who was offered as a witness by plaintiff, was not incompetent.—Eastman v. Winship, 31 Mass. (14 Pick.) 44.

[d] (Miss. 1850) A trustee who takes no benefit is generally a competent witness on the trial of the validity of a trust deed; but one who does take an interest is incompetent in equity. Thus, where a trustee has an interest under a trust deed directly and as security to other creditors, he cannot, by a release to a co-trustee, make himself competent, as he cannot release, and his co-trustee has no power to take a release.—Selser v. Ferriday, 21 Miss. (13 Smedes & M.) 698.

[e] (N. Y. 1808) Where a debtor has assigned his property to A. for his benefit and for the benefit of his other creditors, A. may execute a release to the debtor of all his interest in the fund, and thus become a competent witness.—Main v. Newson, Anth. N. P. 11.

[f] (Pa. 1847) Where a debtor assigns property to his creditor, he is a competent witness for the creditor in respect to such property, on being released by him.—Faunce v. Lesley, 6 Pa. (6 Barr) 121.

[g] (Pa. 1857) In an action by an assignee for the benefit of creditors to recover lands alleged to belong to the assignor, the assignor is not a competent witness; he being interested in making the fund for his creditors as large as possible, though he releases his right to any surplus.—Sharp v. Long, 28 Pa. (4 Casey) 433.

[h] (Pa. 1861) An assignee for the benefit of creditors, having settled his account and been discharged from his trust, and a successor having been appointed, is a competent witness to prove that property standing in the name of the assignee was purchased with the trust funds and is a part of the estate for the payment of the assignment creditors.—Appeal of Robb, 41 Pa. (5 Wright) 45.

§ 465. Creditors.

[a] (Conn. 1836) In an action on a bond for the jail limits, defendant offered a witness to prove that W., one of the joint creditors, gave a parol license to leave the limits. Plaintiff, to disprove such testimony, offered W. himself as

a witness, accompanied by releases from plaintiff and his attorney. W., being examined as to his interest, said that, while the cause was on trial, he had agreed by parol with Y., the other joint creditor, that Y. should have the whole demand against the debtor, and should pay him (W.) one-fourth part of the amount; that it was W.'s understanding that Y. should defray all the expenses of the suit, but that no writing had been signed, and nothing paid or delivered by either party. *Held*, that W. was not a competent witness; for it was doubtful whether there was a legal assignment of his interest, and, if there was, that it was not clearly shown that W. was discharged from the costs which had accrued in the cause.—Seymour v. Harvey, 11 Conn. 275.

[b] (Conn. 1846) In an action by an assignee in bankruptcy against one to whom the bankrupt had conveyed land prior to the bankruptcy proceedings to recover the same, the testimony of a witness for plaintiff was objected to on the ground of his interest as a creditor of the bankrupt, and the only proof of such fact was that his name appeared as a creditor in the bankrupt's schedule of debts. Such witness testified, however, that, although he had been a creditor, he had assigned the debt. *Held*, that he was a competent witness.—Steene v. Aylesworth, 18 Conn. 244.

[c] (Md. 1860) A creditor of an estate to the amount of $900 assigned his claim to a person of no property for two notes of $300 each, one of which the assignee had paid, He made the assignment for the purpose of making himself a competent witness for the estate in a suit about to be brought by the administrator, the loss of which would leave the estate unable to pay more than $200 on his claim. On the voir dire he testified that if the suit was lost he did not intend to collect the second note, and that the assignee knew of that intention, but that there was no agreement to prevent him from collecting it, and that he might change his mind. *Held*, that his interest in the suit was at most honorary, not legal, and therefore that he was a competent witness.—Reynolds v. Manning, 15 Md. 510.

[d] (Pa. 1844) One who becomes interested in the prosecution and recovery of a claim after suit brought, and devests himself of that interest before trial, is a competent witness.—Orphans' Court v. Woodburn, 7 Watts & S. 162.

[e] (Pa. 1844) A creditor who assigns his claim, a few months before the commencement of suit upon it, for the purpose of being a witness for the assignee, is incompetent.—Cochran v. McTeague, 8 Watts & S. 272.

[f] (Pa. 1846) In an issue formed to try whether a judgment was fraudulent as to creditors, a judgment creditor of defendant, who is not a party to the issue, may become a competent witness by disposing of his judgment, provided the act was bona fide, and not dictated by necessity to give it effect by his testimony.—Gates v. Johnston, 3 Pa. (3 Barr) 52.

(f) PRINCIPAL AND SURETY, INDEMNITORS, AND RECEIPTORS.

PRINCIPAL AND SURETY, § 466.
—— SURETY IN GENERAL, § 467.
—— SUBSTITUTION OF NEW SURETY, § 468.
—— ON NOTE, § 469.
INDEMNITORS, § 470.
RECEIPTORS, § 471.

§ 466. Principal and surety.

[a] (U. S. 1837) One of the principals of a bond, released by his co-obligors, is competent to prove that one of the principals had agreed to sign the bond, on condition that another person should also sign it, which had been done.—United States v. Leffler, 36 U. S. (11 Pet.) 86, 9 L. Ed. 642.

[b] (Ala. 1847) A constable is not a competent witness for his sureties, though released by them.—Robertson v. Coker, 11 Ala. 466.

[c] (Ala. 1849) Where a principal places in the hands of his surety the note of a third person as an indemnity against his liability, and the surety, after suing the note to judgment, without the consent of the principal, settles said judgment by taking from defendant therein the note of another person, indorsed by him, the principal is a competent witness for the surety in a suit against the said defendant as indorser of the note so assigned by him in discharge of said judgment.—Herndon v. Givens, 16 Ala. 261.

[d] (Ky. 1825) The principal, with a release from a surety and a covenant never to demand indemnity from either him or his co-sureties in any event, is a competent witness for the surety at the action of the obligee.—Bank of Limestone v. Penick, 18 Ky. (2 T. B. Mon.) 98, 15 Am. Dec. 136.

[e] (Ky. 1848) A release of the principal by the surety to an obligation which is joint and several renders him a competent witness in an action against the surety.—Field v. Davidson, 48 Ky. (9 B. Mon.) 77.

[f] (La. 1860) The release of one of the principal debtors by the surety from all liability to himself as surety renders such debtor a competent witness for the surety.—Jones v. Fleming, 15 La. Ann. 522.

[g] (N. Y. 1851) Where an attachment against a nonresident is issued, and the property attached has been discharged on a bond given by sureties for defendant in the attachment, such defendant cannot be made a competent witness for the makers of the bond, in a suit on it, by a release from them.—Mitchell v. Weed, 6 How. Prac. 128, 1 Code R. (N. S.) 196.

[h] (N. C. 1840) If the surety to a bond or note be sued alone, the principal debtor will be incompetent as a witness for him, because, if plaintiff succeed, he will be liable to the surety for the costs of the action; but the principal may, in such action against the surety, be made competent by a release from the surety before he is called to testify.—Moffit v. Gaines, 23 N. C. 158.

[i] (N. C. 1845) An obligor in a bond is a competent witness for defendant, in an action on the bond against a co-obligor, especially if he is released by defendant.—Ligon v. Dunn, 28 N. C. 133.

[j] (Pa. 1842) If, in proceedings on a mechanic's lien against the owner and the contractor, the sureties of the contractor make defense, and procure a release from the owner to the contractor, and use it to make him a competent witness, it is tantamount to a release from themselves; and the witness is thereby made competent, without a direct release by the sureties.—Church v. Dickinson College, 3 Watts & S. 221.

[k] (Pa. 1845) In proceedings by the commonwealth against the surety of a defaulting officer, the principal becomes a competent witness by being released by defendant from his liability for costs.—Commonwealth v. Reitzel, 9 Watts & S. 109.

[l] (Pa. 1849) A principal is a competent witness in an action against his surety, when released from all liability growing out of the action.—Miller v. Stem, 12 Pa. (2 Jones) 383.

[m] (Vt. 1848) In an action against a surety, the principal, who has been released by the surety as to costs which the surety might be compelled to pay, is a competent witness, since the record in the suit against the surety would

not aid him in a suit to recover from the principal.—Austin v. Dorwin, 21 Vt. 38.

[n] (Va. 1857) A co-obligor is not, nor can he be made by a release, a competent witness for defendant in an action against the personal representative of a deceased obligor. — Brown's Adm'r v. Johnson, 13 Grat. 644; Isbell's Ex'r v. Same, Id.

[o] (Va. 1857) His liability for contribution is more direct and immediate than his liability on the bond to the obligee.—Brown's Adm'r v. Johnson, 13 Grat. 644; Isbell's Ex'r v. Same, Id.

§ 467. — Surety in general.

[a] (U. S. 1811) A surety in a replevin bond is not a competent witness for the plaintiff in replevin, although he has an indemnifying bond. —Thompson v. Carbery, Fed. Cas. No. 13,945 [2 Cranch, C. C. 35].

[b] (Ala. 1841) Where a bond is executed in pursuance of the act of 1828, "the better to provide for the trial of the right of property and for other purposes," it operates "as a release by the claimant of damages against the sheriff or other officer" taking the property claimed in execution, and consequently operates as a discharge of the sureties in a bond to indemnify the sheriff; and they are, therefore, competent witnesses for plaintiff.—Towns v. Alford, 2 Ala. 378.

[c] (Ala. 1847) When a bank moves for judgment against two defendants, one, though a surety, and released by his principal, is not a competent witness for the other.—Colgin v. State Bank, 11 Ala. 222.

[d] (Ala. 1849) The sureties in a bond for the forthcoming of a slave seized by virtue of an attachment, and which slave is afterwards levied upon under an execution issued on the judgment rendered in the same suit, and claimed by a third person, are competent witnesses for plaintiff in the trial of the right of property.—Greene v. Tims, 16 Ala. 541.

[e] (Ala. 1857) Where the principal alone files a bill in equity to enjoin an action at law against himself and his surety, he may render his surety a competent witness for him by paying all costs of the action at law, and depositing with the surety a sum of money sufficient to cover any liability in that action.—Williams v. Mitchell's Adm'r, 30 Ala. 299.

[f] (Ala. 1867) Where an attachment was levied on slaves in 1859, which were replevied, and the trial of the cause was had in 1866, *held* that, compliance with the bond having become impossible on account of the abolition of slavery, the surety on the bond could not be held liable for a failure to deliver the property, and was therefore not incompetent from interest as a witness in the cause.—Glover v. Taylor, 41 Ala. 124.

[g] (Cal. 1863) A witness, who is incompetent because of his being surety on a bond given in the action, can be rendered competent, either by substituting another surety or by a deposit in court of a sufficient sum of money.—Klockenbaum v. Pierson, 22 Cal. 160.

[h] (Del. 1869) While a suit is pending, an injunction bond is under the control of the court, and a surety may be discharged for reexamination as a witness, when his previous examination was inadvertently held without the removal of that disqualification.—Hall v. Livingston, 3 Del. Ch. 348.

[i] (Ky. 1820) The court cannot discharge the surety on a bond given for the due prosecution of a traverse, and thereby render him a competent witness.—Holeman v. Carneal, 9 Ky. (2 A. K. Marsh.) 602.

[j] (Ky. 1830) To render a surety on a bond a competent witness, his responsibility must be released.—Wallace's Heirs v. Twyman, 26 Ky. (3 J. J. Marsh.) 457.

[k] (Ky. 1830) Payment by a surety on a bond to a receiver appointed by the court does not discharge the bond or release the surety, so as to render him a competent witness in an action on the bond.—Wallace's Heirs v. Twyman, 26 Ky. (3 J. J. Marsh.) 457.

[l] (Ky. 1852) A surety, who has been released by his co-surety from all liability to contribute to his co-surety, is a competent witness in an action brought by the co-surety against one who has promised to indemnify him against his liability on the bond.—Jones v. Letcher, 52 Ky. (13 B. Mon.) 363.

[m] (Me. 1851) In a replevin suit, the interest of a surety on the replevin bond is removed by a deposit for his use, made with the clerk of the court, by plaintiff, of an amount equal to the penalty of the bond.—Cooper v. Bakeman, 33 Me. 376.

[n] (Me. 1853) In an action on a bail bond, one who was a surety was offered as a witness, but objected to, whereupon a friend of defendant deposited with the clerk $100 of his own money, "for the benefit of the witness, in case of his liability on the bond." The witness was sworn, judgment was rendered on the bond, and plaintiff moved that the money deposited should be applied to satisfy the judgment. *Held*, that the motion ought not to be granted. —Stuart v. McDougald, 35 Me. 398.

[o] (Md. 1843) The surety of an administrator may, under circumstances, become a competent witness for his principal to maintain an action at law to recover money due the intestate's estate, although at one period the administrator may have been guilty of a devastavit in relation to the same claim, as where, from lapse of time, after due notice to creditors to assert their claims, they are presumed to have been satisfied, and none appear to exist, and where the sole distributee of the deceased had released both the administrator and sureties from all claims.—Mitchell v. Mitchell, 1 Gill, 66.

[p] (Mass. 1833) Where the principal in a replevin bond deposited in the hands of his surety a sum of money equal to the amount of the penalty to secure him against his liability, the surety was thereby rendered a competent witness.—Hall v. Bayliss, 32 Mass. (15 Pick.) 51.

[q] (N. C. 1860) A surety to a prosecution bond is not discharged by a second bond, given as security upon a rule obtained at the instance of defendant; and therefore an obligor in the former bond is not a competent witness for plaintiff.—Buie v. Wooten, 52 N. C. 441.

[r] (Pa. 1866) Under a statute requiring two sureties to a replevin bond, such sureties cannot be released, so as to make them competent witnesses for plaintiff, by the substitution of money under order of court. — Cummings v. Gann, 52 Pa. (2 P. F. Smith) 484.

[s] (S. C. 1836) Where a witness on the part of defendants, in trover for slaves, had become their surety, the judge will permit his bond to be canceled on the delivery of the negroes, to restore his competency.—Spann v. Brown, Riley, 177.

[t] (S. C. 1846) The act (6 St. at Large, p. 337) requires defendant in trover "to enter into bonds with sufficient security to the sheriff," etc., "for the production of the chattel sued for to satisfy plaintiff's judgment." *Held* that, as the bond is discharged and the sureties thereon released by a delivery of the property by defendant to plaintiff, the sureties are thereafter competent witnesses for defendant. —Bowen v. Coker, 3 Rich. Law, 142.

[u] (Tenn. 1837) A party to a suit, who has given a surety for the costs, cannot, by taking

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the poor debtor's oath, have the surety discharged or released, for the purpose of examining him as a witness.—Black v. Crain, 18 Tenn. (10 Yerg.) 516.

[v] (Tex. 1848) A surety on a bond to obtain the release of sequestered property is discharged by the delivery of the property into the hands of the sheriff, as well before as after verdict, and is thereby rendered competent to testify between the parties.—McClenny v. Floyd, 3 Tex. 114.

[w] (Vt. 1846) Plaintiff, in an action brought by a surety against his co-surety for contribution, had assigned his claim for contribution from defendant to three persons, who had incurred liabilities as sureties for him, and had been decreed a bankrupt after the commencement of his action for contribution. His assignee in bankruptcy had entered and prosecuted the suit, and it did not appear that he entered at the request of the assignees of the claim. One of those assignees, after having transferred his claim in the demand to his co-assignees, was offered as a witness on the part of plaintiff. *Held*, that the co-assignees of the witness not having executed to him a release of their right to call upon him for contribution, in case they should eventually be compelled to pay upon their liability for plaintiff, the witness was incompetent.—Hayden v. Rice, 18 Vt. 353.

[x] (Va. 1840) One of two sureties in a bond, having received from the creditor a covenant not to sue him thereon, is a competent witness for the creditor in a suit to enforce a mortgage given to secure the bond, by the principal, as against one claiming under a prior deed or mortgage.—Waggener v. Dyer, 11 Leigh, 384.

§ 468. —— Substitution of new surety.

[a] While a trial in a replevin suit is in progress, a new bond may be substituted, in order to release a surety on the bond and make him a competent witness.

—(Ark. 1860) Patterson v. Fowler, 22 Ark. 396;

(Ill. 1843) Amos v. Sinnott, 5 Ill. (4 Scam.) 440; (1855) Charlesworth v. Williams, 16 Ill. (6 Peck) 338; (1861) Gray v. Morey, 26 Ill. (16 Peck) 409;

(Ind. 1845) Brewer v. Murray, 7 Blackf. 567;

(N. M. 1854) Ward v. Broadwell, 1 N. M. 75.

[aa] When a surety on the appeal bond is needed as a witness in the appellate court, he may be released and a new surety substituted.

—(Ga. 1846) Davis v. Anderson, 1 Ga. (1 Kelly) 176;

(Iowa, 1851) Hammitt v. Coffin, 3 G. Greene, 205;

(Mo. 1839) Flournoy v. Andrews, 5 Mo. 513;

(N. C. 1805) Lavender v. Pritchard, 3 N. C. 337; (1823) McCulloch v. Tyson, 9 N. C. 836;

(Pa. 1817) Salmon v. Rance, 3 Serg. & R. 311.

[b] (Ala. 1847) A surety to an attachment bond, who is a necessary witness for the party, may be made competent by the execution of a new bond, with other sufficient surety; and it is the duty of the court to permit such substitution to be made.—Drinkwater v. Holliday, 11 Ala. 134.

[bb] (Ala. 1848) A surety to a bond for the trial of the right of property may be rendered a competent witness for his principal by the substitution of another surety, and the refusal of the court to permit this to be done may be revised on error.—Taylor v. Branch Bank at Huntsville, 14 Ala. 633.

[c] (Ala. 1861) A surety may be a witness for his principal, where a new and sufficient bond is executed, putting a different surety in his place; but it is not permissible to erase his name from the bond and supply his place with another surety.—Webb v. Kelly, 37 Ala. 333.

[d] (Ala. 1861) An obligor in a detinue bond cannot make a surety thereon a competent witness in his favor, by erasing the surety's name and substituting another with the approval of the court, but without the consent of the obligee. A new bond should be given.—Webb v. Kelly, 37 Ala. 333.

[e] (Ga. 1852) Where, in an action of trover, a possessory warrant for the property is sued out against the plaintiff and a bond given to have the property forthcoming to answer any judgment for the same, a surety on such bond cannot be removed from the bond by the court, so as to make him a competent witness, on an offer to substitute other sureties.—Harper v. Scott, 12 Ga. 125.

[f] (Ga. 1866) Where a material witness is a surety on the bond of a tenant given under the act of 1866, the court hearing the case should allow another surety to be substituted to make the witness competent.—Dudley v. Love, 35 Ga. 148.

[g] (Ky. 1868) A surety in a bond to release attached property is liable until the court has ordered his discharge. Until then he is not a competent witness for the defendant in attachment, although another surety has been substituted.—Rucker v. Pritchett, 66 Ky. (3 Bush) 689.

[h] (La.) When no liability is shown under an attachment or sequestration bond, or bond to release a provisional seizure, the principal may restore his surety's competency by substituting another.—(1828) Vance v. Martin, 6 Mart. (N. S.) 673; (1836) Tyson v. Lansing, 10 La. 444; (1843) Comstock v. Paie, 3 Rob. 440.

[i] (La.) Plaintiff in injunction may, on a proper showing, restore his surety's competency by substituting another. Such is the usual practice as to sureties in attachment and for costs. The original surety may be then examined, though by Act March 25, 1831, No. 48, § 3, a party to the suit, and liable in solido with plaintiff for damages and interest.—(1844) Brashear v. White, 9 Rob. 55; (1845) Williams v. Planters' Bank of Mississippi, 12 Rob. 125.

[j] (Md. 1864) Courts have no authority to discharge a surety on an injunction or appeal bond and substitute another, so as to make the former a competent witness. Such a power may be very convenient, but it impairs the obligation of contracts and violates our organic law.—Artz v. Grove, 21 Md. 456.

[k] (Mass. 1849) Where several actions of replevin are tried together before the same jury, a party offering a surety on a replevin bond as a witness in one of the cases in which the surety is not interested cannot be required, before calling him, to substitute a new surety in his place on the replevin bond.—Kimball v. Thompson, 58 Mass. (4 Cush.) 441, 50 Am. Dec. 799.

[l] (Miss. 1845) In a trial of a right of property claimant can substitute new sureties, so as to discharge the old ones and render them competent witnesses.—Moore v. McKie, 13 Miss. (5 Smedes & M.) 238.

[m] (N. H. 1856) On the trial of a cause in which defendant was held to bail, he moved the court to change the bail, so that the person originally taken might be a witness. Plaintiff made no objection to the responsibility of the new bail offered, but the court ruled that it was not within their discretion to grant the motion. *Held*, that the ruling was erroneous.—Walker v. Kennison, 34 N. H. 257.

[n] (N. Y. 1811) Where a material witness for defendant is holden as his bail, he should

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be discharged by the court and new bail taken. —Irwin v. Caryell, 8 Johns. 407.

[o] (N. Y. 1842) Where the surety in a bond given upon the allowance of an injunction is a material witness for plaintiff, the court will allow the bond to be canceled, and a new bond to be given, with two sufficient sureties, to be approved by a master.—Pomeroy v. Avery, 9 Paige, 591.

[p] (N. C. 1856) The signer of a prosecution bond may become a competent witness, by the substitution of a new bond, under the order of court that a new one be substituted and the former one canceled, although the latter is not in court to be canceled.—Otey v. Hoyt, 48 N. C. 407.

[q] (Ohio, 1838) On an appeal from the common pleas to the supreme court, this court cannot discharge the surety in the appeal bond, to allow him to testify for the appellant, on the substitution of other security.—Stanbery v. Mitten, 8 Ohio (8 Ham.) 546.

[r] (Pa. 1842) Where a cause is remitted from the common pleas of one county to a special court in another, the latter may discharge a recognizor from his recognizance and receive another surety, in order to make the former a witness.—Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362.

[s] (Pa. 1842) Where an action has been remitted from the common pleas of one county to the special court in another county, and the special court has discharged a surety from his recognizance and received another surety, that the first might testify as a witness, the first surety remains liable for the costs up to the time of his discharge, unless the recognizance otherwise provides, and is therefore an interested party and incompetent as a witness.—Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362.

[t] (Tenn. 1838) A surety for the prosecution of a suit may be made a competent witness for the party for whom he stands bound by releasing him of record and substituting another in his place.—Craighead v. State Bank, 19 Tenn. (Meigs) 199; Ross v. Blair, Id., 525.

§ 469. —— On note.

[a] (Ala. 1848) The principal in a note is a competent witness against one who signed the note as his surety, with whom he had deposited corn sufficient to indemnify him against liability.—Gayle v. Bishop, 14 Ala. 552.

[b] (Ala. 1850) Where the surety on a note extinguishes it, by giving a new note with a third person as principal and himself as surety, the principal in the original note is a competent witness for such third person, to show that the substituted note was given for the accommodation of the surety, and under the promise that he would pay it.—Wright v. Lewis, 18 Ala. 194.

[c] (Ga. 1857) The principal in a joint and several note, against whom process is sued out but not served, and who is released from liability for costs, is a competent witness in a suit against the sureties on said note for them. —Holland v. Chambers, 22 Ga. 193.

[d] (Ky. 1827) The principal in a note, released by the surety, is a competent witness for him.—Bank of Limestone v. Penick, 21 Ky. (5 T. B. Mon.) 25.

[e] (Mo. 1849) The maker of a note bearing interest at 10 per cent. was defaulted, and released by his sureties in the note, from all claims which they might have as sureties, and from all claims for interest above the legal rate of 6 per cent. *Held*, that he became thereby a competent witness.—Hogg v. Breckenridge, 12 Mo. 369.

[f] (N. H. 1840) In a suit by a bona fide indorsee of a note against the surety, the principal, being released by the surety, is a competent witness to prove that the words "or order" had been inserted in the note, after its execution and without his knowledge, by the principal, at the request of the payee.—Haines v. Dennett, 11 N. H. 180.

[g] (S. C. 1847) Where a surety on a note executes a release to the maker of all liability to him, in case of a recovery, such release will render the maker a competent witness for the surety, in a suit upon such note against the surety.—Dogan v. Ashby, 1 Strob. 433.

§ 470. Indemnitors.

[a] (Me. 1843) In an action of trespass against a sheriff for goods attached by his deputy, the sheriff executed a release to the deputy in order to render him a competent witness. *Held*, that by virtue of the release a person who had promised to indemnify the deputy for attaching and taking the goods became a competent witness for the sheriff.—Welcome v. Batchelder, 23 Me. (10 Shep.) 85.

[b] (Mass. 1834) Where plaintiff, in an action upon a debt against which he and a third party had covenanted to indemnify defendant, released such third party, he was a competent witness. —Whitaker v. Salisbury, 32 Mass. (15 Pick.) 534.

§ 471. Receiptors.

[a] (Me. 1853) A receiptor of property attached may be qualified to testify as a witness for defendant in the suit, on receiving a sum of money from the party calling him, or from the attorney of such party, sufficient to indemnify him.—Jordan v. Young, 37 Me. 276.

[b] (Mass.) A receiptor of property may be a witness, on having a sufficient sum of money put into his hands as an indemnity.—(1832) Allen v. Hawks, 30 Mass. (13 Pick.) 79; (1834) Beckley v. Freeman, 32 Mass. (15 Pick.) 468.

[c] (Vt. 1845) Where the receiptor of property attached has suffered it to remain in the defendant's possession, the court has no authority to allow defendant to pay to the clerk of the court a sum equal to the receiptor's liability to the attaching officer, and then discharge the attachment, or the attaching officer's liability, so as to render the receiptor a competent witness.—Haskins v. Smith, 17 Vt. 263.

(g) EXECUTORS OR ADMINISTRATORS, AND LEGATEES, DEVISEES, OR HEIRS.

EXECUTORS AND ADMINISTRATORS, § 472.
—— PROCEEDINGS TO ESTABLISH WILL, § 473.
LEGATEES AND DEVISEES, § 474.
HEIRS AND DISTRIBUTEES, § 475.

§ 472. Executors and administrators.

[a] (Ala. 1846) The administrator is not a competent witness to prove that he had funds in his hands sufficient to pay all the claims of creditors, for the purpose of enabling the distributees of the estate to testify; but if the distributees execute releases to him previous to being admitted to give evidence, as his testimony could not prejudice, it will not be an error available in the supreme court.—Hall v. Alexander, 9 Ala. 219.

[b] (Conn. 1846) A., one of two administrators, after becoming bankrupt, sold a nonnegotiable note to C., contrary to the orders of B., the other administrator; C. having full knowledge of the bankruptcy of A. Defendants claimed that they had paid the money due on the note to B., and that he had paid it over to the legatees, who were entitled thereto, and it was shown that at the time B. received the money from defendants he gave them a bond of indemnity; but it also appeared that, before

he was offered as a witness in an action on the note of C. in the names of A. and B., defendants had given up such bond to him for the purpose of qualifying him as a witness. *Held* that, since B.'s interest was extinguished, he was a competent witness for defendants.—Beecher v. Buckingham, 18 Conn. 110, 44 Am. Dec. 580.

[c] (Del. 1838) Where an executor had long ago settled the estate, and any action on the testamentary bond was barred, he was a competent witness to prove facts resting in his knowledge before the will, though such facts went to controvert the title of his testator.—Phillips v. Short, 2 Har. 339.

[d] (Ill. 1853) An administrator is a competent witness to show when money was received from him by a guardian, if it appears that he has settled up the estate and distributed the proceeds among the heirs.—Clark v. Burnside, 15 Ill. (5 Peck) 62.

[e] (Ind. 1857) An executor was empowered by the will to sell certain real estate devised on a condition subsequent, if the condition should be broken. The condition being broken, the executor sold and conveyed the estate by a deed reciting the breach of the condition, but without covenants. The executor, being also a legatee under the will, released by writing all interest in the premises except as trustee of the power to sell. *Held* that, the recitals in the deed relating to the breach of condition being only representations for the truth of which he was not bound, the executor was a competent witness for the plaintiff in an action of ejectment brought by the vendee to recover possession of the lands.—Doe v. Cassiday, 9 Ind. 63.

[f] (La. 1827) A discharged executor is competent for his coexecutor.—Taylor v. Hollander, 5 Mart. (N. S.) 295.

[g] (Md. 1793) An executor is not a competent witness in an action for the estate, though he releases all his interest therein.—Beard v. Cowman's Ex'r, 3 Har. & McH. 152.

[h] (Md. 1811) In replevin by A.'s executor against B.'s administrator for a negro boy, defendant, for the purpose of proving a gift of the negro boy by A. to C., whose administratrix B. was, in her lifetime, offered in evidence D., who was the daughter and one of the representatives of C. and B., and, to restore her competency, gave in evidence a receipt given by the husband of D. to B., as the administratrix of C., of his wife's share of her deceased father C.'s estate. *Held*, that D.'s testimony was inadmissible.—Dunnington's Ex'r v. Dunnington's Adm'r, 3 Har. & J. 279.

[i] (Mass. 1834) In an action by an executor, he is not a competent witness for defendant, although released by him, and though the action was brought for the benefit of the residuary legatee, who had indemnified the executor against costs.—Page v. Page, 32 Mass. (15 Pick.) 368.

[j] (Mass. 1842) Under St. 1839, c. 107, § 2, an executor, who is plaintiff in a suit in which he has no interest, except such as arises from his liability for costs and expenses of the suit, may be a witness in such suit, if there be first tendered to him such security for his liability for costs as is sufficient, in the opinion of the court, to indemnify him on account thereof; and he need not also release his right to recover costs of defendant in such suit, in order to enable him to testify.—Dascomb v. Davis, 46 Mass. (5 Metc.) 335.

[k] (N. H. 1844) If an executor have any interest as heir or creditor, he may make himself competent to testify, by assigning such interest to the nominal plaintiff, and taking from him a release from all liability for costs.—Barker v. Barker, 16 N. H. 333.

[l] (N. Y. 1855) A renunciation, by one named as an executor and devisee in trust in a will, of all right to act as executor or trustee under it, renders him a competent witness to prove its validity, upon an application for probate.—Burritt v. Silliman, 13 N. Y. (3 Kern.) 93, 64 Am. Dec. 530, affirming (1853) 16 Barb. 198.

[m] (Pa. 1813) An administrator cannot be a witness, by releasing his interest and paying costs, when there is an issue on the plea of plene administravit.—Heckert v. Haine, 6 Bin. 16.

[n] (Pa. 1814) An administrator with the will annexed, who has made a void deed of lands, and who might perhaps thus be liable to heirs for having pretended to sell what he had no right as such administrator to sell, is a competent witness for defendant, who claims against the heir; he being released by such defendant from liability on his warranty, and his testimony in favor of defendant, if having any effect on his rights, being only to his own injury.—Moody's Lessee v. Fulmer, 3 Grant, Cas. 17.

[o] (Pa. 1835) Plaintiff cannot make himself a witness by instituting his suit in the name of a former transferee. Therefore an administrator cannot testify on secretly assigning his interest to the heir of his intestate; the legal plaintiff's interest not being diminished, nor the assignee's title enhanced thereby.—Sypher v. Long, 4 Watts, 253.

[p] (Pa. 1858) An executor, who has renounced and been discharged, is a competent witness for his former co-executor.—Burkholder v. Lapp's Ex'r, 31 Pa. (7 Casey) 322.

[q] (S. C. 1827) Where a coexecutor, who is a plaintiff in a suit, releases all his interest in commissions and in the estate, and offers to pay the cost of the suit into the court, he is not thereby rendered competent as a witness.—Christie's Ex'rs v. Furman's Ex'rs, Harp. 553.

[r] (S. C. 1844) An executor cannot be discharged by the ordinary, so as to render him a competent witness in favor of the estate of his testator.—Osborn v. Black, Speers, Eq. 431.

[s] (Tex. 1853) In a suit by an administrator, he is incompetent to testify in behalf of the estate, though he has filed a release of all claims against the estate for commissions.—Dial v. Crain, 10 Tex. 444.

§ 473. —— Proceedings to establish will.

[a] (Ala. 1853) The proponent of a will is an incompetent witness to sustain it, and cannot render himself competent by renouncing as executor.—Gilbert v. Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

[b] (Ala. 1856) An executor, who is shown by the record to be a proponent of a will, cannot, after issue joined contesting the same, demand as a matter of right that he shall be discharged, that he may testify as a witness.—Deslonde v. Darrington's Heirs, 29 Ala. 92.

[c] (Ala. 1859) A person named as executor, who has resigned the trust, after propounding the will and then dismissing the proceedings without paying the costs, is a competent witness to sustain the will on a second application.—Blakey's Heirs v. Blakey's Ex'x, 33 Ala. 611.

[d] (Del. 1891) A legatee and executor, having renounced his rights as executor, is a competent witness in a contest of the will.—Ethridge v. Bennett, 9 Houst. 295, 31 Atl. 813.

[e] (Mass. 1856) Under St. 1839, c. 107, § 2, an executor named in an instrument offered for probate as a will was a competent witness in support of it, on releasing his right to recover costs.—Baxter v. Abbott, 73 Mass. (7 Gray) 71.

[f] (N. Y. 1853) An executor is not a competent witness to prove a will, but his competency is restored by renouncing.—Burritt v. Silliman,

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16 Barb. 198, affirmed (1855) 13 N. Y. (3 Kern.) 93, 64 Am. Dec. 530.

[g] (N. C. 1844) An executor offered a will for probate in the county court. An issue of devisavit vel non was there made up and tried, and an appeal to the superior court taken. In the superior court the executor by permission of the court renounced all right to the executorship and withdrew from the suit; one of the legatees in the will having intervened as a party and agreeing to be responsible for all the costs. *Held*, that the executor under those circumstances became a competent witness in support of the will.—Sawyer v. Dozier's Heirs, 27 N. C. 97.

[h] (Pa. 1850) An executor and legatee, by renouncing his executorship and assigning the legacy, becomes a competent witness to prove the execution of the will, although the words "for valuable consideration" be inserted in the assignment of the legacy.—Appeal of Search, 13 Pa. (1 Harris) 108.

§ 474. Legatees and devisees.

[a] (U. S. 1826) A release by a party to make him a competent witness in favor of an executor is sufficient, if it releases all claim to the estate of the deceased, although by mistake the executor's name is omitted in the release.—Oliver v. Vernon, Fed. Cas. No. 10,501 [4 Mason, 275].

[b] (U. S. 1843) A paid legatee is a competent witness, where payment has been made by the executor voluntarily, with knowledge of the claim sued upon, and without a refunding bond, and a long time has elapsed since the death of the testator. The length of time is regulated by analogy to the statute of limitations.—Wilcocks v. Phillips, Fed. Cas. No. 17,639 [1 Wall. Jr. 47].

[c] (Ala. 1845) A co-legatee cannot make herself a competent witness to increase the distributive sum of her co-legatees, by releasing to them the legacy; and her deposition, under such circumstances, may be properly suppressed.—Powell v. Powell, 7 Ala. 582.

[d] (Ala. 1851) Testator bequeathed a negress and her increase to his grandchildren, and provided that the negroes should remain undivided until the youngest child arrived at the age of 21 years, and should then be divided among those then living. A division was made among the children before the youngest had attained his majority. *Held*, in a suit by such legatee to set aside the division, one of the legatees, who disclaimed all interest in the negroes, having sold his interest to another legatee before division was made, was a competent witness for defendant to prove his minority at the time the division was made.—Johnson v. Culbreath, 19 Ala. 348.

[e] (Ala. 1861) Executors voluntarily paid B. his legacy and took from him his receipt in full, and the solicitors of the defendants afterwards, with the view of restoring his competency as a witness in proceedings for the purpose of setting aside the will, repaid the money, with interest, to the executors in discharge of any claim they might have on B., and released B., the executors, and the estate from all liability to repay or account for the money, and B. approved and adopted the payment, and released the executors from any claim on account of the legacy, and the executors accepted the payment, and released B. from all liability to pay back or refund the money paid to him as legatee. *Held*, that he was a competent witness.—Hall's Heirs v. Hall's Ex'rs, 38 Ala. 131.

[f] (Conn. 1807) A residuary legatee cannot be admitted as a witness to increase the fund on which the residuum depends, and a release by such witness of a particular thing appertaining to this fund, which may be the subject of the suit on trial, does not discharge his interest.—Austin v. Bradley, 2 Day, 466.

[g] (Ga. 1850) Upon an issue founded on an affidavit of illegality, filed by an administrator de bonis non with the will annexed, to a general judgment against the precedent executor to the will, which was levied on the property of the estate in the hands of the administrator, legatees under the will, who have been paid their legacies, are competent witnesses for the administrator.—Johnson v. Lewis, 8 Ga. 460.

[h] (Ga. 1859) The release by a legatee of his interest to his children, affects his credit only, and not his competency.—Martin v. Mitchell, 28 Ga. 382.

[i] (Ga. 1859) A legatee who has released his interest is a competent witness for the will.—Martin v. Mitchell, 28 Ga. 382.

[j] (Ky. 1836) That a legatee who has released the executor from all claim on the estate of the testator is still liable to the creditors of the estate does not destroy his competency as a witness.—Higgins v. Morrison's Ex'r, 34 Ky. (4 Dana) 100.

[k] (Md. 1849) In an action of replevin for a negro, plaintiff, suing as executor, offered the will of a testator, by which the negro was bequeathed to the witness "for her sole and separate use, exclusive of the control of her husband, during her natural life," and a release by witness and her husband. *Held*, that she was not thereby rendered a competent witness.—Smith v. Morgan, 8 Gill. 133.

[l] (Md. 1856) A legatee may render himself a competent witness to support the will, by conveying away by deed for a valuable consideration, his interest in the property, for that purpose.—Wampler v. Wampler, 9 Md. 540.

[m] (Miss. 1854) One who has transferred to her colegatees as much of her portion of the legacy as may suffice to pay her just share of such judgment as may be recovered in an action pending is not thereby made competent to testify in that action in favor of the administrator of the estate.—Dunbar v. Chevalier, 28 Miss. (6 Cushm.) 161.

[n] (N. J. 1851) A devisee, whose share of the estate as one of the heirs at law will be greater than the share devised to him cannot testify, though he has deeded away all his interest in the estate, either as heir or devisee, if it appears that the deed was without consideration, and was made with an understanding between him and the grantee that a reconveyance should be made to him.—Canfield v. Ball, 8 N. J. Eq. (4 Halst. Ch.) 582.

[o] (N. Y. 1849) Legatees in a will, who appeared by counsel before a surrogate to dispute the account of the executor, were incompetent witnesses, though they had assigned all their interest, inasmuch as they might be liable for costs; but a legatee, who had been paid his legacy and given a receipt in full, and was not a party to the proceedings before the surrogate, was a competent witness.—Mesick v. Mesick, 7 Barb. 120.

[p] (Pa. 1827) A devisee who has released his interest is a competent witness for the trustee appointed by the will.—Cook v. Grant, 16 Serg. & R. 198, 16 Am. Dec. 564.

[q] (Pa. 1846) A legatee and incumbent of a solvent estate having received her legacy and released and assigned the annuity, is a competent witness for the executor.—Cornell v. Vanartsdalen, 4 Pa. (4 Barr) 364.

[r] (Pa. 1846) The court will not undertake to judge whether a release and assignment by a legatee and annuitant of a solvent estate of her interest therein, so as to admit of her being a witness, was colorable, when she is not a

party to the record.—Cornell v. Vanartsdalen, 4 Pa. (4 Barr) 364.

[s] (Pa. 1847) A devisee, made a party to an action against the executor to charge the lands devised, is an incompetent witness for defendant, although he has released his interest under the will.—Norris v. Johnston, 5 Pa. (5 Barr) 287.

[t] (Pa. 1847) The owner of a graveyard directed by his will that the lot should continue to be used for that purpose, and that A., who had acted as sexton, under authority from the testator, under which charges were made by him for interments, should be sexton during his life. After the death of the testator, A. continued to act as sexton, and received fees paid for interments. On a feigned issue to try the validity of the alleged will, *held*, that A. was not a competent witness to support the will, although he had released all his interest under it to the persons named as executors, as, if the will is not sustained, he would be liable to the heirs for the fees received.—McNeil v. Conwell, 7 Pa. (7 Barr) 368.

[u] (Pa. 1862) The daughter and residuary legatee of a testator is a competent witness for the executor, upon her assignment to him individually of her interest in the cause of action in suit; he agreeing that no part of the costs of the suit shall become chargeable upon her residuary share.—Steininger v. Hoch's Ex'r, 42 Pa. (6 Wright) 432.

[v] (Pa. 1862) Though such an agreement would not be binding upon him as executor, as the estate would be liable for costs in case of loss, without regard to it, and thus diminish her residuary interest, yet as the ultimate liability of her share would depend upon the contingency of a failure to recover, and of the insufficiency of the other two-thirds of the residuary estate to pay the costs in case of loss, the liability for costs was too remote and contingent to exclude her as a witness.—Steininger v. Hoch's Ex'r, 42 Pa. (6 Wright) 432.

[w] (Tenn. 1847) An infant's release of his legacy does not render him a competent witness for the executor.—Langford v. Frey, 27 Tenn. (8 Humph.) 443.

[x] (Tex. 1857) A legatee becomes a competent witness by an assignment of his interest in the suit.—Saunders v. Duval's Adm'r, 19 Tex. 467.

§ 475. Heirs and distributees.

[a] An heir or distributee of an estate is rendered a competent witness, either by an assignment to another, or by a release to the administrator of all his interest in the suit.

—(Ala. 1851) Herndon v. Givens' Adm'r, 19 Ala. 313; (1858) Robinson's Adm'rs v. Tipton's Adm'r, 31 Ala. 595;

(Ky. 1834) Boon v. Nelson's Heirs, 32 Ky. (2 Dana) 391;

(Pa. 1870) Forrester v. Torrence, 64 Pa. (14 P. F. Smith) 29;

(S. C. 1827) Christie's Ex'rs v. Furman's Ex'rs, 1 Harp. 553;

(Tex. 1857) Saunders v. Duval's Adm'r, 19 Tex. 467;

(Vt. 1848) Sylvester v. Downer, 20 Vt. 355, 49 Am. Dec. 786.

[b] In an action by an administrator to recover a debt due the estate, the heir is not a witness on his releasing his interest in the debt; the administrator should also release him from costs.

—(Ala. 1844) Williams' Ex'rs v. Temple, 6 Ala. 656;

(Vt. 1838) Baxter v. Buck, 10 Vt. 548.

[c] (Ala. 1838) An assignment or release, by a distributee and heir of an estate, of all his interest in a particular suit, the proceeds of which would go to increase the assets of the estate, does not qualify him to be a witness in the suit.—Maury's Adm'r v. Mason's Adm'r, 8 Port. 211.

[d] (Ala. 1844) The heirs or distributees are not competent witnesses for the administrator to establish a claim in favor of the estate, though they executed releases of all their interests in the demand in suit, as the releases of interest in such demand did not alter the fact that, if recovery was had, it would be a fund in the hands of the administrator to pay debts, and thus increase the fund in which they had a distributive share, and if it went against the administrator, he would be compelled to pay costs and thus diminish the fund of which they were distributees.—Williams' Ex'rs v. Temple, 6 Ala. 656.

[e] (Ala. 1846) A distributee, who has received a portion of his distributive share, and releases to the administrator all claim on the residue, is a competent witness for the administrator, in a suit against him by a creditor of the estate.—Hall v. Alexander, 9 Ala. 219.

[f] (Ala. 1847) A husband and wife, releasing to their children all their interest in the estate of the father of the wife, are not thereby rendered competent witnesses in a contest upon the validity of the will of the wife's father.—Locke v. Noland, 11 Ala. 249.

[g] (Ala. 1850) One distributee of an estate, who after the division has sold his portion to another, may by release be made a competent witness for the latter, in a controversy involving the title to the property.—Dent v. Portwood, 17 Ala. 242.

[h] (Ala. 1851) A distributee of an estate is not a competent witness to prove the execution of a release of his interest, so as to render him a competent witness for the administrator.—Herndon v. Givens' Adm'r, 19 Ala. 313.

[i] (Ala. 1853) A distributee of an estate who has released and abandoned all interest therein, which release has been entered of record, is a competent witness for the administrator, to prove an advancement to another distributee.—Grey's Heirs v. Grey's Adm'rs, 22 Ala. 233.

[j] (Ala. 1861) Under the Code, in a suit by an administrator, a distributee of the estate who has released his interest in the subject-matter of the suit to the other distributees is not an incompetent witness for plaintiff as a transferror, to establish a right transferred by him; but he is incompetent on the ground of interest where he has not released his entire interest in the estate.—Coate v. Coate's Adm'r, 37 Ala. 695.

[k] (Conn. 1826) On the hearing of an appeal from a decree of the court of probate, finding an advancement made to appellant by his father, the appellee offered as a witness a brother of the appellant, who, according to said decree, had received his full share of his father's estate, and had not appealed from such decree, who had not appeared as an appellee, and who had executed to the administrator a discharge from all claims against his father's estate. *Held*, that his interest had been extinguished by the probate decree and by his discharge, and that he was a competent witness.—Bailey v. Bailey, 6 Conn. 308.

[l] (Ind. 1855) M., administrator of S., deceased, filed his account for final settlement, etc. Among the items was the account of one C., verified by the claimant in accordance with the statute (Rev. St. 1843, p. 524). M. had paid it and taken C.'s receipt on the back, and filed it as a voucher. To this item alone the heirs objected. M. and the heirs appeared, and by agreement the issue joined was submitted to the court. One of the heirs, the record stated, "released his interest," and was offered as

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a witness by the other heirs. *Held*, that such witness was incompetent.—Stout v. Morgan, 6 Ind. 369.

[m] (Ky. 1843) A distributee is not made a competent witness by release of all his interest in a particular demand, sought to be recovered by the administrator. — Kennedy's Adm'rs v. Conn's Adm'r, 42 Ky. (3 B. Mon.) 321.

[n] (Me. 1851) One of several heirs, to whom land and personal estate descended, may be a witness for the administrator, after having conveyed his interest in the land, and released to the administrator, as such, his interest in the personal property.—Reed v. Gilbert, 32 Me. 519.

[o] (Md. 1849) Where an action of replevin is brought by an executor for an article of property claimed as the property of the testator, a release, by a distributee, of all his interest in said article, does not render her a competent witness.—Smith v. Morgan, 8 Gill, 133.

[p] (Mass. 1835) In an action by an administrator on a note payable to the intestate, the administrator, having called as a witness a son of the intestate, who has released to the administrator all his interest as one of the heirs in the note, executed and delivered to him an instrument in writing, not under seal, by which, in consideration of the sum of $50, alleged to have been received of the witness, the administrator agreed to pay all the costs of such action, and to make no claim therefor in any settlement of his administration account, or otherwise. *Held*, that the son was thereby rendered a competent witness.—Ford v. Ford, 34 Mass. (17 Pick.) 418.

[q] (Mass. 1850) An heir at law of one deceased, whose administrator had brought an action of trespass for taking the personal property of the intestate, released and transferred to the administrator all his interest in such property, and thereupon received from the administrator a written promise to indemnify him from all costs and charges on account of the suit. *Held*, that this promise would operate to prevent the administrator from obtaining an allowance of the costs from the judge of probate, if such allowance would affect the heir, or reach his distributive share of the estate; and, consequently, that it was effectual to render the heir a competent witness in such action.—Dunham v. Branch, 59 Mass. (5 Cush.) 558.

[r] (N. J. 1852) In a suit by the administrator of a deceased mortgagee to foreclose the bond and mortgage, defense of payment being made, one entitled to a distributive share of the personal estate of the decedent can become a competent witness by releasing his interest as distributee in the bond and mortgage, and by the administrator releasing him or his interest in the estate from all liability for costs of suit.—King v. King, 9 N. J. Eq. (1 Stockt.) 44.

[s] (N. Y. 1834) In a suit against an administrator for a debt due from the intestate, the heirs of the intestate, who had sold a portion of the real estate descended, before the commencement of the suit, released to the administrator the residue of their interest in the estate. They were not thereby rendered competent witnesses for the administrator.—Scott v. Young, 4 Paige, 542.

[t] (N. C. 1842) In an action by an administrator to recover a debt due to his intestate, a release by a distributee to the administrator of all his interest in the debt if recovered, and a release by the administrator to the distributee of all claim in him for any part of the costs of the suit if he should fail, renders the distributee a competent witness for the administrator.—Moffit's Adm'rs v. Lane, 24 N. C. 254.

[u] (N. C. 1852) On the trial of a collateral issue between the administrators and heirs as to assets in a suit by a creditor, one of the heirs is an incompetent witness for the administrator, though he may have released to him all his interest in the personal estate, and also an amount supposed to be the value of the real assets descended to him.—Carrier v. Hampton, 35 N. C. 436.

[uu] (Pa. 1830) In a suit by administrators to recover the purchase money of land sold by them, in pursuance of an order of court, one of the heirs who had released all his interest to another heir was a competent witness for plaintiffs.—Cox v. Norton, 1 Pen. & W. 412.

[v] (Pa. 1846) On the trial of an issue between the devisee and one of the heirs at law, the residue of the heirs, although they have conveyed their interest in the subject-matter of the suit, before its commencement, to the sole party of record, are incompetent witnesses against the devisee.—Asay v. Hoover, 5 Pa. (5 Barr) 21, 45 Am. Dec. 713.

[vv] (S. C. 1839) In an action by an administratrix for the recovery of a debt due to the intestate, a distributee, who had received his share and settled with the administratrix, on releasing all interest in the recovery, was a competent witness in the absence of any proof of outstanding demands, or deficiency of assets in the hands of an administratrix.—Spann v. Ballard, 1 Rice, 440.

[w] (Tenn. 1846) Acts 1821, c. 66, § 3, providing that no person shall, under pretext of having transferred his interest to real estate or obligations for the performance of contracts or notes for money during the pendency of any suit at law, be permitted to give testimony in favor of those who held a joint interest with him at the commencement of the suit, or by which he himself could be released from any liability to perform contracts or pay money, does not preclude a party of record to an issue devisavit vel non from withdrawing and assigning his distributive interest in the estate, in the event of the setting aside of the will, and testifying in the cause for his former co-parties. —Patton v. Allison, 26 Tenn. (7 Humph.) 320.

[ww] (Tenn. 1846) A party of record to an issue devisavit vel non withdrew and assigned her distributive interest in the estate, in the event of the setting aside of the will, and was offered as a witness in the cause by her former co-parties. *Held*, that the fact that the assignment was not binding on her because of coverture, and that the assignment of her husband, who joined with her, would not bar her right to a settlement of a portion of her share upon her should she choose to bring her bill for that purpose, or should the assignee come into a court of chancery to recover it, did not render her incompetent to testify.—Patton v. Allison, 26 Tenn. (7 Humph.) 320.

[x] (Tenn. 1860) In an action by an administrator, for the benefit of his intestate's estate, a distributee, to make herself competent as a witness for plaintiff, executed a release of all her interest in any judgment which might be rendered in the case. Objection was raised that the witness still had an interest, as in the event of a judgment against plaintiff the estate would be liable for costs. *Held* that, as there was no evidence that the intestate left any property, the release was sufficient.—Lea v. Henderson, 41 Tenn. (1 Cold.) 146.

[xx] (Vt. 1847) Where a suit is prosecuted by an administratrix for the benefit of the heirs at law of the estate, the heirs, in case of failure to recover, are liable to contribute for the payment of the costs incurred; and one of the heirs, who has received a portion of the estate in land, is not rendered a competent witness for plaintiff by executing to her a release of all his interest in any portion of the estate growing out of the claim in controversy, his liability

for costs being thereby in no manner affected.—Hopkinson v. Guildhall, 19 Vt. 533.

[y] (Va. 1820) The release by an heir and distributee, to the administrator, of all interest in the matter in controversy and in the contract, does not restore his competency.—Rowt's Adm'r v. Kile's Adm'r, Gilmer, 202.

[yy] (Va. 1840) In an action against an administrator, a distributee being offered as a witness for defendant, and objected to by plaintiff, a deed was produced from the distributee to the administrator, releasing his interest in the benefit of any judgment which might be rendered in favor of the administrator in that action so far as such recovery might increase the distributable surplus, and also releasing his interest in the decedent's estate so far as the distributable surplus might be increased by the failure of plaintiff to recover. *Held*, that the objection to the witness was not removed by such release.—Reynolds' Adm'r v. Stephenson's Adm'x, 11 Leigh, 369.

[z] (Va. 1841) In an action of trespass for taking and carrying away a slave, defendant claimed the slave as part of his father's estate, of which he was administrator, and, in order to prove that title, he offered his brother as a witness. He was objected to on the ground that he was interested as a distributee, and, to obviate this objection, defendant offered a deed of the witness, whereby he conveyed to defendant, for a valuable consideration, all his (the witness') right, title, and interest in his father's estate, and warranted the same free from the claims of all persons. *Held*, that as the witness had parted with all his interest in his father's estate, whatever that was, and had not warranted that the particular slave in question was part of that estate, he had no interest in the controversy, and was competent.—Parrish v. Parrish, 11 Leigh, 626.

[zz] (Va. 1889) A distributee, though a party to a suit for accounting, who has released the administratrix from all liability by reason of disbursements complained of, can testify in her behalf on the question of allowance of the disbursements, as such a release would remove his disqualification at common law; and Code 1873, c. 172, §§ 21, 22, providing that, with certain exceptions, a party to or interested in an action can testify in his own behalf, was intended to widen, and not to narrow, the common-law rule.—Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817.

15. DETERMINATION OF LIABILITY OF CODEFENDANT BY DISMISSAL, DEFAULT, OR SEPARATE VERDICT OR JUDGMENT.

(a) IN GENERAL, §§ 476-481.
(b) NATURE OF INTEREST, §§ 482-490.

(a) IN GENERAL.

IN GENERAL, § 476.
DEFAULT, § 477.
CONFESSION OF JUDGMENT, § 478.
DISMISSAL OR DISCONTINUANCE, § 479.
INSUFFICIENCY OF EVIDENCE IN GENERAL, § 480.
DIRECTION OF VERDICT, § 481.

§ 476. In general.

[a] (U. S. 1806) One of several defendants, who has judgment upon demurrer to his separate plea of bankruptcy, may be a witness for the others, upon releasing all rights in his estate.—Hurliki's Adm'r v. Bacon, Fed. Cas. No. 6,921 [1 Cranch, C. C. 340].

[b] (Ark. 1839) A verdict of acquittal or conviction, provided he is not thereby rendered infamous, renders a defendant a competent witness as to his codefendants.—Ballard v. Noaks, 2 Ark. (2 Pike) 45.

[c] (Cal. 1858) If a party be improperly joined as defendant, the court or jury, upon application, should first pass upon his case; and after he is discharged, he can then be examined as a witness for the other defendant.—Domingo v. Getman, 9 Cal. 97.

[d] (Conn. 1796) If, in an action of trespass against several, one is acquitted, he may be a witness for the others in a petition for a new trial, notwithstanding plaintiff has brought a petition against him.—Ranny v. Church, 2 Root, 420.

[e] (Ga. 1855) Under the act of 1839, one of several defendants who has been defaulted, or against whom a verdict has been rendered, and who does not appeal, is not rendered a party to an appeal taken by the others, and may be admitted as a witness for them, provided he be disinterested.—Wooten v. Nall, 18 Ga. 609.

[f] (Ga. 1858) Where of two codefendants one appeals from a verdict and the other does not, the one not appealing is no party to the issue, and is in no manner interested in the event of the suit, so far as it remains yet to be determined, and is therefore competent as a witness.—Wellborn v. Rogers, 24 Ga. 558.

[g] (Ill. 1843) In an action ex contractu against several defendants, if judgment is given in favor of one, in matter set up in defense personal to himself, the cause is adjudicated as to him, and he is not an incompetent witness by reason of his having been a party to the suit.—Brooks v. McKinney, 5 Ill. (4 Scam.) 309.

[h] (Ill. 1844) One of several joint defendants, when discharged by the judgment of the court, becomes a competent witness for the other defendants.—Barnes v. Barber, 6 Ill. (1 Gilman) 401.

[i] (Ill. 1867) In an action of trover against three defendants, N., one of the defendants, was found not guilty, and judgment entered on the verdict. W. and S., the codefendants, were found guilty, and from the judgment on that verdict they appealed. N. did not unite in the appeal, and the judgment was reversed and a new trial had. *Held* that the judgment against N. was not affected by the reversal, and that N. was a competent witness on the new trial for W. and S.—Wells v. Miller, 45 Ill. 382.

[j] (Ind. 1839) If, in a trial of two defendants for an assault and battery, one of them has been separately tried and acquitted, the other may, on his trial, examine the acquitted defendant as a witness.—Carpenter v. Crane, 5 Blackf. 119.

[k] (Iowa, 1859) In an action of contract against two codefendants, one of them, who has withdrawn his defense, and had judgment rendered against him, is a competent witness for his codefendant, to disprove his liability.—Greenough v. Shelden, 9 Iowa, 503; Gates v. Gould, Id. 599; Arms v. Stockton, 12 Iowa, 327.

[l] (Md. 1853) One of several defendants is a competent witness, where the suit is ended as to him, and he has no direct interest in its result as to the others.—Barker v. Ayers, 5 Md. 202.

[m] (Mass. 1847) On the trial of an action of trover against H. and E., the jury disagreed as to H., but found a verdict in favor of E., on which judgment was rendered. *Held*, on a second trial of H., that E. was a competent witness for him.—Lackey v. Holbrook, 54 Mass. (13 Metc.) 131.

[n] (Miss. 1854) In trespass, after all the admissible evidence had been heard, the jury, on motion of defendants, were permitted to retire, and determine on the guilt or innocence

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of one of them, that he might, if innocent, be sworn as a witness. They found him guilty, but assessed no damages. *Held*, that this could not be considered a judgment against defendant, and that he was an incompetent witness against plaintiff.—Bell v. Morrison, 27 Miss. (5 Cushm.) 68.

[o] (N. Y. 1842) A judgment in favor of one of several defendants, in a suit ex contractu, on the ground of a bankrupt discharge, will not render him a competent witness for his codefendants.—Mills v. Lee, 4 Hill, 549.

[p] (N. Y. 1848) One of several defendants, jointly sued for a tort, may be acquitted, and sworn as a witness for his codefendant, whether they have united in the plea of not guilty or not.—McMartin v. Taylor, 2 Barb. 356.

[q] (Ohio, 1849) In an action upon a joint contract, where one of the defendants interposes a plea of infancy, such defendant, if the issue is found for him, may be examined as a witness.—Rohrer v. Morningstar, 18 Ohio, 579.

[r] (Pa. 1848) Where judgment is recovered against two jointly, and it is opened as to one only, who is let into a defense, the other is a competent witness for him, his own liability being determined.—Talmage v. Burlingame, 9 Pa. (9 Barr) 21.

[s] (Vt. 1847) A defendant who has been discharged on his plea of bankruptcy is a competent witness for plaintiff, in the same case, against his codefendant, unless interested; and it makes no difference that plaintiff consented to his discharge.—Onion v. Fullerton, 19 Vt. 317.

§ 477. Default.

[a] A defendant in assumpsit, though defaulted, cannot be a witness for his codefendant.
—(N. H. 1820) Pillsbury v. Cammett, 2 N. H. 283;
(Vt. 1829) Kimball v. Lamson, 2 Vt. 138.

[b] (Ark. 1839) A joint trespasser, who has suffered judgment to go against him by default, is not a competent witness for plaintiff.—Ballard v. Noaks, 2 Ark. (2 Pike) 45.

[c] (Colo. 1873) Prior to the act of 1870, relating to the competency of witnesses, a defendant who had suffered judgment of default to pass against him was not a competent witness for his codefendant, upon the trial of an issue of fact joined by the latter.—Good v. Martin, 2 Colo. 218.

[d] (Ind. 1848) One of joint defendants in assumpsit, who has suffered judgment by default, is a competent witness for plaintiff.—Kincaid v. Purcell, 1 Ind. (1 Cart.) 324.

[e] (Ind. 1848) Where one of two defendants in assumpsit makes no defense, plaintiff may call him as a witness, if he is willing to testify, on the trial of the issue with the other defendant, provided he has no interest in favor of a recovery by plaintiff.—Kincaid v. Purcel, Smith, 164.

[f] (La. 1858) A defendant who has allowed a judgment by default to be made final against him is incompetent to testify upon the trial of the case as to his codefendant, who has answered, he being interested in the question of costs.—Bank of Louisiana v. Hudson, 13 La. Ann. 600.

[g] (Me. 1849) In a complaint for flowage, under the statute, one of two respondents, after being defaulted, cannot be used as a witness for the other.—Wood v. Kelley, 30 Me. (17 Shep.) 47.

[h] (Me.) A codefendant, in an action ex contractu, who has been defaulted, is not a competent witness for the party defending.—(1852) Smith v. Chase, 34 Me. 592; (1853) Thornton v. Blaisdell, 37 Me. 190.

[i] (Mass. 1832) In an action on a contract against two defendants, one of them, who has been defaulted and is willing to testify, is not a competent witness against the other without his consent.—Columbian Mfg. Co. v. Dutch, 30 Mass. (13 Pick.) 125.

[j] (Mass. 1835) Since St. 1834, c. 189 (Rev. St. c. 100, §§ 6, 7), enables the plaintiff in an action on contract against several persons to take judgment against one or more of the defendants, a defendant who has been defaulted is, with his consent, a competent witness in favor of his codefendants.—Bradlee v. Neal, 33 Mass. (16 Pick.) 501.

[k] (Mass. 1836) If one of several defendants in assumpsit be defaulted, he is not a competent witness for his codefendants; being interested, not so much to throw on his codefendants a portion of the demand in suit, as to reduce plaintiff's recovery to a nominal sum.—Vinal v. Burrill, 35 Mass. (18 Pick.) 29.

[l] (Mass. 1844) Where, in an action on a contract alleged to be joint, one of the defendants is defaulted, and the other goes to trial, the defaulted party is not, since the repeal of St. 1834, c. 189, and the substitution of Rev. St. c. 100, §§ 6, 7, a competent witness for the other, to prove that the contract was not joint.—Bull v. Strong, 49 Mass. (8 Metc.) 8.

[m] (Mass. 1849) Where one of two defendants in an action of trover is defaulted, he is incompetent as a witness on the trial of the other, on the ground of interest, even though called to testify to matters not connected with the question of damages.—Gerrish v. Cummings, 58 Mass. (4 Cush.) 391.

[n] (N. H. 1839) Since the statute of July 4, 1834, by which judgment may be rendered against one or more of several defendants, in an action founded upon contract, a defendant who is defaulted, and who has no interest in the controversy between plaintiff and a codefendant, may be a witness for the latter.—Blake v. Ladd, 10 N. H. 190.

[o] (N. H. 1841) In an action on a contract against two or more, if one defendant is defaulted, and another, under the general issue, sets up and maintains a defense which negatives plaintiff's right to recover against either of the defendants, and shows that he had no cause of action, plaintiff will not be entitled to judgment against the one who is defaulted, and he cannot, therefore, be a witness for the other.—Bowman v. Noyes, 12 N. H. 302.

[p] (N. H. 1841) Where one defendant sets up several matters of defense, some of which are personal to himself, and others go to show that plaintiff has no cause of action against any of the defendants, one who is defaulted cannot be a witness to sustain any of the matters of defense.—Bowman v. Noyes, 12 N. H. 302; George v. Sargent, Id. 313.

[q] (N. H. 1849) A defendant, who has suffered a default, may testify for plaintiff, in an action against the codefendant, if he have no interest in the cause to charge him.—Manchester Bank v. Moore, 19 N. H. 564.

[r] (N. H. 1853) In the trial of an action against two for a joint trespass, one of the defendants, who has been defaulted, but has had no assessment of damages against him, is not a competent witness to prove that he did not act, in making the trespass, as the servant of the other defendant.—Chase v. Lovering, 27 N. H. (7 Fost.) 295.

[s] (N. H. 1859) One of several defendants in an action upon a contract, who has been defaulted, is a competent witness, under the provisions of the Revised Statutes, for a codefendant in any matter of defense personal to such

codefendant, if released from liability for costs already accrued.—Bean v. Walker, 38 N. H. 359.

[t] (N. H. 1859) Where one of two defendants who was defaulted in an action on a contract was liable for costs of subsequent litigation between plaintiff and his codefendant, he is a competent witness therein if he would be liable whatever would be the result of the litigation.—Bean v. Walker, 38 N. H. 359.

[u] (N. Y. 1826) One of two defendants sued jointly for the same trespass cannot be a witness for his codefendant, even though he suffered judgment to pass against him by default.—Bohun v. Taylor, 6 Cow. 313.

[v] (N. Y. 1850) Where, in an action of trover against the defendants, one of them pleads, and the other suffers judgment by default, the latter is a competent witness, under the Code of Procedure, for plaintiff against his codefendant.—Thompson v. Blanchard, 4 N. Y. (4 Comst.) 303.

[w] (N. C. 1841) In an action on a contract, a defendant cannot be admitted as a witness for his codefendants, even after he has suffered judgment by default to be taken against himself.—Walton v. Tomlin, 23 N. C. 593.

[x] (Pa. 1814) In an action of trespass for false imprisonment against four defendants, only two of whom pleaded, no judgment by default being taken against the other two, the latter are not interested in the verdict, and are therefore competent witnesses.—Wakely v. Hart, 6 Bin. 316.

[y] (Pa. 1865) Where, in an action on a joint contract, judgment is taken by default against one of the defendants, and a trial had against the other on a plea common to both, the defendant defaulted is not incompetent as a witness for plaintiff on the ground of interest, but he is incompetent, as being a party to the record, except by consent of the other parties.—Swanzey v. Parker, 50 Pa. (14 Wright) 441, 88 Am. Dec. 549.

§ 478. Confession of judgment.

[a] (U. S. 1813) One joint defendant, in an action of assumpsit, cannot confess judgment so as to enable him to testify in behalf of the other defendants.—Patton v. Janney, Fed. Cas. No. 10,836 [2 Cranch, C. C. 71].

[b] (D. C. 1890) In an action by an executrix on a joint or joint and several promise, one defendant cannot, by confessing judgment without the consent of plaintiff, make himself competent to testify in behalf of his codefendant.—Hutchinson v. Brown, 19 D. C. 136.

[c] (Ky. 1854) When two or more persons are sued, if a judgment has been confessed against one, he is then a competent witness for another defendant.—Allen's Ex'r v. Shelby, 53 Ky. (14 B. Mon.) 320.

[d] (Mass. 1864) A defendant in equity, against whom the bill had been taken for confessed, and who had no interest in the matter in controversy, might be examined as a witness for plaintiff, before the passage of the statutes making parties competent witnesses.—Pingree v. Coffin, 78 Mass. (12 Gray) 288.

[e] (Mo. 1845) In an action on a bond against A. and B., B. confessed judgment, and a recovery was had against A. On appeal by A., in which B. did not join, *held*, that B. was a competent witness to prove that A. did not execute the bond.—Coons v. Green, 9 Mo. 198.

[f] (N. Y. 1840) In a suit upon contract, against two defendants, where one cannot be charged without the other, the fact that one has suffered the bill to be taken pro confesso will not make him a competent witness for the other.—Holgate v. Palmer, 8 Paige, 461.

[g] (N. Y. 1848) Where a joint judgment against two defendants is rendered on the confession of one, the other not having been served with process, in a proceeding founded on such judgment to charge him not served with process, the other defendant is not a competent witness.—Oakley v. Aspinwall, 4 N. Y. Super. Ct. (2 Sandf.) 7.

[h] (Pa. 1855) A party defendant cannot remove the objection to his competency as a witness by offering to confess judgment against himself.—Marshall v. Franklin Bank, 25 Pa. (1 Casey) 384.

[i] (Pa. 1863) In account rendered after judgment of quod computet confessed by defendant, he is not a competent witness in his own behalf before the auditor, appointed to ascertain the amount due and make report.—Tutton v. Addams, 45 Pa. (9 Wright) 67.

[j] (Pa. 1865) Two defendants who have confessed judgment are not competent witnesses for their codefendant.—Noble's Adm'r v. Laley, 50 Pa. (14 Wright) 281.

§ 479. Dismissal or discontinuance.

[a, b] (U. S.) The federal courts will, upon motion, and for good cause shown, authorize the name of a party to be stricken from the pleadings; and he can then be examined as a witness, subject to all legal objections.—(1846) The Osceola, Fed. Cas. No. 10,602 [Olcott, 450]; (1847) The Neptune, Fed. Cas. No. 10,-120 [Olcott, 483].

[c] (Ind. 1859) Where the party whose name is sought to be stricken from the record as a party, so he may be a witness, has made costs, and the motion to strike is not accompanied by an offer to pay costs or let judgment be rendered against him for costs, it is not error to refuse to discharge him.—Dearmond v. Dearmond, 12 Ind. 455.

[d] (Iowa, 1856) An action of tort against two was dismissed by plaintiff as to one. *Held*, that plaintiff therefore became liable for costs to that one at any event, and that he therefore was not interested in the result, and was a competent witness for his codefendant.—Hill v. Rogers, 2 Iowa (2 Clarke) 67.

[e] (La. 1832) A witness having sworn he had no interest in the result, is competent after the suit is discontinued as to him.—Strong v. Courcelle, 4 La. 232.

[f] (N. H. 1857) Where, under the act of 1852, an action against two or more defendants is referred to a commissioner to state the facts, the commissioner has no power to discharge one of the defendants, so as to make him a witness for the others.—Dole v. Erskine, 35 N. H. 503.

[g] (N. Y. 1848) Where one of several plaintiffs in a suit in equity, who has no interest in the subject-matter, is a material witness for his coplaintiffs, his name may, on their motion, be stricken out as plaintiff, and he may then be examined as a witness.—Leavitt v. Steenbergen, 3 Barb. 155.

§ 480. Insufficiency of evidence in general.

[a] (U. S. 1859) A separate verdict as to one defendant in tort, to enable him to be a witness, can only be taken when it appears that he has been improperly joined; therefore it cannot be taken when there is any evidence to charge him.—Castle v. Bullard, 64 U. S. (23 How.) 172, 16 L. Ed. 424.

[b] (Ala. 1848) Where there are several defendants in an action for a tort, if there is absolutely no evidence against any one of them, he may be discharged and made a witness for his codefendants; but if there is any evidence

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against him, he cannot be discharged for that purpose.—Harris v. Mauldin, 13 Ala. 674.

[c] (Ala. 1858) Under Code, § 2288, a defendant, against whom there is no evidence, is a competent witness for a codefendant.—Rabby v. O'Grady, 33 Ala. 255.

[d] (Ala. 1862) A defendant may be allowed to testify in favor of his codefendant, after plaintiff has closed his evidence.—Hurter v. Buford, 38 Ala. 243.

[e] (Conn.) If plaintiff includes several as defendants in a suit, and offers no testimony against some of them, they may be witnesses.—(1789) State v. Shaw, 1 Root, 134; (1793) Barney v. Cuttler, Id. 489.

[f] (Del. 1839) In an action against several defendants for an assault, where no proof was produced against a codefendant, and it appeared that he had been made a party in order to exclude his testimony, the court will recommend to the jury his immediate acquittal, and admit him to testify for the others.—Prettyman v. Dean, 2 Har. 494.

[g] (La.) One co-trespasser is a good witness for another, and where they are codefendants, if there is slight evidence or none against one, he may be sworn for the other; a fortiori, if he has been named as a party and not cited. —(1822) Curtis v. Graham, 12 Mart. (O. S.) 289; (1824) Bouligny v. Dormenon, 2 Mart. (N. S.) 455.

[h] (Mo. 1843) Where there is not evidence to justify a verdict against one of several defendants in trespass, a separate verdict may be found for him, and he may then be admitted to testify for the other defendants.—Brown v. Burrus, 8 Mo. 26.

[i] (Mo. 1863) One of several defendants can testify for his codefendants if there be no evidence against him; but the court cannot submit his case to the jury separately, in order that he may be a witness if acquitted.—The Prairie Rose v. Cross, 34 Mo. 109.

[j] (N. Y. 1817) Defendant, against whom no evidence has been produced, may be examined as a witness for his codefendant.—Brown v. Howard, 14 Johns. 119.

[k] (N. Y.) Where, on the trial of an action against two persons for a joint assault, no evidence appears against one of them, he is entitled to be discharged for the purpose of being examined as a witness for his codefendant. —(1818) Van Deusen v. Van Slyck, 15 Johns. 223; (1851) Labar v. Koplin, 4 N. Y. (4 Comst.) 547.

[l] (N. Y. 1851) In an action against two for a joint assault, if there be any evidence, however slight, against the defendant sought to be discharged, it must go to the jury along with the evidence against the other defendants, instead of discharging him for the purpose of examining him as a witness.—Labar v. Koplin, 4 N. Y. (4 Comst.) 547.

§ 481. Direction of verdict.

[a] (U. S. 1821) In an action for a malicious prosecution, there not being the slightest evidence against two of the defendants, the court will direct the jury to find them not guilty, that they may be examined as witnesses for the other defendants.—Wilmarth v. Mountford, Fed. Cas. No. 17,774 [4 Wash. C. C. 79].

[b] (Ill. 1855) Where persons are sued to prevent their being used as witnesses, or where there is no evidence against them, the court, on motion, after the evidence is closed, will direct a finding by the jury, and those not guilty may testify for their codefendants.—Cochran v. Ammon, 16 Ill. (6 Peck) 316.

[c] (Me. 1880) In assumpsit the court will not allow a verdict to be rendered for one defendant, to enable him to testify in favor of his codefendants, the plaintiff objecting thereto.—Berry v. Stevens, 71 Me. 503.

[d] (Mass. 1847) On the trial of a writ of entry against the defendants, it was not error to refuse to direct the jury to return a verdict for one of them in order that he might be a witness for his codefendant, when there was any evidence against such defendant.—Warner v. Bull, 54 Mass. (13 Metc.) 1.

[e] (Mo. 1836) In an action of trespass against three, plaintiff could not have a verdict directed for one of the defendants merely in order to render him a competent witness.—Gearhart v. Smallwood, 3 Mo. 452.

[f] (Mo. 1840) If there is an entire want of evidence against one of several defendants, whether sued in tort or not, the court may direct the jury to find a verdict for him, and he may then be used as a witness.—Campbell v. Hood, 6 Mo. 211.

[g] (Mo. 1855) Where an action is brought against two defendants, and the evidence against one is not such as to authorize a verdict against him, the court cannot direct a verdict in his favor, that he may be examined as a witness for his codefendant, if there is any manner of evidence at all against him.—Hood v. Mathis, 21 Mo. 308.

[h] (N. Y. 1842) Where several are sued in trover, and there is no evidence against one of them, the judge, if requested, should advise the jury to acquit him, that he may become a witness for his codefendant.—Moon v. Eldred, 3 Hill, 104.

[i] (Pa. 1844) In an action of trespass against two or more defendants, if there be no evidence against one of them, the court may direct a verdict to be rendered for him, and he may be sworn as a witness for the other defendants. —Over v. Blackstone, 8 Watts & S. 71.

[j] (Pa. 1860) In an action against two persons, as joint trespassers, it is error to direct a verdict in favor of one of the defendants, upon the close of the plaintiff's testimony, in order that he may be examined as a witness for his codefendant, unless there be no evidence that appears to affect him, and no probability that any such will arise before the whole evidence in the cause is closed.—Morley v. Coolbaugh, 35 Pa. (11 Casey) 237.

[k] (Tenn. 1852) Where it clearly appears that plaintiff has resorted to the fraudulent artifice of joining as defendant in the action one who would be an important witness for another defendant, for the purpose of preventing his examination as a witness, the court may direct a verdict to be rendered for that defendant, and permit him to be introduced as a witness in behalf of the other defendant.—Beasley v. Bradley, 32 Tenn. (2 Swan) 180.

[l] (Wis. 1845) A defendant in an action for tort against whom no evidence was introduced when plaintiff closed his case will be discharged by a verdict in his favor, and he may then be a witness for the other defendants, but he cannot be discharged if there is even slight evidence against him. If it appears that he was made a party arbitrarily to prevent the use of his testimony, he may be discharged by the court without a formal verdict.—Wood v. Folmer, 1 Pin. 509.

(b) NATURE OF INTEREST.

IN GENERAL, § 482.
PARTIES TO NOTES, § 483.
PRINCIPAL AND SURETY, § 484.
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DEFENDANTS IN CRIMINAL PROSECUTIONS, § 487.
—— EFFECT OF CONVICTION OR PLEADING GUILTY, § 488.
—— INSUFFICIENCY OF EVIDENCE, § 489.
HUSBAND OR WIFE, § 490.

§ 482. In general.

[a] (U. S. 1813) If several actions against several underwriters upon the same policy are submitted to the same jury at the same time, and the jury find verdicts against some of them, but wish to reconsider as to the others, those underwriters against whom the verdicts are found cannot be examined as witnesses for the others.—Patton v. Janney, Fed. Cas. No. 10,836 [2 Cranch, C. C. 71].

[b] (U. S. 1821) In ejectment against two, if there be no evidence whatever of any possession by one, the jury may find a verdict for him at the bar, so as to authorize the other to examine him as a witness.—Lanning v. Case, Fed. Cas. No. 8,072 [4 Wash. C. C. 169].

[c] (Cal. 1861) A complaint alleged a conspiracy, between defendants, to defraud plaintiff of goods, which was successfully carried out, wherefor damages were sought. One defendant made a voluntary appearance, but interposed no defense; the other answered and joined issue. *Held*, that the first-mentioned defendant was a competent witness for plaintiff, especially if he made no objection to testifying.—Rosenbaum v. Hernberg, 17 Cal. 602.

[d] (Ind. 1843) In debt against a constable for a false return, a claimant of the property taken, who executed the delivery bond, which was discharged by a judgment in his favor, on a trial of the right of property, is a competent witness for the constable.—Limpus v. State, 7 Blackf. 43.

[e] (Ind. 1859) Where a defendant to a suit to cancel a deed conveyed his interest in the property after the suit was begun but before the trial, the striking of his name from the record as a party to the suit, in order that he might be called as a witness for his codefendants, is within the discretion of the court.—Dearmond v. Dearmond, 12 Ind. 455.

[f] (Iowa, 1859) After a bill in equity to foreclose a mortgage is dismissed as to one of the defendants, he, appearing as one of the makers of the note for which the mortgage was given, and interested in defeating a recovery upon the mortgage, is not a competent witness for the other defendants.—Wilkerson v. Daniels, 1 G. Greene, 179.

[g] (Ky. 1841) A plaintiff cannot dismiss his suit against a tenant in possession, and use the tenant as a witness against one who was admitted to defend with him.—Peters v. Allison, 40 Ky. (1 B. Mon.) 232, 36 Am. Dec. 574.

[h] (Ky. 1841) One of several heirs, in whose name a demise had been laid in the declaration, but which had been stricken out, is a competent witness for plaintiff in ejectment.—Cardwell v. Sprigg's Heirs, 40 Ky. (1 B. Mon.) 369.

[i] (Ky. 1845) One who has sued jointly with another for an alleged fraud in the sale of a slave, but who was not a citizen of the county where the suit was brought, and as to whom the suit had been abated, who had been released by defendant from all liability to him, and against whom any action was then barred by the statute of limitation, is a competent witness for defendant.—Grigsby v. Daniel, 44 Ky. (5 B. Mon.) 435.

[j] (N. H. 1844) A codefendant, against whom an issue in a real action on a plea of disclaimer is found, and who remains in possession, is not a competent witness for the other defendant, who has pleaded the general issue.—Merrill v. Gould, 16 N. H. 347.

[k] (N. Y. 1817) An executor, against whom the bill has been taken pro confesso in a suit by legatees, is a competent witness for the other defendants or devisees.—Lupton v. Lupton, 2 Johns. Ch. 614.

[l] (N. Y. 1840) A. sold land, and took a bond and mortgage for the purchase money, which he assigned to B. In a suit by the purchaser, against A. and B., to set aside the sale on account of alleged fraud or mistake in the conveyance, A., who had suffered the bill to be taken as confessed against him, was competent to prove that B. had taken the assignment in good faith, and with the assent of the purchaser.—Holgate v. Palmer, 8 Paige, 461.

[m] (Pa. 1852) In a scire facias on a mortgage, the mortgagor, against whom a judgment by default had been rendered, is a competent witness for a terre-tenant to prove that a single bill from mortgagor to plaintiff, and the mortgage, were given for advances; the mortgaged premises having been sold under a judgment on the bill and bought by the terre-tenant.—Ridgway v. Longaker, 18 Pa. (6 Harris) 215.

[n] (Pa. 1853) Mortgaged premises were sold at sheriff's sale, on a subsequent judgment. In a sci. fa. on the mortgage, issued against the mortgagor and the purchaser as terre-tenant, judgment by default was taken against the mortgagor, and the terre-tenant made defense. *Held*, that the obligor in the mortgage bond, who was the mortgagor, was not a competent witness for the plaintiff, the mortgagee, to prove that the mortgage debt was not paid.—Hansell v. Lutz, 20 Pa. (8 Harris) 284.

[o] (Pa. 1864) Where suit is brought in the name of an individual for the use of a borough, for charges due to the borough alone, and on the trial in court the individual's name is stricken from the record, he is not incompetent as a witness.—Prescott v. Borough of Duquesne, 48 Pa. (12 Wright) 118.

[p] (Pa. 1865) A defendant in ejectment who is tenant for years of his codefendant is not rendered a competent witness for such codefendant by the entry of judgment in his favor by the court, on the ground that he was not in possession of the premises in question, except certain of them, for which he confessed judgment.—Helfenstein v. Leonard, 50 Pa. (14 Wright) 461.

[q] (S. C. 1830) On the trial of a feigned issue wherein the garnishee in an attachment was plaintiff, and the attaching creditors were defendants, *held*, that an order could not be granted to strike from the record the name of one of the defendants, in order to make him a witness for the others, although he assigned over the judgment which he had recovered against the absent debtor to a third person, who gave him a release.—Westmorland v. Tippens, 1 Bailey, 514.

§ 483. Parties to notes.

[a] (U. S. 1822) In a joint action of debt on a note, if one of the defendants suffer judgment to go against him by default and a writ of inquiry be executed, he is not a competent witness, on the issue joined by the other defendant.—Franklin Bank v. Hipkins, Fed. Cas. No. 5,056 [2 Cranch, C. C. 315].

[b] (Ala. 1848) G. and two other makers of a note were all sued, G. pleading non est factum, and the suit as to him was dismissed by plaintiff, judgment being confessed by the other two. *Held*, that the dismissal as to G. did not affect the competency of such other makers as witnesses in a subsequent action against G.—Gayle v. Bishop, 14 Ala. 552.

[c] (Cal. 1855) It is proper to exclude the testimony of a defendant who has suffered default to prove that he was authorized by his codefendant to sign a note, as he would thereby

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reduce the amount of a judgment against himself.—Washburn v. Alden, 5 Cal. 463.

[d] (Cal. 1856) In an action on a note against the maker and indorser, after judgment against the maker, it is not a valid objection to his competency as a witness for the indorser that the maker is a party, as the action is ended as to him, and his competency must be tested by his interest.—Vance v. Collins, 6 Cal. 435.

[e] (Cal. 1856) In an action on a note against the maker and indorser, the maker of a note, after judgment against him, is a competent witness for the indorser, because his interest is equally balanced.—Vance v. Collins, 6 Cal. 435.

[f] (Ind. 1861) In a suit on a note against A. and B., they answered separately, setting up usury and want of consideration. Afterwards A. withdrew his answer and was defaulted. *Held* that, since the defense of B., if sustained, would preclude plaintiff from any benefit by reason of A.'s default, therefore A.'s withdrawal of his answer did not make him a competent witness for B.—Sutherlin v. Mullis, 17 Ind. 19.

[g] (Iowa, 1860) In a suit on a joint note, one of the codefendants allowed judgment to be entered against him for the amount of plaintiff's claim. *Held*, that though a competent witness for the other defendant as to the separate issue between him and plaintiff, yet his evidence, as applying to reduce the amount which he himself had confessed or was willing to confess, as between himself and plaintiff, was inadmissible.—Keys v. Holmes, 11 Iowa, 139.

[h] (La. 1832) After trial and verdict in favor of one of three obligors on a note who are bound in solido, but sever in their trials, he is a competent witness in behalf of his codefendants.—Row v. Richardson, 4 La. 551.

[i] (Md. 1824) In an action against the indorser of a note, the maker has no such direct interest in the event of the suit as to exclude him from giving testimony on behalf of plaintiffs, they having recovered a judgment against him on the note.—Bank v. Columbia v. Magruder's Adm'x, 6 Har. & J. 172, 14 Am. Dec. 271.

[j] (Miss. 1842) The maker of a note, against whom the holder has obtained judgment, is a competent witness in a suit brought by an indorsee against an indorser to prove payment.—Routh v. Helm, 7 Miss. (6 How.) 127.

[k] (Mo. 1862) A maker of a note, against whom judgment by default has been taken, is a competent witness for an indorser made codefendant in the same suit.—Kleinmann v. Boernstein, 32 Mo. 311.

[l] (S. C. 1817) In an action on an indorsed note, which had been protested, the drawer, against whom a verdict had been rendered on the same note, was an incompetent witness.—Haig v. Newton, 1 Mill, Const. 423.

[m] (Va. 1825) Where a joint action of debt is brought against the drawers and indorsers of a note, under the act of assembly, one of the indorsers cannot render himself, by confession of judgment, a competent witness to invalidate the note.—Taylor v. Beck, 3 Rand. 316.

[n] (Va. 1860) In an action against the maker and indorsers of a note, after the defendants had united in the pleas of nil debent and usury, and issue had been joined, the maker confessed judgment, and final judgment was entered against him separately. *Held*, that conceding for the purpose of this case that the maker, under Code, p. 653, § 49, ceased to be a party to the record as to all subsequent proceedings, yet that he was incompetent as a witness in behalf of the defendants, although two of them had released him from all liability to them, as under Code, p. 587, c. 146, § 6, he continued responsible to two later indorsers for the amount recovered against them and 5 per cent. damages, his liability for these damages being over and above his liability upon the judgment confessed by him.—Mills v. Central Sav. Bank, 16 Grat. 94.

§ 484. Principal and surety.

[a] (Ind. 1860) In a suit against a justice of the peace and his sureties, on his official bond, for failure to pay over money collected, the justice was defaulted; the sureties answered, and, on the trial, offered to prove by their principal that the claim for which suit was brought was not left with him in his official character, but merely as an agent. *Held*, that as this was a joint suit, upon a joint and several bond, and the testimony proposed tended to prove that there was no cause of action against the defendants, or either of them, it was matter in which they were all interested, and could not therefore be proved by a codefendant.—King v. State, 15 Ind. 64.

[b] (Ky. 1844) A principal in a note sued on in conjunction with his surety, who has received his discharge as a bankrupt, and as to whom the suit has been dismissed, and he released by his principal from all responsibility, is a competent witness for the surety.—Lamb v. Fox, 44 Ky. (5 B. Mon.) 94.

[c] (Ky. 1857) A. brought an action against B. and C. to recover money, which he alleged that he had paid for them as surety. Judgment by default was rendered against B. C. answered, denying that plaintiff was his surety, or that the debt paid by plaintiff was his (C.'s) debt, or that he was liable for it. On trial of the issue so made up, plaintiff offered B. as a witness. *Held*, that B. had no direct and certain interest in the event of the suit, and was a competent witness.—Todd v. Luckett, 57 Ky. (18 B. Mon.) 125.

[d] (Me. 1872) In an action on a joint and several note against a principal and surety, the defaulted principal is not a competent witness, at common law, for the surety, to prove that after the note became due, the payee, for a valuable consideration paid by the principal, extended its time of payment, without the knowledge or consent of the surety.—Wing v. Andrews, 59 Me. 505.

[e] (Mass. 1837) In an action on a note against principal and surety, the principal, after being defaulted, is a competent witness to disprove the surety's liability.—Chaffe v. Jones, 36 Mass. (19 Pick.) 260.

[f] (Mo. 1867) Where the principal and surety were jointly sued upon their bond, the principal let judgment go against him by default, and was then adjudged a competent witness to testify in favor of the surety, as his interest in the suit had thus been released.—State to Use of Southern Bank v. Atherton, 40 Mo. 209.

[g] (Ohio, 1853) The principal in a note, sued jointly with his sureties, against whom judgment was entered on default, is a competent witness for such sureties upon the issue joined between them and plaintiff.—Preble County Branch Bank v. Russell, 1 Ohio St. 313.

[h] (Ohio, 1854) In an action on a note against principal and sureties, the principal, having been defaulted, is not a competent witness for a party pleading to the action, where a separate judgment has not been rendered against such principal.—Crowell v. Western Reserve Bank, 3 Ohio St. 406.

[i] (Ohio, 1867) In an action against the makers of a note, one being principal and one surety, the principal, making no defense, may testify, in behalf of the surety, to an extension

of time of payment.—Bell v. Wilson, 17 Ohio St. 640.

[j] (Pa. 1842) After judgment against a surety in a replevin bond, he is a competent witness in an action against the sheriff for taking insufficient sureties.—Myers v. Clark, 3 Watts & S. 535.

[k] (Pa. 1846) A co-obligor defendant, as to whom a nolle prosequi has been entered after a plea of discharge as a bankrupt, and who has released any surplus to his assignees, is incompetent as a witness for the other defendants in an action on the bond.—Irwin v. Shumaker, 4 Pa. (4 Barr) 199.

[l] (Pa. 1848) In an action on a note, plaintiff may call one of the defendants who has been defaulted, as a witness, with his consent, to prove that he is the principal debtor, and that the signatures of the other defendants, who are sureties, are genuine.—Mevey v. Matthews, 9 Pa. (9 Barr) 112.

[m] (Va. 1828) If the principal in a recognizance be bound in a particular sum, and the sureties be separately bound in a like sum, and the principal be defaulted, he is not a competent witness for them on a rule to show cause why a scire facias should not be awarded against them.—Commonwealth v. Craig, 6 Rand. 731.

§ 485. Usurious transactions.

[a] (Ky. 1880) In a suit against a principal and surety, the principal made no defense, and judgment was rendered against him. The surety, however, raised the defense of usury. *Held*, that the principal was a competent witness by whom to establish this defense.—Mix v. Marder's Ex'r, 79 Ky. 131.

[b] (Me. 1853) A codefendant, who sets up usury, cannot prove it by a defaulted codefendant, although a defendant may, in general, do so by his own oath.—Thornton v. Blaisdell, 37 Me. 190.

[c] (N. Y. 1841) A mortgagor, who has suffered a bill to foreclose to be taken pro confesso against him, is a competent witness on behalf of a judgment creditor, party to the suit, to prove the mortgage usurious.—Post v. Dart, 8 Paige, 639.

[d] (N. Y. 1845) A defendant who has put in his answer, setting up the defense of usury, cannot be made a competent witness for a codefendant, to establish the alleged usury, by giving a stipulation abandoning his defense to the suit, and consenting that the bill may be taken as confessed against him for the amount he may prove to be due. The proper course is to apply to the court, upon notice to complainant, for leave to withdraw his answer and be examined as a witness for his codefendant, on which application the court might impose such terms as would be equitable.—Mann v. Cooper, 1 Barb. Ch. 185.

§ 486. Partners.

[a] (U. S. 1879) In an action against A. and B. charging them as partners, and, as such, liable for bills drawn by A. in his own name, but for the benefit of the partnership, A. cannot be examined as a witness for B., upon an issue joined by B. alone, although judgment should have been rendered A. by default.—Nicholson v. Patton, Fed. Cas. No. 10,250 [2 Cranch, C. C. 164].

[b] (Ala. 1843) In an action against several as partners, where one was defaulted, he was a competent witness for the other defendant to prove that they were not partners.—Scott v. Jones, 5 Ala. 694.

[c] (Ala. 1845) Where three persons are sued as partners on an open account, in assumpsit, one against whom a judgment by default has been taken is a competent witness to prove that one of the defendants was not a partner, he having pleaded the general issue.—Gooden v. Morrow, 8 Ala. 486.

[d] (Ala. 1862) An alleged copartner, and one of the defendants in the case, against whom judgment by default has been rendered, is a competent witness for his codefendant to prove that they were not partners.—Aicardi v. Strang, 38 Ala. 326.

[e] (Cal. 1856) One partner, sued for an injury done to partnership property, made his copartner, who refused to join as plaintiff, a defendant, and he was defaulted. *Held* that, as plaintiff would be obliged to account with his partner for the amount which might be recovered, the latter was not a competent witness.—Nightingale v. Scannell, 6 Cal. 506, 65 Am. Dec. 525.

[f] (Cal. 1863) A defaulted defendant is not a competent witness to prove that he was a partner of his codefendant, in the purchase of the property, for the price of which the suit is brought.—Fairchild v. Amsbaugh, 22 Cal. 572.

[g] (Ga. 1860) In a suit upon a note signed by a firm, two of the partners were defaulted, and another pleaded non est factum. *Held*, that the former were incompetent to prove the liability of the latter.—Cody v. Cody, 31 Ga. 619.

[h, i] (Ill. 1873) If two are sued as partners, and the partnership is put in issue by one only, and the other defendant is defaulted, the latter is a competent witness for his codefendant, to show that no partnership existed. The admission by his default cannot affect his codefendant.—Smith v. Knight, 71 Ill. 148, 22 Am. Rep. 94.

[j] (Iowa, 1858) One sued as a partner, and defaulted, but against whom damages have not been assessed, nor a final judgment rendered, is not a competent witness to prove that his codefendant, on trial, was not a partner.—Williams v. Soutter, 7 Iowa (7 Clarke) 435.

[k] (Ky. 1827) Where a decree has been rendered against one of two partners, made defendants by a third, and he is no longer a party to the cause, he is a competent witness for his copartner.—Sharp v. Morrow, 22 Ky. (6 T. B. Mon.) 300.

[l] (Ky. 1847) In a suit against A. and B. as partners, A. denied that he was a partner, and B. made no defense, although no judgment was entered against him. Plaintiff dismissed the suit as to B. conditionally, to be absolute if the issue was found for A. *Held*, that B. was a competent witness for plaintiff.—Campbell v. Todd, 46 Ky. (7 B. Mon.) 316.

[m] (Ky. 1863) Where partners sue to recover a debt, one of them cannot, pending the action, transfer his interest to his coplaintiffs, and become a witness for them, by having his name stricken from the action. Code, § 32, does not authorize it.—Dougherty v. Smith, 61 Ky. (4 Metc.) 279.

[n] (Ky. 1869) A partner, against whom a judgment by default has been rendered, is a competent witness to prove that the bill sued on was made by him in the name of two members of the firm, and indorsed by a third, to raise money for the benefit of the firm, and that the money so raised was so used and applied.—Bacon v. Hutchings, 68 Ky. (5 Bush) 595.

[o] (La. 1851) One partner, against whom a separate judgment has been rendered, is incompetent for plaintiff against another.—Glasscock v. McRae, 6 La. Ann. 284.

[oo] (Md. 1834) In an action against A. and B. as joint obligors of a single bill, signed and sealed in their partnership name, B., who had suffered judgment by default, upon the plea of non est factum by A., was offered as a witness

by plaintiff to prove the execution of the single bill by B. in the presence of, and by consent of, A., and also to prove another bill in the handwriting of A., and to which he had affixed the partnership name. *Held*, that B. was not a competent witness, being interested to fix A.'s liability.—Albers v. Wilkinson, 6 Gill & J. 358.

[p] (Md. 1853) In assumpsit against two, as partners, and upon the joint plea of non assumpsit, one defendant is not a competent witness for the other to disprove the partnership, and show that the witness alone was responsible for the claim; but after withdrawing his plea and confessing judgment for the full amount of the claim, with interest and costs, he is no longer interested in the event of the suit, and his competency for the purpose mentioned is restored.—Barker v. Ayers, 5 Md. 202.

[q] (Md. 1866) Where judgment by default, in an action of assumpsit against two partners, has been entered against one for nonappearance and said judgment is stricken out by subsequent appearance and motion of such party, and judgment by confession entered for the amount claimed in the declaration with interest and costs, defendant confessing is a competent witness on the trial of the cause in favor of his codefendant, to show that the latter was not a partner in the transaction from which the action arose, and did not share in the profits of any such transaction.—Thomas v. Mohler, 25 Md. 36.

[r] (Mo. 1861) A. and B. were partners. A. sold out to B., the latter assuming all the liabilities and indebtedness of the firm. To secure A., B. gave him a bond, with C. as surety. A. sued B. and C. on the bond. Both were served, but B. did not answer, and judgment by default was entered against him. C. answered, and on the trial introduced B., his codefendant, as a witness in his behalf, to prove that the sale of merchandise by A. to B. took place three or four days previous to the execution of the bond, and that full possession was given to B. at the time of sale. *Held*, that B. was a competent witness in behalf of C.—Robertson v. Findley, 31 Mo. 384.

[s] (N. Y. 1844) Two defendants were partners, and one of them was discharged under the bankrupt act, and a nolle prosequi entered as to him. *Held*, that he was a competent witness for his copartner, on releasing his interest in the surplus of the partnership effects.—Butcher v. Forman, 6 Hill, 583.

[t] (N. Y. 1850) One of two copartners, sued for an alleged partnership debt, who has given his individual note for the debt, is not a competent witness for the plaintiff, under the act of 1847, or the Code of Procedure, although he has suffered a default. He is interested in favor of plaintiff against his codefendant.—Rich v. Husson, 6 N. Y. Super. Ct. (4 Sandf.) 115.

[u] (Pa. 1857) In an action by a creditor, against the representatives of a deceased partner, to recover a debt due him by the firm, a surviving partner, against whom the creditor had already obtained judgment for the same debt, is a competent witness on behalf of the creditor.—Collier's Ex'rs v. Leech, 29 Pa. (5 Casey) 404.

[v] (Vt. 1847) Where the action was for money had and received, and defendant, who was called as a witness by plaintiff, after having been discharged upon his plea in bankruptcy, testified that he had been in partnership with his codefendant, and that, at the request of his codefendant, he borrowed of plaintiff, for the use of the firm, the money which plaintiff claimed to recover in this action, and that he informed plaintiff at the time that he was obtaining the money for the firm, *held*, that this disclosed no interest in the witness, which should exclude his testimony from the consideration of the jury.—Onion v. Fullerton, 19 Vt. 317.

§ 487. Defendants in criminal prosecutions.

[a] Where a nolle prosequi is entered as to one of several defendants to an indictment, such defendant is a competent witness against the other defendants.

—(Ill. 1896) Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139;

(Mo. 1852) State v. Clump, 16 Mo. 385; (1887) State v. Chyo Goom, 92 Mo. 418, 4 S. W. 712; (1887) State v. Beaucleigh, 92 Mo. 490, 4 S. W. 666.

[b] (Mo. 1888) Witnesses jointly indicted with defendant for murder, one of whom has been acquitted, and a nolle prosequi entered as to the others, are competent for the prosecution, though another joint indictment is pending against them and defendant for the murder of another man, at the same time and in the same transaction as that for which defendant is on trial.—State v. Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

[c] (Mo. 1891) To render a codefendant a competent witness for the state, it was not necessary that he be acquitted or discharged before defendant was put on trial. It was sufficient that the indictment was dismissed as to him prior to the closing of the state's evidence, which is expressly permitted by Rev. St. 1889, § 4217.—State v. Steifel, 106 Mo. 129, 17 S. W. 227.

[d] (N. Y. 1875) Where an accomplice is jointly indicted with the principal, a nolle prosequi may be entered as to the former, and he may testify for the prosecution.—Linsday v. People, 67 Barb. 548, affirmed (1875) 63 N. Y. 143.

[e] (N. C. 1858) One charged with a crime, who turns state's witness against his associates, under an assurance that his disclosures are not to be used against him, may be cross-examined as to what he told counsel about the offense, while he was himself charged.—State v. Condry, 50 N. C. 418.

§ 488. —— Effect of conviction or pleading guilty.

[a] One who has been convicted, but has not paid his fine, is not a competent witness for his codefendant.

—(Tex. 1858) Tilley v. State, 21 Tex. 200; (1859) Ellege v. Same, 24 Tex. 78.

CONTRA, see

(Miss. 1859) Strawhern v. State, 37 Miss. 422;

(Mo. 1858) State v. Stotts, 26 Mo. 307.

[b] (Ala. 1881) One of two persons jointly indicted is not a competent witness for or against the other, unless there has been a severance, a nol. pros., or an acquittal in his favor; and his mere pleading guilty, no judgment having been rendered, does not render him competent.—Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72.

[c] (Ala. 1888) Where two defendants are jointly indicted, and one is convicted and sentenced, while there is a mistrial as to the other, the convict is a competent witness on the second trial of his codefendant.—South v. State, 86 Ala. 617, 6 South. 52.

[d] (Ala. 1893) The conviction and sentence of one of four persons jointly indicted do not render him incompetent as a witness against the others.—Woodley v. State, 103 Ala. 23, 15 South. 820.

[e] (Ky. 1887) A codefendant who has been tried and convicted on a plea of guilty is a competent witness for the state.—Patterson v. Commonwealth, 86 Ky. 313, 5 S. W. 387; Id., 5 S. W. 765.

[f] (Me. 1863) Where two are jointly indicted, and one only pleads guilty, his testimony is

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admissible for the other respondent on his trial.—State v. Jones, 51 Me. 125.

[g] (Mass. 1847) Where two persons are jointly indicted for housebreaking, and one of them pleads guilty, he is a competent witness for the prosecution, before sentence, on the trial of the other.—Commonwealth v. Smith, 53 Mass. (12 Metc.) 238.

[h] (Miss. 1875) One of two co-defendants in a joint indictment who has pleaded guilty and been remanded to await the court's further order may be examined against the other, on a separate trial of the latter.—Lee v. State, 51 Miss. 566.

[i] (Mo. 1839) An accomplice is a competent witness, and may be examined, if he is willing, for his codefendant in the same indictment, if he has pleaded guilty or been separately convicted, and judgment has not been rendered.—Garrett v. State, 6 Mo. 1.

[j] (Mo. 1884) A person under sentence for robbery is a competent witness in behalf of one jointly indicted with himself, as all disqualifying interest has been removed by his conviction.—State v. Loney, 82 Mo. 82.

[k] (Mo. 1886) Where one of two jointly indicted defendants pleads guilty, or is separately tried and convicted, or acquitted, in either case he becomes a competent witness for the other.—State v. Hunt, 91 Mo. 491, 3 S. W. 868.

[l] (Mo. 1891) Where one of two persons jointly indicted has pleaded guilty, he is competent to testify against the other without judgment being entered against him.—State v. Jackson, 106 Mo. 174, 17 S. W. 301.

[m] (Mo. 1893) Where a person is tried and convicted of burglary, he is a competent witness for the state on the trial of another defendant, jointly indicted with him for the same offense.—State v. Minor, 117 Mo. 302, 22 S. W. 1085.

[n] (N. H. 1859) One of two joint defendants in an indictment for an aggravated assault, who has pleaded nolo contendere, but against whom no judgment has been rendered, is not a competent witness for his codefendant.—State v. Young, 39 N. H. 283.

[o] (N. C. 1871) When two persons are jointly indicted, and one submits, and judgment is suspended, he is still a defendant, and is therefore incompetent to testify for or against his codefendant.—State v. Queen, 65 N. C. 464; Same v. Bruner, Id. 499.

[p] (Pa. 1878) Where one has been convicted of an infamous crime, but not sentenced, and motions in arrest of judgment and for a new trial are pending, he is not a competent witness for another who was jointly indicted for the same offense and granted a separate trial.—Kehoe v. Commonwealth, 85 Pa. 127.

[q] (Tenn. 1858) A. and B. were jointly indicted, but severed on trial, and after conviction of A., but before judgment, B. proposed to introduce him as a witness. The court ruled him out on the ground that judgment had not been rendered on the verdict against him. *Held* that, on this view of the law, it was the duty of the court to remove the supposed disability by at once rendering judgment.—Delozier v. State, 38 Tenn. (1 Head) 45.

§ 489. —— Insufficiency of evidence.

[a] (U. S. 1836) On a criminal prosecution, if there is no evidence against one of the defendants, he may be examined as a witness for the other defendants.—United States v. Fenwick, Fed. Cas. No. 15,086 [4 Cranch, C. C. 675].

[b] (La. 1832) Defendant against whom no testimony has been offered may be sworn for his codefendant.—Franklin's Curator v. Soward, 8 La. 270.

[c] (Mo. 1851) Where there is but little evidence against one jointly indicted with another, his case should be first submitted to the jury, and, if found not guilty, he should be allowed to testify for his codefendant.—Fitzgerald v. State, 14 Mo. 413.

[d] (N. H. 1858) Where several persons are jointly indicted and tried, if no material evidence is introduced by the prosecutor against any one of them, the course is to move that the jury may pass on his case separately; and, if he is acquitted, he may then be a witness as to the others.—State v. Bean, 36 N. H. 122.

[e] (N. J. 1790) Where several joint defendants are being tried for larceny, one of them cannot testify on behalf of the others, though on the trial there is no evidence against him.—State v. Carr, 1 N. J. Law (Coxe) 1.

[f] (N. Y. 1819) An accused indicted with others is not entitled to a verdict of acquittal, that he may testify for such others, unless no testimony has been adduced against him.—In re Bowerhan, 4 City H. Rec. 136.

[g] (Tex. 1896) Defendant's paramour, in a prosecution for adultery, is a competent witness in his behalf after her trial and acquittal.—Perry v. State (Cr. App.) 34 S. W. 618.

§ 490. Husband or wife.

[a] (Ala. 1884) A wife of one of several persons jointly indicted for larceny is a competent witness for or against the others, where a nol. pros. has been entered against her husband.—Woods v. State, 76 Ala. 35, 52 Am. Rep. 315.

[b] (Ky. 1876) The wife of one of three defendants in an indictment is a competent witness against the other two, after the indictment is dismissed as to her husband.—Ray v. Commonwealth, 75 Ky. (12 Bush) 397.

[c] (Me. 1849) Where several defendants are jointly indicted for a misdemeanor, and one is put on trial alone, he may introduce as a witness the wife of his codefendant, who has been defaulted on his recognizance.—State v. Worthing, 31 Me. 62.

[d] (N. Y. 1844) Where the wife of one of several defendants, in a bill to foreclose a mortgage, suffered the bill to be taken as confessed against her, she was a competent witness for the other defendants.—Hadley v. Chapin, 11 Paige, 245.

[e] (N. C. 1888) Where two are indicted for fornication and adultery, and the female pleads guilty, her husband is a competent witness against her codefendant.—State v. Guest, 100 N. C. 410, 6 S. E. 253.

[f] (Vt. 1837) If one of two or more defendants suffers the bill to be taken pro confesso, and other defendants answer, and testimony is taken, the wife of a defaulted defendant cannot testify for the orators against the other defendants.—Sparhawk v. Buell's Adm'r, 9 Vt. 41.

16. STATUTORY REMOVAL OF INCOMPETENCY.

(a) IN GENERAL, §§ 491-496.
(b) PARTIES OF RECORD, §§ 497-502.
(c) ASSIGNOR AND ASSIGNEE, §§ 503-505.
(d) NATURE OF INTEREST IN GENERAL, §§ 506-511.
(e) INTEREST ARISING FROM STATUS OR RELATION OF PARTIES, §§ 512-522.
(f) CRIMINAL PROSECUTIONS AND PENAL ACTIONS, §§ 523-529.

Effect on competency of husband and wife in general, see ante, § 138.
Statutory provisions in general, see ante, § 208.

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§ 494. Nature of proceedings or parties and character of court.

[a] (U. S.) The phrase, "civil action," in Act July 2, 1864 (13 Stat. 351), which provides that in the courts of the United States there shall be no exclusion of a witness in a civil action because he is a party to, or interested in, the issue tried, includes suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties or such parties and the government. Such phrase is used in contradistinction to prosecutions for crime.—(1870) Green v. United States, 76 U. S. (9 Wall.) 655, 19 L. Ed. 806; (1867) United States v. 10,000 Cigars, Fed. Cas. No. 16,451 [Woolw. 123]; (1870) Rison v. Cribbs, Fed. Cas. No. 11,860 [1 Dill. 181].

[b] (U. S. 1877) The provision in Act Cong. July 2, 1864 (13 Stat. 351), that in the courts of the United States no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, has no application to the courts of a territory. They are not "courts of the United States."—Good v. Martin, 95 U. S. 90, 24 L. Ed. 341.

[c] (U. S. 1855) In the admiralty the state laws of evidence are not applied, and interested witnesses are excluded, except in certain cases of necessity.—The Independence, Fed. Cas. No. 7,014 [2 Curt. 350].

[d] (U. S. 1859) A state statute admitting parties as witnesses does not apply in admiralty.—The Australia, Fed. Cas. No. 667 [3 Ware, 240].

[e] (U. S. 1859) The rules of evidence in admiralty cannot be changed by a state statute, and a libelant cannot testify in his own behalf under such a statute making parties competent as witnesses.—The William Jarvis, Fed. Cas. No. 17,697 [1 Spr. 485].

[f] (Ala. 1858) Code, §§ 2313, 2314, authorizing plaintiff to establish the correctness of his demand by his own oath, where the amount in controversy does not exceed $300, does not apply to actions against corporations aggregate.—Yonge v. Mobile & O. R. Co., 31 Ala. 422.

[g] (Ala. 1861) Code, § 2779, providing that a party may be a witness in his own behalf in certain cases unless the adverse party swears that the testimony proposed to be given is untrue, does not apply to suits by or against corporations aggregate.—Alabama & T. R. R. Co. v. Oaks, 37 Ala. 694.

[h] (Ala. 1871) The same rules of evidence govern in trials of contested wills as in courts of common law; interest does not disqualify a legatee from testifying.—Barker v. Bell, 46 Ala. 216.

[i] (Ga. 1876) Under Code, § 3855, a woman cannot be received as a witness, in her own behalf, to prove a contract by a married man, that, in consideration of her consent to sexual intercourse, he will make a certain provision for her in the event of pregnancy; such a suit is instituted in consequence of adultery, within the section.—Sloan v. Briant, 56 Ga. 59.

[j] (N. H. 1855) The provision in Comp. St. c. 181, § 32, empowering parties on trial by the jury to make their adversaries witnesses in chief, relates to such cases only as have been tried before commissioners.—Lovejoy v. Jones, 30 N. H. (10 Fost.) 164.

[k] (N. J. 1858) A trial of an issue of fact by a court of law at direction of the chancery court is not an equitable proceeding within the statute of 1855, providing that complainant in an equitable proceeding in any court shall be a competent witness to disprove so much of defendant's answer as may be responsive to the allegations of the bill.—Black v. Lamb, 12 N. J. Eq. (1 Beasl.) 108.

[l] (N. Y. 1858) A defendant in bastardy proceedings in a court of sessions cannot be examined in his own behalf, under Code, § 399. The Code has no application to the courts of sessions. And proceedings in bastardy are a special statutory remedy, excepted from the Code by section 471.—People v. Duell, 16 How. Prac. 43, 6 Abb. Prac. 285.

[m] (N. Y.) Under the Code, permitting a party to a suit to testify when the adverse party is living, a plaintiff may testify in an action against a corporation.—(1858) Wright v. New York Cent. R. Co., 28 Barb. 80; (1858) La Farge v. Exchange Fire Ins. Co., 16 N. Y. Super. Ct. (3 Bosw.) 157, affirmed (1860) 22 N. Y. 352; (1859) Field v. New York Cent. R. Co., 29 Barb. 176; (1859) Mott v. City of New York, 2 Hilt. 358; (1859) Wallace v. Same, Id. 440, 9 Abb. Prac. 40, 18 How. Prac. 169; (1859) Johnson v. McIntosh, 31 Barb. 267.

[n] (N. Y. 1859) Under Code, § 399, permitting the examination of a party as a witness on his own behalf where the adverse party is living, unless such adversary is the assignee, administrator, executor, or legal representative of a deceased person, a plaintiff is entitled to be examined in his own behalf in an action against a municipal corporation.—Wallace v. City of New York, 18 How. Prac. 169.

[o] (N. Y. 1860) A party to the record in proceedings before a surrogate on the final accounting of an administrator is not a competent witness, as neither the act of December 14, 1847, authorizing parties in civil suits to obtain the testimony of the adverse party, nor Code, § 399, authorizing parties to be examined in their own behalf, has reference to proceedings before a surrogate.—Terry v. Dayton, 31 Barb. 519.

[p] (N. Y. 1860) Under Code, § 399, permitting parties "to an action or proceeding" to testify, a landlord is a competent witness for himself in "summary proceedings to recover the possession of land," brought under 2 Rev. St. p. 512.—Marseilles v. Bulger, 19 How. Prac. 34.

[q] (Ohio, 1865) The judicial settlement of an administrator's account is a "proceeding" within the statute providing that "no person shall be disqualified as a witness in any civil action or proceeding by reason of interest," and the administrator is accordingly a competent witness in his own behalf.—In re Raab's Estate, 16 Ohio St. 273.

§ 495. Civil or criminal nature of proceedings.

[a] Proceedings in bastardy are "civil" proceedings within the meaning of statutes authorizing the parties to civil causes to testify; such a statute enables defendant in bastardy to testify as a witness.

—(Ark. 1885) Chambers v. State, 45 Ark. 56;
(Ill. 1869) People v. Starr, 50 Ill. 52; (1870) Freeman v. People, 54 Ill. 162;
(Ind. 1862) State v. Evans, 19 Ind. 92;
(Me. 1857) Murray v. Joyce, 44 Me. 342;
(N. C. 1870) State v. McIntosh, 64 N. C. 607;
(Ohio, 1858) Grimes v. Berry, 2 Ohio Dec. 51; (1859) Frazier v. Blackburn, Id. 148; (1859) Carter v. Krise, 9 Ohio St. 402;
(Tenn. 1874) Blankenship v. State, 63 Tenn. (4 Baxt.) 383.

CONTRA, see
(Ohio, 1859) State v. Courtney, 2 Ohio Dec. 98.

[b] (U. S. 1867) A proceeding by writ of habeas corpus is not a criminal proceeding, but is a "civil action," within the meaning of the proviso to the sundry civil appropriation bill of July 2, 1864, which declares that no person shall be excluded from testifying in a civil ac-

tion because he is a party thereto; and hence the prisoner is competent to testify in his own behalf.—In re Reynolds, Fed. Cas. No. 11,721.

[c] (U. S. 1867) Under Act July 2, 1864 (13 Stat. 351), which provides that in the courts of the United States there shall be no exclusion of any witness in civil actions because he is a party to, or interested in, the issue tried, the phrase "civil action" extends to a trial of a seizure of property for the violation of the internal revenue laws, and of the controversy arising upon a claim interposed thereto by a third party. The claimant in such case is a competent witness in his own behalf.—United States v. Ten Thousand Cigars, Fed. Cas. No. 16,451 [1 Woolw. 128].

[d] (Ind. 1867) Defendant in a proceeding for surety of the peace is not a competent witness in his own behalf. A prosecution, under the statute, for surety of the peace, is a criminal proceeding to prevent the commission of crime; and as the state has only removed the disability of parties as witnesses in civil proceedings, and not in criminal ones, the latter are still governed by the common law rule.—Deloohery v. State, 27 Ind. 521.

[e] (Iowa, 1877) Under Code 1873, § 4556, one held to keep the peace in a preliminary examination on a charge of threatening to commit a public offense is not a competent witness in his own behalf.—State v. Darrington, 47 Iowa, 518.

[f] (Me. 1861) Whether the cause of action set forth implies an offense against the criminal law, so as to exclude plaintiff as a witness under Rev. St. c. 82, § 79, is to be determined by the allegations in the writ.—Carlisle v. McNamara, 48 Me. 424.

[g] (Mass. 1860) A complaint for flowing land is a "civil action or proceeding," therefore complainant is a competent witness in his own behalf under St. 1857, c. 305.—Hosmer v. Warner, 81 Mass. (15 Gray) 46.

[h] (Tenn. 1882) Proceedings against a person for contempt of court are in the nature of a criminal prosecution, and therefore defendant cannot testify in his own behalf.—Harwell v. State, 78 Tenn. (10 Lea) 544.

[i] (Tex. 1886) A suit on a bail bond is not a criminal proceeding such as will disqualify the principal in the bond from testifying in behalf of himself and his sureties.—Reddick v. State, 21 Tex. App. 267, 17 S. W. 465.

[j] (Va. 1884) Under a statutory provision that the court, on motion, after ten days' notice may revoke a license, and give judgment against the licensee for the costs, including a fee of $5 to the attorney for the commonwealth, the proceedings are in their nature civil, and defendant is a competent witness in his own behalf.—Cherry v. Commonwealth, 78 Va. 375.

§ 496. Effect of introducing other testimony.

[a] (Ky. 1890) Civ. Code, § 606, which provides that no person shall testify for himself in chief after taking other testimony for himself in chief, applies to a defendant who testifies nominally for a codefendant, whose defense to the suit is the same as his own.—American Wire Nail Co. v. Bayless, 91 Ky. 94, 15 S. W. 10.

[b] (Ky. 1892) In a will contest, a judgment for proponents will not be reversed on the ground that a certain interested witness should have testified in chief before the other witnesses not interested had testified, where it appears that his testimony was merely cumulative, and, if left out of the case, could not have affected the result.—Morris v. Morton's Ex'rs, 20 S. W. 287.

[c] (Ky. 1895) Civ. Code, § 606, subd. 4, providing that no person shall testify for himself in chief after introducing other testimony for himself in chief, does not preclude a stockholder of a defendant corporation from testifying in its behalf after the introduction by it of a witness not a stockholder.—Western Dist. Warehouse Co. v. Hayes, 97 Ky. 16, 29 S. W. 738.

[d] (Ky. 1896) Under Civ. Code, § 606, subd. 4, providing that no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief, after a party has testified for himself in chief the fact that he has introduced other testimony did not bar his right to be recalled to give additional testimony.—Louisville Ins. Co. v. Monarch, 99 Ky. 578, 36 S. W. 563.

(b) PARTIES OF RECORD.

IN GENERAL, § 497.
CO-PARTIES, § 498.
ADVERSE PARTIES, § 499.
NOTICE TO ADVERSE PARTY, § 500.
ACTIONS ON ACCOUNTS, § 501.
FACTS WHICH MAY BE PROVED BY OTHER TESTIMONY, § 502.

§ 497. In general.

[a] (U. S. 1859) Parties to a suit in equity, under the existing legislation of congress, are not competent witnesses in their own behalf, in the federal court. — Blanchard v. Sprague, Fed. Cas. No. 1,516 [1 Cliff. 288].

[aa] (Ala. 1844) A defaulting witness in a civil case may, upon a scire facias against him to enforce the penalty imposed by statute for failure to attend in obedience to the subpœna, excuse himself by his own oath under the provision of the statute.—Livingston v. Lucas, 6 Ala. 147.

[b] (Ala. 1874) In an action by a surviving partner to recover a debt due the late partnership, defendant is a competent witness for himself under Rev. Code, § 2704.—Bragg v. Clark, 50 Ala. 363.

[c] (Cal. 1862) In the statute declaring all persons incompetent who are directly interested in the result of the action, the provision authorizing the examination of parties was not intended as an exception to the general rule.—Easterly v. Bassignano, 20 Cal. 489.

[d] (Conn. 1793) Under the statute permitting a party in interest to testify to prevent a failure of justice, as where in a case of trespass done privately there is no other evidence, a plaintiff may be admitted to testify in an action of trespass, where his depositions are ruled out.—Tyler v. Scovel, 1 Root, 523.

[e] (Ga. 1867) Complainant in a bill in equity is a competent witness, his credibility being for the jury.—Atlanta & W. P. R. Co. v. Hodnett, 36 Ga. 669.

[f] (Iowa, 1859) The rule excluding parties from being witnesses where the party has any interest at stake in the suit, although it be only a liability to costs, has not been changed by the Code.—Cherry v. McCorkle, 8 Iowa (8 Clarke) 522.

[g] (Iowa, 1868) In an action of slander, plaintiff is a competent witness, under Revision, § 3978.—Hess v. Fockler, 25 Iowa, 9.

[h] (Ky.) By Code Prac., § 670, a party to the record who is not interested in the issue is a competent witness.—(1854) Allen's Ex'r v. Shelby, 53 Ky. (14 B. Mon.) 320; (1857) Todd v. Luckett, 57 Ky. (18 B. Mon.) 125.

[i] (La. 1852) Parties to a suit can give evidence only by answers to interrogatories under Act 1805, No. 26, § 7, which virtually repeals

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the Roman law relative to the decisory oath; unless they consent, they cannot be verbally examined on the trial.—Billeadeau v. Keller, 8 La. Ann. 487.

[j] (La. 1865) Under the statute, where a witness is merely a nominal party to the suit, and disclaims any personal interest therein, he is competent.—Creen v. Croce, 17 La. Ann. 3.

[k] (La. 1866) In an action against a carrier, the Code does not allow the admission of plaintiff's testimony as to the nature and value of the contents of lost baggage.—Block v. The Trent, 18 La. Ann. 664.

[l] (La. 1874) Defendant filed a supplemental answer with interrogatories on facts and articles, asking that they be answered in open court. Objections were sustained to all the questions except one, which was ordered to be answered. Plaintiff having offered herself as a witness, defendant objected that her answers to interrogatories as a witness having been taken for confessed, she could not be permitted to testify. *Held*, that the objection was properly overruled.—Le Blanc v. Massieu, 26 La. Ann. 332.

[m] (Me. 1857) Where parties are made witnesses, they must testify, subject to the same rules as other witnesses, unless the statute allowing their testimony otherwise provides.—Wheelden v. Wilsoh, 44 Me. 11.

[n] (Me. 1858) Plaintiff, in an action against a town, under Rev. St. c. 82, §§ 78, 79, for an injury occasioned by a defect in the highway, is a competent witness in his own behalf, although no inhabitant of the town has been offered by it as a witness.—Palmer v. Inhabitants of Bangor, 46 Me. 325.

[o] (Me. 1863) In an action against a town to recover damages for an injury received in consequence of a defective highway, plaintiff is a competent witness.—Stover v. Inhabitants of Bluehill, 51 Me. 439.

[p] (Mass. 1855) Under St. 1856, c. 188, which enacts that "parties in all civil actions may be admitted to testify in their own favor, and may be called as witnesses by the opposite party," the deposition of a party is admissible in evidence for him.—Chase v. Breed, 71 Mass. (5 Gray) 440.

[q] (Mich. 1859) Where the circuit court made an order that the parties be examined as witnesses, and they were examined accordingly, it was not error to refuse to permit one of them to be sworn as a witness on his own behalf on a subsequent trial, the other not being in attendance.—Lester v. Sutton, 7 Mich. 329.

[r] (Mo. 1858) The law declares that an interest in the suit does not disqualify a witness. At the same time it provides that neither party shall be a witness in his own behalf. It is only when he is the real plaintiff in interest, compelled to use the name of another in asserting his rights, that he is disqualified.—Sawyer v. Mitchell, 27 Mo. 510.

[s] (N. H. 1834) The statute, though it authorizes auditors to examine the parties on oath, and makes their report evidence on trial before a jury, does not make the parties competent witnesses on such trial.—Stevens v. Hall, 6 N. H. 508.

[t] (N. Y.) The statutes authorizing the examination of a party to the record merely remove the former objection founded on the relation of the witness to the suit. Witnesses incompetent from another cause—e. g., a wife, an insane person—are not rendered competent by the fact of being joined as parties.—(1849) Pillow v. Bushnell, 5 Barb. 156, 2 Code Rep. 19, 4 How. Prac. 9; (1855) Symonds v. Peck, 10 How. Prac. 395.

[u] (N. Y. 1858) Under the Code of 1849, unless the relation of the witness to the suit is such that he is substantially the party, so that he can control it, he is admissible.—Bridges v. Hyatt, 16 N. Y. 546.

[v] (Ohio, 1855) By Code, §§ 310, 311, and section 6 of the act regulating the proceedings in appropriations of land, the owner of land proposed to be taken is a competent witness, in a proceeding under the act, in his own behalf.—Atlantic & G. W. R. Co. v. Campbell, 4 Ohio St. 583, 64 Am. Dec. 607.

[w] (Vt. 1841) Parties who are admitted as witnesses in their own cause under the statute are received under the same requisitions and restrictions as any other witness, and must be of sane mind, of sound memory, and capable of taking an oath.—Arnold v. Arnold's Estate, 13 Vt. 362.

[x] (Vt. 1843) The overseers who have assumed the control of a prosecution for bastardy are competent witnesses, the objection arising from their corporate interest being removed by statute.—Spears v. Forrest, 15 Vt. 435.

[y] (Vt. 1854) Parties being made witnesses are witnesses to every point material to the determination of the case.—McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574.

[z] (W. Va. 1873) Under Code, c. 130, § 23, a party to a civil action may be a witness in behalf of himself, or of any other party, to prove the conditions upon which a bond was delivered.—Newlin v. Beard, 6 W. Va. 110.

§ 498. Co-parties.

[a] (Cal.) Under the statute one of two codefendants is incompetent to give testimony, which as between himself and his co-defendant inures to his own benefit.—(1852) Hotaling v. Cronise, 2 Cal. 60; (1853) Johnson v. Henderson, 3 Cal. 368; (1862) Easterly v. Bassignano, 20 Cal. 489.

[b] (Cal. 1853) Under the statute by which a defendant cannot be a witness for his codefendant, where the defense is general and would operate in discharge of both, the rule is the same, though but one defendant is on trial; the other not having been served with process in time.—Buckley v. Manife, 3 Cal. 441.

[c] (Cal. 1857) Under Code, § 392, providing that no person shall be excluded on account of his interest, except when he is a party to the action, a party cannot testify in behalf of a co-party, irrespective of any interest.—Lucas v. Payne, 7 Cal. 92.

[d] (Ind. 1855) In an action brought to recover possession of a chattel against A. for a wrongful taking and detention, and B. for a wrongful detention, A.'s answer denied the wrongful taking and detention, and B.'s the wrongful detention; both answers averring that the chattel was the property of B., and A.'s answer stating that he had sold the same to B. in good faith. At the trial, B. offered A. as a witness in his behalf. *Held*, that the interest of the two defendants was not joint, in the statutory sense, and that the witness was competent.—Wood v. Cohen, 6 Ind. 455, 63 Am. Dec. 389.

[e] (Ind. 1858) Under our statute a codefendant cannot testify for his codefendant as to matters affecting the liability of both, as where he is charged with combining to procure his codefendant's title, and with jointly occupying the land.—Hall v. Nash, 11 Ind. 34.

[f] (Ind. 1861) One of several codefendants cannot be examined as witness for another where the matter proposed as evidence tends to defeat the action as to all of them.—Anderson v. Weaver, 17 Ind. 223.

[g] (Mass. 1855) Under St. 1852, c. 312, §§ 3, 6, 60, parties severally liable on the same written contract, joined in one action, are competent witnesses for each other, if separate tri-

als are had.—Fuller v. Morse, 70 Mass. (4 Gray) 294.

[h] (Mich. 1857) Rev. St. c. 102, § 100, does not constitute a coplaintiff or a codefendant a legal witness; but only one or all of the opposite parties.—McBride v. Cicotte, 4 Mich. 478.

[i] (Mo. 1852) Under the new Code one defendant is not a competent witness for his codefendant.—Young v. Croughton, 17 Mo. 367.

[j] (Mo. 1860) Under Act Feb. 12, 1857, a party may be examined as a witness for his coplaintiff or codefendant as to any matter in which he is not jointly interested or liable with him, and as to which a separate and not a joint verdict or judgment can be rendered.—Garnier v. Le Beau, 30 Mo. 229; Scheifer v. Kahlman, Id. 232.

[k] (N. Y. 1849) Under the new Code, a more stringent rule with regard to admitting parties as witnesses against their codefendants does not prevail than existed under the old practice.—Leach v. Kelsey, 7 Barb. 466.

[l] (N. Y. 1849) A rule of court, requiring defendant to obtain an order to examine a codefendant, was not inconsistent with provisions of the Code permitting such examination.—Taylor v. Mairs, 1 Code Rep. 123.

[m] (N. Y. 1850) In a joint action of assault and battery, against several persons, each defendant may call all his codefendants as witnesses in his behalf; it being within the provision of the Code.—Parsons v. Pierce, 8 Barb. 655, 3 Code Rep. 177.

[n] (N. Y. 1850) Codefendants charged with the joint conversion of property cannot be witnesses for each other.—Munson v. Hegeman, 10 Barb. 112.

[o] (N. Y. 1851) In an action against three defendants, in which the acquittal of one does not lead necessarily to a discharge of the others, one defendant may be examined as a witness for his codefendants, under Code 1849, § 397.—Finch v. Cleveland, 10 Barb. 290.

[p] (N. Y. 1851) Code, § 397, enacts that a party may be examined on behalf of his codefendant, but that the examination shall not be used on behalf of the party examined; and sections 398, 399, provide that the party may be excluded by reason of his interest in the event of the action. *Held*, that in an action of tort such examination may be always used, for separate judgments may be rendered.—Holman v. Dord, 12 Barb. 336.

[q] (N. Y. 1851) Code, §§ 389-396, permit the examination of a party on behalf of his adversary, under certain conditions, and section 397 declares that a party may be examined in behalf of his coplaintiff or codefendant, but that the examination shall not be used on behalf of the party examined. *Held*, that while any party to an action might be examined as a witness on behalf of any other party, when examined on behalf of a coplaintiff or codefendant, his testimony was only applicable to the issue between the party on whose behalf he was examined and the adverse party.—Albany Mechanics' & Farmers' Bank v. Rider, Code R. (N. S.) 61.

[r] (N. Y. 1851) Code, §§ 397-399, permit a party to be examined on behalf of his codefendant, with the limitations that the examination thus taken shall not be used on behalf of the party examined, and that the testimony of the party may be excluded by reason of his interest in the event of the action. *Held*, that in an action for damages arising from a false warranty, one of several defendants might be called as a witness by and on behalf of his codefendants.—Holman v. Dord, 2 Edm. Sel. Cas. 270 12 Barb. 336.

[s] (N. Y. 1851) Code, § 397, enacts that a party may be examined on behalf of his codefendant, but that the examination shall not be used on behalf of the party examined; and sections 398, 399, provide that the party may be excluded by reason of his interest in the event of the action. *Held*, that the phrase, "interest in the event of the action," does not mean an interest in any event of the action, but an interest in the event as respects the party who calls him as a witness.—Holman v. Dord, 2 Edm. Sel. Cas. 270, 12 Barb. 336.

[t] (N. Y. 1852) A defendant is not a competent witness in behalf of his codefendant, when the fact to which he was sought to be examined relates to a matter in which both are jointly interested, and would, if established, defeat a recovery against either.—Frost v. Hanford, 1 E. D. Smith, 540.

[u] (N. Y. 1853) A. bid off a bond and mortgage at a public sale, and paid the purchase money, but directed the bid to be put down to B., and the bond and mortgage were accordingly assigned to B. A. at all times afterwards disclaimed any interest therein, and in his answer declared that the purchase was made for B., who had repaid to him the purchase money. In a suit against A. and B., *held*, that A. was a competent witness for B.—Gilbert v. Averill, 15 Barb. 20.

[v] (N. Y. 1854) Under the statute each of the defendants is a competent witness, in an action of tort, for his codefendant.—Eno v. Del Vecchio, 11 N. Y. Super. Ct. (4 Duer) 53; Beal v. Finch, 11 N. Y. (1 Kern.) 128, 9 How. Prac. 385.

[vv] (N. Y. 1854) Code, § 397, authorizing any defendant to examine his codefendant as a witness, was amended by Act July, 1851, so as to restrict the examination of a party to matters in which he is not jointly interested or liable with the party calling him as a witness, and in respect to which a separate, and not a joint, verdict of judgment might be rendered. *Held*, that the party when offered was always to be admitted as a witness, but his examination was to be restricted to matters in which he was not jointly interested or liable with his codefendant.—Lefever v. Brigham, 10 How. Prac. 385.

[w] (N. Y. 1855) Under the provisions of the Code, the testimony of a party to an action, in behalf of his codefendants or coplaintiffs, will be excluded where it is manifest that no material evidence can be given on the issues in the cause, by the party offered, which will not inure to his own benefit, and the verdict must be in favor of all.—Brahms v. Joyce, 12 N. Y. Super. Ct. (5 Duer) 16.

[ww] (N. Y. 1855) Code, § 397, does not render joint defendants in trespass competent witnesses for each other, to show a right in the defendants to do the acts complained of by plaintiff as a trespass.—Dean v. Thornton, 13 N. Y. (3 Kern.) 266.

[x] (N. Y. 1855) In an action against two or more to recover damages for the wrongful detention of personal property, each defendant is a competent witness for his codefendant.—Gardner v. Finley, 19 Barb. 317.

[xx] (N. Y. 1855) Where a defendant has no separate defense in an action on a joint contract, a codefendant, called as a witness, can prove nothing that will not inure to his own benefit, as well as to the benefit of his codefendant; as to such matters he is, therefore, interested, and incompetent.—King v. Lowry, 20 Barb. 532.

[y] (N. Y. 1856) Under Code, § 397, in an action where several are joined as plaintiffs or defendants, a coplaintiff or codefendant may be called, whenever a separate judgment can be rendered, but the examination must be confined to matters as to which the witness is not

jointly interested with the party calling him.—Blodget v. Morris, 14 N. Y. (4 Kern.) 482.

[yy] (N. Y. 1857) In all actions, whether contract or tort, one defendant may be a witness for his codefendant to prove that the latter was never liable, when that proof consists of facts which, though true, could be of no benefit to the testifying defendant, when proved by witnesses other than himself.—Buchanan v. Morrell, 14 N. Y. Super. Ct. (1 Bosw.) 601.

[z] (N. Y. 1863) In an action for a tort, tried in 1854, each defendant was, under the provisions of the Code then in force, a competent witness for his codefendant as to any matter in which he was not jointly interested with or liable with such codefendant, and as to which a separate and not a joint verdict or judgment could be rendered.—Wilson v. Elwood, 28 N. Y. 117.

[zz] (N. Y. 1863) Accordingly *held*, that in an action of trover against E. and M., where the defendants answered jointly, denying each and every allegation of the complaint, and justifying under a title in E. by virtue of a mortgage from M., the latter was a competent witness for E. upon the question whether E. was guilty of any act in respect to the property in controversy, which would charge him as a tort-feasor, they not being equally interested in that question.—Wilson v. Elwood, 28 N. Y. 117.

§ 499. Adverse parties.

[a] (U. S. 1870) Since Act July 2, 1864, § 8 (13 Stat. 351), in regard to the competency of parties as witnesses in civil actions in the federal courts, a complainant in chancery who takes the deposition of a respondent adversely interested, though without a previous order of court specially reserving his rights, does not, by operation of law, thereby release such respondent from the liabilities set up in the bill.—Rison v. Cribbs, Fed. Cas. No. 11,860 [1 Dill. 181].

[b] (Ala. 1874) Under the statute abolishing the incompetency of parties as witnesses in civil cases, a party may examine his adversary as a witness in open court, and is not compelled to file interrogatories to him, as under the former statute. Rev. Code, §§ 2704, 2731.—Olive v. Adams, 50 Ala. 373.

[c] (Del. 1850) A joint party may be called as a witness by the adverse party.—Little v. Hazzard, 5 Har. 291.

[d] (Del. 1875) A nominal party defendant, whose substantial interest is the same as that of plaintiff, is not a competent witness for complainant under Act Feb. 18, 1859, providing that any party to the record in any action may be examined by the adverse party.—Rice v. Pennypacker, 5 Del. Ch. 33.

[e] (Del. 1877) A party who is otherwise incompetent to testify, as by reason of interest, is not rendered competent by Act 1859, providing that a party to a civil action may examine the adverse party as a witness.—Rice v. Pennypacker, 5 Houst. 279.

[f] (Ind. 1858) The adverse party who may be called upon to testify is the one really adverse under the issues, and not the one adverse on the record.—Swift v. Ellsworth, 10 Ind. 205, 71 Am. Dec. 316.

[g] (Miss. 1860) The rule in chancery, which denied to complainant a decree against a defendant whom he had examined as a witness upon a material point, is abolished by the provisions of Rev. Code, allowing parties to the record to be examined as witnesses.—Burks v. Loggins, 39 Miss. 462.

[h] (Mo.) Under the Code, the party called as a witness for his adversary must not only be adverse upon the record, but adverse also in interest.—(1857) Harris v. Harris, 25 Mo. 567; (1862) Pratte v. Coffman, 33 Mo. 71.

[i] (N. J. 1857) The supplement to Act March 1, 1849, § 2, compels a party to the suit to testify for the adverse party, against his own interest, but does not permit him to testify in favor of that interest.—Myers v. Hollingsworth, 26 N. J. Law (2 Dutch.) 186.

[j] (N. J. 1893) Under Revision, p. 378, § 2, in all civil actions a party to the action shall be admitted and sworn when called as a witness by the adverse party.—Roehers v. Remhoff, 55 N. J. Law (26 Vroom) 475, 26 Atl. 860.

[k] (N. Y. 1849) A party to a cause may be examined as a witness, at the instance of the adverse party, after issue, and before trial, in all cases.—Partin v. Elliott, 4 N. Y. Super. Ct. (2 Sandf.) 667.

[l] (N. Y. 1850) Under the Code a codefendant who is primarily liable for the debt claimed is a competent witness for plaintiff.—Bank of Charleston v. Emeric, 4 N. Y. Super. Ct. (2 Sandf.) 718.

[m] (N. Y. 1850) Act 1847, enabling parties in civil suits to call any adverse party as a witness, was intended to obviate the technical objection arising from the person called being a party to the record. It does not render him competent if he is otherwise disqualified. Such also is the construction of the Code of Procedure.—Rich v. Husson, 6 N. Y. Super. Ct. (4 Sandf.) 115.

[n] (N. Y. 1855) Under Code, § 399, permitting a party to testify in his own behalf, and under section 390, giving plaintiff the right to call either of the defendants or either of the defendants a right to call either of the plaintiffs as a witness, a person incompetent to testify cannot be rendered competent by being made a party to the record.—Symonds v. Peck, 10 How. Prac. 395.

[o] (N. Y. 1863) A party to an action, within the meaning of the Code, § 390, providing that a party to an action may be examined as a witness at the instance of the adverse party, is one who is named plaintiff or defendant, and appears on the record as such.—Woods v. De Figaniere, 16 Abb. Prac. 1.

[p] (Pa. 1886) An administratrix defendant having an interest cannot be called to testify as an adverse party under the act of April 15, 1869, but may under the act of March 27, 1865, unless the parties have coupled with their bill in equity against her interrogatories for discovery.—William Penn Building & Loan Ass'n v. Mayer, 2 Montg. Co. Law Rep'r, 41.

[q] (Tex. 1859) The testimony of a party, opposed in interest to the intervener, is admissible in favor of the intervener under our statute.—Tucker v. Willis, 24 Tex. 247.

[r] (Tex. 1859) The statute allows a party to call the adverse party as a witness; but that provision does not allow one defendant to be called against his codefendant, where their interests are adverse. In a suit on a mortgage against the mortgagor and his execution plaintiff and purchaser, the debtor is interested to establish the mortgage, and therefore is not a competent witness against his codefendant.—Gill v. Campbell, 24 Tex. 405.

[s] (Tex. 1867) Act Feb. 18, 1858, providing that "either party to a suit may examine the opposing party as a witness," does not make such party a competent witness where he is interested in the result of the suit, it merely removes the objection to him as a party.—Busby v. Scott, 29 Tex. 196.

§ 500. Notice to adverse party.

[a] (Cal. 1863) The certainty requisite in a pleading is sufficient in a notice of intention to testify.—Bond v. Dorn, 22 Cal. 113.

[b] (Cal. 1863) Under the provisions of the practice act for taking the testimony of a party in a suit, upon giving notice of an intention to testify, to the adverse party, it is sufficient if the notice states the several subjects or each particular subject-matter respecting which he intends to testify, without stating each particular fact, or all the evidence in full.—Bond v. Dorn, 22 Cal. 113.

[c] (Cal. 1863) A notice of intention of a party to a suit to testify, under the statutes, must specify the points upon which the party intends to testify with particularity; and it is insufficient to merely refer to the issues made up by the pleadings, or to the allegations of the pleadings.—Bradley v. Kent, 22 Cal. 169.

[d] (Cal. 1864) Under a notice that plaintiff would testify in his own behalf, under the statute of 1861, in an action of contract for services in building a railroad, he offered his testimony to prove the laying the first six miles of the track, the manner of doing the work, the time employed, the value of the services; also other facts connected with items stated in his bill of particulars. *Held*, that the notice was sufficient, and that as the statement did not set out the testimony of plaintiff, nor the points about which he testified, he would not be presumed to have testified as to any facts not properly stated in the notice.—Leet v. Wilson, 24 Cal. 398.

[e] (Iowa, 1858) Under Code 1851, §§ 2421, 2422, making a party to a suit a competent witness if he has had served on his adversary a subpœna to appear and testify and his adversary has failed to appear, a party to a suit does not become a competent witness where the subpœna on his adversary, though issued, is returned not served.—Stevens v. Campbell, 6 Iowa (6 Clarke) 538.

[f] (Kan. 1862) By Code 1858, §§ 310, 313, a party is permitted to testify in his own case, after giving reasonable notice to the adverse party of his intention so to do. *Held*, that notice on the day of trial is not reasonable notice.—Mallory v. Leiby, 1 Kan. 97.

[g] (N. Y. 1849) Examination of a party at the instance of the adverse party may be had without order, on five days' notice, the party being subpœnaed, and paid his fees as a witness.—Partin v. Elliott, 4 N. Y. Super. Ct. (2 Sandf.) 667, 3 Code. Rep. 207.

[h] (N. Y. 1858) Code, § 399, provides that a party may be examined in his own behalf the same as any other witness, but that such examination shall not be had unless ten days' notice shall be given to the adverse party. *Held*, that the notice relates to the trial, and not to the return of process, and in an action in a justice's court, the notice of the intended examination of a party was in time if served within the required number of days before the day on which the trial actually took place, without reference to the time of the return of process.—Totten v. Monell, 6 Abb. Prac. 288.

[i] (N. Y. 1858) A notice to a defendant to appear and be examined, or be liable for contempt and to have his answer stricken out; must be served eight days to authorize either proceeding, on default.—Hewlett v. Brown, 14 N. Y. Super. Ct. (1 Bosw.) 655.

[j] (N. Y. 1858) By Code, § 399, as amended by Act April 13, 1857 (1 Laws 1857, p. 744), a party may be examined as a witness in his own behalf, who has given notice of such intended examination ten days prior to the time he offers himself as such witness, although such notice was not given before the trial commenced.—Bissell v. Hamlin, 16 N. Y. Super. Ct. (3 Bosw.) 383.

[k] (N. Y. 1862) A notice that defendant would be a witness in his own behalf, "as to all the alleged facts in the plaintiff's complaint," does not specify the points as to which he was to be examined, as required by the Code in force in 1857.—Hinds v. Barton, 25 N. Y. 544.

[l] (Wis. 1850) The plaintiffs in a cause cannot be sworn as witnesses, unless they have complied strictly with the provisions of the statute prescribing the course they must pursue in requiring the defendants to testify.—Ecker v. Moore, 2 Chand. 85, 2 Pin. 425.

[m] (Wis. 1850) St. 1841, p. 26, gives either party the right to notify the adverse party that he wishes to have him sworn as a witness, and provides that unless the party notified appears and testifies or produces his deposition, the party giving the notice can himself be sworn as a witness. *Held* that, where on notice to defendants from plaintiff to appear and testify on the trial part of them appear, but one does not, plaintiff cannot be sworn and testify in his own behalf.—Ecker v. Moore, 2 Chand. 85, 2 Pin. 425.

[n] (Wis. 1850) A notice was given to defendant to appear at the trial of a cause before a justice and testify as a witness. The cause was there tried and appealed to the circuit court. Defendant appeared at the latter court, produced the notice previously given him, and claimed to be sworn as a witness. *Held* that, no notice being given him to appear and be sworn at the appellate court, he was not a competent witness.—Greene v. Holley, 2 Chand. 168.

[o] (Wis. 1857) A notice of ten days to the attorney of a party residing in the state of New York to appear and testify at a trial in Wisconsin, under Rev. St. c. 98, § 57, so as to make the party giving the notice admissible as a witness, is not a sufficient notice in point of time.—Cooke v. Manly, 6 Wis. 24.

[p] (Wis. 1859) Rev. St. 1858, c. 137, § 25, requiring notice to the opposite party that his opponent is to be examined as a witness in his own behalf, to be given in reasonable time to allow him to attend court, is satisfied by a verbal notice given to such party in open court, at the trial.—Hubbell v. Noonan, 8 Wis. 214.

[q] (Wis. 1860) A defense, not affecting the liability of the pleader's codefendant, may be proved by that codefendant's testimony, without notice to plaintiff that that testimony is to be relied on.—Anderson v. Prindle, 11 Wis. 136.

[r] (Wis. 1862) The deposition of one of the parties to a cause was taken on a commission, in which the other party joined, and had been on file a long time before the trial, but was not used. *Held*, that the adverse party was not entitled to testify on his own behalf at the trial, without giving the previous statutory notice.—Smith v. Swarthout, 15 Wis. 550.

[s] (Wis. 1865) Although in an action on a note against both the maker and the indorser, the former may be a witness for the indorser as to facts set up as a separate defense exclusively by the latter, yet it is not error to exclude his testimony where he is called as a witness for both of the defendants, without notice of his intended examination having been given to plaintiff, who is not present at the trial.—Simms v. Larkin, 19 Wis. 390.

[t] (Wis. 1872) Under the statutes, a party to an action may be examined as a witness in his own behalf, without notice to the opposite party, although the latter is a corporation.—Potter v. Village of Menasha, 30 Wis. 492.

§ 501. Actions on accounts.

Competency in general, see ante, § 288.

[a] (Ala. 1844) The statute allowing plaintiff's oath as evidence in all suits on accounts for sums not exceeding $100 applies to a de-

mand for $50 due on an exchange of horses.—Cave v. Burns, 6 Ala. 780.

[b] (Ala. 1846) Clay's Dig. p. 342, § 161, provides that when the account does not exceed $100 the oath of plaintiff shall be received as evidence of the demand, unless the same is controverted by the oath of defendant. *Held*, that the intention of the act was not to permit the parties to be witnesses, but to allow recovery only where the affidavit of plaintiff was not controverted, and therefore, where it was controverted, it was error to permit plaintiff to testify to the details of the transaction.—Hudgins v. Nix, 10 Ala. 575.

[c] (Ala. 1848) Where a plaintiff offers himself as a witness under the statute, he is not confined to the mere statement that his account and each item of it is just, but he may prove all the circumstances connected with it.—Yarborough v. Hood, 13 Ala. 176.

[d] (Conn. 1828) In an action of book debt, plaintiff is not a competent witness to prove an acknowledgment and promise of defendant to take the case out of the statute of limitations, by virtue of a statute which in general terms authorized the admission of the evidence of the parties and of other persons interested.—Weed v. Bishop, 7 Conn. 128.

[e] (Iowa, 1844) By the statute of 1841 it is provided that a party may examine the opposite party in a suit relative to the items of his account claimed, and that, if such opposite party is unable to testify as to the correctness or incorrectness of the account, then the claimant may support his account by his own oath. *Held*, that since that statute a party cannot testify to the correctness of the items of his account in the first instance.—Lowe v. Ganby, Morris, 281.

[f] (Iowa, 1858) A party is expressly made competent by Code 1851, § 2406, to prove the matters preliminary to the introduction of account books; and this more especially where he is in a position to testify as to the manner and time of making the entries.—Hastings v. Devoran, 7 Iowa (7 Clarke) 319.

[g] (Mich. 1888) The parties to a suit are by statute competent witnesses to show that others have made settlements with them upon their books of account, and that the books have been correctly kept.—Montague v. Dougan, 68 Mich. 98, 35 N. W. 840.

[h] (Ohio, 1852) Swan's St. p. 326 (Curw. St. Supp. c. 583, § 2; Chase's St. p. 1295), authorizing a party to a suit to be examined respecting the validity and correctness of a book account on which a cause of action or defense is based, does not permit a party to be examined in his own behalf, when there is no book account involved.—Richardson v. Wingate, 1 Ohio Dec. 478.

[i] (Tenn. 1875) Under Code, § 3780, if, in an action upon an account coming from another county, plaintiff's affidavit is denied by the affidavit of defendant, both parties are competent witnesses.—Williams v. Lenoir, 67 Tenn. (8 Baxt.) 395.

[j] (Vt. 1875) The provision of Gen. St. c. 36, § 24, "that in actions of book account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no further," is not confined to cases where the action is, in form, book account, but is applicable in any suit or proceeding where such matter is at issue and on trial.—Woodbury v. Woodbury's Estate, 48 Vt. 94.

[k] (Vt. 1876) Testimony as to what farm certain land belonged to, etc., *held* not to be "proper matter of book account," within Gen. St. c. 36, § 24, allowing the living party to an action of book account to testify in his own favor as to the time when charges in his own handwriting were made.—Woodbury v. Woodbury's Estate, 50 Vt. 152.

§ 502. Facts which may be proved by other testimony.

[a] (Mich. 1857) In a suit at law a party will not be compelled to testify, where it appears, from the affidavit of the other party or from other proceedings in the case, that other witnesses may be obtained who could testify to the same facts.—McBride v. Cicotte, 4 Mich. 478.

[b] (Tex. 1849) Acts 1846, p. 377, provides that on the filing of appeals from justices' courts a party who shall make oath that he has not any other evidence to prove any material fact, except his own oath, shall be examined touching such facts. Defendant made oath that he knew of no one else by whom he could prove his account, but H. By the representations of the deputy sheriff it appeared to the satisfaction of the court that H. was so drunk that he was unable to attend, and that he was habitually addicted to intoxicants. *Held*, that it was error to allow defendant to testify in his own behalf, merely on the representations of the deputy sheriff; but the court should not have been satisfied of such incapacity by representations unsupported by oath.—McGee v. Currie, 4 Tex. 217.

[c] (Tex. 1849) A party who offers to testify in his own case must, in his preliminary examination, state the fact or facts which he is unable to prove by any other evidence than his own oath. To such fact or facts his testimony must be confined; and if, in the course of his examination in chief, he testifies to any other fact, or to any fact in relation to which there is other evidence, his testimony may be objected to, and its admissibility must be decided by the court.—Crozier v. Kirker, 4 Tex. 252, 51 Am. Dec. 724.

[d] (Tex. 1853) No party can testify in his own case, if it appears that another person can testify to the same facts, even though such person live out of the state.—Evans v. Hardgrove, 11 Tex. 210.

[e] (Tex. 1858) The testimony of a party to a suit, given under Hart. Dig. art. 715, should be excluded after he has disclosed that he can prove the facts which he has testified to by some one else.—Johnson v. Ward, 21 Tex. 475.

(c) ASSIGNOR AND ASSIGNEE.

IN GENERAL, § 503.
UNLIQUIDATED DEMAND OR ACCOUNT, § 504.
NOTICE, § 505.

§ 503. In general.

[a] (Ala. 1860) Under Code, § 2302, a vendor is a competent witness in favor of his vendee in an action of trespass brought by the latter against a sheriff for seizing and selling on execution against the vendor the goods sold by the latter to the plaintiff; and said vendor is not a transferror of a contract, within the meaning of section 2290 of the Code, or a transferror of a chose in action, so that his competency as a witness is affected.—Sawyer v. Ware, 36 Ala. 675.

[b] (Ind. 1861) Where the assignor of an account is joined as a defendant in an action thereon, though occupying a nominally adverse position to plaintiff upon the record, yet really their interests are identical, and the assignor is not a competent witness to prove the claim for plaintiff.—Cox v. Davis, 16 Ind. 378.

[c] (Ind. 1861) The assignor of an account must be made a party defendant; but merely naming him as an opposing party does not necessarily make him an adverse party during the

progress of the case, and he will not be competent as a witness to prove the account for plaintiff.—Swails v. Coverdill, 17 Ind. 337.

[d] (Mass. 1852) Since St. 1851, c. 233, § 97, and St. 1852, c. 312, § 60, the assignee and owner of a chose in action is a competent witness for the nominal plaintiff in an action thereon.—Palmer v. White, 64 Mass. (10 Cush.) 321.

[e] (N. Y. 1848) Code, § 361, enacts that no person shall be excluded from being a witness by reason of his interest in the event of the action; and section 352 declares that the assignor of a thing in action assigned for the purpose of making him a witness shall be incompetent as a witness, but that section 351 shall not apply to such assignor. *Held*, that one who had assigned to become a witness might in some cases be competent, but was not competent if he remained interested in the event of the suit.—Hamilton & D. Plank Road Co. v. Rice, 3 How. Prac. 401, 1 Code Rep. 108.

[f] (N. Y. 1850) Under the Code of Procedure an insolvent debtor who has assigned his property to assignees for the payment of his debts is a competent witness in an action brought or defended by his assignees in relation to his estate.—Davies v. Cram, 6 N. Y. Super. Ct. (4 Sandf.) 355.

[g] (N. Y. 1850) Such a suit is not prosecuted or defended for his immediate benefit, within the meaning of the Code.—Davies v. Cram, 6 N. Y. Super. Ct. (4 Sandf.) 355.

[h] (N. Y. 1850) As a general rule, a creditor of the insolvent debtor is also a competent witness in such a suit, though it is possible there may be exceptions, as where there is but a single creditor, who would be entitled to the whole proceeds of the recovery, and where the subject-matter in controversy involves the whole of the assigned estate.—Davies v. Cram, 6 N. Y. Super. Ct. (4 Sandf.) 355.

[i] (N. Y. 1850) The objection goes to the credibility of the witnesses, rather than to their competency.—Davies v. Cram, 6 N. Y Super. Ct. (4 Sandf.) 355.

[j] (N. Y. 1851) Under the Code, the assignor of a demand, in an assignment of his property in trust for the benefit of his creditors, cannot be a witness for the assignees in a suit brought by them to collect the demand.—Fitch v. Bates, 11 Barb. 471.

[k] (N. Y. 1854) Under Code, § 399, permitting an assignor of a contract or thing in action to testify in behalf of his assignee, it is no objection to such witness that the assignment was executed and delivered for the purpose of making him a witness, but that fact goes to his credit only.—Doyle v. Daniels, 2 E. D. Smith, 385.

[l] (N. Y. 1855) Under Code, § 399, permitting the examination of an assignor of a contract or thing in action in certain cases, it is no objection to such witness that he made the assignment for the purpose of becoming a witness.—Vasseur v. Livingston, 11 N. Y. Super. Ct. (4 Duer) 285, affirmed Vassear v. Same (1855) 13 N. Y. (3 Kern.) 248.

[m] (N. Y. 1855) An express covenant in an assignment that the claim assigned is due and payable does not render the assignor incompetent as a witness under Code, § 399.—Winthrop v. Meyer, 1 Abb. Prac. 383, 4 E. D. Smith, 177.

[n] (N. Y. 1857) In a suit by an assignee of an unsettled account between the master and the owner of a vessel, where it appeared that there was a balance due from defendant, plaintiff's assignor is a competent witness, under the Code, for either party.—Allen v. Smith, 16 N. Y. 415.

[o] (N. Y. 1858) One who assigns a claim to a creditor on account of a debt, without any agreement that any part of the debt should by the mere assignment be extinguished, is a competent witness for his assignee in an action to recover the demand.—Bridges v. Hyatt, 16 N. Y. 546, affirming (1856) 2 Abb. Prac. 449.

[p] (N. Y. 1858) One who holds a note which is indorsed in blank by the payee, and who transfers it without indorsement after it becomes due, is not an assignor of a thing in action in such sense that he can be received as a witness in his own behalf, under Code, § 399.—Gardner v. Gordon, 16 N. Y. Super. Ct. (3 Bosw.) 369.

§ 504. Unliquidated demand or account.

[a] (Cal. 1856) The assignor of a demand for money loaned or advanced at various times on an open account, the return of which depends on future conditions, is not, under the statute, a competent witness for plaintiff, in an action by the assignee to recover the amount; it not being a liquidated demand.—Allen v. Citizens' Steam Nav. Co., 6 Cal. 400.

[b] (Cal. 1857) Where the action is prosecuted for the immediate benefit of the assignee, or he is a party, the assignor of an unliquidated claim is an incompetent witness. Prac. Act, §§ 4, 422.—Adams v. Woods, 8 Cal. 306.

[c] (Cal. 1858) The assignor of an agreement to pay money to him, if he would withdraw his defense, is a competent witness for the assignee in an action thereon, as the action is not for an unliquidated demand, and is not, therefore, embraced within the exception contained in section 4 of the practice act.—Gray v. Garrison, 9 Cal. 325.

[d] (Cal. 1861) A suit to recover a reward offered for the arrest and delivery of certain persons charged with a crime was neither an "unliquidated demand," nor an "account," within the meaning of section 4 of the practice act; and hence plaintiff's assignor was a competent witness.—Rochester v. See Yup Co., 18 Cal. 413.

[e] (Cal. 1861) A mining company sued for damages for trespass on their lands in March, April, and May. One who had previously owned an interest in the claim, which he sold to the company on April 1st, being summoned as a witness, executed an assignment to the company of all his interest in the damages. *Held*, that under Prac. Act, § 4, he was not a competent witness for the company.—Columbus Co. v. Dayton Co., 18 Cal. 615.

[f] (Cal. 1863) The right of examining an assignor as a witness is not extended by section 422 of the practice act; and in an action by the assignee of an account, unliquidated demand, or chose in action, not arising out of an express contract, the assignor is not rendered a competent witness under that section.—Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64.

§ 505. Notice.

[a] (N. Y.) Under Code, § 399, it is not necessary to give 10 days' notice of the examination of the assignor as a witness, where the action is against the party personally; and that notice is necessary only where the action is against the party in a representative capacity.—(1854) Doyle v. Daniels, 2 E. D. Smith, 385; (1854) Allen v. Franklin Fire Ins. Co., 9 How. Prac. 501; (1855) Vasseur v. Livingston, 11 N. Y. Super. Ct. (4 Duer) 285, affirmed Vassear v. Same (1855) 13 N. Y. (3 Kern.) 248; (1855) Goble v. Kinney, 11 How. Prac. 248; (1856) Burgart v. Stork, 12 How. Prac. 559; (1857) Bidwell v. Astor Mut. Ins. Co., 16 N. Y. 263. CONTRA, see (1852) Knickerbacker v. Aldrich, 7 How. Prac. 1; (1854) Benham v. New York Cent. R. Co., 13 How. Prac. 198.

[b] (N. Y. 1853) Under Code, § 399, cl. 3, requiring 10 days' notice of the intended ex-

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amination of an assignor of a thing in action or contract to be given to the adverse party, the assignor of a note not negotiable cannot be admitted as a witness for either party, unless such notice has been given.—Jagoe v. Alleyn, 16 Barb. 580.

[c] (N. Y.) The notice of an intention to take the testimony of an assignor must apprise the party of the precise subjects on which the assignor is to be examined. It should be definite, like a bill of particulars.—(1853) Falon v. Keese, 8 How. Prac. 341; (1854) Benham v. New York R. Co., 13 How. Prac. 198; (1857) Pattison v. Johnson, 15 How. Prac. 289.

[d] (N. Y. 1854) A person selling and transferring by delivery, after due, a note payable to him, or bearer, is an assignor of a thing in action, under Code, § 399, excluding such assignor as a witness, in behalf of one deriving title through or from him, against an assignee or an executor or administrator, unless 10 days' notice of his intended examination has been given to the adverse party.—Collins v. Knapp, 18 Barb. 532.

[e] (N. Y. 1860) A plaintiff, who desires to use as a witness his assignor of the demand sued on, need not, under Code, § 399, give any notice thereof to the other party.—Seymour v. Bradfield, 35 Barb. 49.

(d) NATURE OF INTEREST IN GENERAL.

IN GENERAL, § 506.
MORTGAGOR AND MORTGAGEE, § 507.
PARTIES TO BILLS AND NOTES, § 508.
USURIOUS TRANSACTIONS, § 509.
—— DENIAL OF USURY, § 510.
—— EXAMINATION OF ADVERSE PARTY, § 511.

§ 506. In general.

[a] (Ala. 1858) The lessee of a ferry, who has charge of it under his lease when a loss occurs, is not, under Code, § 2302, a competent witness for his lessor, when the latter is sued for damages.—Harris v. Plant, 31 Ala. 639.

[b] (Ala. 1859) In a suit for freedom, defendant's vendor, who conveyed "his interest" only, is a competent witness for defendant. Code, § 2302.—Farrelly v. Maria Louisa, 34 Ala. 284.

[c] (Ala. 1888) Under Code, § 2765, removing all objection as to the competency of witnesses predicated on interest, excepting as to transactions with a decedent, a grantee in a deed can testify as to the handwriting of an absent attesting witness.—Calera Land Co. v. Brinkerhoff, 87 Ala. 422, 6 South. 295.

[d] (Cal. 1860) A sale by the actual owners of goods in the hands of the sheriff, which have been attached by him as the property of a party in whose possession they were found, and by whom they were held under a fraudulent sale, is a sale of the specific goods, and not an assignment of a chose in action, and the vendor is a competent witness for the vendee in an action by the latter against the sheriff to replevy the goods.—Coghill v. Boring, 15 Cal. 213.

[e] (Mass. 1856) The donee causa mortis of a note is a competent witness in an action brought thereon by him in the name of the administrator of the donor.—Bates v. Kempton, 73 Mass. (7 Gray) 382.

[f] (Mo. 1851) Under the statute concerning practice in courts of justice, defendant in an execution is a competent witness for plaintiff, in an action between the latter and the parties to a delivery bond, who claim the property levied on.—Page v. Butler, 15 Mo. 73.

[g] (N. Y. 1850) On a bill in equity, filed by a judgment creditor against the judgment debtor and another person, praying that a previous judgment, confessed by the judgment debtor to his codefendant, may be set aside as fraudulent, and that the plaintiff in that judgment may account for the moneys he has fraudulently received under it, the judgment debtor is not a competent witness for plaintiff against his codefendant, under the Code of 1848.—Henry v. Henry, 8 Barb. 588.

[h] (N. Y. 1852) One who is liable to pay the amount of a judgment, if recovered against one of the parties to a suit, and has promised to do so, and is in fact defending the suit at his own expense, is an incompetent witness for that party, and is within the exception of Code, § 399, as a person for whose immediate benefit the action is defended.—Catlin v. Hansen, 8 N. Y. Super. Ct. (1 Duer) 309.

[i] (N. Y. 1853) In a suit against a sheriff to recover damages for goods wrongfully taken by him on execution, plaintiff in the execution is not a competent witness for the defendant, under Code, §§ 398, 399, allowing the examination of all persons as witnesses except the party for whose immediate benefit the action is prosecuted or defended.—Howland v. Willetts, 9 N. Y. (5 Seld.) 170.

[j] (N. Y. 1855) A suit was brought by a debtor and some of his creditors, on behalf of all the creditors who should come in and contribute, against the assignee of the debtor, charging him with misconduct, and praying that he might be removed and compelled to account, and for an injunction and receiver. *Held*, that the evidence of the debtor on behalf of his coplaintiffs was rightly excluded.—Brahms v. Joyce, 12 N. Y. Super. Ct. (5 Duer) 16.

[k] (N. Y. 1855) To exclude the evidence of a creditor, not named in the complaint, on behalf of plaintiffs, under the Code, it should appear, not merely that he was in a situation in which the judgment might avail him, but positively and unequivocally that he would receive the fund or a portion of it.—Brahms v. Joyce, 12 N. Y. Super. Ct. (5 Duer) 16.

[l] (Ohio, 1852) A creditor, with whom the debtor had left claims for collection to apply to the payment of the debt for which there was no other security, was not a person for whose "immediate benefit" a suit on the claims was prosecuted, and was a competent witness for plaintiff.—Colville v. Gilbert, 1 Ohio Dec. 526.

[m] (Pa. 1872) Under the act of 1869, removing the disability of interest, in an action by an administrator "to use of," etc., a son of the administrator is a competent witness for plaintiff.—McClelland's Ex'r v. West's Adm'r, 70 Pa. (20 P. F. Smith) 183.

[n] (Tex. 1889) Where a bill of sale has no subscribing witnesses, the vendee is, under Rev. St. art. 2246, removing the disqualification of persons interested in, or parties to, an action to testify therein, a competent witness to prove its execution.—Lang v. Dougherty, 74 Tex. 226, 12 S. W. 29.

§ 507. Mortgagor and mortgagee.

[a] (Ala. 1858) Under Code, § 2302, the mortgagee of an insured boat, whose debt has been paid by her sale after she was abandoned for a constructive total loss, and subsequently raised and repaired by the underwriters, is competent for the mortgagor in an action by him against them for the loss.—Fulton Ins. Co. v. Goodman, 32 Ala. 108.

[b] (N. H. 1881) In replevin between one claiming under a mortgage and one claiming under the mortgagor, the mortgagor is not, under the statute, incompetent to testify that the mortgage was without consideration.—Wilson v. Russell, 61 N. H. 354.

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[c] (N. Y. 1859) Under Code, § 397, a mortgagor, who is made a defendant in foreclosure, together with his grantee, is not a competent witness on behalf of his grantee.—Warden v. Buell, 18 How. Prac. 256.

[d] (N. Y. 1864) A mortgagor, who has conveyed the mortgaged premises to another, subject to the lien of the mortgage, is a competent witness for his grantee, under Code, §§ 398, 399, to show payment of the mortgage, in an action brought by the latter against the assignee of the mortgage in his lifetime, and continued against his executrix after his death, to procure the cancellation and discharge of the mortgage, or leave to redeem.—Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260, affirming (1863) 39 Barb. 360.

[e] (N. Y. 1864) And though such mortgagor admits, in effect, in his testimony, that the conveyance was made to enable him to be a witness in the suit his grantee was expected to commence, to procure the cancellation and discharge of the mortgage, this is not a circumstance which will impair the effect of the deed, as between the parties.—Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260.

[f] (N. Y. 1864) Even if such conveyance were a deed of gift as between the parties, defendant in that suit could not question the consideration.—Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260.

[g] (N. C. 1895) Since Code, § 1351, removes the disqualification of witnesses interested in the suit, a mortgagee in a chattel mortgage is competent, as a subscribing witness, to prove the execution thereof.—Clark v. Hodge, 116 N. C. 761, 21 S. E. 562.

[h] (Pa. 1874) Under Act 1869, permitting parties to testify, the effect of the testimony of a party to a deed absolute that it was a mortgage is to raise a question of credibility merely, which was rightly submitted to the jury.—Perry v. Perry, 31 Leg. Int. 372.

§ 508. Parties to bills and notes.

[a] (Ala. 1856) The transferror or assignor of the note sued on is not a competent witness for plaintiff, under Code, § 2290.—Hudson v. Weir, 29 Ala. 294.

[b] (Ala. 1859) A transferror by delivery of the equitable title to a note is not incompetent, under Code, § 2302.—Eaton v. Kirkman, 35 Ala. 272.

[c] (Cal. 1853) Under section 423 of the practice act, in a suit on a note, one codefendant cannot be permitted to testify to such matters as would discharge himself, as well as the other codefendant.—Sparks v. Kohler, 3 Cal. 299; Buckley v. Manife, Id. 441.

[d] (Ky. 1860) Under Civ. Code, § 670, in a suit against the accommodation acceptor of a bill of exchange by the holder of the bill, the payee or indorser, for whose accommodation the acceptance was made, is not a competent witness for the acceptor, being disqualified by his liability to the acceptor for his costs in case he be cast in the action, which creates an interest within the meaning of the section.—Finnell v. Cox, 60 Ky. (3 Metc.) 245.

[e] (La.) The general rules of evidence established by Civ. Code, arts. 2229–2270, are applicable to all contracts whatever; and hence the drawer of a note is competent as a witness.—(1841) Waters v. Petrovic, 19 La. 584; (1843) Johnson v. Marshall, 4 Rob. 157.

[f] (N. Y. 1851) Under Code, § 136, subd. 3, one defendant, in an action brought against several on a joint and several note, is competent as a witness in favor of his codefendant.—Ladue v. Van Vechten, 8 Barb. 664.

[g] (N. Y. 1853) Plaintiff and another indorsed a note for the accommodation of the maker, who loaned it to defendant for his accommodation, on his promise to pay it at maturity and save the indorsers harmless. Defendant negotiated the note to a bank for his own use; and plaintiff, having been compelled to pay it, brought suit to recover the amount so paid. *Held*, that the maker and the other indorser were competent witnesses for plaintiff, as such action was not prosecuted for their "immediate benefit," within the meaning of Code, § 399, cl. 1, providing for the exclusion as a witness of any person for whose immediate benefit the action is prosecuted or defended.—Neass v. Mercer, 15 Barb. 318.

[h] (N. Y. 1853) In an action against the indorser of a note who defends on the ground that the indorsement was forged, one who has guarantied the payment of the note, if the indorsement shall be proved to be genuine, and who has deposited the sum due on the note with a third person, under a contract that it shall be paid to plaintiff if he shall recover final judgment against the indorser, is not a person for whose immediate benefit the action was defended, within the meaning of Code, § 399, and is therefore, notwithstanding his interest, a competent witness for defendant.—Van Wyck v. McIntosh, 9 N. Y. Super. Ct. (2 Duer) 86.

[i] (N. Y. 1859) A party for whose accommodation a note has been indorsed is an incompetent witness for the defense, in an action defended for his benefit, according to Code 1849, §§ 398, 399.—Gildersleeve v. Martine, 19 N. Y. 321.

[j] (N. C. 1872) A defendant who offered in evidence as a counterclaim to plaintiff's demand a note dated October, 1852, was a competent witness to rebut the presumption of payment from lapse of time by virtue of Act 1866, abolishing the law excluding witness on account of interest and making parties, as well as others interested, competent to testify.—Albright v. Albright, 67 N. C. 271.

[k] (Ohio, 1852) Curw. St. c. 527, § 1 (42 Ohio Laws, p. 72), providing "that the plaintiff may commence and prosecute a joint action for money had and received against all the original makers and indorsers of any promissory note," etc., "and may give such note or bill in evidence, and each of the defendants may plead separate pleas, and make separate defenses," does not change the rules of evidence as to the testimony of codefendants in favor of each other.—Greenough v. Smeed, 1 Ohio Dec. 516.

[l] (Pa. 1879) The rule under the act of 1869, making all witnesses prima facie competent, so far as interest and policy of the law are concerned, applies to a party to commercial paper negotiated in the ordinary course of business before maturity.—State Bank v. Rhoads, 89 Pa. 353.

[m] (Tex. 1849) Where all the parties to a note or bill of exchange are sued in the same action, under our statute, the competency of those parties as witnesses is not affected by such joinder.—Parsons v. Phipps, 4 Tex. 341.

[n] (Wis. 1858) In an action on a note against two joint makers, who make separate defenses, one of them is not competent, under Code, § 299, to show that by agreement between the three parties to the note he was to assume the debt and his codefendant to be discharged.—Groat v. Palmer, 7 Wis. 338.

§ 509. Usurious transactions.

Competency of parties in general, see ante, § 238.

—— *of persons other than parties in general, see* ante, §§ 300–304.

[a] (Ala. 1833) The statute of 1819, which provides that the borrower may establish a de-

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fense of usury by his own oath in certain cases, does not extend to contracts made out of the state by persons residing in other states. —Wilson v. Walker, 3 Stew. 211.

[b] (Ala. 1844) The statute of 1819, which makes the "borrower or party" to a usurious contract competent to testify to the fact of usury, does not authorize such proof by the surety of the borrower.—Paul v. Meek, 6 Ala. 753.

[c] (Ala.) When a defendant is offered as a witness under the statute to prove usury, he is not confined in his testimony to the instrument on which the suit is brought, but may prove other transactions connected with it, as that other notes existed, which have been canceled, the consideration of which entered into and formed a part of the note sued.—(1845) Palmer v. Severance, 8 Ala. 53; (1854) Swinney v. Dorman, 25 Ala. 433.

[d] (Ala. 1846) The borrower is a competent witness to prove usury under the statute, when sued to recover the money borrowed, unless plaintiff will negative the truth of his testimony.—Jones v. Kirksey, 10 Ala. 579.

[e] (Ala. 1854) When money is borrowed by two jointly, but for the benefit of one, and a joint note given by them, on which they are both sued, either one is a competent witness under the statute to prove usury.—Swinney v. Dorman, 25 Ala. 433.

[f] (Ga. 1853) If the affidavit of either party is used as evidence, under the first and second sections of the act of 1842 respecting usury, he may be examined in court as other witnesses by the opposite party.—Wright v. Lawson, 13 Ga. 459.

[g] (Ill. 1856) The law of evidence of this state will be enforced when a plea of usury is set up in defense, so far as to permit the party pleading it to give testimony in its support.—McAllister v. Smith, 17 Ill. (7 Peck) 328, 65 Am. Dec. 651.

[h] (Iowa, 1859) If the usury does not appear on the face of the note or contract, the party agreeing to pay it may testify as to its existence in preceding parts of the transactions, under Act Jan. 20, 1853, § 5.—Campbell v. McHarg, 9 Iowa, 354.

[i] (Me. 1843) By Rev. St. c. 69, § 3, usury may be shown by the testimony of the defendant in a suit; but he can be allowed, when introduced for that purpose, to testify only to such facts as go to establish the defense of usury.—Goodwin v. Appleton, 22 Me. (9 Shep.) 453.

[j] (Mass. 1840) Under St. 1826, c. 27, § 5, and Rev. St. c. 35, § 4, the maker of a note payable to his own order, and by him indorsed, is a competent witness, in a suit against him by the first indorsee, to prove the defense of usury. —Little v. Rogers, 42 Mass. (1 Metc.) 108.

[k] (Mass. 1843) In the trial of an action of debt on Rev. St. c. 35, § 3, to recover back threefold the amount of interest paid by plaintiff, when he has paid a greater rate of interest than is allowed by law, plaintiff is not, by section 4, a competent witness, unless there is put in issue the fact of unlawful interest having been taken or reserved on a pre-existing contract.—Brickett v. Minot, 48 Mass. (7 Metc.) 291.

[l] (Mass. 1848) An agreement was made for the loan of $50 for one week for the sum of $2, to be paid as interest therefor. At the expiration of the week, the lender agreed to allow the loan to remain, on condition that the borrower would pay therefor at the rate of $2 a week for so long a time as the loan should remain unpaid; and in pursuance of this agreement the borrower paid $2 a week for 24 weeks, and brought an action on Rev. St. c. 35, § 3, to recover threefold the amount of interest so paid. *Held*, that he was a competent witness, under section 4, both to the original agreement and to the subsequent payments.—King v. Howard, 55 Mass. (1 Cush.) 137.

[m] (Mass. 1852) In an action to recover back usurious interest paid, the original debtor is a competent witness, under Rev. St. c. 35, § 4.—Gifford v. Whitcomb, 63 Mass. (9 Cush.) 482.

[n] (Mass. 1853) In an action by the indorsee of a note against the maker, the latter is a competent witness, under Rev. St. c. 35, § 4, the payee still living, to prove the note originally usurious.—Kendall v. Robertson, 66 Mass. (12 Cush.) 156.

[o] (Mass. 1855) On the trial of an action brought by the assignee of an insolvent debtor, in which the fact of unlawful interest having been taken or reserved from the debtor by defendant is put in issue, and the debtor has testified, defendant is admissible as a witness for himself under Rev. St. c. 35, § 4, although the debtor, his incompetency by reason of interest having been removed by St. 1852, c. 312, § 60, was a competent witness independently of the Revised Statutes.—Cutler v. Bubier, 70 Mass. (4 Gray) 588.

[p] (N. Y. 1855) Under Code, § 397, providing that one defendant may examine on behalf of his codefendant as to any matter in which he is not jointly liable nor jointly interested, and as to which a separate, and not joint, verdict or judgment can be rendered, a defendant cannot be examined by his codefendant to establish usury as a defense to their joint note.—Ely v. Miller, 1 Abb. Prac. 241.

[q] (N. Y. 1856) In an action against two makers and the surety of a joint and several note, the surety cannot be called, under Code, § 397, to testify to usury as the defense relied on. —Blodget v. Morris, 14 N. Y. (4 Kern.) 482.

[r] (R. I. 1850) The second section of the "act fixing the rate of legal interest," which makes the parties, upon a special plea of usury, legal witnesses, is as applicable to suits in equity as at law.—Sessions v. Richmond, 1 R. I. 298.

[s] (S. C. 1798) Where by statute plaintiff is allowed to rebut evidence of usury by his own oath, it is on the condition that he will himself state the whole truth of the transaction; he consequently may be brought under a general examination.—Luyten v. Haygood, 2 Bay, 177.

[t] (S. C. 1822) By the act of 1777, the borrower of money lent on usury may be a competent witness to prove the usury against the lender, who sues on the usurious contract, if the lender will not deny the usury on oath, or is dead.—Thomas' Ex'rs v. Brown, 1 McCord, 557.

[u] (S. C. 1827) The lender can be a witness, under the act against usury, only where the borrower is not a competent witness by the common law.—Kecheley v. Cheer, 4 McCord, 397.

[v] (S. C. 1845) The surety to a note is a competent witness to prove it usurious, under the act of 1777.—Phillips v. Caldwell, 2 Rich. Law, 1.

[w] (Wis. 1854) Sess. Laws 1851, c. 172, § 7, making defendant in certain cases a competent witness to prove usury, applies only where such defense is set up by plea, and not by answer, and is verified by affidavit.—Dudley v. Beck, 3 Wis. 274.

[x] (Wis. 1860) Under Rev. St. c. 137, a defendant in a suit on a note, pleading usury, may, after proper notice, testify in his own behalf as to what amount of the note was consideration, and that the rest was for forbearance, in addition to the interest reserved by the

terms of the note.—Moyer v. Gunn, 12 Wis. 385.

§ 510. —— Denial of usury.

[a] (Ala. 1832) Under the statute which makes defendant a competent witness to give evidence of usury, provided the person against whom he offers such evidence will not, on oath, deny the truth of what defendant offers to swear, if but a part be denied, the residue is admissible in evidence.—Faris v. King, 1 Stew. 255.

[b] (Ala. 1832) A borrower of money cannot give testimony of usury, if the person against whom such testimony is offered deny on oath the truth of what the witness offers to prove. In an action by the payee in a contract for the use of an assignee, it is not sufficient that the assignee make such denial.—Watkins v. Watkins, 2 Stew. 485.

[c] (Ala. 1846) When defendant was irregularly allowed to depose as a witness to the fact of usury, instead of making his statement, his evidence cannot be excluded because the opposite party denies a particular fact stated by him. Under such circumstances, the denial should extend to the fact of the usury.—Palmer v. Severance, 9 Ala. 751.

[d] (Ga. 1848) Under the statute, if plaintiff files his written affidavit in compliance with the terms of the statute, stating that the facts set forth in the plea are not true and that there was no usury in the contract on which the suit was brought, to his knowledge, defendant has not the right to read his own affidavit in support of his plea, but may cross-examine plaintiff. Defendant is only entitled to read his own affidavit in case plaintiff fails or refuses to make a disclosure, and not where plaintiff's affidavit is merely insufficient.—Persons v. Hight, 4 Ga. 475.

[e] (S. C. 1824) Defendant swore that the note sued on was passed to a third person at a usurious discount. That person, on oath, denied the usury. *Held*, that by the statute of usury defendant was an incompetent witness.—Wallis v. Nelson, Harp. 144.

[f] (S. C. 1825) Plaintiff having denied on oath the usury alleged by defendant, other witnesses cannot be sworn to contradict his oath; but they may prove circumstances whence usury may be inferred.—Fulmer v. Hays, 3 McCord, 256.

[g] (S. C. 1826) Where defendant, in a case of usury, offered to swear to the circumstances of usury, and made a statement of the facts he would swear to, and plaintiff makes himself a witness under the act of South Carolina, it is not enough that he denies generally the truth of the statement made by defendant. He must submit to be examined by defendant in answer to the facts stated by him.—Clifford v. Murden, 4 McCord, 65.

[h] (S. C. 1827) If a third person sue on a contract said to be usurious, and defendant offers to swear to the usury, the lender, under the act of South Carolina, may be examined under oath to deny the usury.—Harick v. Jones, 4 McCord, 402.

§ 511. —— Examination of adverse party.

[a] (Iowa, 1857) Where the defense pleaded was usury, and defendants required plaintiff to reply under oath as to the usury, *held*, that defendant's having thus made a witness of plaintiff did not change the meaning of the statute or the relations of the parties, so as to render defendant incompetent to testify as to the usury.—Bacon v. Lee, 4 Iowa (4 Clarke) 490.

[b] (N. Y. 1840) The act of 1837, giving defendant in a suit a right to call on plaintiff to prove usury in the subject of the suit, applies to a note executed and matured before the statute, as well as afterwards.—Peirson v. Smith, 1 Clarke, Ch. 228.

[c] (N. Y. 1841) The real holder and owner of a note, who brings a suit thereon in the name of a person having no interest in the note, may, under the statute, be compelled to testify to usury in the note, as if he were the real party.—Beggs v. Butler, 9 Paige, 226, reversing (1841) Clarke, Ch. 517.

[d] (N. Y. 1842) The notice of the defense of usury required by the act of 1837 must be interposed with the general plea, in order to secure plaintiff's examination.—Cloyes v. Thayer, 3 Hill, 564.

[e] (N. Y. 1842) In an action on a note by the indorsee, defendant gave notice in general terms that he would prove the note to have been given for money loaned on a usurious consideration. *Held*, that the notice was defective, and plaintiff was not obliged to testify.—Cloyes v. Thayer, 3 Hill, 564.

[f] (N. Y. 1843) Under Acts 1837, p. 486, defendant, pleading usury, may call the plaintiff in interest to a suit, though it is brought in the name of another.—Henry v. Bank of Salina, 5 Hill, 523, reversing Bank of Salina v. Henry (1841) 1 Hill, 555, and Stevens v. White (1843) 5 Hill, 548.

[g] (N. Y. 1843) An affidavit verifying a plea of usury filed, where defendant intends to call and examine plaintiff to prove the usury alleged, must state that it is true in substance and matter of fact; and stating that affiant verily believes it to be so is insufficient.—Kingsland v. Cowman, 5 Hill, 608.

[h] (N. Y. 1847) A defendant, sued on a note, set up usury as a defense in a notice which he verified according to the statute, and then called one C., not the plaintiff on the record, but who, he claimed, was the plaintiff in interest, by whom he offered to prove the usury. *Held*, that C. was not bound to testify, under the statute, until it was first proved that he was such plaintiff in interest.—Bank of Salina v. Henry, 2 Denio, 155, affirmed Henry v. Bank of Salina (1847) 1 N. Y. (1 Comst.) 83, 3 Denio, 593.

(e) INTEREST ARISING FROM STATUS OR RELATION OF PARTIES.

GUARDIAN AND WARD, § 512.
PRINCIPAL AND SURETY, § 513.
PARTNERS, § 514.
EXECUTORS OR ADMINISTRATORS, AND LEGATEES, DEVISEES, OR HEIRS, § 515.
PUBLIC OFFICERS, § 516.
MEMBER, STOCKHOLDER, OR OFFICER OF CORPORATION, § 517.
MEMBER OF RELIGIOUS SOCIETY, § 518.
INHABITANT OF MUNICIPALITY, § 519.
AGENT OR EMPLOYÉ, § 520.
HUSBAND OR WIFE, § 521.
WIDOW, § 522.

§ 512. Guardian and ward.

[a] (Ala.) Under Rev. Code, § 2704, a guardian, on a proceeding for final settlement of his accounts before the probate court, is a competent witness in his own behalf.—(1868) Brand v. Abbott, 42 Ala. 499; (1871) Bogia v. Darden, 45 Ala. 269.

[b] (La. 1869) A tutor is a competent witness to prove the correctness of his tutorship account, under Acts 1868, p. 269.—In re Tutorship of Scott, 21 La. Ann. 187.

[c] (N. Y. 1852) A guardian or next friend of an infant plaintiff, by whom he appeared to prosecute his suit, is not a competent witness for plaintiff under the Code, being a party to the record.—Hahn v. Van Doren, 1 E. D. Smith, 411.

[d] (N. C. 1893) Code, § 580, provides that no party to an action on a bond executed prior to August 1, 1868, shall be a competent witness in such action. Acts 1885, c. 361, allows defendants who are administrators or executors to testify in actions on such bonds where there is a reference to state an account. *Held*, that in an action on a guardian's bond given before August 1, 1868, where there is a reference for an accounting, the guardians are competent witnesses.—Coggins v. Flythe, 113 N. C. 102, 18 S. E. 96.

[e] (Pa. 1884) The statutes have not changed the common-law rule that a ward is not competent to testify against a guardian.—In re Bitner's Estate, 2 Chest. Co. Rep. 325.

§ 513. Principal and surety.

[a] (Ala. 1859) Under Code, § 2302, which removes all disability by reason of liability over for costs, a principal may testify for his surety, as the judgment is no evidence for or against him.—Rupert v. Elston's Ex'r, 35 Ala. 79.

[b] (Ky. 1859) In an action on a covenant, the surety is a competent witness for the principal, both of whom are sued, to sustain the defense set up by the principal that he was to be bound only on condition that another would execute it, which had not been done.—Millett v. Parker, 59 Ky. (2 Metc.) 608.

[c] (Mo. 1853) Under the act concerning boats and vessels, the security in a forthcoming bond is a competent witness for the boat.—Bates v. The Madison, 18 Mo. 99.

[d] (N. Y. 1851) In a suit against three obligors on a joint and several bond, one of whom is the principal and the others sureties, each of the defendants is, under the Code of Procedure, a competent witness for each and all of his codefendants.—City of New York v. Price, 6 N. Y. Super. Ct. (4 Sandf.) 616, 1 Code R. (N. S.) 85.

[e] (N. Y. 1858) The surety on an administration bond is not competent under the Code and its amendments.—Willcox v. Smith, 26 Barb. 316.

§ 514. Partners.

[a] Under a statute rendering parties and interested persons competent as witnesses, a partner is a competent witness as to the members constituting the firm; his interest affecting only his credibility.

—(N. Y. 1892) Mason v. Hinds (Super. Buff.) 19 N. Y. Supp. 996;
(Wis. 1886) First Nat. Bank v. Conway, 67 Wis. 210, 30 N. W. 215.

[b] (Ill. 1866) Under the statute of 1861 a party may be called without his own consent and against his own interest; but if he would have been disqualified on the ground of interest by the common law, had he not been a party to the record, the fact that he is a party cannot be considered as restoring that competency. So *held* where the witness had made an arrangement with his partners to shift upon them his liability for the debt at issue.—Brown v. Hurd, 41 Ill. 121.

[c] (Ill. 1867) A codefendant, sued as a partner and suffering default, is disqualified by interest from being a witness, as against his codefendant, to prove the partnership; and he is not made competent by the act of 1861, allowing the parties to testify in certain cases.—Alexander v. Crosthwaite, 44 Ill. 359.

[d] (Iowa, 1860) A plaintiff in chancery is entitled to the testimony of one or all of his adversaries, where they occupy the relation of partners.—Williamson v. Haycock, 11 Iowa, 40.

[e] (Iowa, 1860) One partner of a defendant firm may be called upon by his adversary, under Code 1851, § 2390, to establish his own liability and his membership in the firm.—Holmes v. Budd, 11 Iowa, 186.

[f] (Mo. 1854) A party suing may, by Code, art. 24, § 11, use as a witness the former partner of defendant, who confesses the action.—Robinson v. McFaul, 19 Mo. 549.

[g] (N. H. 1859) Since the disqualification of interest has been removed, so that parties to suits can testify, one partner may be a witness to prove the existence of the partnership, whether he be a party to the suit or not.—Rich v. Flanders, 39 N. H. 304.

§ 515. Executors or administrators, and legatees, devisees, or heirs.

[a] (D. C. 1888) Rev. St. § 876, provides that all persons interested in suits shall be competent to testify therein, except that in actions by or against executors, etc., in which judgment may be rendered for or against them, neither party shall testify. *Held*, that when executors have settled their estate, but retain control thereof as executorial trustees, in a suit against them as such trustees, they are competent to testify in their own behalf.—Droop v. Metzerott, 7 Mackey, 89.

[b] (Ga. 1867) The sole legatee thereunder propounded a paper as the nuncupative will of his testatrix, which was caveated by her next of kin. *Held*, that the cause of action was the factum of the will, that the parties were the propounder and the caveators, and that they were competent witnesses in behalf of their respective interests.—Brown v. Carroll, 36 Ga. 568.

[c] (Ind. 1854) 2 Rev. St. 1852, p. 261, § 66, gives the court the discretion, in making the allowance of claims against estates, to examine the claimant on oath; but this section does not apply to regularly instituted suits at law, and in the latter case the administrator is not a competent witness.—Hodson v. Macy, 5 Ind. 500.

[d] (Ind. 1857) By 2 Rev. St. p. 261, § 66, an administrator is a competent witness in regard to any claim against the estate of the deceased, though not called by the claimant.—Littler v. Smiley, 9 Ind. 116.

[e] (Me. 1858) In a suit brought by an administrator of an estate, one interested therein as an heir is a competent witness, by the provisions of the statute admitting parties and persons interested to testify.—Gunnison v. Lane, 45 Me. 165.

[f] (Mo. 1854) By the new practice act, the distributee of a solvent estate cannot be a witness for the estate.—Penn's Adm'r v. Watson, 20 Mo. 13.

[g] (Mo. 1854) The distributee of a solvent estate may, under the new practice act, be a witness for the estate.—Stein v. Weidman's Adm'r, 20 Mo. 17.

[h] (N. Y. 1850) One of several executors is not a competent witness in behalf of his coexecutors, under the Code, in an action brought against the executors for a claim against the estate of their testator.—Fort v. Gooding, 9 Barb. 371.

[i] (N. Y. 1855) In a suit by an executor to recover a debt due his testator, a residuary legatee of the testator is a competent witness under Code, § 398.—Freeman v. Spalding, 12 N. Y. (2 Kern.) 373.

[j] (N. Y. 1855) An assignment of his interest in the estate, made after objection has been taken to his competency, makes him a competent witness at common law, and does not operate to exclude him under Code, § 399.—Freeman v. Spalding, 12 N. Y. (2 Kern.) 373.

[k] (N. Y. 1855) The son of a deceased mortgagee is not a person for whose immediate benefit (within the meaning of Code, § 399) an ac-

tion by his administrator to foreclose is prosecuted, and is therefore a competent witness.—Butler v. Patterson, 13 N. Y. (3 Kern.) 292.

[l] (N. Y. 1858) Neither the Code nor its amendments applying to proceedings by executors and administrators on settlement of their accounts, their admissibility as witnesses for each other is determined by the law, irrespective of the Code. They are prima facie liable for the entire amount of the personal property; and where they are in fact jointly liable for any considerable portion thereof, and are called and testify in favor of their own interests, they are incompetent.—Willcox v. Smith, 26 Barb. 316.

[m] (N. C. 1861) Under Rev. Code, c. 119, § 9, providing that no person, on account of being an executor of a will, shall be incompetent as a witness to prove its execution or validity, one named as executor in a script propounded as a will, though named as plaintiff in an issue devisavit vel non, may be examined as a witness for the caveator, as well as for the propounder.—Pannell v. Scoggin, 53 N. C. 408.

[n] (Ohio, 1853) The heir is a competent witness for the administrator, under the act to improve the law of evidence, in a suit brought by the latter to recover a debt due the estate.—Butt v. Butt's Adm'r, 1 Ohio St. 222.

[o] (Pa. 1872) After ejectment against husband and wife for land alleged to have been fraudulently conveyed to her by the husband, he died, and his heir was substituted as a party. *Held*, that under the act of 1869, permitting a party to the record, who claims no interest, to testify, the heir was a competent witness for defendants.—Williams v. Davis, 69 Pa. (19 P. F. Smith) 21.

[p] (Pa. 1876) On a feigned issue to test the validity of a will, in which C. is given a legacy, he is a competent witness to prove the execution thereof, under Act 1869, declaring that "no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding."—Frew v. Clarke, 80 Pa. (30 P. F. Smith) 170.

[q] (Tex. 1853) Though an administrator is made by statute a competent witness as to facts which occurred before his qualification, yet this provision does not apply where he is also a distributee.—Miller v. Thatcher, 9 Tex. 482, 60 Am. Dec. 172.

[r] (Tex. 1894) The proponents of a will are competent witnesses in their own behalf under Rev. St. art. 2246, providing that no person shall be incompetent to testify because he is a party to or interested in a "suit or proceeding."—Martin v. McAdams, 87 Tex. 225, 27 S. W. 255.

[s] (Tex. 1895) Legatees under a will are not disqualified by interest to testify to the fact of its execution, where they were not subscribing witnesses.—Gamble v. Butchee, 87 Tex. 643, 30 S. W. 861.

§ 516. Public officers.

[a] (Ala. 1860) Under Code, § 2302, the commissioner for partition, by whom the land was sold, is a competent witness for plaintiff in an action brought by the owners of the land to recover damages for the refusal of the purchaser to comply with the terms of sale.—Hutton v. Williams, 35 Ala. 503, 76 Am. Dec. 297.

[b] (Me. 1838) Where officers, by reason of their office, have an interest in certain cases, and they are by statute rendered competent, notwithstanding, to testify in such cases, they are not thereby prevented from becoming incompetent by the assumption of interest not imposed by their official situations.—Bean v. Lane, 15 Me. (3 Shep.) 190.

[c] (Pa. 1868) Under Act April 16, 1840, § 6, providing that no person shall be excluded from being a witness in any proceeding against a county, city, etc., because such person is a citizen thereof, or owns taxable property therein, etc., a county commissioner is a competent witness in a suit in which the county is a party, although he might thus discharge himself from personal liability.—Cannell v. Crawford, 59 Pa. (9 P. F. Smith) 196.

§ 517. Member, stockholder, or officer of corporation.

[a] (Cal. 1860) The fact that stock was held in the name of one offered as a witness in trust for another, the transfer having been made simply to enable him to become an officer of the company, does not relieve him from responsibility, since the trust is implied, and the corporation act of 1853 as to the competency of witnesses applies only to trustees of an express trust.—Wolf v. St. Louis Independent Water R. Co., 15 Cal. 319.

[b] (Ky. 1855) By Civ. Code, § 675, an officer or inhabitant of a county, city, or town, or an officer, member, or trustee of a corporation or religious society, although a party to the action, is made competent to testify in behalf of such county, city, town, corporation, or religious society. *Held*, that this section applies to incorporated railroad companies.—Covington & L. R. Co. v. Ingles, 54 Ky. (15 B. Mon.) 637.

[c] (Ky. 1856) As Civ. Code, § 675, expressly capacitates members of a corporation to be witnesses in its behalf, members of an incorporated road company were competent witnesses for the company in a suit involving the validity of certain subscriptions for stock.—Lackey v. Richmond & L. Turnpike Road Co., 56 Ky. (17 B. Mon.) 48.

[d] (Me. 1837) A stockholder of a toll bridge corporation is incompetent to testify in behalf of that corporation on the ground of interest. Such case is not within Rev. St. c. 87, providing "for admitting inhabitants of towns and certain other corporations as witnesses."—Watson v. Lisbon Bridge, 14 Me. (2 Shep.) 201, 31 Am. Dec. 49.

[e] (Me. 1855) The stockholders in a corporation are competent witnesses, in actions by or against the corporation, under St. 1855, c. 181.—Penobscot & K. R. Co. v. Dunn, 39 Me. 587.

[f] (Mass. 1839) Rev. St. c. 94, § 54, providing that where "any county, city, town, district, or precinct, or any parish, or any incorporated or legally organized religious society, or any school district, or any incorporated mutual fire insurance company," shall be in its corporate capacity a party to a suit, any member of such corporation may be admitted on the trial as a witness, applies to the members of corporations of the same nature created by the authority of other states.—First Baptist Church in Bristol v. Slade, 40 Mass. (23 Pick.) 160.

[g] (Mass. 1839) Though Rev. St. c. 94, § 54, providing that where a mutual insurance company, etc., is a party to a suit any member shall be competent as a witness, applies to foreign corporations, the court will look into the character of such corporation to see that it is of the class contemplated by the statute, not merely in name, but in substance.—First Baptist Church in Bristol v. Slade, 40 Mass. (23 Pick.) 160.

[h] (Mo. 1879) A condition on the back of a policy of mutual insurance that, in case of suits by or against the company, a member thereof shall be a competent witness, except in suits in which he shall be directly a party, will not be interpreted as an agreement by the insured that he should not be competent as a witness in a case where he is competent under the general law of the state.—Lay v. Home Mut. Fire & Marine Ins. Co., 7 Mo. App. 566.

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[i] (N. H. 1851) Railroad corporations are not public corporations within the meaning of the Revised Statutes, which provide that members of such corporations may be witnesses for them.—Dearborn v. Boston, C. & M. R. R., 24 N. H. (4 Fost.) 179.

[j] (N. Y. 1849) Code, § 351, provides that no person shall be excluded from testifying by reason of his interest in the event of the action, and section 352 provides that this shall not apply to a party to the action, "nor to any person for whose immediate benefit it is prosecuted or defended." *Held*, that the president of a bank, who was also a stockholder, was a person for whose benefit an action by it was prosecuted, and could not be a witness for the bank in an action by it.—Bank of Ithaca v. Bean, 1 Code Rep. 133.

[k] (N. Y. 1850) Code, §§ 398, 399, making a party to an action and interested in the event thereof incompetent to testify therein, does not prohibit a stockholder from testifying in a suit to which the corporation is a party.—Washington Bank v. Palmer, 4 N. Y. Super. Ct. (2 Sandf.) 686.

[l] (N. Y. 1851) A corporator is not a party for whose immediate benefit the suit is brought, under Code, § 396.—Montgomery County Bank v. Marsh, 11 Barb. 645.

[m] (N. Y. 1851) A stockholder of a bank is a competent witness for the bank, under Code, § 396.—Montgomery County Bank v. Marsh, 11 Barb. 645, affirmed (1852) 7 N. Y. (3 Seld.) 481.

[n] (Ohio, 1852) In an action against a money corporation, the defense is not made for "the immediate benefit" of a stockholder, and he is therefore, under Curw. St. c. 975, a competent witness for the corporation.—Little Miami R. Co. v. Martin, 1 Ohio Dec. 440.

[o] (Ohio, 1853) The statute of March, 1850, enacts that no person offered as a witness shall be excluded by reason of his interest in the event of the action; but this shall not apply to any party to the action, nor to any party for whose immediate benefit such action is prosecuted or defended. *Held*, that a stockholder in a corporation, a party to the suit, is a competent witness.—Lawson v. Farmers' Bank of Salem, 1 Ohio St. 206.

§ 518. Member of religious society.

[a] (Mass. 1842) Where persons formed themselves into an association for religious purposes without any lay organization, but solely under the advice and direction of the ministers and elders of their denomination, they constituted a religious society, and were entitled to the privileges of Rev. St. c. 94, § 54, providing that, where a legally organized religious society shall be in their corporate capacity parties to or interested in any suit, any members of such corporation may be admitted as competent witnesses, providing no other objection than that of membership exists.—Christian Soc. in Plymouth v. Macomber, 46 Mass. (5 Metc.) 155.

§ 519. Inhabitant of municipality.

[a] (Mass. 1825) In an action of trespass by a grantee of a town of a portion of its sea flats against one of the inhabitants for taking clams from a bed claimed by plaintiff to be included in his grant, an inhabitant of the town is not rendered a competent witness by St. 1792, c. 32, making inhabitants of a town which is a party to or interested in an action competent witnesses therein.—Lufkin v. Haskell, 20 Mass. (3 Pick.) 356.

[b] (Mass. 1829) Under St. 1792, c. 32, which provides that in suits wherein the town is a party or interested any inhabitant may be admitted as a competent witness, provided he has no other interest therein than as an inhabitant of the town, an inhabitant is not competent as a witness to prove a way for all the inhabitants by prescription.—Odiorne v. Wade, 25 Mass. (8 Pick.) 518.

[c] (Mass. 1839) A proceeding in a court of probate seeking the proof and allowance of a will is a suit at law, within the meaning of St. 1792, c. 32, providing that in all suits at law wherein any parish, etc., is a party or interested, any inhabitant shall be a competent witness, provided he has no other interest.—Haven v. Hilliard, 40 Mass. (23 Pick.) 10.

[d] (Pa. 1824) In an action on a promise by the defendants to support a person who afterwards became a pauper and was maintained by the directors of the poor, a taxable and taxed inhabitant was a competent witness for plaintiffs, under Act March 27, 1823, § 10.—Thornbury v. Directors of Poor of House and Employment of Adams County, 12 Serg. & R. 110.

§ 520. Agent or employé.

[a] (Ill. 1869) Under Act 1867, a cashier or bookkeeper of a bank, who has answered in garnishment therefor, is competent in behalf of the creditor, even to disprove the previous answers.—Young v. First Nat. Bank of Cairo, 51 Ill. 73.

[b] (Ill. 1869) Under Act 1867, an employé of a railroad company is a competent witness in its behalf in an action against the company to recover damages for a death caused by his alleged negligence.—Illinois Cent. R. Co. v. Weldon, 52 Ill. 290.

[c] (N. Y. 1851) By the provisions of the Code an agent is a competent witness against his principal, though the effect of his evidence should be to discharge himself and charge his principal.—Fenly v. Stewart, 7 N. Y. Super. Ct. (5 Sandf.) 101.

[d] (Tenn. 1879) The statute of 1869, allowing interested witnesses to testify, repeals the provision of Code, § 1169, rendering a railroad employé an incompetent witness to prove that an accident was unavoidable.—Grable v. Louisville & N. R. Co., 70 Tenn. (2 Lea) 246.

§ 521. Husband or wife.

[a] (Ala. 1874) Under the statutes abolishing the common-law rule as to the incompetency of witnesses on the ground of interest (Rev. Code, §§ 2704, 2731), the husband is a competent witness for the wife's trustee, claiming a note under a transfer by the husband, in a contest with an attaching creditor of the husband.—Rowland v. Plummer, 50 Ala. 182.

[b] (Ill. 1882) In an action against a corporation on a contract, the wife of the agent of the corporation, who was a stockholder, and with whom the contract sued on was made, was offered as a witness by defendant to testify in corroboration of her husband. *Held*, that she was a competent witness, the statute removing the common-law disqualification for "interest as a party or otherwise."—Lincoln Avenue & N. O. Gravel Road Co. v. Madaus, 102 Ill. 417.

[c] (Me. 1867) Rev. St. c. 82, § 79, providing that parties shall not be witnesses in suits where the cause of action implies an offense against the criminal law on the part of the defendant, unless the defendant first offers himself as a witness, was repealed by Pub. Laws 1864, c. 272. Therefore plaintiff's wife was a competent witness for him at a trial in 1867 of an action of trespass quare clausum fregit, by virtue of Pub. Laws 1859, c. 102, providing that in civil actions the husband and wife of either party shall be deemed competent, when the wife is called with the consent of the husband, or the husband called with the consent of the wife.—Bucknam v. Perkins, 55 Me. 490.

[d] (Mo. 1855) In an action in the nature of trover for the value of property against the special bailee of A., the wife of A. is a competent witness, even if A. is directly interested in the suit; the practice act of 1849 having removed the incompetency of a witness on the ground of interest.—Funk v. Dillon, 21 Mo. 294.

[e] (S. C. 1841) The husband of a "feme sole trader" is a competent witness to prove usury, under the act of 1777.—Gaillard v. Le Seigneur, 1 McMul. 225.

§ 522. Widow.

[a] (Ill. 1885) Where a widow is called to testify, not on behalf of her deceased husband, but in her own interest and that of his children and heirs, she is a competent witness as to all matters coming to her knowledge through sources other than communications of her husband, under Rev. St. 1874, p. 488, c. 51, removing the disability on account of her interest.—Powell v. Powell, 114 Ill. 329, 2 N. E. 162.

[b] (Mo. 1852) Under the new Code, which provides that an interest in the event of the suit shall not disqualify a witness, a widow is a competent witness in favor of the estate of her deceased husband.—Scroggin v. Holland, 16 Mo. 419.

[c] (N. Y. 1852) In a suit by an administrator to recover a debt due to the estate, the widow is a competent witness; the suit not being for her "immediate benefit," within the meaning of the Code.—Megary v. Funtis, 7 N. Y. Super. Ct. (5 Sand.) 376.

[d] (N. C. 1891) Under Code, § 589, which removes disqualifications on account of interest, the widow of deceased was competent to prove that the will was found after his death among his valuable papers, even though she was therein named as a legatee and devisee.—Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78.

(f) CRIMINAL PROSECUTIONS AND PENAL ACTIONS.

CRIMINAL PROSECUTIONS, § 523.
—— EFFECT OF GENERAL STATUTES, § 524.
—— PERSONS JOINTLY INDICTED IN GENERAL, § 525.
—— SEPARATE TRIALS, § 526.
—— CONSPIRACY, § 527.
—— HUSBAND AND WIFE, § 528.
PROCEEDINGS FOR RECOVERY OF FINES AND PENALTIES, § 529.

§ 523. Criminal prosecutions.

[a] (U. S. 1875) Under Rev. St. § 5132, a bankrupt is not a competent witness in a criminal proceeding against him.—United States v. Black, Fed. Cas. No. 14,602 [1 Hask. 570].

[b] (U. S. 1882) The laws of the United States permit a person charged with crime or misdemeanor to be a witness in his own behalf, and such weight is to be given to his testimony as, under all the circumstances, it is fairly entitled to.—United States v. Houghton (D. C.) 14 Fed. 544.

[c] (U. S. 1886) Defendant in a prosecution for sending obscene matter through the mails is a competent witness, and his testimony is to be received on the same basis and under the same rules as that of any other witness.—United States v. Bebout (D. C.) 28 Fed. 522.

[d] (Fla. 1876) Act 1870, entitled "An act concerning testimony," giving the accused in all criminal prosecutions the right to make a statement under oath before the jury of the matter of his or her defense, does not make him a witness in the case, nor subject him to the rules governing in the examination of witnesses. His statement, when so made, is for the jury alone, and is entitled only to such weight as they may see fit to give it.—Miller v. State, 15 Fla. 577.

[e] (Fla. 1892) A statement by accused of his defense, made under Rev. St. § 2908, allowing accused to make a statement to the jury under oath of his defense, is to be regarded as entirely voluntary, unless there is proof of circumstances refuting such presumption.—Ortiz v. State, 30 Fla. 256, 11 South. 611.

[f] (Ind. 1861) 2 Rev. St. 1852, § 90, p. 373, which provides that all persons competent to testify in civil actions shall also be competent in criminal cases, was intended to adopt the then existing laws on the competency of witnesses in civil suits; and Acts 1861, p. 51, admitting parties to testify in civil actions, does not apply to witnesses in criminal cases, and therefore they are not competent to testify in their own behalf.—Hoagland v. State, 17 Ind. 488.

[g] (Ind. 1875) Under Laws 1873, c. 228, permitting defendant, at his option, to testify in his own behalf, defendant should be allowed to testify, and his counsel to interrogate him, as in case of other witnesses, and it is error for the court to deny him the right to be questioned by his counsel.—Clark v. State, 50 Ind. 514.

[h] (Mass. 1881) The legal competency of an accused as a witness is not affected by the fact that he does not offer himself as such.—Commonwealth v. Moran, 130 Mass. 281.

[i] (Mass. 1890) Under Pub. St. c. 169, § 18, an accused is a competent witness for all purposes, if he sees fit to testify, whether to exonerate himself or to give evidence implicating a codefendant, and may properly be allowed to be examined by his own counsel.—Commonwealth v. Mullen, 150 Mass. 394, 23 N. E. 51.

[j] (Mich. 1861) Under Acts 1861, No. 125, removing the disability of parties to testify, and providing that nothing in that act shall give the right to compel defendant in a criminal case to testify, but such defendant may make a statement to the court or jury, a defendant has no right to testify in his own behalf.—People v. Thomas, 9 Mich. 314.

[k] (Mo. 1881) Defendant in a criminal case is a competent witness for himself, and his status when on the witness stand is the same as that of a party to a civil suit who becomes a witness for himself.—State v. Banks, 73 Mo. 592.

[l] (Mo. 1888) The accused, being competent under the statutes to testify in his own behalf, is competent to testify on a preliminary examination.—State v. Kinder, 96 Mo. 548, 10 S. W. 77.

[m] (Pa. 1874) Under Act April 3, 1872 (P. L. 34; 1 Purd. Dig. p. 625, pl. 21), providing that, on the trial for offenses not above misdemeanors, defendant is a competent witness, defendant was not competent where a felony and misdemeanor were joined in the same indictment.—Commonwealth v. Ceary, 2 Leg. Chron. 156.

[n] (Tex. 1889) Act April 4, 1889, permitting defendants to testify in their own behalf, contained an emergency clause, but, failing of the essential two-thirds vote on the passage of the act, the emergency clause did not become operative, and the act did not take effect until 90 days after the adjournment of the legislature. *Held*, that it was not error to refuse to permit defendant to testify in his own behalf, on a trial occurring before the 90 days had expired.—Giebel v. State, 28 Tex. App. 151, 12 S. W. 591.

[o] (W. Va. 1890) Under a statute permitting a defendant in a criminal case to testify in his own behalf, he is a competent witness in a case of homicide to testify to the state of his own feelings when the fatal act was committed.—State v. Evans, 33 W. Va. 417, 10 S. E. 792.

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[p] (Wis. 1865) Under Laws 1861, c. 274, a defendant, indicted for an assault with intent to murder, is not entitled to testify on his own behalf. That chapter relates to criminal trials where the only charge against defendant is assault or assault and battery.—State v. Felner, 19 Wis. 561.

§ 524. —— Effect of general statutes.

[a] (Iowa, 1874) Code 1873, §§ 3636, 4426, 4556, regulating the application of the rules of evidence, render a person indicted for a criminal offense incompetent as a witness in his own behalf.—State v. Laffer, 38 Iowa, 422.

[b] (N. H. 1859) On a trial for selling one pint of spirituous liquor, defendant cannot be permitted to testify under the provisions of Act June 27, 1857, c. 1952, and of Amendatory Act June 25, 1858, c. 2090, allowing parties to testify in pending civil cases.—State v. Connell, 38 N. H. 81.

[c] (N. H. 1859) Act June 25, 1858, amending Act June 27, 1857, and allowing parties to be witnesses in pending civil actions, does not extend the former act, so as to allow parties to testify in criminal proceedings.—State v. Flanders, 38 N. H. 324.

[d] (N. Y. 1850) Either of two defendants charged with a joint offense cannot be a witness for each other, notwithstanding Code, § 397, providing that a party may be examined on behalf of his coplaintiff or a codefendant, but that the examination shall not be used on behalf of the party examined.—Munson v. Hagerman, 5 How. Prac. 223, reversed Same v. Hegeman (1853) Seld. Notes, 63.

[e] (N. Y.) Code, § 399, allowing parties to testify in behalf of those joined with them, applies only to civil actions.—(1865) Williams v. People, 45 Barb. 201; (1866) Patterson v. People, 46 Barb. 625; (1866) Williams v. People, 33 N. Y. 688.

[f] (N. Y. 1866) The relaxation of the common-law rule as to parties testifying for themselves does not apply to criminal cases.—Patterson v. People, 46 Barb. 625.

§ 525. —— Persons jointly indicted in general.

[a] (Ala. 1885) Under Sess. Acts 1884–85, p. 139, providing that, in criminal cases, the defendant at his own request, but not otherwise, shall be a competent witness, where several persons are jointly indicted and tried, those who elect to testify may be examined on behalf of one who did not so elect.—Harris v. State, 78 Ala. 482.

[b] (Fla. 1893) Rev. St. § 2908, which provides that in all criminal prosecutions the accused shall have the right of making a statement to the jury under oath of the matter of his or her defense, does not allow one of two defendants, jointly indicted for murder, to be sworn as a witness in behalf of the other before the case has been disposed of as to the former.—Ballard v. State, 31 Fla. 266, 12 South. 865.

[c] (Ill. 1885) Under 1 Starr & C. Ann. St. c. 38, div. 13, par. 486, § 6, providing that no person shall be disqualified as a witness in a criminal case by reason of his interest as a party or otherwise, one of two codefendants to the same indictment may take the stand in his own behalf; and his evidence may be considered by the jury as against his codefendants.—Smith v. People, 115 Ill. 17, 3 N. E. 733.

[d] (Ind. 1858) Under the statute, parties electing a joint trial cannot testify for each other unless discharged by the court.—Lemasters v. State, 10 Ind. 391.

[e] (Iowa, 1867) Under Rev. St. §§ 2388, 3978–3980, removing the bar of interest, each of two or more defendants jointly indicted and tried may call upon and use his codefendant as a witness.—State v. Gigher, 23 Iowa, 318.

[f] (Iowa, 1879) Where several are on trial for "unlawful assembly," it is competent for one defendant to testify on behalf of a codefendant as to the action and conduct of such codefendant; the jury being cautioned that the witness shall not receive the benefit of his own testimony.—State v. Stewart, 51 Iowa, 312, 1 N. W. 646.

[g] (Mass. 1881) Where one of two defendants jointly indicted offers himself as a witness, his testimony is competent, under St. 1870, c. 393, § 1, cl. 3, for and against the other defendant, as well as himself.—Commonwealth v. Brown, 130 Mass. 279.

[h] (N. C.) Under the statute a defendant is competent and may be compelled to testify in favor of a codefendant if his testimony does not criminate himself.—(1868) State v. Rose, 61 N. C. 406; (1882) Same v. Smith, 86 N. C. 705.

[i] (Or. 1884) Sess. Laws 1880, p. 28, amending Cr. Code, § 166, and providing that defendant may at his own request be a competent witness, does not make codefendants competent witnesses, either for or against defendant.—State v. Drake, 11 Or. 396, 4 Pac. 1204.

[j] (S. C. 1892) Even if Gen. St. § 2643, providing that in criminal cases the defendant may, if he chooses, testify as to the facts of the case, makes a defendant who is infamous competent in his own behalf, it does not make him competent as against a codefendant.—State v. Peterson, 35 S. C. 279, 14 S. E. 617.

[k] (Tenn. 1892) The statute conferring the right on a defendant in a criminal prosecution to testify "for himself" does not imply that he may not testify for or against a codefendant, but evidence in his own favor is admissible, regardless of its effect on the other.—Richards v. State, 91 Tenn. (7 Pickle) 723, 20 S. W. 533, 30 Am. St. Rep. 907.

§ 526. —— Separate trials.

[a] (Ark. 1885) Act of 1885 makes a defendant on trial for a criminal offense a competent witness in his own behalf. *Held*, that this does not authorize his codefendant in the same indictment, but not on trial, to testify for him.—Foster v. State, 45 Ark. 328.

[b] (Ind. 1889) Under Rev. St. § 1798, providing that accomplices, when they consent to testify, are competent witnesses, one jointly indicted with another is properly permitted to testify for the state on the trial of the latter.—Conway v. State, 118 Ind. 482, 21 N. E. 285.

[c] (Iowa, 1859) By the provisions of Const. 1857, art. 1, § 4, and Code 1857, § 2388, the common-law rule that one defendant in an indictment cannot be called as a witness for a codefendant, unless acquitted or convicted, but not rendered infamous, and this even although they are tried separately, has been repealed.—State v. Nash, 10 Iowa, 81.

[d] (Me. 1884) When by statute, an indicted person may testify on his own behalf on the trial of the indictment, one of two jointly indicted may testify against his codefendant on his separate trial, although the indictment against himself is still pending and he has pleaded not guilty.—State v. Barrows, 76 Me. 401, 49 Am. Rep. 629.

[e] (Mich. 1885) How. Ann. St. § 7544, provides that "no person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same as a party, or otherwise: * * * provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness." *Held*, that persons jointly charged with the defendant on trial, but who are not then on trial, and have not yet been tried, are not competent witnesses

when sworn at the request of the defendant on trial, in the absence of any request of record made by themselves.—People v. Van Alstine, 57 Mich. 69, 23 N. W. 594.

[f] (Minn.) Under Rev. St. p. 20, § 93, allowing parties and others to be witnesses in derogation of the common law, and providing that "no defendant in a criminal action or proceeding shall be a witness therein for himself," one defendant is not competent as a witness on behalf of a codefendant until after discharge or judgment against the defendant whose testimony is offered, whether such defendants be tried together or separately, and the rule is the same whether the offense charged be a simple assault or a graver crime.—(1854) Baker v. United States, 1 Minn. 207 (Gil. 181); (1860) State v. Dumphey, 4 Minn. 438 (Gil. 340).

[g] (Minn. 1869) A statutory provision, such as Gen. St. c. 73, § 7, that no person defendant in a criminal action, except at his own request, shall be a competent witness, does not apply to a defendant not on trial so as to except him from the general rule of competency.—State v. Dee, 14 Minn. 35 (Gil. 27).

[h] (Minn. 1890) Under Gen. St. 1866, c. 73, § 7, as amended in 1868, one defendant is competent to become a witness for or against his codefendants, although he has not been convicted, acquitted, or discharged; and on a trial of one defendant under a joint indictment against two, his codefendant may offer himself as a witness and testify on behalf of the state.—State v. Thaden, 43 Minn. 325, 45 N. W. 614.

[i] (Miss. 1883) The provision of Code, § 3071, that, on a separate trial of parties jointly indicted, the one not on trial shall, in all cases, be a competent witness for the one being tried, does not destroy the common-law competency of such witnesses to testify against each other.—Evans v. State, 61 Miss. 157.

[j] (Mo. 1887) Under Rev. St. 1879, § 1918, which provides that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination; * * * provided, that no person on trial or examination * * * shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a codefendant," it is error to refuse to permit the codefendants of the accused, jointly indicted with him, but not put on trial, to testify in his behalf.—State v. Ohyo Chiagk, 92 Mo. 395, 4 S. W. 704.

[k] (Mo. 1888) Under Rev. St. § 1918, providing that no person on trial shall for that reason be incompetent, but such person may testify in his own behalf or in the behalf of a codefendant, a defendant, on a separate trial, may call as a witness his codefendant, who is not on trial.—State v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

[l] (S. D. 1896) Under Comp. Laws, § 7381, providing that in criminal proceedings the person charged shall, at his own request, be a competent witness, a codefendant is competent as a witness, in a trial for robbery, against a defendant who has asked for a separate trial, although such codefendant has not been discharged, under section 7379, providing that, when two or more persons are included in an indictment, one of them may, on application of the district attorney, be discharged, in order that he may be a witness for the state.—State v. Smith, 8 S. D. 547, 67 N. W. 619.

[m] (Wash. 1891) Code, § 1092, providing that the court, in a "prosecution" against several, may direct any defendant to be discharged that he may be a witness for the state, allows one indicted with the prisoner, but not on trial with him, to be a witness, while still under indictment.—Edwards v. State, 2 Wash. St. 291, 26 Pac. 258.

§ 527. —— Conspiracy.

[a] (Ky. 1877) The provision of Cr. Code, § 234, that persons jointly indicted shall be competent witnesses for each other, unless the indictment charges a conspiracy between them, should be construed as meaning a charge warranted by the proof; and the court should not exclude a joint defendant from testifying for a codefendant, unless there is reasonable evidence establishing the charge of conspiracy.—Christian v. Commonwealth, 76 Ky. (13 Bush) 264.

[b] (Ky. 1882) Under Cr. Code, § 234, providing that persons jointly indicted may be competent as witnesses for each other, unless the indictment charges a conspiracy, an indictment against two persons jointly, alleging that they "did conspire together, and willfully, unlawfully, and feloniously, with malice aforethought, kill and murder," etc., does not contain such a sufficient charge of conspiracy as to prevent defendants being witnesses for each other; the object of the conspiracy not being alleged.—Mathis v. Commonwealth, 4 Ky. Law Rep. 53.

[c] (Ky. 1882) Under Cr. Code, § 234, providing that persons jointly indicted may be competent as witnesses for each other, unless the indictment charged a conspiracy, the indictment must be a good indictment for conspiracy at common law.—Mathis v. Commonwealth, 4 Ky. Law Rep. 53.

[d] (Ky. 1883) Although an indictment charges a conspiracy between two or more persons jointly indicted, they are competent witnesses for each other, unless there is such evidence as, in the opinion of the court, establishes with reasonable certainty the existence of the alleged conspiracy.—Galloway v. Commonwealth, 4 Ky. Law Rep. 720.

[e] (Ky. 1883) The determination of the question whether there is such proof of conspiracy as will prevent two defendants, jointly indicted, from being witnesses for each other, must of necessity be left, to some extent, to the discretion of the judge who presides at the trial, and where the testimony of two of the principal witnesses for the defense is impeached, and they are shown to have made statements contradictory in important particulars to those made on the trial, the finding of the trial court that a conspiracy existed will not be disturbed on appeal.—Galloway v. Commonwealth, 5 Ky. Law Rep. 213.

[f] (Ky. 1883) In determining whether there is such proof of conspiracy as will prevent two defendants, jointly indicted, from being witnesses for each other, consideration should not be given to the evidence of the commonwealth alone, but should extend to that introduced by the defense as well.—Galloway v. Commonwealth, 5 Ky. Law Rep. 213.

[g] (Ky. 1883) On the trial of an indictment for conspiracy to commit murder, it appeared that defendants went together to the house of deceased, in a drunken condition, armed with pistols and knives, and with an evident design to break up a party that was in progress; that one of the defendants took one of the party aside as soon as they reached the house, and told him they were going to "raise hell" there; that they proceeded to effect such purpose by cursing, displaying knives, and threatening those present, and that deceased was finally shot by one of them while standing in his doorway and entreating them to behave themselves. *Held*, that there was such proof of conspiracy as to justify the refusal to allow defendants to become witnesses for one another.—Cummins v. Commonwealth, 6 Ky. Law Rep. 32.

[h] (Ky. 1885) In a murder trial it appeared that defendants were in their store at the time

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of the killing, and that deceased was shot while approaching the store in such a way as to make defendants think that he intended to kill or do great bodily harm to one of them, whom he had frequently threatened and once before attacked. Defendants had shut themselves in the store some hours before, and had there remained in fear of deceased, who was an overbearing and dangerous man. *Held*, that where it appeared that there was no difference between deceased and one of defendants, and there was no evidence that such defendant had anything to do with the killing, the fact that both defendants were in their store together at the time deceased was shot was not proof of a conspiracy between them to kill deceased, and, though charged with such conspiracy, they should be permitted to testify for each other on the trial.—Sparks v. Commonwealth, 89 Ky. 644, 20 S. W. 167.

[i] (Ky. 1886) Under Act May 1, 1886, entitled "An act to permit defendants, in penal and criminal prosecutions to testify," persons jointly indicted for murder may testify in behalf of one another, unless a conspiracy is charged in the indictment, and proven to the satisfaction of the court.—Jeffries v. Commonwealth, 84 Ky. 237, 1 S. W. 442.

[j] (Ky. 1887) Cr. Code, § 234, which provides that, if two or more persons be jointly indicted for the same offense, each shall be a competent witness for the others, unless the indictment charges a conspiracy, does not apply where, although the indictment charges a conspiracy, there is no evidence to sustain the charge. In such a case accused is entitled to the testimony of the person jointly indicted with him.—Wright v. Commonwealth, 85 Ky. 123, 2 S. W. 904.

[k] (Ky. 1888) Persons against whom were shown circumstances strongly criminative, jointly indicted with defendant, who is being tried separately upon an indictment charging a conspiracy, are incompetent witnesses for the defense.—Pearce v. Commonwealth, 8 S. W. 893.

[l] (Ky. 1891) On the separate trial of a defendant indicted with seven others for conspiracy and murder, it appeared that the killing arose from a dispute as to whether deceased and two others, or defendant and two others, were the legal trustees of a school. Though the latter were in fact the legal trustees, deceased had installed his niece as teacher in place of a person favored by defendant. The eight defendants, part of them armed, assembled at the schoolhouse on the morning of the killing; defendant and another having the previous night fastened the door by chain and lock. The evidence that defendants knew that deceased would be at the schoolhouse on the occasion was unsatisfactory. Six of them, among them defendant on trial, were on friendly terms with deceased, a man over 50 years old, and had no motive for killing him; but the father of the two who defendant swore did the killing had been killed by deceased many years before. *Held*, that the evidence was insufficient to justify the court in holding that a conspiracy was satisfactorily proved, and in excluding the testimony of any of the other defendants, under Cr. Code, § 234, which provides that, "if two or more persons are jointly indicted, they may testify for each other, unless a conspiracy is charged in the indictment, and proved to the satisfaction of the court."—Brafford v. Commonwealth, 16 S. W. 710.

[m] (Ky. 1892) On a prosecution for murder committed by others than defendant, where the state fails to establish a conspiracy between defendant and such others, it is error to exclude their testimony in defendant's favor.—McGraw v. Commonwealth, 20 S. W. 279.

[n] (Ky. 1895) Cr. Code, § 234, and Act May 1, 1886, § 3, prohibiting persons indicted for conspiracy from testifying in behalf of one another, were expressly repealed by Acts 1894, p. 342, and it was therefore error to exclude material testimony of a person indicted with defendant for conspiracy.—Kidwell v. Commonwealth, 97 Ky. 538, 31 S. W. 131.

[o] (N. C. 1881) On trial of an indictment for conspiracy, where defendants are charged in the bill with conspiring with another who is not indicted, they are competent witnesses for each other, under Acts 1866, c. 43, § 3; but, if it were not for the charge of conspiring with the party not indicted, they would be incompetent.—State v. Gardner, 84 N. C. 732.

§ 528. —— Husband and wife.

[a] (Iowa, 1875) When husband and wife are indicted for keeping a house where intoxicating liquors are unlawfully sold, and are tried together, the wife may, under Code 1873, § 3642, be a witness for her husband, but her testimony cannot be considered in her own behalf.—State v. Donovan, 41 Iowa, 587.

[b] (Mich. 1863) The wife of one of two codefendants in a criminal prosecution may be examined as a witness for the other, under Act March 11, 1861.—Morrissey v. People, 11 Mich. 327.

§ 529. Proceedings for recovery of fines and penalties.

[a] (U. S. 1818) A deposition, taken before the trial, of an informer who is entitled to a portion of a fine, penalty, or a forfeiture, is not admissible evidence. Acts 1799, c. 128, § 91 (1 Stat. 697; 1 Story's Laws, p. 656), only makes such an informer a competent witness when "he shall be necessary as a witness on the trial," of which necessity the court must judge, after hearing the other testimony.—The Thomas, Fed. Cas. No. 13,919 [1 Brock. 367].

[b] (Ala. 1868) Under Rev. Code, § 2704, in proceedings for the recovery of fines or penalties for the violation of city ordinances, defendant is not a competent witness for himself.—City of Mobile v. Jones, 42 Ala. 630.

17. EFFECT OF CALLING OR EXAMINATION AS WITNESS BY ADVERSE PARTY AND OF ADMISSION OF TESTIMONY OF ADVERSE PARTY.

EFFECT OF CALLING OR EXAMINATION AS WITNESS BY ADVERSE PARTY, § 530.
EFFECT OF CALLING ASSIGNOR, § 531.
EFFECT OF ADMISSION OF TESTIMONY OF ADVERSE PARTY, § 532.
EFFECT OF EXAMINATION BY COURT, § 533.
CRIMINAL PROSECUTIONS, § 534.

§ 530. Effect of calling or examination as witness by adverse party.

Right of adverse party to examine, see ante, § 225.

[a] (U. S. 1856) On a reference to take an account, defendant cannot be examined as a witness in his own favor, if objection be made by plaintiff, though he was first called and examined as a party by plaintiff.—Foote v. Silsby, Fed. Cas. No. 4,920 [3 Blatchf. 507].

[b] (Ala. 1854) If a party introduces and examines in chief a witness who has an interest adverse to him, he thereby waives all objection to his incompetency from interest, and confers on his adversary the right to examine the witness fully as to his knowledge touching any and all facts material to the case.—Kelly v. Brooks, 25 Ala. 523.

[c] (Ala. 1859) After the deposition of the nominal plaintiff has been taken by defendant

on direct and cross interrogatories, it may be taken again by the beneficial plaintiff under St. 1855–56, p. 28.—Saltmarsh v. Bower, 34 Ala. 613.

[d] (Cal. 1857) He who calls upon an adverse party to testify waives all objections to his competency for himself or a codefendant.—Turner v. McIlhaney, 8 Cal. 575.

[e] (Cal. 1858) Where defendant calls plaintiff as a witness, plaintiff, after his examination in chief, may testify in his own behalf generally, under Prac. Act, § 421, permitting a party examined by his adversary to testify in his own behalf in respect to any matter pertinent to the issue, but declaring that, if he testify to any new matter not responsive to the inquiries, the adversary will offer himself as a witness in respect to such matter.—Drake v. Eakin, 10 Cal. 312.

[f] (Ill. 1872) Where, in a contest between the mortgagee of chattels and an assumed purchaser, the former called the mortgagor and proved by him merely that the cattle in controversy were the same described in the chattel mortgage, and the court then permitted, against objection, a lengthy examination of the witness by the opposite party in regard to the consideration of the mortgage and various other matters, not elicited in the examination in chief and wholly disconnected therewith, and a verdict resulted against the mortgagee, the judgment must be reversed.—Bell v. Prewitt, 62 Ill. 361.

[g] (Ind. 1850) Where plaintiff, at the instance of defendant, was made a witness, the mere fact of his being a party to the suit was no objection to his competency.—Shellenbarger v. Norris, 2 Ind. (2 Cart.) 285.

[h] (Mass. 1809) In an action on a note, defendant offered a witness who was in fact interested that plaintiff should recover. *Held* that, the competency of the witness having been admitted by defendant, plaintiff might properly cross-examine him as to all matters pertinent to the issues on trial.—Webster v. Lee, 5 Mass. 334.

[i] (Mass.) A party calling a witness interested against him cannot confine the cross-examination to points in which the witness has no interest.—(1809) Webster v. Lee, 5 Mass. 334; (1831) Merrill v. Inhabitants of Berkshire, 28 Mass. (11 Pick.) 269.

[j] (Miss. 1858) An administrator, introduced as a witness by an exceptant to his account to show its incorrectness, may go on and testify in his own behalf as to its correctness.—Crowder v. Shackelford, 35 Miss. 321.

[k] (N. J. 1832) Plaintiff called a sheriff, who had testified for defendant, who produced a book containing certain receipts, and testified that the book was his docket, and that the receipts in it were receipts given to him on account of plaintiff's execution. Plaintiff then called a witness to give an explanation of the receipts, two of which were subsequent to the sale; the date of one of them appearing to have been altered. After such examination defendant proposed again to call the sheriff for confirmation of the receipts and to explain the alteration of one of them. Plaintiff objected to such examination by defendant on the ground that the sheriff was incompetent because of interest. *Held*, that the inquiry proposed to be made of the sheriff was in the nature of a cross-examination, and it was proper to show the receipts plaintiff had produced were genuine receipts.—Newcomb v. Downam, 13 N. J. Law (1 J. S. Green) 135.

[l] (N. Y. 1816) If one of the parties in a suit is sworn and examined at the request of the other party, the latter cannot afterwards object to it.—Miller v. Starks, 13 Johns. 517.

[m] (N. Y. 1824) Where plaintiff, on a reference to a master, examines defendant as to particular subjects of reference, defendant is authorized to give evidence in his own favor as to those particular subjects only.—Armsby v. Wood, Hopk. Ch. 229.

[n] (N. Y. 1848) Under the statute of 1847, allowing a party to call his adversary as a witness, the party so called becomes a general witness in the cause, so that he may testify at large in his own favor.—Ainsworth v. Bolmer, 3 N. Y. Super. Ct. (1 Sandf.) 688.

[o] (N. Y. 1850) Where a person directly interested in favor of plaintiff in a cause is called and examined as a witness by defendant, the objection to his competency is thereby waived, and he is made a witness generally in the cause.—Combs v. Bateman, 10 Barb. 573.

[p] (N. Y. 1850) In an action against A. and B. as alleged joint contractors, A. was examined by plaintiff, and testified that he and B. were joint contractors. *Held*, that it was competent for B. to give evidence in his own behalf, for the purpose of contradicting A.—Comstock v. Doe, 2 Code Rep. 140.

[q] (N. Y. 1857) In an action by a creditor of M. against him and S., T., and C., for a fraudulent agreement among them to hide M.'s property from his creditors, M. was called by plaintiff to show the fraudulent conspiracy. *Held*, that S. and T. were then competent witnesses to testify in their own behalf and for the defense generally, excluding M.—Buchanan v. Morrell, 14 N. Y. Super. Ct. (1 Bosw.) 601.

[r] (N. C. 1842) Though in a suit by an administrator a distributee is not a competent witness for him, he is a competent witness for defendant, and, if introduced by him, may be cross-examined by plaintiff as to all matters pertinent to the issue.—Cox v. Wilson, 24 N. C. 234.

[s] (Ohio, 1853) Where a party is called and introduced as a witness by the adverse party, under the act to improve the law of evidence, the objection to his competency is waived, and he becomes competent for all purposes, with the single qualification that a cross-examination on behalf of the party himself called as a witness, with a view to his own impeachment, would be incompatible with his situation as both party and witness, for the reason that he could not allege his own want of credibility.—Legg v. Drake, 1 Ohio St. 286.

[t] (Pa. 1842) If one who is interested that plaintiff shall recover is called and examined by defendant, plaintiff may afterwards call him and examine him as to other facts.—Turner v. Waterson, 4 Watts & S. 171.

[u] (Pa. 1843) A witness examined by plaintiff may be called and examined by defendant as to any fact within his knowledge material to the defense, though he may be directly interested in defeating plaintiff's recovery.—Floyd v. Bovard, 6 Watts & S. 75.

[v] (Pa. 1868) Where one party in a cause takes the deposition of the other under rule, the other becomes a competent witness for all purposes.—Bennett v. Williams, 57 Pa. (7 P. F. Smith) 404.

[w] (Pa. 1870) Calling a party as a witness renders him competent for the adverse party in a subsequent trial or proceeding in the same cause.—Forrester v. Torrence, 64 Pa. (14 P. F. Smith) 29.

[x] (Vt. 1853) A witness called, sworn in chief, and examined, though on a question touching the interest of another witness merely, may yet be examined by the other party to the jury on the merits of the case; for it is a waiver of the interest of the witness by the party calling him.—Linsley v. Lovely, 26 Vt. 123.

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[y] (Wis. 1842) A party who has been notified to appear and be examined as a witness may upon his appearance be examined, though the party who gave the notice objects to his examination.—Parkison v. McKim, 1 Pin. 214.

[z] (Wis. 1853) The receiving notice, under Rev. St. c. 98, §§ 57–60, by a party to a cause, to appear and testify in conformity therewith, does not entitle such party to testify in his own behalf, nor make him a general witness in the case, unless he is examined by the adverse party.—Hart v. Janes, 1 Wis. 61; Miller v. Waterman, 2 Wis. 90.

§ 531. Effect of calling assignor.

Competency of assignor, see ante, §§ 325, 326.

[a] (Cal. 1863) Under the amendment of 1861 to Prac. Act, § 422, on the trial of a question as to the validity of defendant's deed, where defendant has examined his vendor, plaintiff has a right to examine the vendee, irrespective of the question of interest.—Wright v. Carillo, 22 Cal. 595.

[b] (Me. 1856) When the indorser of a note had been called as a witness by the party deriving title through him, the adverse party may be admitted, under St. 1855, c. 181, § 3, to testify in his own behalf to the matter about which the indorser had testified.—Fogg v. Babcock, 41 Me. 347.

[c] (N. Y. 1850) The word "party," used in section 399 of the Code, should not be so construed as to include any one who is not by name a party to the action.—Pack v. City of New York, 3 N. Y. (3 Comst.) 489.

[d] (N. Y. 1852) Where, in an action on a note payable to A. B., or bearer, brought by a person to whom the same had been sold and delivered by A. B., the latter is examined as a witness in behalf of plaintiff, defendant is a competent witness to be sworn in his own behalf and examined to the same matters testified to by A. B., the former owner.—Bump v. Van Orsdale, 11 Barb. 634.

[e] (N. Y. 1852) When the assignor of plaintiff is examined on his behalf, under Code, § 399, and defendant offers himself as a witness to the same matter, he must be received.—Ward v. Ingraham, 1 E. D. Smith, 538.

[f] (N. Y. 1853) Rent not due passes with the estate. It is not a chose in action, and the grantor of the land is not assignor of the rent as a chose in action; and the examination of him as a witness for plaintiff does not, under the Code, give to defendant a right to be examined himself.—Van Wicklen v. Paulson, 14 Barb. 654.

[g] (N. Y.) A person transferring a note is not the assignor of a thing in action, within the meaning of Code Civ. Proc. § 399. Therefore his examination as a witness in behalf of the person deriving title from him would not entitle the adverse party to testify in his own behalf.—(1853) Watson v. Bailey, 9 N. Y. Super. Ct. (2 Duer) 509; (1858) Porter v. Potter, 18 N. Y. 52.

[h] (N. Y. 1853) Attorneys at law, who were assignors of the claim in suit, testified for plaintiff to a general retainer by defendant to render legal services, and that such services were rendered for defendant under that retainer, and stated the value of the services. *Held*, that under Code, § 399, providing that, when the assignor of a cause of action is examined by plaintiff, defendant may offer himself as a witness to testify "to the same matter" to which the assignor testified, defendant had a right to offer himself as a witness to prove that he had never employed the assignors under such general retainer, but that their employment was under a special agreement.—Angel v. Solis, 2 E. D. Smith, 240.

[i] (N. Y. 1853) Under Code, § 399, providing that, when the assignor of a cause of action is examined by plaintiff, defendant can offer himself as a witness to testify "to the same matter" to which the assignor testified in plaintiff's behalf, defendant cannot, by cross-examination of the assignor, elicit testimony as to other matters for the purpose of laying a foundation for offering himself as a witness in such other matters.—Angel v. Solis, 2 E. D. Smith, 240.

[j] (N. Y.) Under Code, § 399, providing that, when an assignor of a thing in action or contract is examined as a witness on behalf of a person deriving title from him, the adverse party may offer himself as a witness to the same matter, the testimony of defendant is not limited to the identical point to which the assignor has been examined, but he may be examined to the whole matter to which the point relates.—(1854) Gardner v. Clark, 17 Barb. 538; (1856) Burgart v. Stork, 12 How. Prac. 55.

[k] (N. Y. 1854) The provision in Code, § 399, which provides that, whenever the assignor of a thing in action or contract has been examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter on his own behalf, applies as well to the case of an involuntary assignor as to that of a voluntary assignor.—Gardner v. Clark, 17 Barb. 538.

[l] (N. Y. 1854) Under Code, § 399, providing that, when an assignor of a thing in action or contract is examined as a witness by one deriving title from him, the adverse party may testify in his own behalf, a vendor of personal property is not such an assignor, so that in an action by the vendee against a third person for illegally detaining the property, in which the vendor has testified, defendant cannot be examined as a witness.—McGinn v. Worden, 8 E. D. Smith, 355.

[m] (N. Y. 1854) Under Code, § 399, providing that, when an assignor of a thing in action or contract testifies on behalf of one deriving title through him, the adverse party may testify to any matter that will discharge him from any liability that such assignor's testimony tends to render him liable for, an indorser of a note is such an assignor, so that in an action on the note by an indorsee, where the indorser testifies, the maker is a competent witness, but in offering himself as such he may do so generally.—Potter v. Bushnell, 10 How. Prac. 94.

[n] (N. Y. 1854) When an assignor has been examined as a witness for plaintiff, defendant may offer himself in his own behalf, without being required to specify the matters to which he proposes to testify. He should be sworn generally; but, if he is interrogated upon matters not embraced in the assignor's testimony, the evidence, upon objection, should be excluded.—Potter v. Bushnell, 10 How. Prac. 94.

[o] (N. Y. 1855) A payee of a note, who has transferred it by delivery to a third person, is a competent witness for such person in an action on the note, and the fact that he is so admitted will not authorize defendant to testify in his own behalf; and, if defendant be a competent witness on one point, it does not follow that he may be examined on all the points on which the assignor of plaintiff testified.—Calkins v. Packer, 21 Barb. 275.

[p] (N. Y. 1855) Code, § 399, providing that, where an assignor is examined as a witness on behalf of any person deriving title through him, the adverse party may offer himself to the same matter in his own behalf, does not apply where an indorser of a note is sworn by an indorsee.—Hicks v. Wirth, 4 E. D. Smith, 78, 10 How. Prac. 555.

[q] (N. Y. 1855) Under Code, § 399, providing that, when an assignor of a contract or

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thing in action is permitted to testify in behalf of his assignees, the adverse party may testify in his own behalf to the same matter, an assignor having testified to a sale of a chattel to defendant, it was not competent for defendant to testify on his own behalf to a subsequent payment for the chattel, or a release, or infancy, or any matter in avoidance of the consequences of the fact testified to by the assignor.—Carpenter v. Sweet, 4 E. D. Smith, 333.

[r] (N. Y. 1855) Where the assignor of plaintiff testifies to the sale of a horse of defendant, to recover the price of which the action is brought, it is not competent for defendant to testify in his own behalf to a subsequent payment of the price, or to a release, or infancy, or other matter in avoidance, under Code, § 399, providing that, where the assignor of a thing in action is examined by his assignee, defendant can offer himself as a witness to "the same matter."—Carpenter v. Secor, 11 How. Prac. 403.

[s] (N. Y. 1856) Code 1852, § 309, provides that, when an assignor of a thing in action is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received. *Held*, that the vendor of a nonnegotiable note was an "assignor of a thing in action," within the section, and that, where such assignor was called as a witness in behalf of his assignee in an action on such note against the maker, he was competent to testify as to the same matters.—Tulloss v. Rapelye, 3 Abb. Prac. 93.

[t] (N. Y. 1856) The indorser of a bank check is not an assignor within the meaning of Code, § 399; hence his examination as a witness on behalf of the indorsee, in an action against the drawer, does not render the latter a competent witness on his own behalf.—Anderson v. Busteed, 12 N. Y. Super. Ct. (5 Duer) 485.

[u] (N. Y. 1856) Under Code, § 399, providing that, when the assignor of a contract or thing in action testifies in behalf of his assignee, the adverse party may be permitted to testify in his own behalf to the same matter, the testimony of the adverse party must be responsive or relative to the examination of the assignor.—Evans v. Burbank, 12 How. Prac. 73.

[v] (N. Y. 1856) The payee of a note, who transfers it by delivery, is an assignor of a thing in action, within the meaning of Code, § 399, providing that, when such assignor is permitted to testify, the adverse party may testify in his own behalf to the same matter.—Clement v. Adams, 12 How. Prac. 163.

[w] (N. Y. 1857) The examination of plaintiff's assignor of certain alleged notes does not authorize the examination of the defendant as a witness generally, but only to the same matter that the assignor was examined to.—Brown v. Richardson, 14 N. Y. Super. Ct. (1 Bosw.) 402.

[x] (N. Y. 1857) The fact that the wife of the assignor of a contract assigned to plaintiff testified in plaintiff's behalf did not entitle defendant to be examined in his own behalf, by virtue of Code, § 399, providing that, when an assignor of a thing in action or contract is examined as a witness on behalf of the person deriving title through him, the adverse party may testify in his own behalf as to the same matter.—Hanford v. Higgins, 14 N. Y. Super. Ct. (1 Bosw.) 441.

[xx] (N. Y. 1858) To entitle a defendant to be a witness for himself on the ground that the assignor of the claim had been sworn against him, the assignment must be one that passes the cause of action—an effective assignment, without which the suit would have to be brought in the name of the assignor.—Hale v. Boardman, 27 Barb. 82.

[y] (N. Y. 1858) One who indorses and transfers a note after it has become due is not the assignor of a thing in action, within the meaning of Code, § 399, providing that, when an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through him, the adverse party may offer himself as a witness to the same matter.—Gardner v. Gordon, 16 N. Y. Super. Ct. (3 Bosw.) 369.

[yy] (N. Y. 1858) Where an assignor, examined as a witness on behalf of the assignee, testified that he delivered bricks at a certain house, without defining the quantity thereof, the adverse party was entitled to offer himself as a witness to prove the quantity so delivered, under Code, § 399.—Cowing v. Geib, 16 N. Y. 600.

[z] (N. Y. 1859) The provision of Code, § 399, that, "whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received," should be construed to extend only to cases where the party against whom the other party has been examined is a natural person, capable of giving evidence, and a competent witness, provided he had not been a party or person in interest.—Field v. New York Cent. R. Co., 29 Barb. 176.

[zz] (Wash. 1867) The grantor by a quitclaim deed of a water right which he had not reduced to possession, but claims under a contract giving him the equitable right, is an assignor within Rev. St. 1863, p. 154, § 328, providing that the adverse party may be examined as a witness, where the "assignor of a thing in action or contract" has been so examined.—Glasford v. Baker, 1 Wash. T. 224.

§ 532. Effect of admission of testimony of adverse party.

[a] (Ala. 1848) Where plaintiff offers himself as a witness under the statute, in an action on account, defendant is confined to a denial of the statements of plaintiff.—Yarborough v. Hood, 13 Ala. 176.

[b] (Ala. 1859) Where plaintiff has proved his account by his own oath, defendant can only testify in denial of that proof, and cannot draw out new facts on cross-examination and then offer himself to disprove them. Code, § 2313.—West v. Brunn, 35 Ala. 263.

[c] (Cal. 1851) If defendant calls plaintiff as a witness, and he testifies to matter not responsive to defendant's inquiries, defendant may himself testify in respect to such irresponsive matter, limiting himself to an explanation or contradiction thereof.—Dwinelle v. Henriquez, 1 Cal. 387.

[d] (Cal. 1858) A party to a suit has a right to testify, to rebut new matter introduced on the cross-examination of his opponent, whom he has called as a witness, under Code, § 421.—Jones v. Love, 9 Cal. 68.

[e] (Cal. 1864) Under Prac. Act, § 422, as amended in 1861, a person who, with others, has assigned his claim against a third party, under an agreement that the assignee shall bring suit on the claims, and the assignors shall pay their respective proportions of the expenses of the litigation, and receive their respective proportions of the amount collected, is a competent witness in favor of the assignee, or of a sheriff who is sued for attaching goods in such suit, if the adverse party has been examined in his own behalf, in accordance with the provisions of said section.—Brodek v. Ellis, 26 Cal. 145.

[f] (Ind. 1859) A plaintiff, called to prove defendant's account, testified to his own in offset.

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Defendant then offered himself as a witness to the whole case. *Held*, that he should be allowed to testify to the new matter only.—Pence v. Armstrong, 13 Ind. 539.

[g] (Ind. 1862) Prior to the witness law of 1861, a plaintiff, summoned as a witness by defendant, went beyond a due response to the inquiries put, and testified to another branch of the cause, not included in such inquiries. *Held*, that defendant had a right to be heard as a witness in the same matter.—Daniels v. Little, 19 Ind. 305.

[h] (Ind. 1866) Where, in an action on account between partners, plaintiff testified to a contract between them, stipulating that, if either rendered more service for the firm than the other, he should be compensated therefor by the other, defendant may prove by the plaintiff that he had rendered more services than plaintiff.—Dean v. Wilson, 26 Ind. 205.

[i] (Iowa, 1844) By the statute of 1841, it is provided that a party may examine the opposite party in a suit relative to the items of his account claimed, and that, if such opposite party is unable to testify as to the correctness or incorrectness of the account, then the claimant may support his account by his own oath. *Held* that, since that statute, a party cannot testify to the correctness of the items of his account in the first instance.—Lowe v. Ganby, Morris, 281.

[j] (Ky. 1861) A party to a suit can only introduce his own evidence by pursuing the plan allowed in the Code, which permits it only when new matter not responsive to the inquiries is introduced in the answers of his adversary to the interrogatories propounded by him and annexed to his answer.—Musick v. Ray, 60 Ky. (3 Metc.) 427.

[k] (N. Y. 1849) Where defendant called plaintiff as a witness under Code, § 349, providing that a party examined by an adverse party may be examined on his own behalf, and if he testifies to any new matter the adverse party may offer himself as a witness, and he, in reply to a question by the court, testified to new matter, defendant was entitled to offer himself as a witness for the purpose of answering the new matter.—Myers v. McCarthy, 4 N. Y. Super. Ct. (2 Sandf.) 399.

[l] (N. Y. 1853) Plaintiff cannot be sworn as a witness on his own behalf under Code, § 395, where defendant as a witness merely answers inquiries, or explains those answers, or testifies enough to explain answers, that would otherwise charge him, and if defendant goes beyond this plaintiff can be a witness only in respect to the excess. This right of a party to his own oath is in derogation of the common law, and should not receive a loose construction.—Richardson v. Wilkins, 19 Barb. 510.

[m] (N. Y. 1854) In an action for not making a certain number of scythe snaths according to agreement, defendant was called by plaintiff as a witness, and testified that he did not make any scythe snaths for plaintiff. On cross-examination by his own counsel, he testified that why he did not make any scythe snaths for plaintiff was that he was under no obligation to make any, as he had made no agreement to that effect, and was merely working as an experiment. *Held*, that this was not new matter, so as to entitle plaintiff to the right to be examined on his own behalf under section 395 of the Code.—Chamberlain v. Hamilton, 18 Barb. 324.

[n] (Pa. 1867) In an action of assumpsit by an administrator, claiming money which had been placed by the decedent in the hands of defendant in trust for the use of the children of the decedent, plaintiff introduced evidence showing that C., defendant, was a trustee of the money for the children. *Held*, that C. was a competent witness for himself.—Cox v. McKean, 56 Pa. (6 P. F. Smith) 243.

[o] (W. Va. 1871) It is error to refuse to permit a party to testify to a fact in relation to which his adversary has already testified; the statute permitting parties to testify in their own behalf being intended to protect the equality of rights.—Myers v. McGraw, 5 W. Va. 30.

§ 533. Effect of examination by court.

[a] (Ind. 1864) A defendant, who is "sworn at the instance of and examined by the court," without the solicitation of plaintiff, and whose statements have no bearing against him, has no right, by virtue of sections 295, 300, 2 Gav. & H. St. p. 188, to insist on testifying fully as to all matters in controversy in the suit.—Crisman v. Smith, 22 Ind. 13.

§ 534. Criminal prosecutions.

[a] (Miss. 1881) Under Code 1880, § 1603, providing that, "when admissions or confessions of the accused are admitted as evidence, he may testify as to them, but he shall not be competent as a witness in the inquiry as to the admissibility of his admissions or confessions," if the statement is a confession of a pre-existing crime he may testify, but not if it is a part of the res gestæ.—Howze v. State, 59 Miss. 230.

[b] (Miss. 1881) The first part of Code, § 1603, gives the accused the right to testify in answer to the testimony of the person against whose property the offense is alleged to have been committed. The second part of the section provides that, when his admissions or confessions have been admitted in evidence, he may testify as to them only. *Held*, that where, in a trial for larceny, the person whose money was stolen testified both to confessions of the accused and other matters, the prisoner might testify generally in her own behalf.—Williamson v. State, 59 Miss. 235.

[c] (Miss. 1882) Under Code 1880, § 1603, making the accused a competent witness in response to the testimony of his adversary, a person on trial for murder can testify in his own behalf if the dying declarations of the person alleged to be murdered are introduced by the state.—Owens v. State, 59 Miss. 547.

18. OBJECTIONS TO COMPETENCY AND DETERMINATION THEREOF.

(a) OBJECTIONS AND WAIVER THEREOF, §§ 535-538.
(b) EVIDENCE AS TO INTEREST, §§ 539-546.
(c) DETERMINATION AS TO COMPETENCY, §§ 547-549.

(a) OBJECTIONS AND WAIVER THEREOF.

OBJECTIONS IN GENERAL, § 535.
TIME FOR OBJECTION AND WAIVER THEREOF, § 536.
—— EFFECT OF EXAMINATION OF WITNESS BY PARTY OBJECTING, § 537.
REQUISITES, SUFFICIENCY, AND EFFECT OF OBJECTION, § 538.

§ 535. Objections in general.

[a] (Ala. 1858) An objection to a witness as incompetent on the ground of interest waives other objections, and grounds of public policy or his being the transferror of the cause of action are not open.—Fulton Ins. Co. v. Goodman, 32 Ala. 108.

[b] (Ala. 1858) Evidence of a deceased witness' testimony at a former trial may be objected to on the ground of interest, although the same testimony was then offered by the objector.—House v. Camp, 32 Ala. 541.

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[c] (Ky. 1822) Where a party calls an interested witness, he cannot object to the witness' testimony, even if it be in support of the interest of the witness.—Helm v. Handley, 11 Ky. (1 Litt.) 219.

[d] (La. 1844) Objections to witnesses, because interested, cannot avail a party who did not appear at the trial and object.—Cressap v. Winchester, 6 Rob. 458.

[e] (N. Y. 1840) Where a party has consented to the examination of a witness upon the voir dire, he stating that he had no interest in behalf of the party calling him, he cannot be afterwards objected to upon the testimony of others.—Hosack v. Rogers, 8 Paige, 229, affirmed (1841) 25 Wend. 313.

[f] (Ohio, 1828) Where a party puts a witness upon his voir dire as to interest, he cannot afterwards object to him.—Bisbee's Lessee v. Hall, 3 Ohio (3 Ham.) 449.

[g] (Pa. 1788) Cross-examination of a witness under a rule for taking depositions does not amount to an examination of him on his voir dire, and does not preclude objections to his competency at the trial.—Mifflin v. Bingham, 1 Dall. 272, 1 L. Ed. 133.

[h] (Pa. 1867) The incompetency of a witness cannot be set up by a party who has himself previously called that witness.—Seip v. Storch, 52 Pa. (2 P. F. Smith) 210, 91 Am. Dec. 148.

§ 536. Time for objection and waiver thereof.

[a] Testimony cannot be first objected to on appeal as incompetent because of the interest of the witnesses, if the interest was known to the adverse party at the trial.

—(Ark. 1854) Hershy v. Clarksville Institute, 15 Ark. 128; (1856) McCarron v. Cassidy, 18 Ark. 34;

(Ind. 1852) Zion v. State, 3 Ind. 397; (1854) House v. House, 5 Ind. 237;

(Ky. 1808) Respass v. Morton, 3 Ky. (Hardin) 226; (1822) Ashby v. Sharp, 11 Ky. (1 Litt.) 156; (1832) Alexander v. Bank of Commonwealth, 30 Ky. (7 J. J. Marsh.) 580;

(N. Y. 1830) Livingston's Ex'rs v. Van Rensselaer's Adm'rs, 6 Wend. 63; (1855) Fenn v. Timpson, 4 E. D. Smith, 276;

(Pa. 1867) Perot v. Harley, 1 Brewst. 407;

(Tenn. 1844) Davis' Ex'rs v. Roberts, 24 Tenn. (5 Humph.) 111;

(Wis. 1853) Whiting v. Gould, 1 Wis. 195.

[b] The party against whom an interested witness is called to testify must take his objection as soon as the interest is discovered and he has an opportunity of doing it; otherwise, he will be considered as having waived the objection.

—(Cal. 1864) Bear River & A. Water & Mining Co. v. Boles, 24 Cal. 359;

(Conn. 1850) Lewis v. Morse, 20 Conn. 211;

(Iowa, 1860) Kingsbury v. Buchanan, 11 Iowa, 387;

(Md. 1863) Groshon v. Thomas, 20 Md. 234.

[c] An objection to the competency of a witness on the ground of interest must be distinctly made at the first opportunity, or it will be held to have been waived.

—(Ala. 1856) Drake v. Foster, 28 Ala. 649;

(Me. 1851) Stuart v. Lake, 33 Me. 87.

[d] The objection to a witness on the ground of interest must be taken before the testimony is given, if the party objecting is aware of the interest.

—(Me. 1853) Rumsey v. Bragg, 35 Me. 116;

(Mass. 1829) Donelson v. Taylor, 25 Mass. (8 Pick.) 390;

(N. J. 1869) Berryman v. Graham, 21 N. J. Eq. (6 C. E. Green) 370.

[e] (U. S. 1861) An objection that a witness in admiralty is interested cannot be made after the hearing.—Nelson v. Woodruff, 66 U. S. (1 Black) 156, 17 L. Ed. 97.

[f] (U. S. 1838) The court will receive the testimony of the libelants themselves if the respondent's counsel do not object.—Ferrara v. The Talent, Fed. Cas. No. 4,745 [Crabbe, 216].

[g] (U. S. 1846) An agreement that all testimony taken before certain named commissioners before a given date "shall be heard and considered by the commissioner of patents, whether the same be filed before the 12th of January instant or not," operates as a waiver of objections to the competency of the witnesses.—Warner v. Goodyear, Fed. Cas. No. 17,183 [Cranch, Pat. Dec. 125, 1 MacArthur, Pat. Cas. 60].

[h] (Ark. 1853) Where the surety on a bond for costs is introduced as a witness against the party on whose motion the bond was required to be filed, the objection to his competency must be made at the trial; and, if he is permitted to testify without objection, the party is presumed to have waived the incompetency, and cannot make it ground for a new trial or reversal on error.—Scott v. Jester, 13 Ark. (8 Eng.) 437.

[i] (Ark. 1853) Where it appears, after a witness has testified, that he is incompetent, the court will strike out his evidence, or exclude it from the jury on motion; but, if the objection be not made on the trial, it will not avail on error.—Scott v. Jester, 13 Ark. (8 Eng.) 437.

[ii] (Cal. 1863) Where the interest of a witness appears on direct examination, objection to his competency must be made before cross-examination.—Brooks v. Crosby, 22 Cal. 42.

[j] (Colo. 1873) An objection to a witness upon the ground of interest in the event of the suit cannot be made after he has been sworn in the cause.—Milsap v. Stone, 2 Colo. 137.

[jj] (Ga. 1859) Plaintiff having examined the execution defendant in a claim case, it is too late, after verdict, for the claimant to object to his incompetency.—Caraway v. Smith, 28 Ga. 541.

[k] (Ga. 1860) In an action by a sheriff for the use of execution creditors to recover the price of property sold under the execution, the record showed that the real plaintiffs proposed to indemnify the sheriff against costs, and that he then testified, although in fact he had not been indemnified. *Held*, that defendant waived the objection.—Glenn v. Black, 31 Ga. 393.

[kk] (Ga. 1891) The fact that no nolle prosequi was entered as to two of four defendants, jointly indicted, before such two were permitted to testify in favor of the state, is no ground for reversal, where no objection was raised until after verdict.—Sims v. State, 87 Ga. 569, 13 S. E. 551.

[l] (Ill. 1864) In a trial in which a question of usury was raised, defendant, who was a competent witness to prove the usury, was allowed without objection to testify to other facts. *Held*, that an objection to his general competency could not be taken on error, or in the form of instructions to disregard his evidence.—Gordon v. Goodell, 34 Ill. 429.

[ll] (Ill. 1893) An objection that a wife was an incompetent witness, because her husband was interested in the suit, cannot be made for the first time on appeal.—R. J. Gunning Co. v. Cusack, 50 Ill. App. 290.

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[m] (Ind. 1831) If, in the course of a witness' examination, he appears from his own answers to be incompetent, the party against whom the evidence is given should move to strike out the testimony; but, if no objection be made below to the evidence, its admission cannot be assigned for error.—Sims v. Givan, 2 Blackf. 461.

[mm] (Ind. 1846) Objections to the admission of a witness are not to be favored, when made after it is too late to restore his competency by a release.—State v. Holloway, 8 Blackf. 45.

[n] (Iowa, 1855) On the cross-examination of a witness it appeared that he was security for the costs of the suit; but he was still permitted to testify without objection, and, after the evidence in the case had been closed and the cause submitted on motion, and the court adjourned for one night, it was moved to exclude the testimony on the ground of interest. *Held*, that the objection came too late.—Austin v. Peasley, 1 G. Greene, 257.

[nn] (Iowa, 1859) While objections to the competency of a witness should, in general, be taken before he is examined in chief, yet they may be made at any time during the trial, if made as soon as the incompetency of the witness is discovered.—Veiths v. Hagge, 8 Iowa (8 Clarke) 163.

[o] (Iowa, 1859) The fact that a witness is a surety on a delivery bond filed in the case is not, of itself, such notice of the interest of the witness as will preclude plaintiff, against whom he was called, from raising the objection after the examination has been commenced.—Veiths v. Hagge, 8 Iowa (8 Clarke) 163.

[oo] (Md. 1825) If a party objects to the competency of a witness offered on the adverse side, and the court sustains the objection, and the party making it afterwards waives it, and consents that the witness be examined, the party offering the witness has no right to require of the court to decide that he is competent, independent of the waiver of the objection.—Beall's Lessee v. Lynn, 6 Har. & J. 336.

[p] (Md. 1828) Where the interest of a witness is discovered after his examination, it is the duty of the court to direct the jury to discard his evidence, although both parties may have informed the court that the testimony was closed and the witnesses had been discharged; the party making the objection having omitted to make the objection at an earlier period, without any intention of ensnaring his adversary.—Morton v. Beall's Adm'r, 2 Har. & G. 136.

[pp] (Md. 1850) An objection to a witness for interest, if made after the party objecting had introduced contradictory and explanatory testimony, the party having in his possession a deed disclosing his interest, comes too late.—Baugher v. Duphorn, 9 Gill, 314.

[q] (Md. 1859) The objection to a witness not objected to below will not be considered on appeal, though it be that, being one of the parties against whom an injunction was prayed in the bill, he was examined without an order of court.—Windwart v. Allen, 13 Md. 196.

[qq] (Md. 1859) Defendant's counsel knew of a witness' connection with defendant by certain contracts; but as he could not know, until the parol evidence was in, that plaintiff's claim was for the same work which the witness had thereby agreed, but failed, to perform, he was not bound to make the objection until the necessary evidence was in.—Andre v. Bodman, 13 Md. 241, 71 Am. Dec. 628.

[r] (Mass. 1816) The objection of interest applies equally, where the fact appears on the examination in chief, as where it appears on the voir dire.—Fisher v. Willard, 13 Mass. 379.

[rr] (Mass. 1837) An objection to the competency of a witness should be made before he is examined in chief; but, if it be not known until after such examination, it may be made in any stage of the trial, when discovered.—Shurtleff v. Willard, 36 Mass. (19 Pick.) 202.

[s] (Mass. 1851) If the indorser of the writ is called and examined as a witness on the trial of the cause, without being objected to as interested in the event of the suit, the objection cannot be taken afterwards.—Snow v. Batchelder, 62 Mass. (8 Cush.) 513.

[ss] (Miss. 1841) Where the interest of a witness came out on cross-examination, it was a seasonable objection to his competency, if taken in an instruction to the jury to disregard his testimony.—Carter v. Graves, 7 Miss. (6 How.) 9.

[t] (N. H. 1839) An objection to the admissibility of a witness on account of interest in the costs, if not taken at the trial, cannot be urged on a hearing of a case saved, in which his admissibility is resisted on other grounds.—Essex Bank v. Rix, 10 N. H. 201.

[tt] (N. H. 1851) An objection to the incompetency of a witness, if not made when the witness is offered, is waived.—Watts v. Derry, 22 N. H. (2 Fost.) 498.

[u] (N. H. 1859) If it is objected to a witness offered on trial that he is party to the record, and no objection is then made on the ground of his interest, the objection of interest cannot be urged on the hearing of the case.—Jackson v. Barron, 37 N. H. 494.

[uu] (N. J. 1840) Where the interest of a witness is such that the party offering him might release it, if no objection to his competency is taken at the time of his examination, the objection, being first taken at the hearing, will not be sustained, at least without giving the party an opportunity to release the interest of the witness and to re-examine him, if the opposite party wish it.—Neville v. Demeritt, 2 N. J. Eq. (1 H. W. Green) 321.

[v] (N. J. 1855) An objection to a witness on account of a known interest, taken after his direct examination, is too late.—Sheridan v. Medara, 10 N. J. Eq. (2 Stockt.) 469, 64 Am. Dec. 464.

[vv] (N. Y. 1839) An objection to the competency of a witness should be made before the master, who is executing the decree under which the testimony is taken, at the time of applying for the order to examine the witness, or at least when the testimony is read before the master.—Pratt v. Adams, 7 Paige, 615.

[w] (N. Y. 1855) Where a witness was examined before the surrogate, and no objection was made there to his competency, none will be heard on appeal.—McDonough v. Loughlin, 20 Barb. 238.

[ww] (N. C. 1881) An objection to the competency of a party as a witness, under Act 1879, may be taken after he is sworn in chief, and when the incompetency first appears; a voir dire not being necessary.—In re Macay, 84 N. C. 63.

[x] (Ohio, 1850) If the opposite party would avail himself on error on account of an interested witness being allowed to testify, he should, if the fact of interest was known to him, object to the witness testifying, or if by evidence afterwards offered in the case the interest of the witness should become apparent he should ask the court to rule it out. Nothing of this kind being done, it was not error to permit the testimony of the witness to go to the jury, although he might have been interested.—Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430.

[xx] (Pa. 1845) It appeared, from the face of the deposition taken by defendant, that the

release of the witness was in the hands of the witness, and that he desired that it should be filed of record, and the certificate of the justice showed that the deposition was taken in the presence of plaintiff's attorney, who made no objection, but allowed the witness to be examined, and cross-examined him. *Held*, that it was too late to insist at the trial of the cause, on mere formal proof, that the release had not been tendered to the witness before he was sworn.—Myre v. Ludwig, 1 Pa. (1 Barr) 47.

[y] (Pa. 1862) An objection to a witness called by one party in the trial of a cause, if known to the opposite party, must be made before he is examined. If he is permitted to testify without objection, his competency cannot afterwards be objected to, when recalled for examination at any subsequent stage of the trial.—Patterson v. Wallace, 44 Pa. (8 Wright) 88.

[yy] (S. C. 1856) In an action against a carrier for damage to cotton, a witness was examined by commission for plaintiff. He had agreed to share with plaintiff in the profits and loss of the shipment, but had assigned and released his interest to plaintiff. On the production of the assignment, objection to the testimony was waived, and it was read. When the evidence was closed, the next day, the circuit judge, being requested to rule out the testimony, refused. *Held*, that his ruling was proper.—Burnside v. Union Steamboat Co. of Georgia and South Carolina, 10 Rich. Law, 113.

[z] (Tex. 1847) One of two defendants was called by his codefendant to testify, and no objection was made at the trial. *Held* that, though he was an incompetent witness, all objections would be considered as waived.—Legg v. McNeill, 2 Tex. 428.

[zz] (Vt. 1851) Though plaintiff in an action on book account cannot by his own testimony prove a new promise to avoid the statute of limitations, where such testimony is received without objection at the time it cannot afterwards be objected that it was incompetent.—White v. Dow, 23 Vt. 300.

§ 537. —— Effect of examination of witness by party objecting.

Admissibility of deposition, see "Depositions," vol. 16, cc. 1336, 1337, § 335.

[a] (U. S. 1843) To establish the competency of a witness, respondents on their direct interrogatories annexed to his deposition asked him if he had not received a release from them of all liability on account of the subject-matter of the suit, and he answered that he had, and produced the supposed release and annexed it to his answer. *Held* to estop respondents from denying the release.—Citizens' Bank v. Nantucket Steamboat Co., Fed. Cas. No. 2,730 [2 Story, 16].

[b] (U. S. 1846) When a witness is examined de bene esse out of court, in an admiralty cause, by the claimants, and is cross-examined by the libelant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness because interested in the cause, and exclude his testimony given in chief for the claimants.—The Osceola, Fed. Cas. No. 10,602 [Olcott, 450].

[c] (Ala. 1854) When complainant has several times examined a defendant as a witness (once in chief, and twice on cross-interrogatories), without raising any objection to his competency on the ground of interest, he cannot raise that objection for the first time on the hearing.—De Vendal v. Malone's Ex'rs, 25 Ala. 272.

[d] (Ala. 1883) The mere filing of cross-interrogatories to complainant after objecting to his competency is not a waiver of the objection.—Goodlett v. Kelly, 74 Ala. 213.

[e] (Conn. 1850) A witness called by plaintiff was examined, cross-examined, and dismissed from the stand; and the next day defendant objected to his competency on the ground of his interest, which was disclosed at the commencement of his examination. *Held*, that the objection came too late.—Lewis v. Morse, 20 Conn. 211.

[f] (Ky. 1870) Objection to the competency of the witness is waived by taking his deposition.—Weil v. Silverstone, 69 Ky. (6 Bush) 698.

[g] (Me. 1850) In an action on a book account, plaintiff offered himself as a witness, was sworn and then declared inadmissible. Defendant afterwards put to him certain questions, which he answered. *Held*, that he was not thereby made a general witness to other facts, and that he did not subject himself, by answering one or more questions, to answer others.—Robbins v. Merritt, 31 Me. 451.

[h] (Tex. 1855) Objections to the competency of a witness ought, generally, to be taken before he is examined in chief. A party, aware of the interest, will not be permitted to examine a witness, and then object to his competency, if he dislikes the testimony.—Johnson v. Alexander, 14 Tex. 382.

[i] (Va.) Cross-examination of a witness without objecting that he is incompetent waives the objection.—(1877) Hord's Adm'r v. Colbert, 28 Grat. 49; (1878) Neilson v. Bowman, 29 Grat. 732.

[j] (Wis. 1853) A party objecting to the admission of the testimony of a witness, incompetent on account of interest, does not waive that objection by subsequently recalling such witness and examining him in his own behalf.—Carpenter v. Ginder, 1 Wis. 243.

§ 538. Requisites, sufficiency, and effect of objection.

[a] (Ala. 1840) A bill of exceptions which states that defendant offered to examine the nominal plaintiff as witness, to which plaintiff objected, and his objection was sustained, raises the question whether the nominal plaintiff was a competent witness.—Duffee v. Pennington, 1 Ala. 506.

[b] (Ala. 1871) Augustus C. Rose was jointly indicted with defendant for a conspiracy to extort money, and a severance was granted. Defendant on his trial offered as a witness one described in the record as "Aug. C. Rose." *Held*, that the exclusion of such witness without stating any ground of objection was error, in the absence of anything to show that Aug. C. Rose was the Augustus C. Rose named in the indictment.—Morgan v. State, 45 Ala. 64.

[c] (Me. 1846) In order that an objection to the introduction of a witness may be available, the party objecting should explain why he objects.—Emery v. Vinall, 26 Me. (13 Shep.) 295.

[d] (Me. 1855) The party who at the trial makes a specific objection to the competency of a witness will be limited to that objection only, in the court above; and if the objection is interest under a particular statute, interest in other respects cannot be shown.—Bunker v. Gilmore, 40 Me. 88.

[e] (N. H. 1853) An exception taken to a witness, on the ground of interest, upon his voir dire, which is overruled by the court, will avail the party taking it, as an exception to all the testimony of that witness given in the case.—Smith v. Fairbanks, 27 N. H. (7 Fost.) 521.

[f] (N. Y. 1848) A party who objects to the competency of a witness should state specifically the grounds of his objection; it is not sufficient

to object generally that the witness is incompetent.—Elwood v. Deifendorf, 5 Barb. 398.

[g] (N. Y. 1849) Where a witness is objected to on the ground of interest, the nature of the interest must be specified.—Leach v. Kelsey, 7 Barb. 466.

[h] (N. Y. 1853) Where plaintiff is examined as a witness in his own behalf under Code, § 395, and objection, instead of being made to what is illegal in the testimony, is made generally that plaintiff cannot be a witness, the objection will not prevail if any part of the testimony is competent.—Richardson v. Wilkins, 19 Barb. 510.

[i] (N. Y. 1887) It was not error to allow one who was defending as a highway commissioner to testify that he was such officer, where no specific objection was made.—Dominick v. Hill, 6 N. Y. St. Rep. 329.

[j] (Pa. 1846) When a witness is competent for certain purposes, a specific objection must be taken to such parts of his testimony as are inadmissible.—Peters v. Horbach, 4 Pa. (4 Barr) 134.

[k] (Pa. 1852) There is no error in overruling an objection to an interested witness, where the objection does not disclose his interest.—Snyder v. May, 19 Pa. (7 Harris) 235.

[l] (Pa. 1854) A general objection to the competency of a witness on the ground of interest must be overruled if he is competent for any purpose.—Patterson v. Fay, 1 Phila. 473.

[m] (Tex. 1859) The objection was that from the state of the pleadings the witness was incompetent against his codefendant; the pleadings showed that the interests of the two defendants were adverse. *Held*, that the objection was well stated.—Gill v. Campbell, 24 Tex. 405.

(b) EVIDENCE AS TO INTEREST.

IN GENERAL, § 539.
TRANSFER OR RELEASE OF INTEREST IN GENERAL, § 540.
TESTIMONY OF WITNESS IN GENERAL, § 541.
—— CONTENTS OF DOCUMENTS, § 542.
—— TRANSFER, RELEASE, OR DISCHARGE OF INTEREST, § 543.
DECLARATIONS AND ADMISSIONS OF WITNESS, § 544.
EFFECT OF OTHER EVIDENCE AS EXCLUDING TESTIMONY OF WITNESS, § 545.
EFFECT OF TESTIMONY OF WITNESS AS EXCLUDING OTHER EVIDENCE, § 546.

§ 539. In general.

[a] A witness is presumed to be competent until the contrary is shown.

—(Ga. 1847) Adams v. Barrett, 3 Ga. (3 Kelly) 277;
(Mich. 1843) Norris v. Hurd, Walk. Ch. 102;
(Pa. 1856) Smith v. Moore, 2 Phila. 114.

[b] A witness who is objected to because of an interest in the event of the suit may be examined on his voir dire, or his interest may be shown by witnesses, but resort cannot be had to both modes.

—(Ill. 1862) Diversy v. Will, 28 Ill. (18 Peck) 216; (1865) Walker v. Collier, 37 Ill. 362;
(Pa. 1788) Mifflin v. Bingham, 1 Dall, 272, 1 L. Ed. 133.

[c] (Ala. 1849) Although a written instrument may contain the highest evidence of a witness' interest, it is not indispensably necessary to produce it. The proof may be made by the witness himself on voir dire, or by any other person who is able to testify to the fact.—Robertson's Ex'rs v. Allen, 16 Ala. 106.

[d] (Ala. 1850) The competency of a witness is presumed until the contrary is clearly shown, and the mere fact that the witness has intermarried with the daughter of the testator does not show that he is legally interested in a suit brought against the executor in his representative character. The rule would be different if the suit was against the personal representative of an intestate.—Clealand v. Huey, 18 Ala. 343.

[e] (Cal. 1863) When a deed under which a party in a suit claims is not in evidence, the grantor is presumed competent to testify concerning it; and if objected to on the ground of interest, the burden of proof is on the party making the objection.—Wright v. Carillo, 22 Cal. 595.

[f] (Conn. 1824) Though the interest of a witness must be proved either by examining him on the voir dire or by the testimony of other witnesses, yet a resort to one mode to prove the interest of the witness, on one ground, does not preclude recourse to the other, to prove his interest on a distinct ground.—Stebbins v. Sackett, 5 Conn. 258.

[g] (Conn. 1838) In an action by A. against B., on a note for $100, dated January 1, 1831, defendant offered C. as a witness. Plaintiff objected to him on the ground of his interest, and, to prove it, gave in evidence two writings signed by C., the first of which was dated May 11, 1833, and was as follows: "If any note or notes, payable to A. or order, shall hereafter come against B., except the one I now hold for $100, which has been due some time, I do agree to pay such notes myself." The other writing, written afterwards, was a letter addressed to A., requesting him to put the writer in possession of the paper which A. held, purporting that C. had agreed to pay the notes, etc., which A. held against B. *Held* that, if the first writing imported a promise to pay the note in suit, there was no proof of any consideration for that promise, derived from the writings or otherwise, and that, consequently, C. was not legally bound to fulfill the promise, and no such interest appeared as would render him an incompetent witness.—Dodge v. Burdell, 13 Conn. 169.

[h] (Conn. 1846) In an action by an assignee in bankruptcy against one to whom the bankrupt had conveyed land prior to the bankruptcy proceedings to recover the same, the testimony of a witness for plaintiff was objected to on the ground of his interest as a creditor of the bankrupt, and the only proof of such fact was that his name appeared as a creditor in the bankrupt's schedule of debts. Such witness testified, however, that although he had been a creditor he had assigned the debt. *Held*, that the schedule was not conclusive evidence of the witness' interest.—Steene v. Aylesworth, 18 Conn. 244.

[i] (Ga. 1858) That a witness is interested must be shown affirmatively.—Richardson v. Hodge, 24 Ga. 203.

[j] (Ind. 1846) The party objecting to the competency of a witness on the ground of interest must show his incompetency.—State v. Holloway, 8 Blackf. 45.

[k] (Ky. 1837) The party objecting to a witness, as interested, must show the interest; and where the allegation is that a witness might be responsible in consequence of having instituted the suit without authority, the party objecting must show that the witness acted without color of authority, to render him incompetent.—Smith v. White, 35 Ky. (5 Dana) 376.

[l] (Ky. 1839) In an action on a warranty of the title to a slave, it was proved, as an objection to the competency of a witness offered by plaintiff, that both he and the witness had said that the latter was interested in the profits of a lot of slaves that had been sent to the South, of which the slave in question was one. *Held*, that this did not prove the witness incompetent, as he might still have no interest in the event

of the suit; and that, to disqualify him, it should be shown that he was interested with plaintiff in his purchase, or in the damages he was suing for.—Offutt v. Twyman, 39 Ky. (9 Dana) 43.

[m] (Ky. 1845) It is incumbent on the party objecting to the competency of a witness to show his incompetency. The court will not presume that an administrator, who was sued, has been removed, and the suit revived against his successor, has committed a devastavit, and rendered himself an incompetent witness for his successor, without proof.—Anderson's Adm'r v. Irvine, 44 Ky. (5 B. Mon.) 488.

[n] (Ky. 1851) Where a witness was objected to as incompetent, and the party objecting failed to show his incompetency, his testimony was admissible.—Hamilton v. Summers, 51 Ky. (12 B. Mon.) 11, 54 Am. Dec. 509.

[o] (La. 1839) A witness' competency may be ascertained on his voir dire; if the party objecting do not choose to do this, the party offering him may rebut any presumption of his incompetency by other evidence.—Denton v. Commercial & R. Bank, 13 La. 486.

[p] (Me. 1849) The words "property of A.," written in the margin of a note, do not show such an interest in the note at the time of the trial of an action brought on the note, as to render A. incompetent as a witness in such action.—Sibley v. Lumbert, 30 Me. (17 Shep.) 253.

[q] (Me. 1852) The previous declarations of plaintiff, that he supposed he should have to commence a suit against defendant for the benefit of a third person, and that, if such third person should bring a suit, he should not object to it, will not preclude plaintiff from using such third person as a witness, without further proof of his interest in the suit.—Cole v. Cole, 33 Me. 542.

[r] (Me. 1854) Proof that the master sailed the vessel "on shares" is not enough to make a part owner a good witness, in an action against the master for wages of one of the crew.—Lufkin v. Patterson, 38 Me. 282.

[s] (Md.) If the testimony of a witness is intended to be objected to, in an action of ejectment, because of his holding adjoining lands, his interest must be located on the plots.—(1797) Chapline's Lessee v. Keedy, 3 Har. & McH. 578; (1800) Gittings' Lessee v. Hall, 1 Har. & J. 14, 2 Am. Dec. 502; (1807) Hall v. Gittings' Lessee, 2 Har. & J. 112.

[t] (Md. 1828) In an action of ejectment, where defense is taken on a warrant, and plots are returned, an objection to a witness on the score of interest cannot prevail, where his interest is not located on the plots; and his own private plot, made to demonstrate his interest, cannot be received in evidence for that purpose.—Stoddert's Lessee v. Manning, 2 Har. & G. 147.

[u] (Md. 1852) In an action on a note, made by a testatrix, in favor of her grandson, and by him indorsed to plaintiff, a witness was objected to on the ground that she was the daughter of the testatrix, and, as such, a distributee of her estate. The record stated that the witness was the mother of the payee of the note, and that he was the grandson of the testatrix. *Held*, that it did not necessarily follow from these facts that the witness was the daughter of the testatrix.—Renwick v. Williams, 2 Md. 356.

[uu] (Mass. 1764) Where it is sought to make administrators competent witnesses in matters affecting the estate of their intestate by showing that the estate was insolvent, the report of the commissioners is the only legal evidence which can establish their competency.—Allison v. Cockran, Quincy, 94.

[v] (Mo. 1862) Evidence may be given to show the nature and character of the interest of a party called as a witness for his adversary, without examining him upon his voir dire.—Pratte v. Coffman, 33 Mo. 71.

[vv] (N. H. 1833) A witness, examined on the voir dire, may be required to verify his signature to an instrument, and the instrument may then be read in connection with his evidence, for the purpose of excluding it on account of an interest in the event of a suit.—Hamblett v. Hamblett, 6 N. H. 333.

[w] (N. H. 1850) Evidence relating to the competency of a witness is addressed in the first instance to the court, but may in doubtful cases be ultimately submitted to the jury, and ought therefore to be competent evidence.—Johnson v. Kendall, 20 N. H. 304.

[ww] (N. J. 1791) A bare allegation of interest does not deprive one of the benefit of his witnesses; it must be proved on the voir dire.—Hulshart v. Hart, 1 N. J. Law (Coxe) 52.

[x] (N. Y. 1846) Upon an application for leave to examine a codefendant as a witness, there must be an affidavit that the person proposed to be examined is not interested in the matters to which he is to be examined; and an affidavit of the solicitor that he is discharged in bankruptcy, and that the solicitor is advised and believes him to be a competent witness, is not sufficient, it not appearing that such bankrupt has released all right to a surplus of his estate, after paying the debts.—American Life Ins. & Trust Co. v. Sackett, 1 Barb. Ch. 585.

[xx] (N. Y. 1855) A party has a right to call witnesses to prove that an adverse witness is a party in interest.—Healy v. Kinsley, 4 E. D. Smith, 286.

[y] (N. Y. 1860) One offered as a witness is competent to testify as to whether he is the plaintiff in interest, and therefore incompetent under Code, § 399; his incompetency cannot be assumed until it has been proved upon the evidence on one side or the other.—Requa v. Requa, 22 N. Y. 254.

[yy] (Pa. 1852) Statements by a party calling a witness that he is interested are evidence sufficient to exclude him on the ground of interest.—Walker v. Coursin, 19 Pa. (7 Harris) 321.

[z] (S. C. 1826) A record of a judgment under an award, between a prisoner and the prosecutor, is competent evidence, on the trial for forging a receipt, to show that all matters in dispute between the parties had been settled, to which the forged receipt related; to show that the prosecutor had no interest, and was therefore a competent witness.—State v. Foster, 3 McCord, 442.

[zz] (Va. 1837) In an action against an administrator, a sister of the deceased was a competent witness for defendant in the absence of a showing that she was a distributee.—Janey v. Blake's Adm'r, 8 Leigh, 88.

§ 540. Transfer or release of interest in general.

[a] (Ind. 1857) Where a release is produced in court and made part of the record, it will be presumed to be on file in the court for the releasee's use.—Petro v. Cassiday, 9 Ind. 63.

[b] (Ky. 1808) A release, to render an interested person a competent witness, if produced in court by the attorney of the party to the suit, is insufficient without proof of its execution by the subscribing witness.—Reading v. Metcalf, 3 Ky. (Hardin) 535.

[c] (La. 1857) A formal release of a witness from any liability over to the party interrogating him, annexed to the interrogatories and transmitted with the commission under which he was examined, is sufficient to remove the objection to his testimony on the score of interest.—Farwell v. Harris, 12 La. Ann. 50.

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[d] (La. 1868) A resolution of the directors of a bank authorizing its president to execute a full release of all liability of its agent to the bank on account of a transaction in behalf of the bank, and also the release, are admissible evidence, where the competency of the agent as a witness is objected to on the ground of interest.—State v. Louisiana State Bank, 20 La. Ann. 468.

[e] (Me.) The release of a witness must be produced, and its execution proved, that the court may judge of its sufficiency.—(1840) Hobart v. Bartlett, 17 Me. (5 Shep.) 429; (1842) Southard v. Wilson, 21 Me. (8 Shep.) 494.

[f] (N. J. 1852) A witness was interested in the event of the suit and a release of his interest was proved by the witness himself, and then offered in evidence to render him competent. *Held*, that it was not competent to do so; the subscribing witness to the release must be called and the release be regularly proved as any other deed.—King v. King, 9 N. J. Eq. (1 Stockt.) 44.

[g] (Pa. 1845) Before the assignor of a chose in action is permitted to testify for the assignee the legal presumption, which is adverse to the admission of such testimony, must be rebutted by the most overwhelming proof. Not the slightest doubt should be suffered to remain that at the time of the contract there was no intention whatever entertained to support the claim by the oath of the assignor, nor any such necessity supposed to exist.—Phinney v. Tracey, 1 Pa. (1 Barr) 173, 44 Am. Dec. 116.

[h] (Tex. 1864) In trespass to try title, defendant offered the deposition of B., to which was appended by the witness a release, executed to him by defendant, acquitting the witness of all liability on his covenants of warranty in his deed to G. defendant's grantor. Defendant claimed under a quitclaim deed. The release was acknowledged by defendant before the presiding judge of the county court of S., state of Kentucky, who certified the acknowledgment under his hand without seal. The certificate of the clerk of the same court, under the seal of the court, was appended, certifying to the official character of the judge. *Held*, that the release was effectual and properly authenticated, and the deposition admissible in evidence.—Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657.

[i] (Vt. 1844) The deposition of a witness residing out of the state was offered by plaintiff, and defendant showed, by an ex parte deposition, taken previous to the one offered, that the deponent was, at the time of taking such ex parte deposition, directly interested in behalf of plaintiff in the case. *Held*, that plaintiff might prove by parol that at the time he sent for the deposition offered, and as a part of the same packet, he executed and mailed to the deponent a full release of his interest, and that this showing entitled plaintiff to use the deposition offered.—Oakes v. Weller, 16 Vt. 63.

[j] (Vt. 1851) When the deposition of a witness whose testimony would discharge him from liability to plaintiff is offered by plaintiff, and a release in due form to the witness, purporting to be executed by plaintiff, is attached to the deposition, and it does not appear that defendant made any question at the trial in reference to the genuineness of plaintiff's signature to the release, he cannot afterwards be allowed to object that the execution of the release was not duly proved, although it is stated upon the bill of exceptions that no evidence was adduced to prove its execution.—Christy v. Smith, 23 Vt. 663.

§ 541. Testimony of witness in general.

[a] (Ala. 1853) If a witness, shown to be incompetent on his voir dire, be allowed to testify, facts proved by him on his examination in chief cannot be looked to for the purpose of curing the error.—Lay's Ex'r v. Lawson's Adm'r, 23 Ala. 377.

[b] (Ark.) Where an objection to the competency of a witness arises from his own examination, he may be further interrogated as to facts tending to remove the objection.—(1859) Brittin v. Crabtree, 20 Ark. 309; (1860) McRae v. Rhodes, 22 Ark. 315.

[c] (Cal. 1852) A party, offering a witness, who is objected to, has a right to cross-examine him on his voir dire.—Beach v. Covillaud, 2 Cal. 237.

[d] (Fla. 1856) When a witness, on being examined on his voir dire, has stated that he has no interest in the result of the suit, he may still be further examined while on his voir dire as to his position and real situation as to the subject-matter of the suit and the parties to it.—Hooker v. Johnson, 6 Fla. 730.

[e] (Ill. 1863) Where a witness being examined on his voir dire states that a certain party had recovered a judgment against him on a matter relating to his interest in the suit in which he was testifying, such statements may be taken as sufficient proof that a judgment was obtained, to render the witness incompetent on the ground of interest.—Babcock v. Smith, 31 Ill. 57.

[f] (Ind. 1845) To permit a party to ask a witness, whom he had previously called and examined, and whose testimony is unimpeached, whether he had any interest in the suit, is irregular, but cannot be assigned for error.—Griggs v. Voorhies, 7 Blackf. 561.

[g] (Ind. 1854) For the purpose of disqualifying a witness for plaintiff, he was asked by defendant if he had not a joint interest with plaintiff in the mill, for the injury of which the action was brought, during the time covered by the declaration. *Held*, that the question should have been allowed.—Cory v. Silcox, 5 Ind. 370.

[h] (Ky. 1806) A party may examine a witness as to the detail of his transactions, in order to show his interest, and at any stage of the suit.—Baldwin v. West, 3 Ky. (Hardin) 50.

[i] (Ky. 1834) An interested witness is not competent to prove that he had no interest when the facts to be established by him occurred; but if he was then disinterested and afterwards became interested, and is therefore not incompetent, it must be made to appear by testimony other than his own.—In re Gill's Will, 32 Ky. (2 Dana) 447.

[j] (Ky. 1837) A witness stated that he "felt" some interest in the result of a suit, but the grounds of that feeling as disclosed by him on his voir dire showed that his interest was not of the disqualifying kind. *Held*, that he was admissible.—Elliot v. Porter, 35 Ky. (5 Dana) 299, 30 Am. Dec. 689.

[k] (La. 1813) A witness may be sworn on his voir dire that he is interested in the suit and questioned to ascertain in whose favor.—Rochelle v. Musson, 3 Mart. (O. S.) 73.

[l] (La. 1831) A witness, though prima facie incompetent, may be examined on his voir dire to explain his situation.—Orillon v. Nerault, 2 La. 292.

[m] (La. 1860) Although a witness testifies that he has no interest in the suit, yet, if it appears by his examination on the voir dire that he has an interest, he cannot be heard as a witness.—Copse v. Eddins, 15 La. Ann. 528.

[n] (La. 1866) It is competent for the party offering the witness, if the objector does not pursue the inquiry, to show on cross-examination whether or not the witness really has any disqualifying interest in the result of the suit, and, for this purpose, may inquire how the wit-

ness is interested.—Succession of Weigel, 18 La. Ann. 49.

[o] (Me. 1839) In an action against two persons for services performed for them in "lumbering," if a witness offered by them state "that he was connected with them in lumbering," this, without qualification or limitation, is conclusive of his incompetency to testify.—Jennings v. Estes, 16 Me. (4 Shep.) 323.

[p] (Me. 1842) In an action brought by a banking corporation, in which defendant sought to compel one of the stockholders to testify, the interest of the witness as a stockholder might be proved by his statements on the voir dire without producing any other evidence thereof.—Bank of Oldtown v. Houlton, 21 Me. (8 Shep.) 501.

[q] (Md. 1790) A witness sworn on the voir dire may only be asked whether he conceives himself interested in, or that he shall gain or lose by, the event of the suit.—Moore v. Sheridine, 2 Har. & McH. 453.

[r] (Md. 1815) Plaintiff in ejectment proved, by a witness, only the time when one A. was born. Defendant thereupon proceeded to examine him, in order to establish the location of the tract of land called C., for which he took defense. Plaintiff then offered to ask the witness if he did not own or claim title to the tract of land called P., located by defendant, in order to show that the witness was interested in having the location of C. established. *Held*, that plaintiff was at liberty to ask the question of the witness, for the purpose of showing that he was interested, and incompetent to give evidence relative to the location of C.—Shields' Lessee v. Miller, 4 Har. & J. 1.

[s] (Md. 1824) The maker expressed his doubts, on his voir dire, of his interest in the event of the suit, and represented it to depend upon the question whether the act of limitations could be pleaded to a claim he had against the indorser, in case, on a recovery against him by the plaintiff, he, the witness, should be sued by the indorser. *Held*, that he was competent.—Bank of Columbia v. Magruder's Adm'x, 6 Har. & J. 172, 14 Am. Dec. 271.

[t] (Md. 1854) The right to swear a witness on his voir dire clearly belongs to the party objecting to his testimony.—Foley v. Mason, 6 Md. 37.

[u] (N. J. 1813) In an action for damages caused by overflowing land by the erection of a milldam, a witness, in his examination upon his voir dire, may properly be asked if the removal of the dam would not operate to his advantage.—Blackwell v. Hagerman, 3 N. J. Law (2 Penning.) 1032.

[v] (N. Y. 1823) In determining the question of the competency of a witness who has been sworn de bene esse, the judge should disregard the testimony of the witness thus sworn, and look only to the other evidence given.—Mott v. Hicks, 1 Cow. 513, 13 Am. Dec. 550.

[w] (N. Y. 1824) Where a witness, on objection to his competency, answers on his voir dire generally that he is interested, and no particular questions are put to him to show the nature of his interest, he should be excluded.—Williams v. Matthews, 3 Cow. 252.

[x] (N. Y. 1856) A defendant, objecting to the examination of a witness on the ground that she was the wife of the real plaintiff in interest, has a right to have her first sworn on her voir dire.—Seeley v. Engell, 13 N. Y. (3 Kern.) 542.

[y] (Pa. 1852) Though it may appear from the direct answer of a witness sworn on his voir dire that he is incompetent on the ground of interest, yet if it appears from his answers to the inquiries of the party calling him that he has no interest, the witness is competent.—Blackstock v. Leidy, 19 Pa. (7 Harris) 335.

[z] (Tenn. 1809) A witness having, on his voir dire, denied any interest, may be interrogated as to his situation, in order to discover his interest.—Reid's Lessee v. Dodson, 1 Tenn. (1 Overt.) 396.

§ 542. —— Contents of documents.

[a] A witness, upon the voir dire, may be examined respecting contracts, records, or documents, not produced at the trial, so far as relates to his interest in the cause.
—(Me. 1830) Miller v. Mariners' Church, 7 Me. (7 Greenl.) 51, 20 Am. Dec. 341;
(Md. 1829) Hays v. Richardson, 1 Gill & J. 366.

[b] (Ala. 1849) In the examination of a witness on voir dire, it is permissible for him to testify as to the contents of written instruments that are not produced.—Herndon v. Givens, 16 Ala. 261.

[c] (Conn. 1824) On the examination of a witness as to his interest, he may be asked any questions concerning instruments he has executed, without producing those instruments.—Stebbins v. Sackett, 5 Conn. 258.

[d] (Me. 1842) A witness examined on the voir dire, and exhibiting an apparent interest in the case, may be permitted to show, by testifying further, that such apparent interest has been removed by writings or records, although not produced or present at the time.—Fifield v. Smith, 21 Me. (8 Shep.) 383.

[e] (N. J. 1811) A witness may testify of his interest, on which to found an objection to his competency, without producing a bill of sale, which is his evidence of his interest.—Mayo v. Gray, 3 N. J. Law (2 Penning.) 837.

[f] (N. J. 1849) It is competent to show the incompetency of a witness, during his cross-examination, on the ground of interest, and to do this he may be asked as on his own voir dire as to the contents of a writing, which makes his interest, without accounting for its absence; and if a witness be proven to be interested at any stage in the examination, his testimony must be overruled.—Howell v. Ashmore, 22 N. J. Law (2 Zab.) 261.

§ 543. —— Transfer, release, or discharge of interest.

[a] (Ala. 1850) A witness, whose interest is made to appear otherwise than by the examination of the opposite party, is incompetent to prove that he has been released.—Dent v. Portwood, 17 Ala. 242.

[b] (Ala. 1855) If the interest of a witness appears on the face of the note in suit, and objection to his competency on that ground is made before filing interrogatories, he is incompetent to prove his own release.—Hiscox v. Hendree, 27 Ala. 216.

[c] (Ala. 1855) If the interest of a witness appears from his own testimony, he may testify to facts which will remove the objection; aliter, when his interest is otherwise shown.—Montgomery & W. Plank Road Co. v. Webb, 27 Ala. 618.

[d] (Conn. 1839) A witness, whose deposition had been taken ex parte, and offered in evidence, was found to be incompetent by reason of interest. A discharge had been made and signed by the party offering the deposition, bearing the same date with it, and appended thereto; and the witness testified in his deposition that he had been discharged before he testified. It was not, however, otherwise shown when the discharge was made, or that it had ever been delivered to the witness. *Held*, that the deposition was inadmissible.—Hall v. Connecticut River Steamboat Co., 13 Conn. 319.

[e] (Ill. 1853) A witness on his voir dire is competent to prove that he has received a re-

lease of his interest in the matter.—Ault v. Rawson, 14 Ill. (4 Peck) 484.

[f] (Ill. 1864) It may be shown on the examination in chief of a witness who had been interested in the action that he had signed a written release of such interest.—Goodrich v. Hanson, 33 Ill. 498.

[g] (Iowa, 1856) In an action against a steamboat, the captain said on the voir dire: "I was captain and part owner when the contract was made. I have no interest in the present suit. I sold out before I knew that the plaintiff had any claim." No other evidence on the point being introduced, *held*, that he was competent.—West v. The Berlin, 3 Iowa (3 Clarke) 532.

[h] (La. 1823) A witness, whose interest appears by the instrument sued on, cannot restore his competency by his own declaration.—Evans v. Gray, 1 Mart. (N. S.) 709.

[i] (La. 1828) A witness is competent when his declarations, being the only evidence of his interest, establish its release.—McMicken v. Fair, 6 Mart. (N. S.) 515.

[j] (La. 1842) A witness' statement in depositions offered by a party, that the latter has released him, is itself an effectual release dispensing with the original.—Bailey v. Stewart, 1 Rob. 410.

[k] (Me. 1842) A recital in the deposition of a person previously interested in the cause of action, that he had been released, is not sufficient evidence of a release to qualify him to testify.—Southard v. Wilson, 21 Me. (8 Shep.) 494.

[l] (Mass. 1826) Where a witness, being asked whether he is interested in the suit, declares that he has parted with his interest, and, without further question, is allowed to testify in chief, a new trial will not be granted because the deed of transfer or a release was not exhibited.—Baxter v. Rodman, 20 Mass. (3 Pick.) 435.

[m] (Mass. 1851) The indorser of a note paid the same, and took up the note of a third person, payable to the maker of the first note, by whom it had been deposited as collateral security for the payment for the first note, and caused the note so taken up to be sued in the name of such payee; and being called as a witness for plaintiff in such action, stated on his examination upon the voir dire that he directed the commencement of the suit as the agent of plaintiff, by whom he had been reimbursed all the costs advanced by him, and that he had no interest in the note or in the suit. *Held*, that such disclaimer of any interest he might otherwise have made him a competent witness for plaintiff.—Snow v. Batchelder, 62 Mass. (8 Cush.) 513.

[n] (N. J. 1791) Where a witness is proved to have been once interested, though only by his own confession, the disability cannot be removed by his further swearing such interest is at an end.—Ely v. Jones, 1 N. J. Law (Coxe) 46.

[o] (N. Y. 1808) Where a witness shows his interest on his voir dire, arising under a sealed instrument, and by parol shows it to be at the same time discharged, he is a good witness.—Fanning v. Myers, Anth. N. P. 47.

[p] (N. Y. 1851) If the assignor of a thing in action called as plaintiff's witness is made defendant's witness for the purpose of an examination on his voir dire, and testifies to facts showing plaintiff to be the real party in interest, defendant is so far bound by his declarations as to preclude an exception to his admission as a witness, although some circumstances of suspicion may attach to the assignment.—Briggs v. Evans, 1 E. D. Smith, 192.

[q] (N. C. 1864) Where a witness who had an interest in a cause gives or accepts a release in order to extinguish his interest, which recites that it was given in consideration of a sum of money named therein, it is competent for the other party to ask him whether in fact there was any consideration.—Johnson v. Murchison, 60 N. C. 286.

[r] (Pa. 1850) A witness cannot remove an appearance of interest by his own oath.—Banks v. Clegg, 14 Pa. (2 Harris) 390.

[s] (Tenn. 1844) Plaintiff gave a joint promisor in a note a release to render him competent. *Held*, that the joint promisor was not competent to prove the existence of such release, much less its legal effect, but that it should have been produced.—Harvey v. Sweasy, 23 Tenn. (4 Humph.) 449.

§ 544. Declarations and admissions of witness.

[a] Interest of a witness for the purpose of proving his incompetency to testify cannot be shown by hearsay evidence or declarations out of court.

—(U. S. 1812) Vining v. Wooten, Fed. Cas. No. 16,949 [Brunner, Col. Cas. 187, 3 Tenn. (Cooke) 127];

(Ill. 1859) Waughop v. Weeks, 22 Ill. (12 Peck) 350;

(Ind. 1845) Griggs v. Voorhies, 7 Blackf. 561;

(Ky. 1829) Freeman v. Luckett, 25 Ky. (2 J. J. Marsh.) 390; (1830) Davis v. Whiteside's Adm'r, 27 Ky. (4 J. J. Marsh.) 116;

(Me. 1841) Young v. Inhabitants of Garland, 18 Me. (6 Shep.) 409; (1846) George v. Stubbs, 26 Me. (13 Shep.) 243; (1851) Stuart v. Lake, 33 Me. 87;

(Md. 1800) Colston v. Nicols, 1 Har. & J. 105;

(N. H. 1851) Martin v. Farnum, 24 N. H. (4 Fost.) 191; (1860) Rich v. Eldredge, 42 N. H. 153;

(Ohio, 1839) Dunn v. Cronise, 9 Ohio (9 Ham.) 82;

(Pa. 1852) Walker v. Coursin, 19 Pa. (7 Harris) 321;

(Vt. 1826) Nichols v. Holgate, 2 Aikens, 138.

[b] (Ala. 1843) The presumption being in favor of the competency of a witness, if it be shown that a witness said he was entitled to receive and control one-half which should be recovered by the plaintiff, it will be presumed that he was entitled to receive the same as attorney or agent of plaintiff, unless the contrary is proved.—Densler v. Edwards, 5 Ala. 31.

[c] (Ky. 1823) It is no objection to the admissibility of a witness that he has been heard to say, when not on oath, that he must pay the damages if any are recovered.—Jones v. Tevis, 14 Ky. (4 Litt.) 25, 14 Am. Dec. 98.

[d] (La. 1839) A witness's testimony on his voir dire, as to his interest, is entitled to greater credit than his unsworn statements to a third person.—Le Bret v. Belzons, 13 La. 93.

[e] (La. 1847) Where the declarations of a witness are the only evidence of his having been interested, and those declarations establish the release of that interest, they must be taken together as proving his competency.—Cavelier v. Moss, 2 La. Ann. 584.

[f] (N. H. 1860) The letters of a person offered as a witness are not competent evidence of interest to exclude his testimony.—Rich v. Eldredge, 42 N. H. 153.

[g] (N. Y. 1808) The liability of a witness for the costs of a suit must be proved otherwise than by his own confessions, in order to render him incompetent.—Main v. Newson, Anth. N. P. 11.

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[h] (N. Y. 1826) A declaration by the indorser of a note that he had disposed of all his interest therein and believed that he had not been made responsible is insufficient to do away with the presumption of law that he was interested.—Baskins v. Wilson, 6 Cow. 471.

[i] (N. C. 1836) Interest of a witness must be shown in the manner in which other controverted facts are to be proved, and the declarations of the witness either on oath or in the presence of the party against whom they are offered cannot be proven as evidence.—Ingram v. Watkins, 18 N. C. 442.

[j] (Pa. 1796) The competency of a witness cannot be destroyed by evidence of a statement that another heard him confess that he might be a loser by the event of the suit.—Pollack's Lessee v. Gillespie, 2 Yeates, 129.

[k] (Pa. 1861) In an action on a promise by defendant to pay plaintiff a certain sum for his interest in a business, a witness for plaintiff cannot be rejected merely on evidence of a loose declaration to the effect that he was purchaser and not the defendant.—Crosley v. Yetter, 4 Phila. 345.

§ 545. Effect of other evidence as excluding testimony of witness.

[a] (U. S. 1803) If the objection to a witness on account of interest arise from proof made by the objector, the witness cannot discharge himself of the objection by any matter sworn by himself; it must be removed by proof drawn from some other source.—Murray v. Marsh, Fed. Cas. No. 9,965 [1 Brunner, Col. Cas. 22, 3 N. C. 290].

[b] (U. S. 1832) An objection to a witness on the ground of interest may be supported either by examining the witness himself or by other independent evidence, but if this fact is proved by evidence aliunde, it must be overcome by proof independent of the witness' testimony.—The Watchman, Fed. Cas. No. 17,251 [1 Ware (232) 233].

[c] (Ala. 1836) A party objecting to a witness on the ground of interest may offer evidence of such interest; and the witness cannot afterwards disclaim the interest on his voir dire.—Carroll v. Pathkiller, 3 Port. 279.

[d] (Cal. 1856) The deed to a trustee and his covenant of warranty were given in evidence to support the objection to his competency, by which it appeared that the land was conveyed to him absolutely, and that he had conveyed a part with covenant of warranty, but it appeared from his examination on his voir dire, that the trust existed by parol, and that he really had no interest therein, and was indemnified against loss by his warranty. *Held*, that the question as to the admissibility of such parol evidence to contradict or vary the terms of the instrument under seal could only properly arise in a suit between the trustee and the cestui que trust, upon a denial of the trust by the grantee, and that for the purposes of the examination the evidence on the voir dire was admissible.—Peralta v. Castro, 6 Cal. 354.

[e] (Ill. 1862) The witness objected to because of interest cannot be called to contradict those who have testified as to his disqualification.—Diversy v. Will, 28 Ill. (18 Peck) 216.

[f] (Ind. 1828) If a witness be objected to as interested, and his interest be proved by other witnesses, the party calling him has no right to examine him on his voir dire; that right belonging alone to the party who makes the objection.—Wright v. Mathews, 2 Blackf. 187.

[g] (Iowa, 1856) Where the interest of a witness as partner of plaintiff is shown by evidence aliunde after he has been examined, he cannot be recalled to restore his testimony on his voir dire.—Robinson v. Turner, 3 G. Greene, 540.

[h] (La. 1845) The allegation in an answer, that a third person is the real plaintiff, is not sufficient to exclude his testimony.—Henderson v. Western Marine & Fire Ins. Co., 10 Rob. 164, 43 Am. Dec. 176.

[i] (La. 1860) When interest in a witness is established by evidence aliunde, it cannot be disproved by his own testimony.—Young v. Cook, 15 La. Ann. 126.

[j] (Me. 1836) Where a party has attempted to exclude a witness produced against him, by evidence from others of his interest, and has failed, the judge, in his discretion, may permit him to examine such witness on the voir dire; but it is doubtful whether this may be claimed as a right.—Butler v. Tufts, 13 Me. (1 Shep.) 302.

[k] (Mass. 1804) A witness cannot be examined on the voir dire to show his interest, where the person seeking to examine him has attempted to show his interest in another manner.—Bridge v. Wellington, 1 Mass. 219.

[l] (N. Y. 1808) Where a mere offer has been made to prove a witness interested, he may still be examined on his voir dire, where the testimony offered has been overruled.—Main v. Newson, Anth. N. P. 11.

[m] (N. Y. 1848) Where a witness's interest, or other incompetency, is not shown by his own examination, but by evidence aliunde, the witness cannot testify to the restoration of his competency by the execution of a release, or by any other fact.—Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

[n] (N. C. 1806) Though a witness cannot be examined on his voir dire, after witnesses have been examined to prove his interest, the mere fact that it was proposed to call a witness to prove the interest of another, or that it was not done because of the absence of the witness proposed to be called, would not prevent the examination of the alleged interested witness, on his void dire.—Ray v. Marriner, 3 N. C. 385.

[o] (Pa. 1851) Where evidence is adduced to show the incompetency of a witness, his own testimony is not admissible.—Gordon v. Bowers, 16 Pa. (4 Harris) 226.

[p] (Pa. 1853) A witness cannot, at the instance of the party calling him, repel an objection to his competency on the ground of interest established by other evidence.—Anderson v. Young's Ex'rs, 21 Pa. (9 Harris) 443.

[q] (Pa. 1856) After evidence has been given to charge a witness with interest, he cannot, upon being admitted, be allowed to prove his own competency; but if such proof be elicited on his cross-examination by the party objecting to him, it is not a fault of which such party may complain.—Haynes v. Hunsicker, 26 Pa. (2 Casey) 58.

§ 546. Effect of testimony of witness as excluding other evidence.

[a] (Conn. 1793) After a witness has been questioned under oath as to his interest in the cause of action, the party examining him cannot introduce evidence to show his interest.—Mallet v. Mallet, 1 Root, 501.

[b] (Conn. 1808) Where a witness whose deposition was taken before a magistrate was examined by the party against whom he was called as to his interest in the event of the suit, other witnesses cannot be examined on trial as to such interest.—Butler v. Butler, 3 Day, 214.

[c] (La. 1840) Where a witness on his voir dire declares himself interested and the grounds of his belief appear sufficient, the party calling him cannot disprove his interest by other witnesses.—Brumgard v. Anderson, 16 La. 341.

[d] (Me. 1849) A party, after unsuccessfully examining a witness on the voir dire, with a

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view to prove him incompetent from interest, is not allowed to introduce evidence aliunde for that purpose.—Le Barron v. Redman, 30 Me. (17 Shep.) 536.

[e] (Me. 1851) It is a general rule that if a party, objecting to a witness, examines him on the voir dire to show his interest, he cannot afterwards prove, from other sources, for the purpose of showing his interest, facts which were known to him at the time when the witness was examined.—Stuart v. Lake, 33 Me. 87.

[f] (Md. 1848) A party, having elected to examine witnesses upon the voir dire, is precluded from resorting to any other mode to show their interest in the event of the suit.—Williams v. Savage Mfg. Co., 1 Md. Ch. 306.

[g] (N. Y. 1808) After a witness has been examined on his voir dire, his interest cannot be proved by witnesses.—Welden v. Buck, Anth. N. P. 9.

[h] (Pa. 1856) A deponent should not be examined on his voir dire as to his competency, and other witnesses then called by the same party to the same point. But, if they prove no more than he admitted, the error is immaterial. —Schnader v. Schnader, 26 Pa. (2 Casey) 384.

[i] (Tenn. 1805) The interest of a witness cannot be proven by other testimony after he has denied it on his voir dire.—McAlister's Lessee v. Williams, 1 Tenn. (1 Overt.) 107; Id. 119.

[j] (Vt. 1802) If a witness is put on the voir dire as to his interest, and purges himself, evidence to the objection ab extra is not admissible either at that trial nor on motion for a new trial. The objecting party, having once made his election of proof, shall not afterward use another mode.—Dorr v. Osgood, 2 Tyler, 28.

(c) DETERMINATION AS TO COMPETENCY.

IN GENERAL, § 547.
ADMISSION OR EXCLUSION OF EVIDENCE, § 548.
QUESTIONS OF LAW AND FACT, § 549.

§ 547. In general.

[a] (U. S. 1880) To exclude a party in a criminal prosecution to the record as a witness for defendant, not only must objection be made for incompetency, but such objection must be sustained by the court at the trial.—United States v. Schindler (C. C.) 10 Fed. 547, 18 Blatchf. 227.

[b] (Ala. 1845) Where the witness disavows all interest in the result of the cause, and the facts disclosed by him are consistent with such disavowal, it is the duty of the court to permit his testimony to go to the jury.—Strawbridge v. Spann, 8 Ala. 820.

[c] (Ala. 1847) An order to examine a co-defendant as a witness does not ascertain his competency to testify; and if, at the hearing, it appears that he was interested, his testimony will be rejected.—Holman's Heirs v. Bank of Norfolk, 12 Ala. 369.

[d] (Conn. 1797) After the court have excluded defendant's witnesses, on the ground of a writing which defendant withholds, which would show their interest, they will not reconsider the question, on his producing it.—Mitchelson v. Enos, 2 Root, 515.

[e] (Ind. 1858) A witness was offered generally, but being incompetent as to some of the issues, the judge held that he could not be a witness generally. The party then said that he would question him on certain points, to which the court made no objection; but no questions were put. *Held*, that it was not error to exclude the witness generally, he being avowedly offered for legal and illegal purposes, and this exclusion not interfering with the right of the party to offer his evidence on the issues where it was competent.—Ferry v. Parks, 11 Ind. 165.

[f] (Mass. 1846) Where an objection is made, at a trial, to the competency of a witness on the ground of interest, the decision of the judge on the question of fact is conclusive, unless he sees fit to report the evidence for the consideration of the whole court.—Dole v. Thurlow, 53 Mass. (12 Metc.) 157.

[g] (Pa. 1850) Where a witness was offered by plaintiff, and objected to because he was a partner with plaintiff, the court should hear the evidence and decide on it whether the witness was competent.—Lyon v. Daniels, 14 Pa. (2 Harris) 197.

[h] (S. C. 1818) Where, in an action on a note by an indorsee, the payee was called as a witness, and produced a release from plaintiff, but refused to answer as to whether there was not a secret understanding between him and the plaintiff respecting the note, it was not to be conclusively presumed that he was interested, and it was error to enter a decree for defendants.—Lott v. Burrel, 2 Mill, Const. 167.

[i] (Tenn. 1848) It is the business of the party offering a witness to free his competency from legal exception; and if this be left doubtful, the witness may be excluded.—Story v. Saunders, 27 Tenn. (8 Humph.) 663.

[j] (Tenn. 1859) The question of competency in all cases is a collateral question; and it is error to reject the witness altogether because of the difficulty of getting at his interest.—Walker v. Skeene, 40 Tenn. (3 Head) 1.

§ 548. Admission or exclusion of evidence.

[a] If a party attempts to prove a witness interested in a question, and fails, the court will not set him aside, though afterwards it appears that he is interested.
—(Conn. 1795) Coit v. Bishop, 2 Root, 222.

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(Me. 1830) Schillinger v. McCann, 6 Me. (6 Greenl.) 364.

[b] (U. S. 1806) Where on cross-examination it appears that the witness is interested, the court will instruct the jury that his testimony is not evidence.—Brohawn v. Van Ness, Fed. Cas. No. 1,920 [1 Cranch, C. C. 366].

[c] (U. S. 1816) Where it subsequently appears, on examination of a witness sworn on his voir dire, that he is incompetent, his testimony will be set aside.—Evans v. Eaton, Fed. Cas. No. 4,559 [Pet. C. C. 322, 1 Robb, Pat. Cas. 68].

[d] (Ill. 1861) Where witnesses were sworn without objection to their competency, and it was left doubtful whether they were interested or not, and the jury were instructed that they might disregard their testimony, there was no error in the admission of the evidence.—Moline Water Power Co. v. Nichols, 26 Ill. (16 Peck) 90.

[e] (Me. 1836) If the interest of a witness be discovered in any stage of the cause, even after an unsuccessful attempt to prove it, his testimony will be rejected.—Butler v. Tufts, 13 Me. (1 Shep.) 302.

[f] (N. Y. 1810) Where a witness in any stage of a cause, in law or equity, discovers himself to be interested, his testimony may be rejected. —Swift v. Dean, 6 Johns. 523.

[g] (N. Y. 1832) If it appears from the testimony of the witness, after he has been sworn in chief, that he is incompetent on account of interest, his testimony may be rejected.—Rogers v. Dibble, 3 Paige, 238.

[h] (Tex. 1855) At whatever stage of the case (before the trial is concluded) the interest of the

witness is discovered, his testimony may be excluded.—Johnson v. Alexander, 14 Tex. 382.

§ 549. Questions of law and fact.

[a] (Conn. 1836) The competency of a witness, though it may depend upon a question of fact, is to be determined exclusively by the court.—Cook v. Mix, 11 Conn. 432.

[b] (Ill. 1864) It is for the court alone to pronounce upon the competency of a witness, and though the jury may and ought to examine into, and scrutinize the credibility of a witness, they have no right to exclude his evidence on the ground of interest, if he has been admitted by the court as competent.—Wickliffe v. Lynch, 36 Ill. 209.

[c] (N. H. 1842) Where a witness, on the voir dire, testifies to facts showing that he has no interest in the suit, and is admitted to testify, and he is afterwards contradicted as to those facts, but the question of interest is left in doubt, the jury must judge of the point, and if they believe he is interested, they must lay his evidence out of the case.—Walker v. Sawyer, 13 N. H. 191.

[d] (N. H. 1860) The question as to the interest of a witness in the cause so as to affect his competency may be referred to the jury in a doubtful case.—Rich v. Eldredge, 42 N. H. 153.

[e] (N. Y. 1837) The court must decide on the competency of a witness who believes himself interested.—Commercial Bank of Albany v. Hughes, 17 Wend. 94.

[f] (Pa. 1849) The question of the incompetency of a witness on grounds of interest may be decided by the court, or submitted by it to the jury, in its discretion.—Coheck v. George, 2 Am. Law J. (N. S.) 257.

[g] (Pa. 1851) If the interest of a witness is doubtful, the court should receive his testimony, and refer it to the jury to decide whether he has such interest or not.—Gordon v. Bowers, 16 Pa. (4 Harris) 226.

[h] (Pa. 1856) Evidence which is offered to sustain an objection to a witness on the ground of interest must be entirely free from doubt; otherwise the court may suffer the witness to testify, and leave the question of interest to the decision of the jury.—Haynes v. Hunsicker, 26 Pa. (2 Casey) 58.

[i] (Pa. 1864) The question of the competency of a witness on the ground of interest is for the court, and not for the jury.—Railroad Co. v. Schollenberger, 1 Walk. 401.

[j] (S. C. 1820) Interest goes to the competency of a witness, and is a question to be determined by the court.—State v. Van Evour, 2 Nott & McC. 309.

[k] (Tenn. 1868) The admissibility of the testimony of a witness, objected to on account of interest, is a question to the court.—Currier v. Bank of Louisville, 45 Tenn. (5 Cold.) 460.

(C) TESTIMONY OF PARTIES OR PERSONS INTERESTED FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.

1. IN GENERAL, §§ 550-552.
2. ACTIONS AND PROCEEDINGS IN WHICH TESTIMONY IS EXCLUDED, §§ 553-574.
3. PARTIES AND OTHER PERSONS WHOSE TESTIMONY IS EXCLUDED IN GENERAL, §§ 575-581.
4. PARTIES OF RECORD, §§ 582-597.
5. PERSONS INTERESTED IN EVENT, §§ 598-618.
6. GRANTOR, ASSIGNOR, OR OTHER PERSON FROM WHOM PARTY DERIVES TITLE OR INTEREST, §§ 619-624.
7. SURVIVING PARTY TO CONTRACT OR OTHER TRANSACTION OR CAUSE OF ACTION, §§ 625-643.
8. HUSBAND OR WIFE OF PARTY, OR OTHER PERSON EXCLUDED FROM TESTIFYING, §§ 644-649.
9. PARTIES AS AGAINST WHOM TESTIMONY IS EXCLUDED, §§ 650-662.
10. NATURE AND SUBJECT-MATTER OF EVIDENCE IN GENERAL, §§ 663-682.
11. COMMUNICATIONS OR INSTRUMENTS IN WRITING, §§ 683-695.
12. TRANSACTIONS OR COMMUNICATIONS BETWEEN PERSON OTHER THAN WITNESS AND PERSON SUBSEQUENTLY DECEASED OR INCOMPETENT, AND BETWEEN WITNESS AND PERSON OTHER THAN DECEASED OR IN ANOTHER'S PRESENCE, §§ 696-701.
13. MATTERS EQUALLY WITHIN KNOWLEDGE OF WITNESS AND PERSON SUBSEQUENTLY DECEASED, AND MATTERS OCCURRING BEFORE OR AFTER DEATH OR INCOMPETENCY OF PARTY TO CONTRACT OR OTHER TRANSACTION OR CAUSE OF ACTION, §§ 702-705.
14. NATURE AND EFFECT OF TESTIMONY, §§ 706-710.
15. EFFECT OF ADMISSION OF TESTIMONY OF PERSON SUBSEQUENTLY DECEASED OR OF TESTIMONY OF ADVERSE PARTY, AND EFFECT OF CALLING OR EXAMINATION AS WITNESS BY ADVERSE PARTY, §§ 711-725.
16. OBJECTIONS TO ADMISSIBILITY AND DETERMINATION THEREOF, §§ 726-731.

Improper answer to proper question, see post, § 822 [b].
Nature and form of question, see post, § 817 [m, n].

1. IN GENERAL.

IN GENERAL, § 550.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 551.
CHARACTER OF COURT AND WHAT LAW GOVERNS, § 552.

§ 550. In general.

[a] The intention of the statutory limitation on the rights of parties to testify in their own behalf was to secure mutuality of right in testifying, and that one party to the suit should not testify in a case where the party with whom the contract was made, or the transaction was had, was dead, or, from any cause, incapacitated to testify.
—(Ill. 1871) Merrill v. Atkin, 59 Ill. 19; (1874) Whitmer v. Rucker, 71 Ill. 410; (1876) Langley v. Dodsworth, 81 Ill. 86;
(Ohio, 1860) Hall's Ex'r v. Crain, 3 West. Law Month. 137, 2 Ohio Dec. 453.

[b] (U. S. 1877) Although the surviving party is not entitled, as a matter of right, to testify as to transactions with the intestate, when, after filing a libel against a vessel, the claimant dies, yet when the court can see that justice demands that he should be sworn, it is within its discretion to permit his testimony to be given.—The Poland, Fed. Cas. No. 11,242.

[c] (Iowa, 1868) Rev. St. §§ 2366, 2367, authorizes the county court to summon and examine under oath any person suspected by an executor of having taken wrongful possession of the effects of the decedent. *Held*, that such person is not a witness within Rev. St. §§ 3980, 3982,

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precluding parties in interest from testifying where the adverse party is the executor of a deceased person.—Smyth v. Smyth, 24 Iowa, 491.

[d] (N. H.) In an action where an executor is a party, to justify the admission of the living party on the ground that injustice will be done, it must appear from testimony other than that of the party himself that injustice will otherwise be done.—(1867) Harvey v. Hilliard, 47 N. H. 551; (1874) Fosgate v. Thompson, 54 N. H. 455.

§ 551. Constitutional and statutory provisions.

Effect of statutes disqualifying agent, see post, § 579.

[a] (Ala. 1868) Rev. Code, § 2704, providing that no person shall be incompetent to testify because he is a party or interested, except that where an executor or administrator is a party, neither party shall testify against the other as to any transaction with or statement by the testator or intestate, unless called to testify thereto by the opposite party, does not render a witness incompetent generally, but incompetent only to testify upon the subjects specified.—O'Neal v. Reynolds, 42 Ala. 197.

[b] (Colo. 1891) Civ. Code 1887, § 58, which provides that, when cross-demands have existed between two persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, neither party shall be deprived of the benefit thereof by the death of the other, does not by implication repeal Gen. St. § 3641, which prohibits a party from testifying in his own behalf when the adverse party sues or defends as executor or administrator of any deceased person; and hence, in an action by an administrator, it is proper to reject the testimony of defendant as to a counterclaim set up by him against plaintiff's intestate.—Rathvon v. White, 16 Colo. 41, 26 Pac. 323.

[c] (Iowa, 1872) In so far as interested parties were competent as witnesses, by the exceptions recognized in the common law, or by previous statutes, they are not excluded by the provision of the Code of Procedure, restricting the examination of a party, where the adverse party is an executor, administrator, etc.—Keech v. Cowles, 34 Iowa, 259; Rinehart v. Buckingham, Id. 409.

[d] (Iowa, 1886) Code 1873, § 3639, declaring that no person interested in the event of an action shall testify as to a personal transaction or communication with a person who, at the commencement of the examination, was deceased, is not open to the objection of being unconstitutional as contravening Const. art. 1, § 4, declaring that "a party shall have the right to use any other person as a witness not disqualified on account of interest," because it is the province of the legislature to determine what the interest that will disqualify shall be.—Donnell v. Braden, 70 Iowa, 551, 30 N. W. 777.

[e] (Mass. 1870) If a witness, examined under objection and exception, was incompetent by the law existing at the time of the trial, as a surviving party to the contract, the fact that a statute has since been passed rendering the witness competent will not defeat the exception, or prevent a reversal.—Woodrow v. Mansfield, 106 Mass. 112.

[f] (Mo. 1876) Under the witness act, in a case where a party might testify in his own behalf at common law, he may still do so, notwithstanding the death of the adverse party. The effect of the provisions, excepting actions, where one of the parties to the contract or cause of action is dead, from the general enabling provision that parties may testify, is that, where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party to such contract or cause of action will not be permitted to testify to any fact which he would not have been permitted to testify to at common law; that such other party stands, in regard to testifying, precisely as if the statute allowing persons to testify had not been enacted.—Angell v. Hester, 64 Mo. 142.

[g] (Mo. 1890) Rev. St. 1889, § 8918, in regard to the effect of the death of one party on the competency of another, is an enabling, and not a disabling, statute, and does not operate to disqualify any witness who was competent at common law.—Fink v. Hey, 42 Mo. App. 295.

[h] (Mont. 1879) Civ. Prac. Act 1872, § 445, leaves the rule as to a witness' incompetency from interest to stand as at common law where the adverse party is the representative of a deceased person, and the facts to be proven transpired during the life of the deceased.—Shober v. Jack, 3 Mont. 351.

[i] (N. H. 1880) The exception to the statute permitting parties to testify, whereby the surviving party is excluded unless the adverse party elects to testify, does not include cases where parties were previously permitted to testify.—Page v. Whidden, 59 N. H. 507.

[j] (N. J. 1865) Act 1851 (Nix. Dig. p. 928, § 27), providing that the complainant or petitioner in any action or proceeding of an equitable nature shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the complaint or petition, even after the death of defendant, was not repealed by Act 1859 (Nix. Dig. p. 928, § 34), providing that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, if either of the parties in the case sue or are sued in a representative capacity.—Lanning v. Lanning's Adm'r, 17 N. J. Eq. (2 C. E. Green) 228.

[k] (N. J. 1867) Under the proviso in the act of 1859, which prevents a party being sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, the deposition of complainant is competent to disapprove so much of defendant's answer as is responsive to the allegations to the bill of complainant, under Act 1855, § 2, which is not repealed by the act of 1859.—Marlatt v. Warwick, 19 N. J. Eq. (4 C. E. Green) 439.

[l] (N. J. 1882) The statute permitting a party to be a witness when the other party sues, or is sued, in a representative capacity, applies to an action pending at the time of its passage.—Besson v. Cox, 35 N. J. Eq. (8 Stew.) 87.

[m] (Pa. 1883) A party defendant to a bill praying for a partnership account may be called as a witness for plaintiff, although one of the codefendants is dead, and his executors have been substituted of record in his stead, said witness being within the letter of Act March 27, 1865, and a witness who would have been competent prior to Act April 15, 1869, is not rendered incompetent thereby, it being an enabling statute.—Packer v. Noble, 103 Pa. 188.

[n] (Tex. 1879) The exception to the rule that a witness shall not be excluded because he is a party to or interested in the issue tried, to the effect that he shall not be permitted to testify to transactions with the decedent, will not be extended by construction.—Hicks v. Patterson, 1 White & W. Civ. Cas. Ct. App. § 349.

[o] (Vt. 1855) By the law of 1852, parties in civil suits are admitted as witnesses. Section 3 of the act provides "that it shall not affect any suit brought before or pending at the time the act went into effect." By an act of 1853, this provision was repealed, with a saving that the repealing act should not apply to any action

commenced before the passage of the act of 1852, "where one of the parties to such action had deceased" previous to the enactment of the act of 1853. *Held*, in an action against the administrator of a party dying previous to such enactment, that plaintiff could not be a witness, the term action in the above expression being construed cause of action.—Kimball v. Baxter's Estate, 27 Vt. (1 Williams) 628.

[p] (Vt. 1865) Gen. St. c. 36, § 24, applies to an action pending when the statute was passed.—Johnson v. Dexter, 37 Vt. 641.

[q] (Vt. 1866) In 1860 an action was commenced against B. and C., and in 1863 B. died, pending the suit, and the suit as to him was transferred by the statute to the commissioners on his estate, from whose decision an appeal was taken to the county court, and the case was referred in 1865. *Held*, that by Act 1864, providing that the provisions in the general statutes which exclude a party as a witness in his favor when the other party is dead shall not in any manner affect any suit brought or pending on August 1, 1863, plaintiff was properly admitted as a witness before the referees, though they found that his claim was not a joint claim against B. and C., but a several claim against B., as the second suit was a continuation of the first, and the first was brought prior to August, 1863.—Graham v. Chandler's Estate, 38 Vt. 559.

[r] (Vt. 1883) The provision of the statute which disqualifies a party to a suit from testifying if the adverse party has died since the commencement of the suit, not being obscure, but explicit, cannot be disregarded by engrafting on it exceptions not made or implied.—Blair v. Ellsworth, 55 Vt. 415.

§ 552. Character of court and what law governs.

[a] (U. S. 1880) Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], relating to testimony by parties in actions by and against executors, administrators, and guardians, applies to the courts of the District of Columbia as fully as to the federal, circuit, and district courts.—Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268.

[b] (U. S. 1886) A defendant is, under the Michigan statutes, incompetent to testify concerning transactions with a deceased person under whom the complainant claims; but the federal courts are controlled by Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], under which the defendant in such cases is a competent witness.—Crawford v. Moore (C. C.) 28 Fed. 824.

2. ACTIONS AND PROCEEDINGS IN WHICH TESTIMONY IS EXCLUDED.

IN GENERAL, § 553.
GROUNDS OF ACTION AND NATURE OF ISSUE IN GENERAL, § 554.
DECEDENT'S ESTATE NOT INTERESTED OR NOT A PARTY, § 555.
REPRESENTATIVE OR OTHER CAPACITY OR TITLE OR INTEREST OF PARTY IN GENERAL, § 556.
NOMINAL PARTIES, § 557.
ACTIONS BY OR AGAINST HEIRS OR NEXT OF KIN, § 558.
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ACTIONS OR PROCEEDINGS BY OR AGAINST WIDOW, § 560.
POSSIBILITY OF JUDGMENT FOR OR AGAINST PARTY IN PARTICULAR CAPACITY, § 561.
ACTIONS BY OR AGAINST GUARDIANS, § 562.
DEATH OF PARTY PENDING ACTION, § 563.
—— TESTIMONY TAKEN BEFORE DEATH OF PARTY, § 564.
PROBATE OR CONTEST OF WILL, § 565.
CLAIM OR DEMAND AGAINST ESTATE OF DECEDENT, § 566.
—— ENFORCEMENT OF TRUST, § 567.
—— RIGHT TO TESTIFY, § 568.
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ACCOUNTING OF EXECUTOR, ADMINISTRATOR, OR TRUSTEE, § 571.
DETERMINATION OF VALIDITY OF DEED, § 572.
PROCEEDINGS FOR DISTRIBUTION AND SETTLEMENT OF ESTATE, § 573.
CLAIM CASES, § 574.

§ 553. In general.

[a] (U. S. 1877) When, after the filing of a libel against a vessel and giving the stipulation to answer judgment, the claimant and owner of the vessel dies, and the answer is put in by the administrator of his estate, the same rule with regard to the exclusion of parties in interest as witnesses (Rev. St. § 858 [U. S. Comp. St. 1901, p. 659]) applies as if the case were an ordinary common-law action brought against the administrator.—The Poland, Fed. Cas. No. 11,242.

[b] (U. S. 1886) The exclusion of testimony of parties to actions by or against executors, administrators, or guardians, under Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], does not extend to an inquiry incidental to taking an account, and not upon an issue which is the subject of a decree.—Charlotte v. Soutter (C. C.) 28 Fed. 733.

[c] (N. Y. 1890) On foreclosure of a land contract because of the nonpayment of a balance alleged to be due thereon, brought by the vendor's administrators against the vendee's heirs and administrator, the trial of a feigned issue out of chancery, before a jury, as to the amount due on the contract, is a "trial of an action" within the meaning of Code, § 829.—Parks v. Andrews, 56 Hun, 391, 10 N. Y. Supp. 344.

[d] (Pa. 1872) "Action," as used in the exception, in the act permitting interested witnesses to testify, that the act "shall not apply to actions by or against executors," etc., includes all civil proceedings.—Appeal of McBride, 72 Pa. (22 P. F. Smith) 480.

[e] (Pa. 1886) In proceedings under the sheriff's interpleader act to test the title to property levied on by an administrator, the claimant is incompetent to testify to any facts accruing prior to the death of plaintiff's intestate, as such proceeding is such an action as is within Act April 13, 1869, authorizing parties interested in an action to testify, but providing that such act shall not apply to actions by or against executors or administrators.—Harbison v. Gilliland, 2 Pa. Co. Ct. R. 369.

§ 554. Grounds of action and nature of issue in general.

[a] (Ind. 1873) 3 St. p. 559, relative to the competency of witnesses, provides that in all suits by or against an heir founded on a contract with or a demand against the ancestor, in any way affecting the title to or possession of land or other property of the ancestor, neither party shall be allowed to testify as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court. *Held* not applicable to a suit to recover damages for breach of a covenant running with the land.—Gavin v. Buckles, 41 Ind. 528.

[b] (Ind. 1878) An action by a widow and heirs for the partition of land, alleged to have been conveyed by her and her deceased husband by a deed absolute in form, but intended as a mortgage, to a person since deceased, who fraudulently conveyed the lands to another having knowledge of the facts, is not a suit "to ob-

tain title" etc., and 2 Rev. St. p. 135, is inapplicable, and the widow may testify in her own behalf as to occurrences before the grantor's death.—Caress v. Foster, 62 Ind. 145.

[c] (Ind. 1882) The widow and heirs of A., claiming by descent, brought suit to recover land against B., claiming title by a prior conveyance from A.'s grantor. *Held*, that defendant was a competent witness in her own behalf, as her claim was not "founded on a contract with or demand against the ancestor," under Rev. St. 1881, § 499, providing that in all suits by or against heirs founded on a contract with or demand against the ancestor neither party shall be a competent witness as to any matter which occurred prior to the ancestor's death.—Harding v. Elzey, 88 Ind. 321.

[d] (Me. 1862) In an action where the question in issue is whether the property in controversy is a part of an estate of which one of the parties is an administrator, the parties are admissible as witnesses.—Beach v. Pennell, 50 Me. 587.

[e] (Me. 1862) Thus, in an action of replevin for certain articles of merchandise, where defendant alleged, by way of brief statement, that the property was part of an estate of which she was administratrix, plaintiff may testify that the goods were not sold by him to defendant's intestate, but consigned to him for sale.—Beach v. Pennell, 50 Me. 587.

[f] (Miss. 1876) In replevin by an administrator, against R. and his wife, to recover cattle and horses, R. demanded the right to testify, notwithstanding the suit was brought by an administrator in his representative capacity, upon the ground that the point in issue was whether the property did belong to the estate or defendant, and that this question could not be decided by the court in limine. *Held*, that the testimony of defendant was inadmissible, and that he was properly excluded as a witness.—Rushing v. Rushing, 52 Miss. 329.

§ 555. Decedent's estate not interested or not a party.

[a] (Ala. 1886) In trover for goods loaned by plaintiff which had come into possession of defendant through the death of the borrower, who was his tenant, the estate of the borrower is not interested in the result, and therefore plaintiff is not incompetent to testify as to a conversation with the deceased borrower, under Code 1876, § 3058, relative to testimony as to transactions with persons deceased.—Butler v. Jones, 80 Ala. 436, 2 South. 300.

[b] (Ala. 1895) Where one contracts with a debtor to pay his debt, and the creditor sues him on such contract after the debtor's death, statements of the deceased are admissible to show a breach, the estate not being directly interested in the suit.—Pugh v. Barnes, 108 Ala. 167, 19 South. 370.

[c] (Ala. 1895) In ejectment by legal representatives of R., deceased, claiming by inheritance from him, defendant, who claims by deed from N., deceased, is competent to prove transactions with or statements by N., while N. was in possession of the land, to show adverse possession by N., since neither the legal nor personal representatives of N. are parties to or interested in the result of the suit.—Wisdom v. Reeves, 110 Ala. 418, 18 South. 13.

[d] (Ark. 1876) In a contest for title, between the devisees of a party deceased and others claiming the land under a title bond executed by the testator, which is begun after the administration is closed, any of the parties to the suit are competent to prove such transactions with, or statements by, the deceased, as are relevant to the issues.—Bozeman v. Browning, 31 Ark. 364.

[e] (Ga. 1879) Where the contest was over title to realty, and a mistake in the deed from the deceased grantor under which both sides claimed was alleged by defendants, *held*, that one of the defendants, who claimed by purchase under the others, was an incompetent witness as to the original contract, although the administrator was not a party as no decree reforming the deed could have been made without making him a party.—Muller v. Rhuman, 62 Ga. 332.

[f] (Ga. 1888) In ejectment, neither party representing or being able to bind the estate of any person deceased, both are competent witnesses for some purposes, though both claim the premises under a deceased person—one as heir and the other as vendee.—Terry v. Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

[g] (Ga. 1888) Where the question is whether defendant is the tenant of plaintiff, defendant and his wife are competent to prove that she rented the land of a third person, not a party to the action, although such third person is dead.—Brantly v. Mayo, 80 Ga. 678, 7 S. E. 137.

[h] (Ga. 1893) Acts 1889, p. 85 (Evidence Act) § 1, providing that, when suit is prosecuted or defended by the representatives of a deceased person, the opposite party shall not testify as to transactions with decedent, does not forbid the maker of a note to testify to his payment thereof to the deceased payee, in an action on the note by an indorsee after maturity, who is not a representative of decedent.—Woodson v. Jones, 92 Ga. 662, 19 S. E. 60.

[i] (Ind. 1872) In an action on an official bond against the principal and his surety and the administrator of a deceased surety, where the process was returned as to the administrator "not found," and no steps were taken to have the cause continued as to such administrator for further process, plaintiff was a competent witness in his own behalf.—Hall v. State, 39 Ind. 301.

[j] (Ind. 1888) One who claims a mare in possession of a third person, sold to him by an administrator as the property of his decedent, is not an incompetent witness, in a suit between him and the third person to prove a gift of the mare to him by the decedent by reason of Rev. St. 1881, § 498, providing that in a suit where an administrator is a party involving matters in decedent's lifetime, where a judgment may be rendered against the estate, a person who is a necessary party, whose interest is adverse to the estate, shall not be a competent witness against the estate.—Durham v. Shannon, 116 Ind. 403, 19 N. E. 190, 9 Am. St. Rep. 860.

[k] (Ind. 1894) Rev. St. 1894, § 506 (Rev. St. 1881, § 498), providing that, in actions to which an executor or administrator is a party, no necessary party to the issue or record, having an interest adverse to the estate, shall testify against it, does not disqualify one from testifying in his own behalf as to a conversation between himself and decedent, where decedent's estate is not a party, and it is in no way interested in the controversy.—Hankey v. Downey, 10 Ind. App. 500, 38 N. E. 220.

[l] (Ind. 1895) In an action to recover goods sold to defendant by plaintiffs' bailee, testimony as to plaintiffs' transactions with the bailee are admissible, though the bailee is dead, his estate not being represented in the action.—Leffler v. Watson, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467, following Durham v. Shannon (1888) 116 Ind. 403, 19 N. E. 190, 9 Am. St. Rep. 860.

[m] (Iowa, 1889) Under an oral agreement with her mother to furnish a living, and support to her and her husband in consideration of a gift of her mother's homestead, plaintiff and her husband went into possession, and perform-

ed her contract. *Held*, that plaintiff and her husband were competent to testify as to the oral contract between plaintiff and her mother, who was dead, in a suit to enjoin the sale of the homestead to satisfy an execution against plaintiff's brother as an heir of her mother in the homestead. Code 1873, § 3639, providing that they could not testify in a suit against the executor, administrator, etc., in support of such contract, does not apply to a suit against the judgment creditor of an heir.—Drake v. Painter, 77 Iowa, 731, 42 N. W. 526.

[n] (Md. 1872) In an action of ejectment between parties all of whom were living, the fact that the grantor in a deed which came incidentally in question was dead did not preclude defendant, the grantee in the deed, from testifying in his own behalf, as Acts 1864, c. 109, and Acts 1868, c. 116, merely prohibit from testifying parties to the contract or cause of action when an original party to it was dead or insane, or when an executor or administrator was a pary to the suit.—Leiter v. Grimes, 35 Md. 434.

[o] (Mich. 1878) Where an action is against a surety on a decedent's bond, the rule prohibiting a party from testifying to matters equally within the knowledge of his deceased adversary is inapplicable, since the suit is not against decedent or his estate, or his heirs, representatives, or assigns.—Lee v. Wisner, 38 Mich. 82.

[p] (Mich. 1895) Under How. Ann. St. § 7545, providing that, in proceedings by the heirs or personal representatives of a deceased person, the opposite party cannot testify on his own behalf as to matters within the knowledge of such deceased person, etc., in an action on a note executed by defendant to decedent, his father, and indorsed to plaintiff by defendant's sister, who was also made a defendant, testimony of the sister as to acts and statements of deceased, whereby ownership in the note was transferred to her, is competent, the estate itself not being a party to the action.—Latourette v. McKeon, 104 Mich. 156, 62 N. W. 153.

[q] (Miss. 1879) On a bill in equity by A.'s heirs, setting up a claim to land against B., owner of the legal title, and making codefendant the administrator of C., who conveyed to A. by warranty deed, B. may introduce a deposition as to transactions between himself and C., and tending to establish his right to the land against A. and C.; there being no rights involving the estate of decedent in this suit.—Love v. Stone, 56 Miss. 449.

[r] (Miss. 1880) That the estate of a decedent may be affected in another suit affords no reason for rejecting, upon a trial, the testimony of an interested witness.—Fennell v. McGowan, 58 Miss. 261.

[s] (Miss. 1883) In a suit by a firm one member of which is dead, defendant may testify to transactions affecting the contract sued on though they occurred between himself and the deceased, such suit not being by or against the estate of a deceased person.—Combs v. Black, 62 Miss. 831.

[t] (Miss. 1896) The fact that the grantor in a deed is dead does not render inadmissible testimony of his delivery of the deed in an action by the grantee for the recovery of the land against one claiming under a subsequent deed from the decedent, where in the latter deed the decedent warranted specially only, and his estate cannot be held liable thereon for a failure of the title.—Horne v. Nugent, 74 Miss. 102, 20 South. 159.

[tt] (Mo. 1896) A subcontractor is not a competent witness in his suit against the contractor's administrator and the owner to enforce a mechanic's lien, although the administrator's answer admits the allegations of the petition.—Cahill v. Elliott, 54 Mo. App. 387.

[u] (N. J. 1886) Where neither party to an action represents a testator or intestate, although one of the parties to the transaction out of which the suit grows is dead, the living party is competent to speak as a witness as to what was said and done by the other.—Lehigh Coal & Navigation Co. v. Central R. Co., 41 N. J. Eq. (14 Stew.) 167, 3 Atl. 134.

[uu] (N. J. 1892) A mortgage was given to secure the mortgagee as indorser of the mortgagor's notes, which complainant discounted, and, at maturity paid. After the death of the mortgagee, complainant, as subrogee and assignee, brought a suit to foreclose the mortgage, to which the mortgagee's personal representatives were not parties. *Held*, that the mortgagor was a competent witness as to conversations with the mortgagee.—Flemington Nat. Bank v. Jones, 50 N. J. Eq. (5 Dick.) 244, 24 Atl. 928.

[v] (N. Y. 1860) Where plaintiff brings an action to recover possession of property taken by defendant from him, while held under a contract of hire, with an agreement to return it at a time specified, defendant is a competent witness to prove himself to be entitled to the possession, notwithstanding the death of the party of whom plaintiff hired.—Penny v. Black, 19 N. Y. Super. Ct. (6 Bosw.) 50.

[vv] (N. C. 1876) A plaintiff, examined as witness for himself, may testify to a conversation had with a certain person, deceased, whose representative is not party to the suit.—Thomas v. Kelly, 74 N. C. 416.

[w] (Ohio, 1862) A fraudulent alienor, in a suit by his judgment creditor against him and the heirs of his alienee (the personal representative of the alienee not being a party thereto), is a competent witness, under Code, §§ 310, 313, to prove fraudulent collusion between himself and the deceased alienee.—Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

[ww] (Pa. 1872) In actions by or against the surviving partner, the adverse party is a competent witness under the act of 1869, since the estate of the deceased partner cannot be affected by the judgment.—Runkel v. Phillips, 9 Phila. 619, overruled Hanna v. Wray (1874) 77 Pa. (27 P. F. Smith) 27.

[x] (Pa. 1874) In trespass qu. cl. fr. by a grantee of a grantee of H., against certain successors to H.'s title to adjoining land, who claimed a right of way over the locus in quo, H. being dead, *held*, that nothing in the act of 1869, excluding testimony of one party when the opposite party is dead, would preclude plaintiff or his grantor from testifying of transactions between themselves and H.—McFerren v. Mont Alto Iron Co., 76 Pa. (26 P. F. Smith) 180.

[xx] (Tex. 1890) In replevin for chattels claimed by defendant under an administrator, plaintiff, who denies the title of the intestate, is a competent witness to prove his admissions, and is not excluded by Rev. St. 1879, art. 2248, providing that in actions against administrators neither party shall testify as to any statement by the intestate.—Bush v. Barron, 78 Tex. 5, 14 S. W. 238.

[y] (Vt. 1866) Where plaintiff had given his wife the right to collect and use the rents and profits from an estate in which she had a dower interest from a former husband, and had notified his stepson, who was in possession of the real estate, *held* that, the wife acting merely as agent for plaintiff, the stepson, defendant in this case, could properly testify in relation to his agreements with his mother, although it appeared on the trial that plaintiff's wife, the mother of defendant, was deceased, since neither she nor her representatives are parties to the contract or cause of action, nor does plain-

tiff succeed to her rights, nor can her estate be affected.—Cheney v. Pierce, 38 Vt. 515.

[yy] (Vt. 1868) In ejectment on account of the eviction of plaintiff's intestate by defendant, the point in issue was whether defendant's occupation of the premises was adverse, or whether he had recognized the title of plaintiff's intestate and occupied in subjection to it. *Held*, that under Gen. St. c. 36, § 24, defendant was incompetent as a witness, although the estate of the intestate was not interested in the result of the suit, the widow and heir having quitclaimed the premises to plaintiff.—Hollister v. Young, 41 Vt. 156.

[z] (Vt. 1874) In trover for property which plaintiff purchased of B., deceased, of whom defendant claimed to have subsequently purchased it, *held*, that plaintiff was a competent witness in his own behalf to his contract of purchase, since the estate of deceased was not a party to the suit or interested therein.—Downs v. Belden, 46 Vt. 674.

[zz] (Wis. 1861) In a suit against the survivor of two makers of a joint and several note, defendant proved that plaintiff had sold chattels mortgaged to him by the deceased maker, and had received enough to pay the note together with all the other indebtedness due from the mortgagor to plaintiff. *Held*, that plaintiff was not, by reason of the death of said maker, prevented from testifying that by way of accounting for the proceeds of the mortgaged property he had with the mortgagor's consent applied a large amount to the payment of another debt, since neither the administrator nor the personal representative of the deceased were made parties, and would not therefore be concluded by a judgment in this suit.—Ward v. Bowen, 14 Wis. 405.

§ 556. Representative or other capacity or title or interest of party in general.

Parties as against whom testimony is excluded, see post, § 652.

[a] (U. S. 1886) Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], provides that no witness shall be rendered incompetent because of interest, except that in actions by or against executors or administrators, an interested party will not be admitted to testify to transactions with any decedent. *Held*, that the exception cannot be extended to an action against an assignee in bankruptcy.—Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940.

[b] (Colo. 1893) 2 Mills' Ann. St. § 4816, providing that parties and persons directly interested in an action are precluded from testifying therein of their own motion, where the opposite party sues or defends as an administrator, is not applicable in favor of a defendant who is not sued as administrator, and who does not, by his answer, defend as such.—Prewitt v. Lambert, 19 Colo. 6, 34 Pac. 683.

[c] (Ga. 1873) Where defendant is surety on a note, and is also administrator of maker, and is sued in both characters, plaintiff is an incompetent witness.—Dixon v. Edwards, 48 Ga. 142.

[d] (Ga. 1894) A party is not incompetent as a witness because of the death of one whose estate is to be affected by the result of a suit, unless the suit is prosecuted or defended by the personal representative.—Gunn v. Pettygrew, 93 Ga. 327, 20 S. E. 328.

[e] (Ill. 1875) The fact that an administrator to whom is assigned a note and mortgage securing it in payment of a debt due the estate in bringing suit to foreclose the mortgage unnecessarily describes himself as administrator, instead of foreclosing in his own name, will not render the mortgagor an incompetent witness to testify in his own behalf, under Act 1867, § 2, rendering a party incompetent where the adverse party sues as administrator.—Roberts v. Pierce, 79 Ill. 378.

[f] (Ill. 1888) Under Rev. St. c. 51, § 2, forbidding parties in civil actions from testifying when the adverse party sues or defends "as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee," one suing a corporation for refusal to transfer to him shares of its stock is a competent witness on his own behalf, though the person from whom he bought the stock is dead.—Firemen's Ins. Co. v. Peck, 126 Ill. 493, 18 N. E. 752, affirming 27 Ill. App. 91.

[g] (Ill. 1890) Where suit is brought against an administrator personally, evidence of transactions had with his decedent is competent, the estate having no interest in the suit.—Esterly Harvesting Co. v. Hill, 36 Ill. App. 99.

[h] (Ind. 1887) In a suit by the administrator of a deceased creditor who was a stranger to the transaction to set aside a conveyance by a husband to his wife for alleged fraud, the husband and wife are competent witnesses in their own behalf to show that the purchase money for the property was originally furnished by the wife, and the title taken in the name of the husband without her consent. Rev. St. 1881, § 498, relative to the testimony of parties interested in actions by executors or administrators, does not apply to such a case.—Taylor v. Duesterberg, 109 Ind. 165, 9 N. E. 907.

[i] (Ind. 1891) Rev. St. 1881, § 498, provides that in proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment may be rendered for or against the estate, any person who is a necessary party to the issue, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate. *Held*, that where, in an action by a daughter against her father to recover moneys left in trust with him for her by her deceased mother, the daughter sues not as heir, but as representative of her mother, the father is not a competent witness in his own behalf as to the contract of trust.—Reddick v. Keesling, 129 Ind. 128, 28 N. E. 316.

[j] (Iowa, 1871) Under Rev. St. § 3982, the provision of section 3980, rendering an administrator competent to testify in behalf of the estate, does not apply where the adverse party is also an administrator.—Schmid v. Kreismer, 31 Iowa, 479.

[k] (Iowa, 1882) Code 1873, § 3639, that provides that "no party to an action or proceeding, nor any person interested in the event thereof, * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, against the executor * * * of such deceased person," applies as well to actions brought by an executor as to actions brought against an executor.—Leasman v. Nicholson, 59 Iowa, 259, 12 N. W. 270, 13 N. W. 289.

[l] (Iowa, 1894) Code 1873, § 3639, provides that no party to an action against the executor, heir, legatee, or next of kin of a deceased person, nor any person interested in the event thereof, shall be examined as a witness as to personal transactions or communications with the deceased. *Held*, in an action against an executrix, seeking to make her personally liable on a contract to pay notes of the firm of which her testator, to whom she was also next of kin, was a member, that testimony of the payees of the notes, and of the surviving partner, as to personal transactions and communications with deceased touching the execution of the

notes, was admissible.—Clarke v. Ross, 60 N. W. 627; Ensminger v. Same, Id.

[m] (Me. 1859) Rev. St. c. 82, § 83, excluding the testimony of his adversary in cases where an executor is a party to the suit, includes the case of an executor on the estate of one in prison, under sentence of death.—Knight v. Brown, 47 Me. 468.

[mm] (Me. 1885) Where an administrator was joined as one of the defendants simply as an individual to whom the premises were conveyed by plaintiff's alleged equitable vendor, plaintiff was not thereby rendered incompetent as a witness.—Douglass v. Snow, 77 Me. 91.

[n] (Me. 1892) Where neither party to an action appears by the record to be an executor or administrator, nor is made (by the order of court) a party as an heir of a deceased party, either party may testify in his own behalf.—Goulding v. Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357.

[nn] (Mich. 1888) How. Ann. St. § 7545, amended by Laws 1885, No. 139, which provides that in all actions wherein an executor or administrator is a party the opposite party shall be precluded from testifying to matters equally within the knowledge of deceased and himself, applies to an action on a note indorsed by deceased, brought against the maker only, a stranger to the estate, where the executor indemnifies defendant, and takes on himself the defense of the suit.—Hillman v. Schwenk, 68 Mich. 301, 40 N. W. 924, following 68 Mich. 297, 36 N. W. 670.

[o] (Mich. 1888) Under How. Ann. St. § 7545, amended by Laws 1885, No. 139, which provides that, in actions wherein an executor or administrator is a party, the opposite party shall not testify to matters equally within the knowledge of the deceased and himself, plaintiff in an action against the maker of a note indorsed by decedent is not incompetent to testify to the date of indorsement, though one of the legatees in the will is defending the action for the benefit of the estate; there being an executor of the will.—Hillman v. Schwenk, 68 Mich. 297, 36 N. W. 670.

[oo] (Minn. 1890) Plaintiff executed a note to one S., and gave a chattel mortgage to secure it. After the death of the surety on the note, S. presented this note as a claim against the estate, had it allowed and paid, and transferred it to the administrator, who then took possession of the property covered by the mortgage. Plaintiff, in an action to recover the property, alleged that the note was usurious, and that defendant's intestate knew it was so. *Held*, that plaintiff is competent to testify to the usury, the contract having been made with S., who is still in life; and the case is not within the exceptions mentioned in Gen. Laws 1879, c. 66, § 5, which provides that, whenever "in any action in any court the defendant shall plead or answer the defense of usury, either party to the action may be a witness in his own behalf on the trial, except in actions in which the opposite party sues or defends as administrator or personal representative of a deceased person; except also actions in which the opposite party claims as assignee, and the original assignee is deceased."—Parker v. Maxwell, 45 Minn. 1, 47 N. W. 161.

[p] (N. H. 1881) Where an administrator is sued personally for a tort committed by him before his appointment, plaintiff is not excluded as a witness under Gen. Laws, c. 228, § 18, because prior to the suit defendant caused the property to be inventoried as a part of his intestate's estate.—Harrington v. Tremblay, 61 N. H. 413.

[pp] (N. H. 1891) Where plaintiff, though appearing as the executor of his mother, is the real party in interest, as being her sole distributee, defendant may testify, though plaintiff does not testify.—Chase v. Chase, 66 N. H. 588, 29 Atl. 553.

[q] (N. J. 1863) Plaintiff in an action against executors of their own wrong, defendants being sued in a representative capacity, is not a competent witness.—Parker v. Thompson, 30 N. J. Law (1 Vroom) 311.

[qq] (N. J. 1867) Complainant is not a competent witness where any one of the defendants is sued in a representative capacity.—Force v. Dutcher, 18 N. J. Eq. (3 C. E. Green) 401.

[r] (N. J. 1876) Where one acting in a representative capacity causes a levy to be made, under an execution in his favor, on property belonging to a third person, who thereupon sues him, plaintiff is not debarred from testifying in his own behalf by the fact that defendant acted in a representative capacity.—Holmes v. Chester, 27 N. J. Eq. (12 C. E. Green) 423.

[rr] (N. J. 1879) In a suit against devisees and executors to set aside a deed to the testatrix, alleged to have been obtained by her by fraud, complainants are not competent witnesses.—Montgomery v. Simpson, 31 N. J. Eq. (4 Stew.) 1.

[s] (N. J. 1882) In replevin, when the plea of non cepit is pleaded, and property in defendant as an administrator, defendant is not sued in a representative capacity, and therefore plaintiff is a full witness in the case.—Hodge v. Coriell, 44 N. J. Law (15 Vroom) 456.

[ss] (N. Y. 1861) A foreign executor is not the representative of a deceased person within the meaning of our statute concerning witnesses, as he cannot sue here in his representative capacity.—Buckingham v. Andrews, 34 Barb. 434, 12 Abb. Prac. 322.

[t] (N. Y. 1861) He can only sue here in cases where the legal title is in him by virtue of some contract, without regard to the beneficial interest therein, and therefore can only be deemed a party in his own right, and the other party is, in such case, consequently, a competent witness in his own favor.—Buckingham v. Andrews, 34 Barb. 434.

[tt] (N. Y. 1880) Upon the death of H., plaintiff, who was in possession of a farm and certain articles of personalty, claimed title thereto by virtue of an agreement with deceased, whereupon plaintiff, her husband and defendant, who was the executor of H., agreed that plaintiff would release her interest in the property to defendant, upon defendant personally agreeing to make certain payments to her. *Held*, that since the action on the agreement was not brought against defendant in his representative capacity, the testimony of plaintiff and her husband as to the interest accruing to her in the property by virtue of her agreement with deceased was not inadmissible under Code, § 829, relating to testimony of transactions with persons afterwards deceased.—Hall v. Richardson, 22 Hun, 444.

[u] (N. Y. 1890) Money was given to C. by a decedent for plaintiff. C. gave it to defendant without plaintiff's consent. *Held*, in a suit to recover the money from defendant, C. was not prohibited from testifying by Code Civ. Proc. § 829, relating to transactions with deceased persons; defendant not deriving his title to the money through the decedent.—Mason v. Prendergast, 120 N. Y. 536, 24 N. E. 806.

[uu] (N. Y. 1890) But, as plaintiff did acquire whatever interest she had in the money from decedent, defendant was incompetent to testify as to anything occurring between him and decedent relating to such transaction.—Mason v. Prendergast, 120 N. Y. 536, 24 N. E. 806.

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[v] (N. Y. 1891) In an action by an administrator to set aside a deed from decedent to defendants as in fraud of decedent's creditors (Laws 1858, c. 314), defendants may testify as to conversations with decedent relative to the transaction, since the administrator in such action represents the creditors of decedent, and not the estate.—Miller v. Davis, 60 Hun, 198, 14 N. Y. Supp. 725, 20 Civ. Proc. R. 414.

[vv] (N. C. 1873) In an action on the bond of a constable, since deceased, plaintiff was not a competent witness to prove any transaction or conversation between himself and the deceased constable, the suit being within the meaning, though not within the letter, of Code Civ. Proc. § 343, permitting parties to testify, but providing that in suits with administrators they shall not testify as to transactions with the decedent.—Bryant v. Morris, 69 N. C. 444.

[w] (N. C. 1878) A party to an action is not, under Code Civ. Proc. § 343, disqualified from testifying to a transaction between himself and a person then deceased, unless the representative of deceased is a party.—Shields v. Smith, 79 N. C. 517.

[ww] (Pa. 1879) A. executed a bond to B. who assigned it to C. The latter died and D. sued to the use of C.'s administrators. *Held* that, the suit being in reality by the administrator, A. was incompetent as a witness.—Hoopes v. Beale, 90 Pa. 82.

[x] (R. I. 1873) Rev. St. c. 203, § 32, disqualifying one from testifying where an executor is a party, applies only where an executor is a party as an executor representing the estate, and not merely as an appellee.—Hamilton v. Hamilton, 10 R. I. 538.

[xx] (S. C. 1887) In an action against a bank to recover a policy of insurance upon the life of A., deceased, payable to plaintiffs and one J., deceased, which policy, as defendant alleged, has been assigned by A. to it as collateral, *held*, that plaintiffs did not sue in any of the representative capacities referred to in Code, § 400, concerning evidence of transactions with deceased persons, and that the testimony of defendant's president and cashier, as to transactions and communications with A. concerning the policy, was admissible.—Macauley v. Central Nat. Bank, 27 S. C. 215, 3 S. E. 193.

[y] (Utah, 1892) Comp. Laws 1888, § 3877, providing that parties to an action or proceeding "against an executor or administrator upon a claim or demand against the estate of a deceased person" cannot be witnesses "as to any matter of fact occurring before the death of such deceased person, and equally within the knowledge of both the witness and the deceased person," applies in actions by, as well as against, administrators.—Ewing v. White, 8 Utah, 250, 30 Pac. 984.

[yy] (Vt. 1866) In an action of trespass and trover against an administrator for various articles of personal property, brought by a party claiming to have been married to the intestate at the time of her decease, *held*, that plaintiff's own testimony that he was lawfully married to the intestate was not admissible, although defendant was not named in the writ as administrator.—Fitzsimmons v. Southwick, 38 Vt. 509.

[z] (Wash. 1891) A certain person bought land and took the deed in his own name. After his death, his mother obtained a decree that she was the equitable owner, and that decedent held the legal title in trust for her. She brought ejectment against a tenant who had gone into possession soon after the purchase. The latter admitted her title, but set up a parol agreement with the decedent wherein he had agreed to purchase at any time within 10 years, and was entitled in the mean time to the possession. Code, § 389, in force at the commencement of the action, provided that where the adverse party sues or defends as executor, administrator, or "legal representative" of any deceased person, a party in interest or to the record shall not be admitted to testify in his own behalf. Said section was modified before the trial, by the Laws of 1889–90, so as to provide that where the adverse party sues or defends as above specified, or "as deriving right or title by, through, or from any deceased person," a party in interest or to the record shall not be permitted to testify "as to any transaction had by him with, or any statement made to him by, any such person." *Held*, that defendant's testimony was incompetent under either provision.—Smith v. Taylor, 2 Wash. St. 422, 27 Pac. 812.

[zz] (Wis. 1862) When an administrator sues in his representative capacity for an injury to his intestate's estate even when he might have sued in his individual capacity, one of two defendants is not a competent witness to prove the intestate's execution of a mortgage, under which the codefendant justifies, there being other proof that an instrument purporting to be such a mortgage, and to which the defendant was a subscribing witness, had been accidentally destroyed by fire.—Knox v. Bigelow, 15 Wis. 415.

§ 557. Nominal parties.

[a] (Me. 1860) In a suit against a husband and wife, brought by one in his capacity of executor, their testimony was rightfully excluded, there being no evidence that the executor was only a nominal plaintiff; and in the absence of such evidence, the provision of Laws 1859, c. 79, does not apply, for an executor, as such, cannot be regarded as a nominal party in contemplation of that statute.—Drew v. Roberts, 48 Me. 35.

[b] (Me. 1864) In an action by an administrator of a deceased person against the maker of a note which belonged to the intestate's estate, defendant will not be permitted to testify that he paid plaintiff's intestate the contents of the note before the latter's death. The administrator in such case is not a nominal party to the suit within the meaning of Pub. Laws 1859, c. 79.—Farnum v. Virgin, 52 Me. 576.

[c] (Me. 1872) Where a note belongs to and is sued for an estate in the name of the administrator, plaintiff is not a nominal party within Rev. St. c. 82, § 87, cl. 3, providing that if the principal party in an action is nominal only both parties may be examined as witnesses as to transactions with a decedent.—Wing v. Andrews, 59 Me. 505.

[d] (Me. 1886) When an action is brought for the benefit of a testate estate in the name of an executor, plaintiff cannot be deemed a nominal party, within the third clause of Rev. St. c. 82, § 98, so as to allow the adverse party to testify—whether the amount recovered would finally go to pay the debts of the estate, or to plaintiff as legatee under the will—if the estate has not been finally settled in probate court.—Buck v. Rich, 78 Me. 431, 6 Atl. 871.

[e] (Pa. 1881) A mechanic's lien was filed against two persons as owners. Subsequently one of them died and his administrator was substituted. On the trial, the jury was sworn as to both defendants. Plaintiff offered himself as a witness with reference to the terms of the original contract, contending that he was not disabled from testifying by reason of the fact that the action was against an administrator, because he was not a necessary party to the suit, his decedent having been merely the agent of the codefendants in contracting for the building. This fact he also proposed to testify to. *Held*, that the name of the administrator not having been stricken off the record, and the jury having been sworn to try the case as against him, plaintiff was incompetent to testify as to either of the points.—Harnish v. Herr, 98 Pa. 6.

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§ 558. Actions by or against heirs or next of kin.

Parties as against whom testimony is excluded, see post, § 655.

[a] (Ill. 1871) St. 1867, § 2, which prohibits a party from testifying when the adverse party sues or defends "as executor, administrator, heir, legatee or devisee of a deceased person," should be deemed to apply as well in favor of a remote heir as in behalf of the immediate heir. The word "heirs" comprehends the heirs of heirs, ad infinitum.—Merrill v. Atkin, 59 Ill. 19.

[b] (Ill. 1874) On bill by the heirs at law of a deceased person, against his widow, for the partition of land, and cross-bill, by such widow, to to have a resulting trust declared in her favor, she is not a competent witness to establish the trust as against the heirs.—Connelly v. Dunn, 73 Ill. 218.

[c] (Ill. 1879) The rule under Acts 1867, § 2, as to testimony of interested parties where the adverse party sues or defends as heir, applies, although a husband and wife be the party adverse to the witness; and this is not affected by the restriction in section 5 upon the competency of husband and wife as witnesses.—Pyle v. Oustatt, 92 Ill. 209.

[d] (Ill. 1879) Acts 1867, § 2, allowing no one to testify by virtue of section 1, on his own motion, in any proceeding where the adverse party sues or defends as heir, etc., excludes a plaintiff in an action of ejectment defended by a party as heir of, and not under a conveyance from, his father.—Pyle v. Oustatt, 92 Ill. 209.

[e] (Ill. 1881) In case complainant in a suit is incompetent to testify because one of the defendants is defending as heir, complainant may become competent by dismissing the bill as to such heir, there being no community of interest between the heir and the other defendants.—Walsh v. Wright, 101 Ill. 178.

[f] (Ill. 1886) Rev. St. c. 51, § 2, excluding testimony of the adverse party to a suit by an "heir," does not apply to testimony in a suit by an "heir" to enforce a right not claimed by inheritance, as to facts occurring during plaintiff's minority.—Seago v. People, 21 Ill. App. 283.

[g] (Ill. 1888) In an action for partition and assignment of dower and homestead, in which complainant claims through his deceased wife, and defendants dispute her title except as to a one-fifth interest, and assert title as heirs of another deceased person, the husband is not incompetent under Rev. St. c. 51, § 2, which renders parties incompetent to testify of their own motion where the adverse party defends, as heir, legatee, or devisee of any deceased person.—Best v. Jenks, 123 Ill. 447, 15 N. E. 173.

[h] (Ill. 1889) Rev. St. c. 51, § 2, which makes a party incompetent as a witness when the opposite party sues or defends as the heir, devisee, or legatee of any deceased person, does not apply to a suit regarding the title to land in which the complainants are grantees of the heirs of a deceased owner.—Robbins v. Moore, 129 Ill. 30, 21 N. E. 934.

[i] (Ill. 1895) In a suit between heirs for partition of land claimed by defendants under a deed from the ancestor, defendants are not competent witnesses, since complainants sue as heirs of a decedent.—Stodder v. Hoffman, 158 Ill. 486, 41 N. E. 1082.

[j] (Ind. 1865) The exception to the law allowing parties to testify, which excludes such testimony in actions where an executor, administrator, or a guardian is a party, does not apply to an action against the heirs of the decedent, though one of the defendants is an infant and answered by a guardian ad litem.—McDonald v. McDonald, 24 Ind. 68.

[k] (Ind. 1871) In a suit where judgment is sought against the administrator of an estate, and the answer brings the defense within the exception of the statute, admitting parties as witnesses, which relates to cases where an action is brought by an heir upon a contract made with the ancestor, plaintiff is not a competent witness, unless called by the administrator or the court.—Bishop v. Welch, 35 Ind. 521.

[l] (Ind. 1882) A suit by heirs on a contract by a son of their ancestor, to pay the heirs a stated sum at the ancestor's death in consideration of a conveyance of property to the son, is not a suit by or against the heirs, as such, upon a contract with the ancestor, to obtain title to or possession of property belonging to him, within the meaning of Act March 15, 1875 (Rev. St. 1881, p. 499), and plaintiffs are competent witnesses.—Waltz v. Waltz, 84 Ind. 403.

[m] (Iowa, 1883) Under Code 1873, § 3639, excluding all testimony relating to personal transactions with deceased by defendants in an action "against" heirs, no such testimony is admissible in an action between heirs.—Neas v. Neas, 61 Iowa, 641, 17 N. W. 30.

[n] (Iowa, 1885) In an action against an heir for specific performance of a contract to convey, made by his father shortly before his decease, plaintiff cannot testify to communications between himself and decedent, such evidence being prohibited by Code 1873, § 3639.—Thomas v. Griffith, 68 Iowa, 11, 25 N. W. 900.

[o] (Iowa, 1891) Where in an action defendant sets up a note as a counterclaim, and alleges that it was given by plaintiff, his brother, in pursuance of an agreement to pay defendant for his interest in land of their father's estate, which was first conveyed by all the heirs to their mother, and then by her to plaintiff, defendant's testimony to an agreement had with his mother, since deceased, by virtue of which he relinquished his interest, to the effect that plaintiff and another brother should have the real estate, that defendant should quitclaim his interest to her, and that he should receive what was right in the end, is not incompetent, under Code 1873, § 3639, providing that "no party to any action * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, in an action against the * * * heir at law, next of kin, assignee, * * * or survivor of such person," as defendant seeks to hold plaintiff not as heir at law, etc., but on a note given in fulfillment of an agreement between defendant and plaintiff.—Cahalan v. Cahalan, 82 Iowa, 416, 48 N. W. 724.

[p] (Iowa, 1892) Where a wife, on the death of her husband intestate, leaving children, without authority takes possession of his estate, and is sued on a note given by her in consideration of a note which the holder represented to have been executed by her husband, plaintiff is incompetent to testify as to the consideration of the note given by the husband, since defendant, though not an executrix, administratrix, heir at law, or survivor of her husband, is a "next of kin," within the meaning of Code 1873, § 3639.—French v. French, 84 Iowa, 655, 51 N. W. 145, 15 L. R. A. 300.

[q] (Me. 1880) The demandant in a writ of dower is a competent witness in her own behalf, although the tenant holds the estate by inheritance from his father, the demandant's late husband. The son is not "made a party as an heir of a deceased party," but is a party because the tenant of the estate.—Wentworth v. Wentworth, 71 Me. 72.

[r] (Me. 1886) Under Rev. St. c. 82, § 98, excluding the testimony of parties in causes where plaintiff or defendant is made a party as heir of a deceased party, complainant, in a bill in

equity brought against the heir of a deceased person to establish a resulting trust for the benefit of plaintiff in the defendant as heir of such deceased person, is precluded from testifying as to facts that took place before the death.—Higgins v. Butler, 78 Me. 520, 7 Atl. 276.

[s] (Me. 1887) When defendant in a suit in equity is made a party as heir of a decedent, plaintiff is rendered incompetent as a witness by the provisions of Rev. St. c. 82, § 98, relating to competency of witnesses in actions by and against executors or heirs of decedents.—Hinckley v. Hinckley, 79 Me. 320, 9 Atl. 897; Wiley v. Davis, 10 Atl. 493.

[t] (Me. 1888) Plaintiff in a real action may be a witness in her own behalf, if she demands inherited property in her own right, and is not made a party as "heir of a deceased party," under Rev. St. c. 82, § 98.—Johnson v. Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162.

[u] (Me. 1891) When complainants in a suit for partition claim title by descent from their mother, the respondent is a competent witness, for they are not "made parties as heirs of a deceased party."—Pierce v. Rollins, 83 Me. 172, 22 Atl. 110.

[v] (Mich. 1888) In an action to have a deed by plaintiff to a deceased person declared a deed of trust, defendant being an assignee of the heirs of deceased, testimony of plaintiff as to want of consideration, an agreement to reconvey on condition, etc., is incompetent, under How. Ann. St. § 7545, providing that, in suits by or against heirs, assigns, etc., of a deceased person, the opposite party shall not testify in his own behalf as to matters which, if true, must have been equally within the knowledge of deceased.—Buffum v. Porter, 70 Mich. 623, 38 N. W. 600.

[vv] (Mich. 1893) Under How. Ann. St. § 7545, excluding evidence of the opposite party as to facts equally within the knowledge of a decedent in a suit prosecuted or defended by his "heirs, assigns, devisees, or personal representatives," a daughter who seeks to enforce against the widow and other heirs a parol contract made by her deceased father is incompetent to testify as to the terms of the contract.—Lloyd v. Hollenback, 98 Mich. 203, 57 N. W. 110.

[w] (N. J. 1880) A son, who was one of the administrators of his father's estate, filed a bill for the specific performance of a contract to convey a house and lot to him, alleged to have been made by his father, in consideration of his services. He made defendants to the bill his brothers and sisters, as his father's heirs at law, and also his father's widow, as a coadministrator. *Held*, that heirs at law were within the purview of Revision, p. 378, § 3, excluding parties as witnesses where the other parties "sue or are sued in a representative capacity," and consequently, even if the administratrix were not a proper party, complainant would not be a competent witness.—Colfax v. Colfax, 32 N. J. Eq. (5 Stew.) 206.

[ww] (N. J. 1895) In an action by one heir against his coheirs for specific performance of a contract by deceased to convey land to plaintiff, plaintiff may testify in his own behalf where defendants are sued in a representative capacity but for property to which they hold title by descent.—Vreeland v. Vreeland, 53 N. J. Eq. (8 Dick.) 387, 32 Atl. 3.

[x] (N. Y. 1862) In a suit prosecuted by the heir, for the possession of real property, after the death of his ancestor, by whom the suit had been brought, defendant was a competent witness.—Spaulding v. Hallenbeck, 39 Barb. 79.

[xx] (N. Y. 1862) The executors and administrators of a deceased person, and not his heirs, are his "representatives" within the meaning of Code, § 399.—Spaulding v. Hallenbeck, 39 Barb. 79.

[y] (N. Y. 1863) Under Code, § 399, as amended in 1860, permitting parties to testify subject to the exception that he should not be examined against parties who are "representatives" of a deceased person in respect to any transaction had personally between the deceased person and the witness, the term "representative" includes the heirs at law as well as the executors or administrators.—Lee v. Dill, 39 Barb. 516, 16 Abb. Prac. 92.

[yy] (Ohio, 1877) In Code, § 313, as amended March 23, 1875 (72 Ohio Laws, p. 77), relating to the competency of witnesses, the proviso that it shall not be so construed "as to prevent any and all heirs, grantees, and legatees from testifying in cases to contest the validity of, or to set aside, a will or deed of any ancestor or grantor under whom they may claim title," applies only to a case for setting aside a will, or the deed of a deceased person, and not to an action against heirs for specific performance of their ancestor's contract.—Mosher v. Butler, 31 Ohio St. 188.

[z] (Tex. 1892) Rev. St. art. 2248, which provides that in all actions by or against the heirs or legal representatives of a decedent, arising out of any transaction with such decedent, neither party shall be allowed to testify as to such transaction, unless called by the opposite party, does not prevent a son, defending in ejectment against one claiming under a deed from his deceased father, from testifying to a prior parol gift of the land to him by his father, since he does not claim as heir.—Wootters v. Hale, 83 Tex. 563, 19 S. W. 134.

[zz] (Tex. 1895) In partition by persons claiming title to one-half the tract through a deed from their deceased father and two-thirds of the remainder as heirs of their mother, against a brother holding the remaining sixth as heir of the mother, and claiming an interest under the deed from the father, testimony of defendant as to statements by the father tending to show that the deed was made in trust for all the children, and as to the transaction by which the trust was alleged to have arisen, having no reference to the title derived by descent, is not within Rev. St. art. 2248, making a party to a suit "by or against heirs or legal representatives of decedent" incompetent to testify as to a transaction with decedent.—Wagner v. Isensee, 11 Tex. Civ. App. 491, 33 S. W. 155.

§ 559. Actions by or against legatees or devisees.

Parties as against whom testimony is excluded, see post, § 655.

[a] (U. S. 1889) Though complainant is executrix of the person with whom the transactions were had, yet, where she does not seek a decree in her favor as executrix, but claims only as legatee and devisee, she is not forbidden to testify by Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], providing that, in actions by or against executors, neither party shall testify against the other as to any transaction with or statement by testator, unless called to testify thereto by the opposite party.—Goodwin v. Fox, 129 U. S. 601, 9 Sup. Ct. 367, 32 L. Ed. 805.

[b] (N. J. 1893) In an action against devisees under Revision, p. 476, to recover a debt due from the devisor, the devisees are "representatives" of the decedent, within the meaning of Revision, p. 378, §§ 3, 4, and Supp. Revision, p. 287, § 1, so as to exclude the testimony of plaintiff in regard to any transaction with, or statement by, decedent.—Joss v. Mohn, 55 N. J. Law (26 Vroom) 407, 26 Atl. 987.

[c] (Tex. 1890) Rev. St. art. 2248, which prevents parties from testifying "in actions by or against executors, administrators, or guard-

tans," and which provides that "the provisions of this article shall extend to * * * actions by or against the heirs or legal representatives of a decedent," does not apply to an action by a legatee.—Newton v. Newton, 77 Tex. 508, 14 S. W. 157.

[d] (Tex. 1891) In an action by the widow against her husband's devisee, plaintiff is a competent witness in her own behalf, as to transactions in the lifetime of her husband, since the devisee is not an heir or legal representative, within the meaning of Rev. St. art. 2248, forbidding evidence of transactions with decedents in actions by or against their legal representatives.—Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705.

[e] (Tex. 1892) Rev. St. art. 2248, which prevents parties from testifying "in actions by or against executors, administrators, or guardians," and provides that the provisions of this article shall extend to actions by or against the heirs or legal representatives of a decedent, does not apply in an action against legatees.—Curtis v. Wilson, 2 Tex. Civ. App. 646, 21 S. W. 787.

§ 560. Actions or proceedings by or against widow.

Parties as against whom testimony is excluded, see post, § 656.

[a] (Ala. 1893) In a suit by a widow against the surety on a note held by her deceased husband, when the widow does not sue as personal representative of his estate, but as his widow, testimony of the maker of the note that the husband granted him an extension of time for payment is admissible, since there is no such conflict of interest between the witness and decedent that his estate can be said to be interested in the result of the suit, within the meaning of Code, § 2765, which prohibits in such a case a party adversely interested from testifying as to transactions with deceased.—Howle v. Edwards, 97 Ala. 649, 11 South. 748.

[b] (Ark. 1881) In suits by the widow and heirs of an intestate for property descended from him. Const. 1874 does not preclude defendant from testifying to transactions with the intestate, and statements made by him in regard to the matter in controversy.—Bird v. Jones, 37 Ark. 195.

[c] (Ark. 1885) Where the widow and heirs, and not the administrator, are parties, the statute excluding the testimony of the adverse party to transactions had with the intestate has no application.—Lawrence v. La Cade, 46 Ark. 378.

[d] (Ark. 1888) When the widow of an intestate pays a claim against the estate for money loaned decedent, which is not in excess of the widow's share, in an action by the widow, as administratrix, to recover the sum paid, defendant cannot give evidence of personal transactions with plaintiff's intestate concerning the loan, under schedule to Const. 1874, § 2, which provides that in actions by or against administrators neither party shall be allowed to testify against the other as to personal transactions with and statements of the intestate.—Rainwater v. Harris, 51 Ark. 401, 11 S. W. 583, 3 L. R. A. 845.

[e] (Ga. 1892) Under Act Dec. 12, 1882 (Acts 1882-83, p. 47), declaring that, "upon the death of the husband without lineal descendants, the wife is the sole heir, and upon the payment of his debts, if any, may take possession of his estate without administration, sue for and recover the same," a widow whose husband dies intestate, leaving no lineal descendants, is, in the absence of evidence that he left debts which are still unpaid, his "personal representative," and in a suit against her by one claiming to be a creditor of her husband, plaintiff is not a competent witness to establish an alleged contract between himself and deceased, out of which the alleged indebtedness arose.—Johnson v. Champion, 88 Ga. 527, 15 S. E. 15.

[f] (Ga. 1893) An executor, claiming title to land by deed from deceased is competent, in proceedings by the widow to have dower assigned her in such land, to testify as to communications with deceased concerning his purchase.—Flowers v. Flowers, 92 Ga. 688, 18 S. E. 1006.

[g] (Ga. 1894) One contesting with a widow the title of decedent to property set apart for her year's support is not incompetent as a witness against her.—Gunn v. Pettygrew, 93 Ga. 327, 20 S. E. 328.

[h] (Ind. 1863) Where a part of the estate of an intestate is the note of A., and the whole estate is appraised at less than $300, and is, therefore, under the provisions of the decedent's estates' act, delivered to his widow, and she sues A. on said note, who pleads defenses going to the merits, A. is not rendered an incompetent witness in his own behalf, by the terms of the last proviso of Act March 11, 1861, § 3 (2 Gav. & H. St. p. 168).—Walker v. Clifford, 21 Ind. 123.

[i] (Ind.) In a suit by the widow against the administrator of her deceased husband, to compel him to make distribution to her of her share of the personal estate, the widow is a competent witness as to all facts within her own knowledge.—(1866) Shaffer v. Richardson's Adm'r, 27 Ind. 122; (1890) Sherwood v. Thomasson, 124 Ind. 541, 24 N. E. 334.

[j] (Ind. 1871) In an action brought by a widow as the heir of her husband, where she claims that under and by virtue of a contract made with her husband by defendant her husband became the owner of certain property in controversy, and that she as the heir of her husband has the right to compel defendant to charge himself with the property as administrator of the husband, neither plaintiff nor defendant is, by the law of Indiana allowing parties to testify, made competent to testify as a witness to any matter that occurred prior to the death of the husband, unless required by the opposite party or by the court.—Pea v. Pea, 35 Ind. 387.

[k] (Ind. 1890) In an action by a creditor of an intestate to compel an accounting by the widow for personal property of decedent converted by her, and the application of the proceeds to the payment of plaintiff's debt, defendant is the "heir" of her husband, within the meaning of Rev. St. 1881, § 499, providing that in suits by or against "heirs" or devisees, on a contract with or demand against the ancestor, neither party shall be a competent witness as to matters occurring before his death, and plaintiff therefore is incompetent to prove his claim.—Larch v. Goodacre, 126 Ind. 224, 26 N. E. 49.

[l] (Ind. 1890) Allegations in the complaint making the widow liable as an administratrix de son tort did not change the action so as to make plaintiff competent.—Larch v. Goodacre, 126 Ind. 224, 26 N. E. 49.

[m] (Mich. 1890) How. Ann. St. § 7545, provides "that, when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." *Held*, that one who defends against a suit for dower, claiming a grant by deceased before his death, is not prohibited from testifying in regard thereto; the estate not being interested.—Lake v. Nolan, 81 Mich. 112, 45 N. W. 376.

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[n] (Mo. 1888) Rev. St. § 4010, declaring that where an executor or administrator is a party the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator, does not make a widow incompetent to testify in her own favor in a proceeding by her for a distributive share in her husband's estate, as neither the deceased in his lifetime nor his executor are parties adversary to plaintiff.—Hoyt v. Davis, 30 Mo. App. 309.

[o] (N. J. 1887) In a suit by a widow against the heirs at law of her deceased husband, to set aside a deed on the ground of fraud, the widow, under the construction which has been given to the statute of 1880, is a competent witness to testify to transactions with her husband and statements made by him, since it is only where one or the other of the parties to the suit appear upon the record as representing a decedent that the other is incompetent.—Crimmins v. Crimmins, 43 N. J. Eq. (16 Stew.) 86, 10 Atl. 800.

[p] (N. J. 1889) In an action for dower, the demandant is a competent witness against the devisees under the testator's will.—Smith v. Smith, 52 N. J. Law (23 Vroom) 207, 19 Atl. 255.

[q] (N. Y. 1879) Defendant agreed with plaintiff to work the latter's farm on the same terms as he had worked it under an agreement with plaintiff's husband, since deceased. *Held*, in an action to enforce the agreement, where plaintiff sued in her individual capacity, though she was also executrix of her husband, that defendant might testify as to interviews between him and the husband when the original agreement was made.—Titus v. O'Connor, 18 Hun, 373, 57 How. Prac. 391.

[r] (Pa. 1885) A suit by a widow, against a society, to recover a sum of money due her as funeral benefits on the death of her husband, is not by or against executors, nor between parties claiming through or against a deceased assignor, within the meaning of Act 1869, and as defendant and other members of the lodge were competent witnesses for the defense.—Dodd v. Armstrong, 2 Pa. Co. Ct. R. 352.

[s] (Pa.) A widow is a competent witness to prove the family relation in a proceeding for the allowance of a statutory exemption against her alleged deceased husband's estate.—(1885) In re Groves' Estate, 5 Pa. Co. Ct. R. 498; (1888) In re Burkett's Estate, Id. 501.

[t] (Tenn. 1878) Upon the trial of an action against a widow in her own wrong, as for rent due for the period she held over after the expiration of the lease to her husband, plaintiff may testify as to his lease with defendant's deceased husband, since the action is against defendant personally and not as the representative of her husband.—Johnson v. Hall, 68 Tenn. (9 Baxt.) 351.

[u] (Tex. 1895) In an action by a widow, as the representative of the community estate of herself and deceased husband, the testimony of defendant in his own behalf, as to transactions between him and deceased, is not admissible, without plaintiff's consent, under Rev. St. art. 2248.—Gurley v. Clarkson (Civ. App.) 30 S. W. 360.

[v] (W. Va. 1885) On a bill filed by a widow as administratrix, claiming as her own certain bonds alleged to have been given her by her deceased husband in contemplation of marriage, she is not competent to prove the gift or delivery.—Martin v. Smith, 25 W. Va. 579.

§ 561. Possibility of judgment for or against party in particular capacity.

[a] (Ind. 1863) Where a mortgagor dies, and the mortgagee sues the heirs and administrator of the mortgagor to foreclose the mortgage, and defenses are interposed by the heirs, the mortgagee, under the provisions of the last proviso of the third section of Act March 11, 1861 (2 Gav. & H. St. p. 168), is a competent witness in his own behalf, since no judgment can be rendered against the administrator for a deficiency.—Newkirk v. Burson, 21 Ind. 129.

[b] (Tex. 1895) Rev. Civ. St. art. 2248, relating to transactions with a decedent, in actions by or against personal representatives or heirs in which judgment may be rendered for or against them as such, does not prohibit a woman's testifying to the fact of a marriage between herself and the deceased, in a contest over the right to administer on his estate, among parties who do not claim to be heirs, where she, having renounced her right as surviving wife to administer, is not a party to the suit.—Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56.

§ 562. Actions by or against guardians.

[a] (Ind. 1882) In a suit by the guardian of an insane person for fraud practiced on his ward, defendants are not competent witnesses for each other.—Pavey v. Wintrode, 87 Ind. 379.

[b] (Tex. 1886) Rev. St. art. 2248, rendering the testimony of parties as to transactions with wards incompetent as witnesses in actions by and against guardians, apply to actions between the guardian as guardian and third persons, and not to suits in which the guardian and ward are opposing parties.—Jones v. Parker, 67 Tex. 76, 3 S. W. 222.

§ 563. Death of party pending action.

[a] (U. S. 1883) A proceeding to subject to execution corporate stock which had been assigned to defendant by the execution debtor, who died pending the action, and whose administrator was substituted as a party defendant, is not an action "by or against" the administrator within Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], so as to render the testimony of the administrator of defendant incompetent, for the liability of the estate had already been fixed by the judgment against decedent, and the real issue was between plaintiff and defendant as to the validity of the attachment.—Monongahela Nat. Bank v. Jacobus, 109 U. S. 275, 3 Sup. Ct. 219, 27 L. Ed. 935.

[b] (Ala. 1890) The testimony of plaintiff and his wife with reference to transactions with the original defendant, who has died pending suit, the action being revived against his executrix, is inadmissible.—Marcy v. Howard, 91 Ala. 133, 8 South. 566.

[c] (Cal. 1896) Where an action to foreclose subcontractors' liens on death of the owner, is revived against his administratrix, plaintiffs are competent witnesses.—Joost v. Sullivan, 111 Cal. 286, 43 Pac. 896.

[d] (Ga. 1874) Where on affidavit of illegality the issue of payment of the judgment on which the execution was issued is disclosed, defendant is not a competent witness if plaintiff be dead.—Chancy v. Carrigan, 53 Ga. 84.

[e] (Ill. 1874) Where plaintiff in a suit on a joint note against two defendants dies, and the suit is revived in the name of his executors, one of the defendants is not a competent witness on behalf of his codefendant, as to a transaction with the payee in his lifetime, of which the proposed witness and the payee were alone cognizant.—Whitmer v. Rucker, 71 Ill. 410.

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[f] (Ill. 1878) One defendant having died pending the suit, complainant and two defendants who had a common interest with the complainant in the result and against the estate are incompetent to testify as to transactions with the deceased.—Apperson v. Gogin, 3 Ill. App. (3 Bradw.) 48.

[g] (Ind. 1863) Pending a suit for specific performance of a contract for the conveyance of land, defendant died, and his heir at law, an infant daughter too young to testify, was made defendant. *Held*, that plaintiff was a competent witness on his own behalf.—Dahoney v. Hall, 20 Ind. 264.

[h] (Ind. 1879) A defendant in replevin is not a competent witness in his own behalf, and on his own motion, to testify to a conversation in relation to the title to the property between himself and a coplaintiff, who has died without making a deposition, and whose administrator has been made a party to the suit as coplaintiff.—Charles v. Malott, 65 Ind. 184.

[i] (Kan. 1867) Under Code, § 323, providing that no party shall, by virtue of the statute making parties witnesses, be permitted to prove by his own oath what the deceased might have disproved if alive, a surviving party plaintiff is a competent witness.—Anthony v. Stinson, 4 Kan. 211.

[j] (Mass. 1864) Plaintiff in a suit in equity to redeem a mortgage is a competent witness in his own behalf, notwithstanding the decease of one of several defendants.—Doody v. Pierce, 91 Mass. (9 Allen) 141.

[k] (Miss. 1876) Where, in an action to enforce a mechanic's lien, defendant, who is the owner of the property, dies, and his heirs and representatives are substituted as defendants, plaintiff is not a competent witness to prove his claim.—O'Leary v. Burns, 53 Miss. 171.

[l] (Miss. 1882) Complainant filed a bill, assailing a judgment, on the ground that a summons had never been served upon her, and defendant answering denied the want of a summons. *Held*, that complainant could not, after the death of defendant, testify to want of service.—Duncan v. Gerdine, 59 Miss. 550.

[m] (Neb. 1894) Where an action is ordered to proceed in the name of the surviving plaintiff on the death of his coplaintiff, thereafter a conversation between one of the parties in interest and deceased is not provable by the former's testimony.—Mead v. Weaver, 42 Neb. 149, 60 N. W. 385.

[n] (N. J. 1870) The testimony of a complainant, taken after defendant's executors were made parties, but before either of them had been sworn as witnesses, is incompetent.—Walker v. Hill's Ex'rs, 21 N. J. Eq. (6 C. E. Green) 191, affirmed (1871) 22 N. J. Eq. (7 C. E. Green) 513.

[o] (Okl. 1896) Where, before trial of an action of ejectment by a landlord against a tenant, who, during the tenancy, purchased an outstanding title, defendant died, plaintiff could not testify as to the making of the lease.—Cunningham v. Phillips, 4 Okl. 169, 44 Pac. 221.

[p] (Pa. 1871) In an action against three defendants, held before arbitrators, plaintiff called one of the defendants as his witness, and another of the defendants then testified in their own behalf. Before the hearing of an appeal which was taken, the witness called by plaintiff died. *Held*, that on the trial the case was governed by Act April 15, 1865, excluding one party when the other is dead, and the defendant who had testified in his own behalf was not a competent witness.—Allum's Ex'rs v. Carroll's Adm'rs, 67 Pa. (17 P. F. Smith) 68.

[q] (Pa. 1871) Where a case was heard before arbitrators, but before the trial in court defendant died, plaintiff was an incompetent witness.—Eilbert v. Finkbeiner, 68 Pa. (18 P. F. Smith) 243, 8 Am. Rep. 176.

[r] (Pa. 1876) Where defendant died pending an action and his executors are substituted, plaintiff is not a competent witness.—Pratt v. Patterson, 81 Pa. (31 P. F. Smith) 114.

[s] (Pa. 1878) Where an action is brought against three partners, one of whom afterwards dies, and his death having been suggested, his executors are substituted in his place, plaintiff is not a competent witness as to anything which occurred during the lifetime of the deceased partner, although the latter may have personally taken no part in the contract on which the suit was brought.—Brady v. Reed, 87 Pa. 111.

[t] (Pa. 1879) H. and L. sold land to G. To secure the purchase money G. gave them certain bonds and a mortgage. He paid all the bonds but one. L. assigned his interest in this one to H., and H. assigned his interest therein to C. On the refusal of G. to pay the bond, a sci. fa. was issued on the mortgage, in the names of H. and L., to the use of C. The latter died after suit brought, and her administrator was substituted. *Held*, that under the act of 1869, excluding parties as witnesses in actions by or against executors, administrators, or guardians, G. was not competent as a witness.—Gamble v. Hepburn, 90 Pa. 439.

[u] (Pa. 1881) A., the purchaser at sheriff's sale of a leasehold sold as the property of B., brought ejectment therefor against C., D., and E., partners, who claimed under a previous sheriff's sale of the leasehold as the property of B. A. having died, his administrators were made parties, and C., also dying, his executors were brought in by scire facias, but did not plead nor take any part in the suit. *Held*, the fact that C.'s executors were made parties to the record did not render D. incompetent under that clause of the act of 1869 which excepts from its operation cases where executors or administrators are parties, because C.'s executors were made parties unnecessarily, and should not properly have appeared upon the record; but that under said clause D. was rendered incompetent because of the substitution of A.'s administrators as parties.—Oram v. Rothermel, 98 Pa. 300.

[v] (Pa. 1884) In an action of scire facias sur mechanic's lien against the contractor and owner, on the death of plaintiff pending suit, and the substitution of his administrator, the contractor is not a competent witness.—Hommel v. Lewis, 104 Pa. 465.

[w] (Pa. 1887) After the death of plaintiff in ejectment, the suit was prosecuted by the administrator for mesne profits. *Held*, that defendant could not testify in such action.—Hart v. McGrew, 11 Atl. 617.

[ww] (Pa. 1888) A bill in equity, filed by a terre-tenant, charging fraud in the execution of a mortgage on which a sci. fa. had been issued, was dismissed without prejudice to his right to set up the matters therein alleged as a defense to the sci. fa. It appeared that the consideration of the mortgage was the payment of a certain sum to a bank on account of a mortgage it held against the mortgagor; and that, although the mortgage in suit was dated July 7, 1876, the mortgagee, the plaintiff in the sci. fa. proceeding, had not paid and taken an assignment of the bank's mortgage until March 27, 1877. Plaintiff was offered as a witness to prove that he had on July 7, 1876, assumed the payment of the bank's mortgage, and paid the interest thereon in September, 1876. This evidence was objected to for the reason that defendant terre-tenant was dead, having died since the decree in the equity suit. *Held*, that the court properly sustained the objection.—Ballentine v. Ballentine, 15 Atl. 859.

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[x] (Pa. 1889) Act May 23, 1887, § 5, cl. e, provides that when a party to a contract in action is dead, and his right has passed to a party in the record who represents his interest, no person whose interest shall be adverse to the right of deceased shall be a competent witness. *Held* that, where plaintiff claimed title under one R. as against E., alleging that E. obtained a deed to the land in fraud of R., who was dead, and E. dies pending suit, neither plaintiff nor the alienee of the devisee of E. is a competent witness.—Parry v. Parry, 130 Pa. 94, 18 Atl. 628.

[xx] (Pa. 1891) The interest of a partner was sold under execution against him, and purchased by his wife. The same interest was again sold under execution, and purchased by complainants, who filed a bill against the remaining partners for an accounting. *Held*, on substitution of the retired partner as a party, as the executor of his wife, who has died pending the suit, the case becomes one against an executor, and such retired partner is incompetent as a witness, under Act April 15, 1869, allowing parties in interest to testify, but excepting actions by or against executors from its provisions.—Crawford v. Shriver, 139 Pa. 239, 21 Atl. 518.

[y] (S. C. 1888) On a bill against a judgment debtor and creditor to set aside the judgment as a fraud on other creditors, where the debtor dies before a hearing, and the suit is prosecuted against the creditor alone, plaintiff cannot testify as to anything said or done by the deceased.—Martin v. Adams, 29 S. C. 597, 6 S. E. 860.

[yy] (Tex. 1874) A plaintiff may testify to declarations of a deceased partner of defendant, where suit had been brought against the firm, and one of the parties died pending the suit, and his representatives were not made parties.—Roberts v. Yarboro, 41 Tex. 449.

[z] (Tex. 1879) In an action against heirs made parties after the death of the original defendant, plaintiff cannot testify as to conversations with such original defendant.—McCampbell v. Henderson, 50 Tex. 601.

[zz] (Vt. 1894) On petition for rule to open a judgment on a note, defendant is not a competent witness if the payee in the note and original plaintiff in the judgment is dead.—Cake v. Cake, 162 Pa. 584, 29 Atl. 797.

§ 564. —— Testimony taken before death of party.

See "Depositions," vol. 16, cc. 1217-1219, § 245.

[a] (Ark. 1883) In an action by the administrator of A. against B., defendant filed a set-off. The deposition of plaintiff was taken de bene. After this, but before the trial, B. died, and the action was revived against his administrator. *Held*, that parts of the deposition relating to statements made by B. concerning transactions with A., and which were material to the issue raised by the set-off, were inadmissible, under Schedule Const. 1874, § 2, making the opposite party, in actions by or against administrators, incompetent to testify as to transactions with or statements by the deceased.—Park v. Locke, 48 Ark. 133, 2 S. W. 696.

[b] (Md. 1874) Where a party to a suit dies, the testimony of the adverse party taken prior to such death, and admissible at the time it was taken, is not, under Acts 1864, c. 109, and Acts 1868, c. 116, rendered inadmissible by such subsequent death.—Armitage v. Snowden, 41 Md. 119.

[c] (Mass. 1862) Plaintiff is not a competent general witness in a suit after defendant's death, although, in a hearing of the case before an auditor, in defendant's lifetime, both parties testified, and their testimony was stated in the auditor's report, which has been read to the jury.—Green v. Gould, 85 Mass. (3 Allen) 465.

[d] (N. J. 1866) Where defendant dies after complainant has been examined as a witness, and his administrators are substituted, this evidence will be admitted at the hearing. Complainant was competent when it was taken, and that is the test of admissibility. It cannot be rejected because defendant was prevented from testifying by his death.—Marlatt v. Warwick, 18 N. J. Eq. (3 C. E. Green) 108.

[e] (N. Y. 1880) The death of one of the defendants is no ground for striking out the deposition of plaintiff's testimony given before his death; the disqualification under Code, § 399, depending entirely upon facts existing when the testimony is given, not upon any subsequent change.—Comins v. Hetfield, 80 N. Y. 261, affirming (1877) 12 Hun, 375.

[f] (Ohio, 1857) Under Code, § 313, which prohibits a party otherwise competent by section 310 from testifying "where the adverse party is the executor or administrator of a deceased person, when the facts to be proved transpired before the death of such deceased person," the deposition of a plaintiff, taken during the pendency of the suit, is not admissible on the trial when defendant has since died.—Neville v. Hambo, 1 Disn. 517.

[g] (Wash. 1894) Code, § 389, providing that, in suits by or against a personal representative, an adverse party shall not testify in his own behalf, will not exclude from a trial had after the death of an original party, and the substitution of his representatives, the deposition of an adverse party duly taken before such death.—Neis v. Farquharson, 9 Wash. 508, 37 Pac. 697.

§ 565. Probate or contest of will.

Interest of legatee or devisee, see post, § 604.

[a] (Ala. 1894) Parties interested in the probate of a will are competent witnesses in an action contesting its validity.—Henry v. Hall, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22.

[b] (Fla. 1893) McClel. Dig. p. 987, § 9, providing that no will shall be admitted to probate on the oath of an executor interested in the estate, refers to the admission to probate in common form, and not to testimony in a contest.—Hays v. Ernest, 32 Fla. 18, 13 South. 451.

[c] (Ill. 1879) In the trial of an issue as to the validity of a will, submitted to a jury, complainant's husband is competent, under Rev. St. 1874, c. 51, to testify to matters transpiring, and declarations made before the death of the testator.—Mueller v. Rebhan, 94 Ill. 142.

[d] (Ind. 1878) In an action against an executor and legatees to contest the validity of the will, the fact that a legatee's administrator is a party defendant is no ground for excluding his codefendants from testifying as witnesses on their own behalf.—Coryell v. Stone, 62 Ind. 307.

[e] (Iowa, 1887) The exclusion of the testimony of a witness as to transactions and communications had by him with a testator, when the witness has revealed his interest in sustaining the will, is correct, under Code 1873, § 3639, providing that "no party to any proceeding, nor any person interested in the event thereof, * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person deceased," etc.—Smith v. James, 72 Iowa, 515, 34 N. W. 309.

[f] (Iowa, 1888) Under Code 1873, § 3639, providing that no person interested in the event of an action, nor any person from, through, or under whom any such party or interested person derives any interest or title, by assignment or otherwise, "shall be examined as a witness

in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased," etc., on the trial of an issue as to the validity of a will, the daughter of testator, being one of the contestants, is not competent to prove conversations had with testator.—Blake v. Rourke, 74 Iowa, 519, 38 N. W. 392.

[g] (Iowa, 1895) Under Code 1873, § 3639, providing that no party to, or person interested in, the result of an action, shall be examined as to any personal transaction or communication between himself and one at the commencement of such examination deceased, against the executor, legatee, devisee, etc., one contesting the probate of a will cannot testify as to conversations between himself and the testatrix relative to the disposition of her property.—In re Goldthorp's Estate, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 400; Goldthorp v. Goldthorp, 62 N. W. 845.

[h] (Ky. 1881) In a contest as to the probate of a will, a devisee is a competent witness as to transactions between himself and the testator, all the claimants under the will being entitled to the same privilege. All parties are thus placed upon an equal footing, thus creating an exception to the rule against permitting parties in interest to testify.—Flood v. Pragoff, 79 Ky. 607.

[i] (Me. 1858) A person named in the will as executor is not legally such until the proof of the will and the giving of bond, and therefore he is a competent witness upon the issue of the validity of the will, as he is not "a party" within the meaning of Rev. St. 1857, c. 82, § 83, although he is the principal devisee.—Millay v. Wiley, 46 Me. 230; McKeen v. Frost, Id. 239.

[j] (Mich. 1875) The statute providing that in suits in which the heir, personal representative, etc., is a party, the adverse party cannot testify, will not exclude the testimony of the proponent of a will claiming under it, the contestant not being heir, devisee, or representative of the estate.—Brown v. Bell, 58 Mich. 58, 24 N. W. 824.

[k] (Mich. 1890) How. Ann. St. § 7545, providing that in a suit or proceeding prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representative of a deceased person, the opposite party, if examined as a witness, shall not be admitted to testify to matters which if true must have been equally within the knowledge of such deceased person, does not apply to prevent the grantees in a deed from a person since deceased from testifying in proceedings to admit the deed to probate as the will of decedent.—In re Lautenschlager, 80 Mich. 285, 45 N. W. 147, following Schofield v. Walker (1885) 58 Mich. 96, 24 N. W. 624, and Brown v. Bell, 58 Mich. 58, 24 N. W. 824.

[l] (Mich. 1894) Testimony of one of the proponents that testatrix had stated to her that she intended to leave her property to them is not within the prohibition of How. Ann. St. § 7545, providing that the opposite party, in a proceeding by devisees or legatees of a deceased person, cannot testify in his own behalf to matters which, if true, must have been equally within the knowledge of deceased.—McHugh v. Fitzgerald, 103 Mich. 21, 61 N. W. 354.

[m] (Miss. 1882) At the trial of an issue devisavit vel non, the contestant, or proponent, although the principal legatee can testify.—Tucker v. Whitehead, 59 Miss. 594.

[n] (Mo. 1873) In a proceeding to establish a will, parties in interest are competent witnesses.—Harris v. Hays, 53 Mo. 90.

[o] (N. H. 1885) The appellant, on the trial of an appeal upon the probate of a will, cannot under Gen. Laws, c. 228, §§ 16, 17, testify as to matters between himself and the testator when the executor is not a witness, and it does not appear to the court that injustice would result from the exclusion of his testimony.—Welch v. Adams, 63 N. H. 344, 1 Atl. 1, 56 Am. Rep. 521.

[p] (N. J. 1883) A beneficiary under a will may, as the proponent, be a witness in proceedings on a caveat to establish the will.—Mackin v. Mackin, 37 N. J. Eq. (10 Stew.) 528.

[q] (N. Y. 1863) In an issue at law between the heir at law and a devisee, as to the decedent's due execution of his will and his competency to execute it, the question was which of these two contestants had the best title to the property. *Held*, that the devisee was not a competent witness as to transactions occurring between the testator and himself, and going to establish the will.—Lee v. Dill, 39 Barb. 516.

[r] (N. Y. 1869) A widow contesting the probate of her deceased husband's will is not disqualified as a witness in such proceeding by a provision (Code Proc. § 399) that a party to an action against executors, etc., shall not give testimony of transactions with the deceased.—In re Dieterich's Will, 1 Tuck. 129.

[s] (N. Y. 1880) Where a will made S. the sole devisee and appointed S. and her husband executors, *held*, that on their proposing the will for probate, and a contest on the ground of testamentary incapacity, they were under the protection of Code, § 829, forbidding any person interested in the event from testifying as to any personal transactions or communications with the deceased. This would apply to a proceeding before a surrogate, though they were not yet technically "executors" nor legatees.—Schoonmaker v. Wolford, 20 Hun, 166.

[t] (N. Y. 1883) An executor propounding a will may testify not only in regard to the execution of the will, but also as to other transactions and communications with deceased.—Whelpley v. Loder, 1 Dem. Sur. 368.

[u] (N. Y. 1886) An executor seeking probate of a will is not incompetent as a witness to conversations and transactions had by him with the testator at the time of the preparation of the will, by reason of being a party to the proceeding or being interested by way of commissions as executor.—In re Wilson's Will, 103 N. Y. 374, 8 N. E. 731.

[v] (N. Y. 1888) The proponent of a will, though a party to the probate proceedings, is not incompetent to testify as to transactions with testatrix, under Code Civ. Proc. § 829.—Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874.

[w] (Ohio, 1859) Code, § 313, providing that no party shall testify, where the adverse party is an executor or administrator, to facts transpiring before the death of the decedent, does not apply to the contest of a will, as the executor is only a formal party.—Thompson v. Thompson, 2 Ohio Dec. 214.

[x] (Tenn. 1879) In a contest over a will, the parties are competent to prove conversations with, or declarations of, the testator, bearing on the issue.—Orr v. Cox, 71 Tenn. (3 Lea) 617.

[y] (Vt. 1891) R. L. §§ 1002, 1003, which provide that where one of the original parties to the contract or cause of action in issue is dead, or where an executor of deceased is a party, the other party shall not testify in his own favor, do not disqualify a legatee, on the contest of a will, to testify as to the mental capacity of testator.—Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253.

[z] (Wis. 1891) Rev. St. § 4069, provides that no person in interest shall be a witness respecting any transaction or communication by him with the decedent. *Held*, in contesting a will, that proponent—a beneficiary—could not testify as to what took place between him and

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testator at the time the will was executed.—Goerke v. Goerke, 80 Wis. 516, 50 N. W. 345; In re Goerke's Will, Id.

§ 566. Claim or demand against estate of decedent.

Action for wrongful death as constituting claim, see post, § 570 [c].

[a] (Cal. 1877) Code, § 1880, as amended in 1874, prohibiting parties in whose favor an action is prosecuted "against" an estate from being witnesses, does not prohibit one against whom an action is prosecuted by an executor on a claim in favor of an estate from being a witness in his own behalf.—Sedgwick v. Sedgwick, 52 Cal. 336.

[b] (Cal. 1878) An application for a family allowance is not an "action or proceeding" within Code, § 1880, subd. 3, excluding testimony of parties to an action or proceeding, against an executor, on a "claim or demand" against the deceased.—In re McCausland's Estate, 52 Cal. 568.

[c] (Cal. 1891) An action to enforce a mechanic's lien, being in the nature of a proceeding in rem, in which no personal judgment can be recovered against a decedent's estate, payable in course of administration, is not a "claim," within the meaning of Code Civ. Proc. § 1880, which declares that a party cannot be a witness in an action against an executor or administrator "upon a claim or demand against the estate of a deceased person."—Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

[d] (Cal. 1894) Code Civ. Proc. § 1880, disqualifies parties or assignors of parties to an action against an executor or administrator, or persons in whose behalf such action is prosecuted on a claim against the estate of the deceased, from testifying as to facts occurring before the death of the deceased. *Held*, that the disqualification applies only to those parties who assert claims against the estate.—Todd v. Martin, 37 Pac. 872.

[e] (Ill. 1894) One who swore to and filed a claim against an estate afterwards amended it so as to make it the claim of another person, who appealed from the judgment of the probate court to the circuit court. *Held*, that the original claimant was not a competent witness in the circuit court.—Mitchell v. Goodell, 56 Ill. App. 280.

[f] (Ind. 1881) Under 2 Rev. St. 1876, p. 132, providing that "in all suits where an executor, administrator, or guardian is a party in a case where a judgment may be rendered for or against the estate * * * neither party shall testify as witness unless required by the opposite party or by the court, except in cases arising upon contracts made with the executor, administrator," etc. *Held*, on exceptions to an administrator's allowance of a claim, that claimant was not a competent witness to the justice of the claim.—Clift v. Shockley, 77 Ind. 297.

[g] (Md. 1868) Under Acts 1864, c. 109, where an administratrix is a party to a suit, contesting a claim against her intestate, the other party is an incompetent witness.—Neidig v. Whiteford, 29 Md. 178.

[h] (Mass. 1862) A creditor of an intestate is a competent witness to prove his debt in support of a petition by the administrator for leave to sell real estate of his intestate for payment of debts.—Chamberlin v. Chamberlin, 86 Mass. (4 Allen) 184.

[i] (Miss. 1859) Code, art. 190, § 17, provides that no person or party shall be incompetent by reason of interest to give evidence, "provided that no person shall be a witness in any suit by or against himself to establish his own claim to an amount exceeding $50 against the estate of a deceased person." *Held*, that the proviso intended that the act should not apply so as to permit a party defendant to be a witness in a suit against him by the representative of a decedent's estate, so as to discharge himself by proof to establish his own claim as by way of offset or payment.—Griffin v. Lower, 37 Miss. 458.

[j] (Miss.) Rev. Code, p. 510, art. 190, which prohibits a party from establishing by his oath a claim against a deceased person to an amount exceeding $50, prevents such person from testifying as a witness to defeat a claim against him in favor of a decedent.—(1859) Griffin v. Lower, 37 Miss. 458; (1860) Otey v. McAfee's Adm'r, 38 Miss. 348.

[k] (Miss. 1860) As the proviso to Rev. Code, p. 510, art. 190, prohibiting a party from establishing by his own evidence a claim against the estate of a deceased person to a greater sum than $50 extends not only to cases where the claim sought to be established is a fixed debt, but to any right or claim whatever litigated with the representatives of the deceased party, in such a suit the survivor cannot be a witness to establish any fact in support of his demand.—Lamar v. Williams, 39 Miss. 342.

[l] (Miss. 1871) A contingent liability for costs as nominal plaintiff in a suit is not a "demand or claim," within the meaning of Code, p. 510, art. 190, which incapacitates a witness from giving testimony to establish his own claim to an amount exceeding a certain sum.—Hedges v. Aydelott, 46 Miss. 99.

[m] (Miss. 1874) Under Code 1871, § 758, a party, plaintiff or defendant, in a suit in which the representative of a decedent is a party is not competent to establish his right or demand against the estate, nor to defeat one set up by the estate against him.—Wood v. Stafford, 50 Miss. 370.

[n, o] (Miss.) The term, "estate of a deceased person," in Code 1871, § 758, which provides that, if the demand of a claimant is "against the estate of a deceased person," he is incompetent as a witness, is used in its broad and popular sense to signify all the property of every kind which one leaves at his death. Therefore, any right asserted against real or personal property left by a deceased person, as accrued to the party by virtue of a dealing between him and such person, since deceased, renders the person asserting it incompetent as a witness to maintain, in his own behalf, such assertion of right.—(1876) Jacks v. Bridewell, 51 Miss. 881; (1877) Rothschild v. Hatch, 54 Miss. 554.

[p] (Miss. 1877) The term "claim," in Code 1871, § 758, embraces any right or demand relied on and asserted against a decedent's estate.—Rothschild v. Hatch, 54 Miss. 554.

[q] (Miss. 1887) Code, § 1602, which provides that "no person shall testify as a witness to establish his own claim against the estate of a deceased person, which originated during the life-time of such deceased person, or any claim he has transferred since the death of such decedent," precludes any person from testifying to establish his own claim to any species of property left by the decedent, whether the same be real or personal property, or a personal demand against the representative, but it must appear that the witness is interested in the subject-matter, or that he was so interested at the time of the decedent's death.—Snell v. Fewell, 64 Miss. 655, 1 South. 908.

[r] (Miss. 1890) Code, § 1602, provides that no person shall testify to establish his own claim for or against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent. *Held* that, in a suit on a note by the indorsee

of a deceased payee, the testimony of the maker, in his own behalf, that he had paid the amount thereof to the deceased, was improperly excluded.—Cole v. Gardner, 67 Miss. 670, 7 South. 500.

[s] (Miss. 1890) In replevin against one who has taken possession of property of a decedent under a trust deed executed by him, plaintiff cannot prove title by his own testimony, under Code, § 1602, providing that no person shall testify to establish his own claim against a decedent's estate which originated during decedent's lifetime.—Jackson v. Smith, 68 Miss. 53, 8 South. 258.

[t] (Miss. 1894) Under Rev. Code 1880, § 1602, providing that no person shall testify to establish his own claim against a decedent's estate, which originated during decedent's lifetime, a party to an action for the possession of property cannot testify that decedent gave him the property.—Cockrell v. Mitchell, 15 South. 41, following Jackson v. Smith (1890) 68 Miss. 53, 8 South. 258.

[u] (Pa. 1872) Act April 15, 1869, applies to claims against the estate of a decedent; the word "actions" embracing all civil proceedings. —Appeal of McBride, 72 Pa. (22 P. F. Smith) 480.

[v] (Pa. 1874) Claimants are not competent as witnesses before auditors in the distribution of an intestate's estate.—In re Young's Estate, 9 Phila. 348.

[w] (R. I. 1892) Pub. St. c. 214, § 83, providing that when an administrator is a party to a suit the other party cannot testify on his own offer, does not apply to proceedings to have allowed a claim against an estate where the administrator of the estate, though holder of the fund out of which the claim would be paid, is not a party to the record, and has no control of the suit, the party to the record being the heir at law.—Kenyon v. Peirce, 17 R. I. 794, 24 Atl. 825.

[x] (Vt. 1859) Plaintiff brought suit against P., who afterwards died, and the suit was discontinued, under the statute, and the same claim presented before the commissioners on P.'s estate. *Held*, in an appeal from their decision, that plaintiff was not a competent witness.—Pierce v. Paine's Estate, 32 Vt. 229.

[y] (Vt. 1865) The proceedings of commissioners on a claim presented against an estate of a deceased person is "a suit," and if such claim was presented before August 1, 1863, the suit was pending, and plaintiff was a competent witness in his own behalf, and was not rendered incompetent by Gen. St. c. 86, § 24, but such case was strictly within the meaning of the act of 1864.—Calderwood v. Calderwood's Estate, 38 Vt. 171.

§ 567. —— Enforcement of trust.

[a] (Cal. 1885) An action to enforce a resulting trust against the personal representatives of a deceased trustee is not founded upon a "claim or demand," within Code Civ. Proc. § 1880. The cestui may testify, therefore, to facts occurring before the trustee's death.—Myers v. Reinstein, 67 Cal. 89, 7 Pac. 192.

[b] (Cal. 1892) In an action against the administrator of a trustee and the administrator of the trustor to enforce the execution of the trust by the former, Code Civ. Proc. § 1880, which makes parties in actions upon claims against decedents incompetent as witnesses as against the representatives of the decedent, does not render plaintiff an incompetent witness to prove the contract between himself and the trustor, by virtue of which he became the cestui que trust.—Tyler v. Mayre, 95 Cal. 160, 30 Pac. 196, affirming (1892) 95 Cal. 160, 27 Pac. 160.

[c] (Utah, 1893) In a suit against executors to enforce a trust against the estate of their decedent, the testimony of plaintiff was properly excluded, under Comp. Laws 1888, § 3877, providing that a party to an action against an executor is not a competent witness as to any matter occurring before the death of decedent, equally within the knowledge of the witness and decedent, since it was a claim against the estate for several thousand dollars.—Wood v. Fox, 8 Utah, 380, 32 Pac. 48; Whitney v. Same, Id.

§ 568. —— Right to testify.

[a] (Me. 1868) On the trial of an appeal from the decision of commissioners of an insolvent estate, the statute (Rev. St. c. 66, §§ 13, 15), providing that "the creditor may be examined on oath," does not give the creditor the privilege of testifying in his own behalf as matter of right, but leaves it discretionary with the court to require him to do so, on motion of defendant, when the discovery of the truth seems to make it necessary.—Gould v. Carlton, 55 Me. 511.

[b] (Me. 1877) Rev. St. c. 66, § 15, providing that commissioners of insolvent estates may require a claimant to be sworn and examine him on matters relating to his claim, does not confer upon him the privilege of being a witness as a matter of right.—White v. Brown, 67 Me. 196.

[c] (Me. 1877) Rev. St. c. 66, § 15, providing for an appeal from the proceedings before commissioners of insolvent estates, and that the creditor may then be examined under oath, as before the commissioners, does not confer upon a claimant the privilege of testifying as a matter of right.—White v. Brown, 67 Me. 196.

[d] (N. H. 1862) Upon appeal from the decision of a commissioner, as to the allowance of a claim against an insolvent estate, the court may allow the creditor to testify in his own favor, or compel him to testify in favor of the estate, whether the administrator elects to testify or not; but he cannot testify in his own favor as matter of right.—Moore v. Taylor, 44 N. H. 370.

§ 569. —— Claim of executor or administrator.

Party to action in general, see post, § 591.

[a] (Ala. 1895) It is error to refuse to permit an administrator to be examined as a witness for any purpose, in a proceeding in which his right to withhold moneys of the estate, under the claim that they are due him as a creditor of the estate, is in issue; as it is neither his interest in nor relation to the matter in controversy, but the character of his testimony and his relation to the other parties in interest, that determine his competency as a witness.—Daughdrill v. Daughdrill, 108 Ala. 321, 19 South. 185.

[b] (Ga. 1889) The administrator is not competent to testify in his own behalf as to a debt due himself by his intestate and his wife.—Fulcher v. Mandell, 83 Ga. 715, 10 S. E. 582.

[c] (Me. 1882) An executor or administrator cannot testify in his own behalf in support of his private claim against the estate which he nominally represents, but which in that instance is the real defendant against which he is proceeding as plaintiff.—Preble v. Preble, 73 Me. 362.

[d] (Miss. 1859) Under Rev. Code, p. 510, art. 190, which provides that no person shall be a witness in any suit, by or against himself, to establish his own claim to an amount exceeding $50 against the estate of a deceased person, an executor or administrator is not a competent witness to testify in his own behalf, and estab-

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lish his own account against the estate of the deceased.—Haralson v. White, 38 Miss. 178.

[e] (Miss. 1880) An executor is not competent to establish his claim against decedent's estate which arose in testator's lifetime.—Gordon v. McEachin, 57 Miss. 834.

[f] (N. H. 1878) In the prosecution of his personal claim against the estate of his intestate, an administrator cannot testify to facts within the knowledge of the deceased.—Perkins v. Perkins, 58 N. H. 405.

[g] (N. Y. 1874) Where an executor is cited to render an account before the surrogate, neither his testimony nor entries in his books are admissible under Code, § 399, in support of a claim against the estate made by him for money advanced by him to decedent in her lifetime.—Elmore v. Jaques, 2 Hun, 130.

[h] (Pa. 1876) An administratrix cannot testify in support of claims against the estate of her deceased husband, intestate.—In re Hyneman's Estate, 11 Phila. 135.

§ 570. Actions for wrongful death.

[a] In an action by a widow for an injury causing her husband's death, defendant is a competent witness in his own behalf.

—(Ga. 1879) McEwen v. Springfield, 64 Ga. 159;

(Pa. 1876) Mann v. Weiand, *81 Pa. (32 P. F. Smith) 243.

[aa] (Ill. 1875) Defendant is a competent witness in his own behalf, in an action brought under the liquor law of 1872, by the widow of a deceased person, to recover damages for causing the death of her husband by selling him intoxicating liquor, from the drinking of which to excess he died.—Reget v. Bell, 77 Ill. 593.

[b] (Ind. 1873) In an action by an administrator for an injury causing death, defendant is not a competent witness to testify on his own behalf.—Sherlock v. Alling, 44 Ind. 184.

[c] (Ind. 1886) A widow is a competent witness in an action brought by the administrator of her deceased husband to recover for an injury causing his death, inflicted by the negligence of a railroad company on whose train he was a passenger, and the provisions of the state statute prohibiting evidence of parties in claims against decedents' estates do not apply, since such an action is not a claim against the estate.—Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

[d] (Ind. 1890) An action by an administrator for intestate's death, under Rev. St. 1881, § 284, providing that the damages shall be distributed in the same manner as decedent's personal property, but shall inure to the exclusive benefit of decedent's widow and children, or, there being none, to his next of kin, is within section 498, rendering persons whose interests are adverse to a decedent's estate, and who are necessary parties to an action brought by or against the administrator, and involving matters occurring before decedent's death, incompetent as witnesses against the estate.—Hudson v. Houser, 123 Ind. 309, 24 N. E. 243.

[e] (N. Y. 1860) An administrator is a competent witness in a suit brought by him to recover damages for the wrongful ejectment of his intestate from a horse car, whereby his death was occasioned.—Sandford v. Eighth Ave. R. Co., 20 N. Y. Super. Ct. (7 Bosw.) 122.

[f, g] (Pa. 1875) An action was brought under Act April 26, 1855, giving a right of action to the widow or children of a man killed by wrongful act, against a railroad company. The conductor and brakemen of the company, whose action was alleged to have resulted in the death of the deceased, were joined as defendants. *Held*, that an objection that the evidence of such conductor and brakemen was incompetent as against the representatives of the deceased could not be sustained, as under said act the wife and children sued in an individual and not in a representative capacity.—Bourke v. Railroad Co., 1 Lack. Leg. Rec. 108.

[h] (Pa. 1877) Act April 15, 1869, permits parties to a civil action to testify provided it shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead. *Held*, that the proviso had no application to an action by a widow under Act April 15, 1851, to recover damages for the death of her husband.—Mann v. Wieand, 34 Leg. Int. 77.

[i] (Pa. 1878) Under Act April 15, 1851, and Act April 26, 1855, giving the widow and children a right of action for damages and negligence resulting in the death of the husband and father, the parties are not incompetent to testify, as plaintiff sues in an individual and not in a representative capacity.—Bourke v. Railroad Co., 1 Lack. Leg. Rec. 108.

[j] (Tenn. 1874) In an action by a widow in the name of her husband's administrator to recover damages for the killing of her husband by the defendant, the widow and defendant are competent witnesses as to the circumstances of the killing.—Hale v. Kearly, 67 Tenn. (8 Baxt.) 49.

§ 571. Accounting of executor, administrator, or trustee.

[a] (Ala. 1875) A distributee or legatee contesting a final settlement by an executor or administrator is an incompetent witness on her own behalf to prove that deceased loaned money to the personal representative for the purpose of charging the latter with the amount, under Rev. Code, § 2704, providing that neither party to a suit by or against an executor or administrator shall testify to any transaction or conversation with the deceased.—Harwood v. Harper, 54 Ala. 659.

[b] (Ala. 1876) Under Acts 1875, p. 252, an administrator whom the creditors are seeking to charge with the rent of certain lands of the estate, cannot testify, in his own behalf, as to the terms of the contract of renting between himself and the intestate, but he may state that certain bales of cotton, with which he charged himself in his account, were on account of the rent of the lands that year.—Strange v. Graham, 56 Ala. 614.

[c] (Ala. 1880) Code, § 3058, excluding proof of transactions with a deceased person whose estate is interested in the result of the suit, does not render the administrator incompetent as a witness for himself to prove the correctness of a record proposed to be substituted for the record of an annual or partial settlement of his accounts, alleged to be lost.—Lilly v. Larkin, 66 Ala. 110.

[d] (Ala. 1884) Under Code, § 3058, an heir of the intestate is incompetent to testify, as being interested in the judgment, at the final settlement of the accounts of a deceased administrator between his personal representative and the administrator de bonis non, as to any transaction with or statement by the deceased administrator in connection with the assets of the estate, unless he has been called by the opposite party.—McDonald v. Jacobs, 77 Ala. 524.

[e] (Fla. 1880) In a suit in equity against an administrator by the heirs to compel him to account, his testimony as to transactions and communications with his intestate, as to his own claims against the estate, is inadmissible, under Laws, c. 1983, § 1, except as to matters upon which the heirs are examined on their own behalf; but it is admissible as to claims of third

parties, which he has paid.—Sanderson v. Sanderson's Adm'rs, 17 Fla. 820.

[f] (Ill. 1887) Rev. St. c. 13, § 2, providing that no party to any civil action or proceeding or person directly interested in the event shall be allowed to testify therein of his own motion when any adverse party sues or defends as legatee or devisee, unless when called as a witness by the party so suing or defending, applies to an application to require an executor to disclose assets, and the executor is not a competent witness therein as to facts occurring before the death of his testator.—Booth v. Tabbernor, 23 Ill. App. 173.

[g] (Md. 1868) In a proceeding instituted by C. to ascertain whether B., the executor of D., has come into possession of assets of his testator, and if so to compel him to account for such as had come into his hands, B. is a competent witness to show that he had advanced money to his testator, though Acts 1864, c. 109, § 2, prohibits a party to a contract from testifying where the other party is dead.—Cooke v. Cooke, 29 Md. 538.

[h] (Mass. 1867) Under Gen. St. c. 131, § 14, excluding a party from testifying in his own favor when the other party to the contract or cause of action is dead, and St. 1864, c. 304, § 1, an executor is not a competent witness in his own behalf to substantiate a charge in his probate account of money paid to himself individually, and not "acting only in a representative capacity," for services rendered to his testatrix.—Ela v. Edwards, 97 Mass. 318.

[i] (Miss. 1880) On the trial of the exceptions to an executor's final account, creditors of the testator are competent witnesses as to the propriety of the executor's action in paying their demands without their being registered.—Gordon v. McEachin, 57 Miss. 834.

[j] (N. J.) Under the act of 1880, on exceptions to an executor's account, he is not a competent witness when he offers himself as such in his own behalf, to testify as to any transactions between himself and his testator.—(1881) Smith v. Burnet, 34 N. J. Eq. (7 Stew.) 219; (1882) Id., 35 N. J. Eq. (8 Stew.) 311.

[k] (N. J. 1887) Upon exceptions to the account of an executor on the ground that he had not charged himself with the amount of a promissory note and two drafts made or accepted by him, and delivered to the decedent, the testimony of the executor, on his own behalf, as to transactions between himself and the decedent relative to said note and drafts, is inadmissible; although the exceptant, who was also a co-executor, was allowed to prove the signature to the note and drafts, and the possession of them by the decedent at his death—the status of the latter being that of a legatee protecting his individual interests and not that of executor.—Tichenor v. Tichenor, 43 N. J. Eq. (16 Stew.) 163, 10 Atl. 867.

[l] (N. Y. 1862) At a final settlement of an administrator's accounts, made in June, 1861, under the law as it then stood, an administrator was a competent witness to prove what took place between himself and the deceased in reference to making a certain note, and that he signed it at the request and for the benefit of the deceased.—Bolton v. Smead, 38 Barb. 141.

[m] (Pa. 1884) An administrator voluntarily paid for services claimed by A. to have been rendered the intestate. In settling the administrator's account it was *held* that A. was not a competent witness in support of the claim.—Appeal of Fross, 105 Pa. 258.

[n] (Vt. 1893) Since the court is required, by R. L. § 2298, to examine a trustee on oath as to the correctness of his account before allowing it (unless it is unobjected to, and its correctness well proved), the trustee is a competent witness on exceptions to his account by the estate of his deceased cestui que trust.—In re Hodges' Estate, 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820.

§ 572. Determination of validity of deed.

[a] (Ohio, 1894) An action by an administrator to recover the value of land conveyed to defendant by decedent with intent to defraud his creditors involves the validity of a deed, and defendant is a competent witness in his own behalf to facts occurring before the death of the grantor, under Rev. St. § 5242, which provides that "nothing in this section contained shall apply to * * * actions or proceedings involving the validity of a deed," etc.—Doney v. Dunnick's Adm'r, 8 Ohio Cir. Ct. R. 163.

[b] (Pa. 1890) Under Act May 23, 1887, § 5e (P. L. 158), which provides that, where a party to a contract is dead, no other person whose interest shall be adverse to the right of the deceased shall be a competent witness to any matter occurring before the death of the deceased unless the issue or inquiry be devisavit vel non, plaintiff in ejectment, who claims by descent from his father, and that a voluntary deed executed by the father to defendant, another of his children, is void because of the father's insanity, is not a competent witness as to matters occurring before the father's death.—King v. Humphreys, 138 Pa. 310, 22 Atl. 19.

§ 573. Proceedings for distribution and settlement of estate.

[a] (Iowa, 1873) An action to compel a conveyance of real estate under a parol contract with a person deceased is not "in relation to the settlement of estates of deceased persons," within Rev. St. § 3982, regulating the admission of testimony of parties interested.—Campbell v. Mayes, 38 Iowa, 9.

[b] (Ky. 1873) The fact that an estate cannot be settled till a certain action is finally determined does not make the same an "action relating to the settlement of estates," within the law of 1872, regulating the admission of testimony.—Booth's Ex'r v. Vanarsdale, 72 Ky. (9 Bush) 717.

[c] (Pa. 1872) A proceeding in the orphans' court for the distribution of the estate of a decedent is an "action" within the provision of Act April 15, 1869, that interest shall not exclude any party or person from being a witness in any civil proceeding, except in actions by or against executors, administrators, or guardians.—Appeal of McBride, 72 Pa. (22 P. F. Smith) 480.

[d] (Pa. 1873) A husband and wife had given a bond to the wife's father, stipulating for the payment of interest to him during his lifetime, and on his death for the payment of the principal to the wife. *Held*, that in proceedings for the distribution of the assets of the estate the husband and wife were not made competent to testify that the money forming the consideration of the bond was a gift and not an advancement by virtue of Act April 15, 1869, permitting parties to testify, but declaring that it shall not apply to actions by or against executors, administrators, or guardians.—In re Knabb's Estate, 30 Leg. Int. 361, 2 Woodw. Dec. 386.

[e] (Pa. 1875) In the distribution of an estate, the widow may testify that a bond has been paid by her husband.—In re Watson's Estate, 11 Phila. 99.

§ 574. Claim cases.

[a] (Ga. 1872) When a third party interposes a claim to property upon which a fi. fa. has been levied, plaintiff in execution is a competent witness on the trial of the issue so raised, although defendant in execution be dead or insane. The real issue is between the claimant and plaintiff in execution. Such a

case therefore is not within the exceptions to the evidence act of 1866.—Anderson v. Wilson, 45 Ga. 25.

[b] (Ga. 1884) Plaintiff in fi. fa. may testify as to admissions of the claimant, or to conversations between himself and defendant communicated to claimant, although defendant is dead.—Powell v. Watts, 72 Ga. 770.

[c] (Ga. 1884) Defendant in fi. fa. is not a party to the issue between claimant and plaintiff, and on trial of the claim case his death does not prevent third persons from testifying that they made a trade with him concerning the property in question.—Woodruff v. Wilkinson, 73 Ga. 115.

[d] (Ga. 1889) The claimant in a statutory claim case is not disqualified as a witness in his own behalf to prove transactions between himself and defendant in fi. fa., though the latter be dead.—Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068.

3. PARTIES AND OTHER PERSONS WHOSE TESTIMONY IS EXCLUDED IN GENERAL.

IN GENERAL, § 575.
REPRESENTATIVE OR EMPLOYÉ OF PARTY OR PERSON INTERESTED IN GENERAL, § 576.
AGENT OF PARTY OR PERSON INTERESTED, § 577.
—— ATTORNEY, § 578.
—— EFFECT OF STATUTES DISQUALIFYING AGENT, § 579.
MEMBER, STOCKHOLDER, OR OFFICER OF CORPORATION PARTY OR INTERESTED, § 580.
MEMBER OR OFFICER OF UNINCORPORATED SOCIETY, § 581.

§ 575. In general.

[a] (U. S. 1881) All disqualifications on the ground of interest in the event of the suit are abolished by Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], except only where an executor, administrator, or guardian is a party for or against whom judgment may be rendered, and it is sought to prove, by one of the parties, some transaction with or statement by the testator, intestate, or ward.—Rice v. Martin (C. C.) 8 Fed. 476, 7 Sawy. 337.

[b] (Ala. 1880) Code, § 3058, which prohibits a party from testifying as to transactions with a decedent in an action in which the estate is interested, does not prevent one not a party to the record nor interested in the result of the suit from testifying as to such transactions.—Daily's Adm'r v. Daily, 66 Ala. 266.

[c] (Ala. 1891) Where a witness was not a party to the suit, or interested in its result, his testimony as to an interview between plaintiff and defendant's decedent is not excluded by Code, § 2765.—Espalla v. Richard, 94 Ala. 159, 10 South. 137.

[d] (Fla. 1883) Laws 1874, c. 1983, § 1 (McClel. Dig. p. 318, § 24), provides that no party to an action or proceeding or any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and the person at the time of such examination deceased, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, unless the opposing party shall have been examined in his own behalf touching such transaction or communication. *Held*, in an action by a widow to enjoin a legatee of her husband from taking certain proceedings before the county court in the matter of the estate of her husband and to obtain a decree declaring certain real estate to be her separate property and her estate of inheritance, and that she be not further annoyed by parties claiming as heirs or legatees, that neither plaintiff, her son, defendant, nor deceased's executor are competent witnesses as to declarations or transactions of deceased relating to conveyances by him to parties from whom defendant claims to have deraigned title.—Stewart v. Stewart, 19 Fla. 846.

[e] (Ga. 1873) On the trial of a claim case it appeared that defendant after the date of the judgment had conveyed the land to the claimant. J. was introduced as a witness to prove that some years prior to the date of the judgment he had bought the land from defendant and paid the consideration money, but had taken no deed or other writing, and that the deed made to the claimant by defendant was made at J.'s request, he having sold the land to the claimant and received the consideration. *Held*, that J. was a competent witness under the evidence act of 1866, notwithstanding the death of defendant who made the deed, since he was not a party or interested in the event of the action.—Johnson v. McComb, 49 Ga. 120.

[f] (Ga. 1885) One who would not, at common law, be competent to testify as to a transaction with one since deceased, is not competent under Code, § 3854.—National Bank of Augusta v. Bones, 75 Ga. 246.

[g] (Ga. 1888) One who purchases property from a defendant in fi. fa., with knowledge of the judgment, cannot, long after the death of the plaintiff, in a claim case to which his administratrix is a party, use the defendant in fi. fa. as a witness to prove that there was no real debt on which the judgment was founded, but that the judgment was a collusive arrangement between the plaintiff and the defendant in fraud of creditors.—Prendergast v. Wiseman, 80 Ga. 419, 7 S. E. 228.

[h] (Ill. 1883) The statute providing that an interested witness shall not testify in his own behalf as against the representatives of a decedent disqualifies him from so testifying in favor of his own interest, either as a party to the suit or as a witness for another.—Plain v. Roth, 107 Ill. 588.

[i] (Iowa, 1891) In proceedings to establish as a claim against a decedent's estate a note on which decedent and one F. were sureties, a release of the sureties by the payee was relied on as a defense. F. testified that he called on the payee on behalf of both sureties; that the payee stated that he did not intend to hold them, but would look to the principal; and that he then took no steps to protect himself. *Held*, that conversations between F. and decedent were admissible, as F. was acting for both himself and decedent.—Wolf v. Madden, 82 Iowa, 114, 47 N. W. 981.

[j] (Me. 1882) In suit on a claim purchased by plaintiff at a sale of a bankrupt's effects, the bankrupt may be called by plaintiff to testify touching the same, although the party defending is an executor or administrator, since he is not a party to nor interested in the event of the suit and is not excluded by any statutory provision.—Alden v. Goddard, 73 Me. 345.

[k] (Md. 1882) In a contest between the holders of two mortgages as to priority, the mortgagor was objected to as a witness on the ground that the mortgagee, whose transaction with him was the subject of the testimony, was dead, and that therefore he was incompetent under Acts 1864, c. 109, Acts 1868, c. 116, and Acts 1876, c. 222. *Held*, that the witness was not a party, and was in no manner interested, and, being a competent witness at common law, the evidence acts had no application.—Swartz v. Chickering, 58 Md. 290.

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[l] (Mich. 1879) One who is precluded from testifying to dealings with a decedent may establish such dealings by the testimony of an outsider.—McKeown v. Harvey, 40 Mich. 226.

[m] (Mich. 1887) A witness not a party to the suit may testify to conversations between a deceased lessor and a surviving lessee, which were heard by him; the disqualification of How. Ann. St. § 7545, applying only to testimony of the opposite party in a suit against the representative of a deceased person.—Pendill v. Neuberger, 64 Mich. 220, 31 N. W. 177.

[n] (N. Y. 1889) A mortgage after assignment was canceled of record by the mortgagee in fraud of the assignee's rights, and was transferred to plaintiff, who paid full value, and had no notice of the satisfaction. The land was conveyed to one who assumed payment of plaintiff's mortgage, and a second mortgage of the land was given to secure a debt due by the partnership, of which the grantee was a member. *Held* that, as plaintiff did not derive title to her mortgage through such grantee or his partner, who were called as witnesses for her, and as one of them was not a party and the other made no defense, and they were not called in behalf of themselves or one succeeding to their interest, their testimony as to conversations with one of the second mortgagees, who was dead, was not incompetent, under Code Civ. Proc. § 829, providing that a party or interested person, or a person through whom such party or interested person derives his interest, shall not be examined in the interest of himself, or person succeeding to his interest, against an executor, etc., as to personal transactions with decedent, etc.—Clark v. McNeal, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638, affirming (1888) 14 N. Y. St. Rep. 507.

[o] (N. Y. 1895) On the hearing of a claim against decedent's estate for money alleged to have been paid by mistake, it is competent for the agent who represented decedent in the transaction in which the money was paid to testify for claimant as to a conversation between himself and decedent, as the agent was not a party to the action, or interested in the event thereof, within Code Civ. Proc. § 829, prohibiting witnesses from testifying as to communications with decedent in certain cases.—Ketchum v. Holden, 88 Hun, 482, 34 N. Y. Supp. 870.

[p] (N. Y. 1896) On settlement of an administrator's account, the transferee of a note made by decedent in favor of the administrator, and by him paid to the transferee, out of the decedent's estate, is not disqualified by Code Civ. Proc. § 829, to testify as to the transaction with decedent which resulted in the execution and delivery of the note; such transferee not being a party to the proceedings for the settlement of the accounts, or interested in the event.—In re McNeany, 5 App. Div. 456, 38 N. Y. Supp. 1093.

[q] (N. Y. 1896) Code Civ. Proc. § 829, making "a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title," incompetent to testify to transactions with a decedent against an executor, does not apply to a witness who testified in behalf of an executor that certain money with which it was sought to charge the executor in accounting was received by the witness, during the lifetime of the testatrix, and, by agreement with her, was retained.—In re Lewis, 5 App. Div. 178, 39 N. Y. Supp. 26.

[r] (N. C. 1890) Under Code, § 590, disqualifying parties, and those interested in the event of the suit, from testifying against the representative of a deceased person concerning any personal communication or transaction between the witness and deceased, a person not a party, nor interested in the event of the suit, may testify as to such transaction or communication.—Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043.

[s] (Pa. 1894) In an intervention suit for property levied on, plaintiff in intervention claiming to have bought it of defendant in execution before the levy, the latter is not incompetent to testify for plaintiff, though defendant in intervention is dead; defendant in execution not being a party to the action, or a person whose interest is adverse to the right of the deceased party, within Act May 23, 1887, § 5, cl. e.—Smith v. Rishel, 164 Pa. 181, 30 Atl. 239, 35 Wkly. Notes Cas. 365.

[t] (Tenn. 1875) Code, § 3813c, relating to witnesses in proceedings by or against executors, does not, on scire facias in favor of an executrix to revive a judgment obtained by her testator, prevent the principal debtor in the judgment, but who was not a party to the proceeding to revive against the stayor, from being a competent witness against her, to prove that the debt has been paid.—Kelton v. Jacobs, 64 Tenn. (5 Baxt.) 574.

[u] (Vt. 1888) Plaintiff and defendant's intestate having signed a note as sureties, and the question in issue being whether plaintiff had signed as co-surety with, or as surety for, the intestate, the maker of the note was a proper witness, and not incompetent, under R. L. § 1002, as he was neither a party to the action nor interested in its result.—Canfield v. Bentley's Estate, 60 Vt. 655, 12 Atl. 655.

§ 576. Representative or employé of party or person interested in general.

[a] (Fla. 1896) In an action by an administrator against the trustees of the internal improvement fund on interest coupons, defendants alleged that the coupons belonged to them; that possession of part of them had been acquired by plaintiff's intestate by his taking them up as agent for defendants; and that possession of the remainder of them was acquired through intestate's settlement as agent with C., a former treasurer of defendants. On the trial it was shown that C. had failed to account to the trustees, and defendants called on him for an accounting. *Held*, that C. was not interested within Rev. St. § 1095, so as to disqualify him from testifying to the fact of settlement with intestate, or as to the question whether he turned any coupons over to intestate on such settlement.—Adams v. Board of Trustees of Internal Imp. Fund, 37 Fla. 266, 20 South. 266.

[b] (Ill. 1893) Rev. St. c. 51, § 1 et seq., does not render the foreman of a railroad company an incompetent witness, in an action against the company for the death of plaintiff's intestate (an employé under the foreman), to testify as to instructions given decedent by him, as he has no legal interest in the suit, he being free from negligence.—Lake Shore & M. S. Ry. Co. v. Rohlfs, 51 Ill. App. 215.

[c] (Mich. 1895) In an action on an insurance policy after the death of insured, the testimony of a clerk in the office of an agent of the company is admissible as to the terms of an agreement between insured and the agent for a change in the policy, such person not being an interested party to the action.—Krause v. Equitable Life Assur. Soc. of United States, 105 Mich. 329, 63 N. W. 440.

[d] (N. Y. 1892) In an action against a city to recover salary claimed to have been due to plaintiff's intestate as assistant city engineer, the chief engineer has no such interest in the litigation as renders him incompetent to testify to conversations between him and decedent, tending to show that decedent had been discharged before the period for which salary is

claimed.—Connor v. City of New York, 64 Hun, 635, 19 N. Y. Supp. 85.

§ 577. Agent of party or person interested.

Interest in event, see post, § 615.

Surviving party to contract or other transaction or cause of action, see post, § 640.

[a] (Ga. 1892) An agent for the custody and management of a fund is not incompetent to testify in behalf of his principal against an administrator, save as to transactions with decedent which took place in dealings, or in alleged dealings, between the witness, as agent, and decedent.—Hidell v. Dwinell, 89 Ga. 532, 16 S. E. 79.

[b] (Ill. 1876) The agent of a vendor in a bill for specific performance is not a competent witness after the vendee's death, as against his heirs, to testify that a payment indorsed by him on the contract was made by mistake, and that it was not in fact made.—Bruner v. Battell, 83 Ill. 317.

[c] (Ill. 1890) Where the defense to a suit on a note is that it was procured by fraud, the payee's agents who were guilty of such fraud, if there was any, are "persons having a direct interest in the event of the suit," within the meaning of Rev. St. Ill. c. 51, § 2, which allows a person sued by the representatives of a decedent to testify as to transactions as to which "persons having a direct interest in the event of such suit" have previously testified on behalf of the representatives, since, in such case, the agents, being liable to their principal for any loss resulting through their fraud, and being bound by the suit because testifying, are directly interested therein.—Butz v. Schwartz, 135 Ill. 180, 25 N. E. 1007, affirming (1889) 32 Ill. App. 156.

[d] (Ind. 1872) On the trial of a claim against a decedent's estate, an agent of the claimant who transacted with the deceased the business on which the claim is founded is a competent witness.—Helms v. Kearns, 40 Ind. 124.

[e] (Ky. 1895) Civ. Code Prac. § 606, subd. 2, providing that "no person shall testify for himself concerning any verbal statement, or any transaction with, or any act done or omitted to be done by," one who is dead when the testimony is offered, does not preclude an agent, who acts for a party in a transaction with one afterwards dying, from testifying for his principal concerning any verbal statement of, or transaction with, or act done by, the decedent.—Cobb's Adm'r v. Wolf, 96 Ky. 418, 29 S. W. 303.

[f] (Ky. 1895) The collecting agent of an insurance company is competent to testify, in an action against the company by the administrator of a policy holder, as to an agreement between the witness and the policy holder to the effect that the latter's policy should be treated as canceled and void.—Fidelity & Casualty Co. v. Goff's Ex'x, 30 S. W. 626.

[g] (Minn. 1890) Gen. St. 1878, c. 73, § 8, declaring parties to actions, and persons interested in the event thereof, to be incompetent to testify to conversations with, or admissions of, deceased persons relative to a matter in issue, does not apply to an agent of a party to the action, such agent not being a party, nor having any legal interest in the event of the action.—Darwin v. Keigher, 45 Minn. 64, 47 N. W. 314.

[h] (Mo. 1867) In an action upon a quantum meruit brought by surviving partners, defendant's wife may testify that she, as her husband's agent, made a special contract with the deceased partner, the disqualification of a party to the record in such a case not extending to his agent.—Stanton v. Ryan, 41 Mo. 510.

[i] (Mo. 1891) Though a contract in suit was made by one of the parties through an agent, the death of the other party will not render the agent an incompetent witness to prove the contract for his principal, if the principal is not a corporation.—Baer v. Pfaff, 44 Mo. App. 35.

[j] (Mo. 1893) Since, at common law, an agent was competent to testify to his agency, he is not now incompetent, when one of the parties to the contract he negotiated is dead. This restriction on the testimony of the parties themselves is by way of exception to the statutory grant to them of the right to testify.—Samuel v. Bartee, 53 Mo. App. 587.

[k] (N. Y. 1878) Notes signed with G.'s name by A., his agent, were delivered to B. and owned by B. at the time of B.'s death. One of them had been indorsed to B. by the payee, F., but F. had never been charged as indorser thereon. In an action on the notes by B.'s administrator, *held*, that A. was a competent witness for G., to prove payment of the notes to B.—Nearpass v. Gilman, 16 Hun, 121, affirmed (1887) 104 N. Y. 506, 10 N. E. 894, 5 N. Y. St. Rep. 745, 25 Wkly. Dig. 459.

[l] (N. Y. 1887) Under Code Civ. Proc. § 829, disqualifying parties interested in the event of a suit from testifying as to transactions with a decedent, the agent of defendant in an action by the administrators of a decedent to recover the amount of certain notes, claimed to have been executed by defendant through such agent, is not bound by the judgment, either directly, by its own force, or indirectly, as evidence against him of misconduct or negligence, and is not so interested in the event of the suit as to be disqualified.—Nearpass v. Gilman, 104 N. Y. 506, 10 N. E. 894, affirming (1878) 16 Hun, 121.

[m] (N. Y. 1891) In an action to foreclose two mortgages, the husband of one of the defendants, who acted as her agent, is not for that reason a party to the action, or interested in the result, within the meaning of Code Civ. Proc. § 829, prohibiting such persons from testifying as to transactions with decedents.—Whitman v. Foley, 125 N. Y. 651, 26 N. E. 725, reversing (1889) 7 N. Y. Supp. 310, 954.

[n] (N. Y. 1891) In an action against an executor for services rendered to his testator, plaintiff's wife is competent to testify as to the agreement made by the testator for compensation for such services which were rendered by her, where she acted as an agent in the service of and subordinate to her husband, to whom the claim to compensation accrued, and by whom the action was brought.—Porter v. Dunn, 61 Hun, 310, 16 N. Y. Supp. 77.

[o] (N. Y. 1896) The husband, acting as agent of a party to an action, is not a "person interested in the event," within Code Civ. Proc. § 829, which provides that a person interested in the event of an action shall not testify in his own behalf against the administrator of a decedent concerning personal transactions with him and decedent.—Savercool v. Wilsey, 5 App. Div. 562, 39 N. Y. Supp. 413.

[p] (Ohio, 1893) An agent who makes a sale of goods for his principal is not incompetent to testify to the circumstances of the transaction because of the death of the buyer.—Shaub v. Smith, 50 Ohio St. 648, 35 N. E. 503.

[q] (S. C. 1878) A factor brought an action against the executors of the owner of certain cotton, to recover the amount of a reclamation paid by the factor on account of such cotton. *Held*, that a witness through whom the factor shipped the cotton and paid the amount of the reclamation, but not the factor, was competent to testify as to transactions with the owner of the cotton, since deceased.—Blakely v. Frazier, 11 S. C. 122.

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[r] (Tenn. 1892) In an action against the makers of a note, found among the papers of the deceased payee, a son of one of the makers is competent to testify as to the contents of a lost letter, written to his father by the deceased payee, authorizing a renewal of the note sued on, and promising to return such note as satisfied, on receipt of the renewal note; and also that, in a personal interview with the deceased payee, the latter agreed to a renewal of the note in suit, and to return such note on receipt of the renewal note—since the prohibition of Mill. & V. Code, § 4565, against testimony as to transactions with or statements by decedents, extends only to parties to the action; and the fact that the son was acting as agent for the makers in procuring the renewal is immaterial.—Montague v. Thomason, 91 Tenn. (7 Pickle) 168, 18 S. W. 264.

[s] (Va. 1895) In an action against an executor for the price of lumber sold to decedent, plaintiffs' agent, who sold and delivered the lumber, is competent to testify for plaintiff as to the transaction.—Goodell's Ex'rs v. Gibbons, 91 Va. 608, 22 S. E. 504.

[t] (Wis. 1890) Rev. St. § 4069, which excludes the testimony of a party, or the person under whom he claims, as to transactions had by him personally with a deceased or insane person, under whom his antagonist claims, does not exclude the testimony of an agent of such party.—Hanf v. Northwestern Masonic Aid Ass'n, 76 Wis. 450, 45 N. W. 315.

§ 578. —— Attorney.

[a] (Iowa, 1873) In an action against an administrator, plaintiff's attorney, who has no agreement for a contingent fee, but does not know that he will receive anything if plaintiff fails to recover, has no such interest as renders him incompetent as a witness for plaintiff.—Birge v. Rhinehart, 36 Iowa, 369.

[b] (Mich. 1886) Plaintiff's attorney cannot testify as to his transactions in that relation, regarding a claim against a deceased person, unless they were brought home to decedent during his life, or included in dealings known to or authorized by him.—Passmore v. Passmore's Estate, 60 Mich. 463, 27 N. W. 601.

[c] (Minn. 1895) Under Gen. St. 1878, c. 73, § 8 (Gen. St. 1894, § 5660), making one interested in the result of an action incompetent to testify as to conversations with or declarations by a deceased person relative to the matter in issue, an attorney for plaintiff in a suit to recover land, whose fee in case of success was to be an undivided interest in the land recovered, and who assigned the right to such fee shortly after suit was begun, to persons not lawyers, and retained control of the suit, is incompetent to testify as to conversations had by him with defendant's intestate relative to the title to the land, it appearing that the assignment was merely colorable.—Tretheway v. Carey, 60 Minn. 457, 62 N. W. 815.

[d] (N. Y. 1893) In an action by the assignee of a mortgagee against a judgment creditor of the mortgagor for the conversion of mortgaged property by a sale of the same on execution, defendant's attorney in the execution sale is not an interested party, within Code Civ. Proc. § 829, so as to disqualify him from testifying to a verbal agreement between himself and the mortgagee, made before the entry of defendant's judgment, whereby defendant was permitted to satisfy his execution out of the chattels without interference from the mortgagee, and that execution issued in pursuance of such agreement.—Paine v. Kerr, 66 Hun, 636, 21 N. Y. Supp. 880.

[e] (N. C. 1881) The fact that an attorney has had an interest in the event of a suit on account of the tax fee does not disqualify him under Code Civ. Proc. § 343, from testifying as to a transaction or communication with a person deceased.—Syme v. Broughton, 85 N. C. 367.

[f] (N. C. 1889) An attorney of one of the parties to an agreement is not precluded from testifying for his client concerning the agreement, under Code, § 590, providing that a party in interest, or a party from whom such party derives his interest, shall not testify in his own behalf, or that of the party succeeding to his title, concerning a personal transaction or communication between the witness and a party who has since become a lunatic, in an action against the representative of the lunatic.—Propst v. Fisher, 104 N. C. 214, 10 S. E. 295.

§ 579. —— Effect of statutes disqualifying agent.

[a] (Ga. 1892) If both parties admit or contend that the transaction under investigation involved no element of agency, but was one between the agent, acting for himself as principal, on the one hand, and decedent as principal on the other, the agent is a competent witness, under the evidence Act 1889, as, in such case, he is not an agent at all within the intention and meaning of the act.—Hidell v. Dwinell, 89 Ga. 532, 16 S. E. 79.

[b] (Ga. 1893) Under Act 1889, a witness offered by one of certain defendants was incompetent to testify to a transaction had with plaintiff's intestate, in which the witness acted as the agent of that defendant.—Thompson v. Ray, 92 Ga. 540, 17 S. E. 903.

[c] (Ga. 1893) Under Act 1889, disqualifying an agent to testify in behalf of his principal as to any transaction or communication between himself and the person with whom the transaction or communication was had, when that person is dead, and his legal representative is a party to the suit, an agent is not disqualified to testify to a transaction between his principal and a deceased person, in which the agent took no part.—McCamy v. Cavender, 92 Ga. 254, 18 S. E. 415.

[d] (Ind. 1887) Under Rev. St. 1881, § 500, disqualifying an agent who had made a contract from testifying against the representatives of the other party to the contract, after the latter's death, as to matters occurring prior to such death, the agent of an insurance company is not a competent witness for the company, in an action by the heir of the original policy holder, as to matters occurring in the lifetime of the deceased relative to the contract of insurance.—Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315.

[e] (Ind. 1890) An attorney present at the making of a contract, not as agent, but adviser, of his client, is not made incompetent as a witness by Rev. St. 1881, § 500, making a person who acted as agent in the making of a contract incompetent to testify for his principal after the death of the other party.—Piper v. Fosher, 121 Ind. 407, 23 N. E. 269.

[f] (Ind. 1893) In an action by the executor of a deceased principal to recover damages from an agent for his neglect of duty in loaning the principal's money on incumbered real estate, in violation of instructions, the person to whom the money was loaned may testify to a conversation with the deceased principal, wherein the latter directed the witness to tell the agent to turn over the money, and accept a second mortgage, since such witness is not an agent, either of the deceased or of defendant, within the meaning of Rev. St. 1881, § 500, which renders incompetent as a witness any person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, as to matters occurring prior to the death of such decedent.—

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Welsh v. Brown, 8 Ind. App. 421, 35 N. E. 921.

[g] (Mich. 1892) It is provided by 3 How. Ann. St. § 7545, that when any suit is prosecuted by the heirs or personal representatives of a deceased person against a corporation, no officer or agent of such corporation shall be allowed to testify in relation to matters which, if true, must have been equally within the knowledge of such deceased person. *Held*, that this includes only those who are authorized to act for the corporation in the matter with reference to which testimony is given, and hence a brakeman and conductor of defendant's road were competent to testify that they had warned deceased against the dangers of coupling cars loaded with logs, when it is not claimed that they had any authority to speak for the company.—Brennan v. Michigan Cent. R. Co., 98 Mich. 156, 53 N. W. 358.

§ 580. Member, stockholder, or officer of corporation party or interested.

Surviving party to contract or other transaction or cause of action, see post, § 641.

[a] (Ga. 1877) Testimony by officers of the plaintiff company as to interviews and negotiations with a deceased defendant is not admissible, though witnesses acted in some other capacity, in such negotiations, than their official one.—Central R. & Banking Co. v. Papot, 59 Ga. 842.

[b] (Ga. 1881) In a suit between a railroad company and a partnership, a director of the road is incompetent to prove negotiations in reference to the subject-matter of the suit between him and a member of the firm since deceased.—Southwestern R. R. v. Papot, 67 Ga. 675.

[c] (Ga. 1895) A director or other agent of a corporation may testify in a case to which the corporation is a party, concerning transactions had between such director or agent in behalf of the corporation and a person since deceased, whose executor or administrator is the other party to the case.—Ullman v. Brunswick Title Guaranty & Loan Co., 96 Ga. 625, 24 S. E. 409.

[d] (Ill. 1890) In an action by an administrator against a corporation for negligently causing the death of his intestate, stockholders of the corporation are not competent witnesses for defendant, since they are interested parties.—Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

[e] (Ill. 1891) On a bill against stockholders of an insolvent corporation to enforce payment of a judgment recovered against it, surviving stockholders, not defending, are competent witnesses for complainant, notwithstanding the fact that their testimony tends to charge the representatives of deceased stockholders, where the preponderance of their interest is in opposition to their testimony.—Thayer v. El Plomo Min. Co., 40 Ill. App. 344.

[f] (Ind. 1874) On a claim against a decedent's estate for the amount of a note executed by him to the county treasurer and assigned to a turnpike company, where it appeared that the note was given for the amount of an assessment in favor of such company, the treasurer was not a competent witness.—Modlin v. Northwestern Turnpike Co., 48 Ind. 492.

[g] (Iowa, 1879) In an action against an executor by a corporation on a contract entered into by it and the decedent, a stockholder is an interested person, within Code 1873, § 3639, prohibiting interested persons from testifying to personal transactions between them and persons since deceased.—First Nat. Bank of Burlington v. Owen, 52 Iowa, 107, 2 N. W. 980.

[h] (Md. 1872) In an action by a corporation against an executor to recover an alleged subscription by his testator to the capital stock, the stockholders are not "parties," within Acts 1868, c. 116, declaring one party incompetent as a witness where the opposite party is dead.—Downes v. Maryland & D. R. Co., 37 Md. 100.

[i] (Mich. 1878) In a suit brought by the estate of a deceased person against a private corporation, the corporators may testify to matters equally known to the deceased.—Rust v. Bennett, 39 Mich. 521.

[j] (Minn. 1889) In an action to reform an insurance policy and to recover on the reformed policy, the issue was whether there had been an agreement between the insurance agent, since deceased, and plaintiff's agent, for insurance on the property omitted from the policy. Plaintiff's agent testified as to conversations with the deceased insurance agent as to the agreement between them prior to issuing the policy. It appeared, after the evidence was received, under objection, that the witness was a member of a partnership which was a stockholder in plaintiff corporation. *Held* error not to strike out the evidence, as it related to transactions with a decedent, under Gen. St. 1878, c. 73, § 8.—Farmers' Union Elevator Co. v. Syndicate Ins. Co., 40 Minn. 152, 41 N. W. 547.

[k] (Miss. 1879) A claim of a savings institution against the estate of a decedent may be established by testimony of the president thereof as to transactions and conversations with the decedent.—Mitchell v. Tishomingo Sav. Inst., 56 Miss. 444.

[l] (Mo. 1889) A corporation was organized by converting into a corporate business the business of B., who subscribed for nearly all the stock, giving for it only his business. He transferred to S. part of this stock, which was entered on the books in the name of plaintiff, the wife of S. In an action by her, after the death of S., to recover dividends declared but not paid to her, B. was called as a witness by the corporation to prove that neither plaintiff nor her husband paid anything for the stock. *Held*, that B. was incompetent to testify as to what had passed orally between him and S. (since deceased) touching the stock transaction, whether the contract was regarded as essentially his own, or as the contract of the corporation for which he was the sole contracting agent with S.—Soeding v. Bonner & Zollner Iron Co., 35 Mo. App. 349.

[m] (N. J. 1895) Testimony of officers or directors of a corporation called as witnesses in behalf of the corporation in an action in which it is a party is not testimony of the corporation, within Act Feb. 25, 1880 (Supp. Revision, p. 287), declaring that a party to an action wherein his adversary sues or is sued in a representative capacity shall not be permitted to give testimony as to any transaction with or statement by any decedent represented in the action.—New Jersey Trust & Safe Deposit Co. v. Camden Safe Deposit & Trust Co., 58 N. J. Law (29 Vroom) 196, 33 Atl. 475.

[n] (N. Y. 1882) A shareholder in a corporation is not an interested witness in a matter concerning the corporation, where his testimony is adverse to the interest of the corporation.—Trustees of Canandarqua Academy v. McKechnie, 90 N. Y. 618.

[o] (N. Y. 1886) The president of, and a stockholder in, a corporation whose interests are identified with those of the corporation, is incompetent to testify to a personal transaction

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with one deceased.—Keller v. West, Bradley, & Cary Mfg. Co., 39 Hun, 348.

[p] (Pa. 1885) As a bank discounting a note is an assignee of the maker who receives the proceeds, its stockholders are incompetent to testify to matters which occurred during the lifetime of the deceased assignor.—Foster v. Collner, 107 Pa. 305.

[q] (Pa. 1885) In an action against a bank to recover the value of certain certificates deposited with a cashier who sold them and embezzled the money, a stockholder who had transferred his stock in good faith was competent to testify, though plaintiff was dead.—Searle v. First Nat. Bank of Montrose, 2 Walk. 395.

[r] (Tenn. 1842) Where a testator devised his estate to a school district, for the education of the children therein, the inhabitants of such district were competent witnesses of the sanity of the testator.—Gass' Heirs v. Gass' Ex'rs, 22 Tenn. (3 Humph.) 278.

[s] (Tenn. 1888) A stockholder is not disqualified by interest from testifying, in a suit by the corporation against an administrator, as to conversations with the deceased in reference to the contract in suit.—Grange Warehouse Ass'n v. Owen, 86 Tenn. (2 Pickle) 355, 7 S. W. 457.

[t] (Wash. 1895) Where one negotiates a lease for himself, and subsequently becomes the president of a corporation which has by assignment succeeded to his rights under the lease, such president, in an action against the corporation by executors of the deceased lessor for unlawful detainer, is a "party in interest," within 2 Hill's Code, § 1646, prohibiting a "party in interest" from testifying as to any transaction or conversation with a deceased person in an action by or against his legal representatives.—Gilmore v. H. W. Baker Co., 12 Wash. 468, 41 Pac. 124.

§ 581. Member or officer of unincorporated society.

[a] (Mo. 1890) In an action by the trustees of an unincorporated benevolent society against the executrix of an alleged surety on a treasurer's bond, where the only issue was as to the execution of the bond by decedent, which it was sought to prove by his admissions, persons who were members of the society at the time such admissions were made, but not at the time of the trial, are competent to testify as to such admissions; but otherwise as to persons members at the time of the trial, they being disqualified by interest.—Fink v. Hey, 42 Mo. App. 295.

[b] (N. Y. 1895) Code Civ. Proc. § 829, forbidding a party to an action to testify as to a personal transaction with a decedent, did not prevent an officer of a charitable institution, who served without pay, from testifying in proceedings by the institution to prove a claim against the estate of a decedent.—In re O'Rourke, 12 Misc. Rep. 248, 34 N. Y. Supp. 45.

[c] (Pa. 1893) In an action upon a mortuary benefit certificate, brought against a mutual benefit society by a deceased member's wife, to whom it was expressly made payable, members of the society, who are subject to assessment to pay mortuary benefits, are not incompetent witnesses, under Act May 23, 1887, § 5, which declares that where any party to a contract is dead, and his right therein has passed to the litigant who represents his interest, no person whose interest is adverse to such decedent shall be a competent witness as to any matter occurring before the death, since the deceased member never had any right to the benefit mentioned in the certificate, and plaintiff does not represent him.—Hamill v. Supreme Council of the Royal Arcanum, 152 Pa. 537, 25 Atl. 645, 31 Wkly. Notes Cas. 505.

4. PARTIES OF RECORD.

IN GENERAL, § 582.
WHO ARE PARTIES, § 583.
PARTIES NOT SERVED AND EFFECT OF DEFAULT OR DISMISSAL, § 584.
EFFECT OF RELEASE, ASSIGNMENT, OR WITHDRAWAL, § 585.
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PARTIES TO BILLS AND NOTES, § 595.
MORTGAGOR AND MORTGAGEE, § 596.
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Husband or wife of party, see post, § 645.
Surviving party to contract or other transaction or cause of action, see post, §§ 625–643.

§ 582. In general.

[a] (U. S. 1881) In a suit by an administrator for the annulment of a contract, on the ground of fraud and undue influence, defendant is disqualified, by Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], from testifying as to transactions and conversations with the decedent personally.—Rhode Island Hospital Trust Co. v. Hazard (C. C.) 6 Fed. 119.

[b] (Ala. 1878) A party to a suit is not an incompetent witness, unless the case involves a direct immediate conflict between the rights of living persons and those of the estate of a deceased person.—Alabama Gold Life Ins. Co. v. Sledge, 62 Ala. 566.

[c] (Ala. 1880) Under Code 1876, § 3058, relating to the competency of parties as witnesses, a party to a suit cannot testify to a conversation with a deceased person, whose estate would be liable to refund to the adverse party in the event of a recovery.—Jackson v. Clopton, 66 Ala. 29.

[d] (Ala. 1889) Code, § 2765, provides that neither party shall be allowed to testify against the other as to transactions with any deceased person whose estate is interested in the result of the suit or proceeding unless called to testify thereto by the opposite party. *Held* that, in a proceeding in the probate court, by the administratrix and widow of an intestate, to declare his estate insolvent, where the heirs appear and deny the insolvency, a creditor who joins in the issue with the heirs, and denies the insolvency, but whose claim is resisted by the heirs as unjust, cannot, to establish his claim, testify as to transactions with the intestate.—Dolan v. Dolan, 89 Ala. 256, 7 South. 425.

[e] (D. C. 1894) Testimony of a complainant suing an executor, who is also charged as a trustee, as to an alleged agreement with deceased, is inadmissible where an adverse result would diminish the estate, under the proviso to Rev. St. U. S. § 858 [U. S. Comp. St. 1901, p. 659], which permits parties to the suit to testify on their own behalf.—Nieman v. Mitchell, 2 App. D. C. 195.

[f] (Fla. 1883) In a controversy between a creditor of an estate and an administrator, the former is not a competent witness to any transaction or communication between him and deceased, unless the administrator is examined as to such transaction, or testimony of such de-

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ceased person is given in evidence.—Sammis v. L'Engle, 19 Fla. 800.

[g] (Fla. 1885) In a suit in equity against the representative of a deceased person, complainant cannot testify as to any transaction or communication between himself and the deceased.—Ley v. Edwards, 21 Fla. 333.

[h] (Ga. 1875) In an action against an administrator to enforce a vendor's lien on land, it appeared that plaintiff sold the land to B., who, without paying the purchase money, sold it to defendant's intestate. *Held*, that plaintiff was not a competent witness.—Steele v. Brown, 54 Ga. 498.

[i] (Ill. 1878) On a bill against the heirs of a deceased person to enforce an agreement claimed to have been made by deceased with complainant, the latter is incompetent to testify in her own behalf, being a party in interest, under Rev. St. 1874, c. 51, §§ 1, 2.—Marshall v. Peck, 91 Ill. 187.

[j] (Ill. 1886) Under 1 Starr & C. Ann. St. cc. 51, 92, one of the plaintiffs in a bill to set aside a judgment obtained against their ancestor brought against the heirs of the judgment plaintiff cannot testify as to transactions in which his ancestor took part, and of which he was a witness.—Ebert v. Gerding, 116 Ill. 216, 5 N. E. 591.

[k] (Ind. 1886) Where rights are claimed through a deceased person, parties to the record are not competent witnesses to prove a contract or transaction with the deceased.—Wolfe v. Kable, 107 Ind. 565, 8 N. E. 559.

[l] (Ky. 1895) Under Civ. Code, § 606, subd. 2, prohibiting a party to a suit from testifying as to any transaction between himself and decedent, all testimony of that kind should be excluded, even if the facts testified to are established by independent witnesses.—Kendall's Ex'r v. Collier, 97 Ky. 446, 30 S. W. 1002.

[m] (Me. 1874) Under Rev. St. c. 82, § 87, plaintiff in a bill in equity prosecuted against an administrator and heirs of a deceased person cannot testify, except in reference to such facts as the administrator or heirs testify to, or in regard to such books or memoranda of the deceased as they put in evidence.—Burleigh v. White, 64 Me. 23.

[n] (N. Y. 1865) Plaintiff in a suit in equity brought to establish a lost or destroyed will, against the administrator and next of kin of the testator, is not a competent witness in his own behalf to prove conversations had between himself and the deceased, at the time of making the will and before, on the subject of the will.—Timon v. Claffy, 45 Barb. 438.

[o] (N. C. 1883) A member of the board of county commissioners is not a competent witness as to transactions with defendant's intestate in a suit by the board.—Forsyth Com'rs v. Lash, 89 N. C. 159.

[p] (Ohio, 1862) In an action against an executor, a residuary legatee, on his bond as such legatee, the claim not having been previously established in an action against him in his representative capacity, the exception of Code, § 113, to the admissibility of a party as a witness, applies, and plaintiff is not a competent witness to testify as to transactions between him and the testator.—Stevens v. Hartley, 13 Ohio St. 525.

[q] (Ohio, 1879) Code, § 313, making a party to a suit incompetent to testify where the adverse party is administrator, does not render a son of the party incompetent to testify in his behalf.—Clarkson's Adm'r v. Ryan, 6 Ohio Dec. 829.

[r] (Pa. 1879) One of two plaintiffs jointly interested in the suit having died, the other is incompetent to prove anything that occurred in the lifetime of the decedent.—Zell v. Benjamin, 1 Walk. 113.

[s] (Va. 1873) Under the statute, plaintiff is not a competent witness to prove the acts and declarations of a deceased person, under whom defendants claim.—Field v. Brown, 24 Grat. 74.

[t] (W. Va. 1893) A grantor in a deed after the death of the grantee cannot testify against his heirs that the deed was delivered conditionally, since he is a party to the suit and interested.—Paxton v. Paxton, 38 W. Va. 616, 18 S. E. 765.

[u] (Wis. 1862) In an action against an administrator, plaintiff should not be permitted to testify as to transactions between himself and defendant's intestate.—Reed v. Jones, 15 Wis. 40.

§ 583. Who are parties.

[a] (Ill. 1873) A person who is a necessary party to a bill, and who, if a party, would not be competent to testify as against parties defending as heirs, falls within the meaning of the statute, and will be treated as incompetent, the same as if he were a party to the suit.—Alexander v. Hoffman, 70 Ill. 114.

[b] (Ill. 1873) On a bill for specific performance by a party succeeding to the rights of a vendee of land, against the trustee of the owner, and the heirs of the owner, to compel the execution of a deed, the vendee, whether a party to the bill or not, is not a competent witness to prove payments to, and conversations with, the deceased owner or cestui que trust in his lifetime.—Alexander v. Hoffman, 70 Ill. 114.

[c] (N. Y. 1889) On the hearing of a petition by a legatee to revoke the probate of a will, which provided that if any beneficiary thereunder should directly or indirectly institute or become an acting party to any proceeding to set aside, interfere with, or make null any provision of the will, his interest under the will should become null, it appeared that after the commencement of the proceeding certain legatees and next of kin of the testatrix, not including the petitioner and other contestants, had executed an agreement, the object of which was stated to be to avoid any controversy between themselves in relation to testatrix's estate, and the obvious purpose of which was to secure their legacies to the legatees signing it, and to the contestants, in case the will should be set aside. *Held*, that the condition in the will against contesting it was valid; that a legatee executing the agreement became thereby a party to the proceeding to set the will aside, thus depriving herself of her legacy in case the will should be sustained, and was therefore incompetent to testify concerning personal communications to her by the testatrix.—In re Stewart's Will, 5 N. Y. Supp. 32, 1 Con. Sur. 412.

[d] (N. Y. 1891) Claims against the estate of an intestate, presented by two physicians and a nurse who attended him in his last illness, for their professional services, were disputed by the administrator, and were referred, pursuant to statute, to the same referee, by the same order of reference. *Held*, that thus joining the claims in the reference did not deprive either proceeding of its individuality, and that the physicians were not incompetent to testify, in support of the claim of the nurse, to personal transactions with the intestate, as being parties to the proceeding.—Pandjiris v. McQueen, 59 Hun, 625, 13 N. Y. Supp. 705,

[e] (Ohio, 1859) Although under Code, § 313, where one party is an administrator, the other party cannot testify as to facts occurring before the decease of the original debtor; yet in a suit by the assignee of a chose in action, the assignor is not a "party," and is therefore ad-

missible to prove those facts.—Myres v. Walker's Adm'r, 9 Ohio St. 558.

[f] (Ohio, 1876) Code Civ. Proc. § 3130, as amended May 2, 1871 (68 Ohio Laws, p. 127), provides that "no party to a civil action shall be allowed to testify * * * in any action where an adverse party is the * * * executor or administrator of a deceased person, or is a party claiming or defending as heir, grantee, or devisee of a deceased person," except in certain specified cases. *Held*, that the husband of an heir who was joined with her as a plaintiff in an issue of devisavit vel non was not by this statute rendered incompetent as a witness for the contestants.—Wolf v. Powner, 30 Ohio St. 472.

[g] (Tex. 1890) In an action against a married man, in which a judgment against him would be, in effect, a judgment against the community property, his wife is really, though not nominally, a party, within the meaning of the statute forbidding parties from testifying in certain actions.—Newton v. Newton, 77 Tex. 508, 14 S. W. 157.

[h] (Vt. 1877) On sci. fa. against the sureties of a deceased sheriff, on a claim allowed against his estate for money officially collected by him and not paid over, the owner of the claim is not a party in such a sense as to be incompetent as a witness within Gen. St. c. 36, § 24.—Tute v. James, 50 Vt. 124.

[i] (Wis. 1865) In an action by an administrator against the "Adams Express Company," which Priv. Laws 1858, c. 204, authorizes to be sued under that style, to recover a lost consignment, an allegation of the complaint that one H. S. was a member of defendant's firm was not sufficiently denied. *Held* that, being a party to the action, H. S. was incompetent as a witness for defendant.—Martin v. American Exp. Co., 19 Wis. 336.

[j] (Wis. 1884) In an action affecting the title to land, one claiming under a deed from defendant, which was unrecorded when the notice of lis pendens was filed, being bound by the judgment, is a party to the suit, and therefore cannot be examined as to transactions between himself and one deceased, under whom plaintiff claims title.—Wright v. Jackson, 59 Wis. 569, 18 N. W. 486.

§ 584. Parties not served and effect of default or dismissal.

[a] (Cal. 1892) Where an action against two co-contractors is revived against the administrator of one of defendants, the surviving defendant is not, under Code Civ. Proc. § 1880, which forbids a party to an action against an administrator to testify, a competent witness for plaintiff, though judgment has been rendered against such survivor by default.—Moore v. Schofield, 96 Cal. 486, 31 Pac. 532.

[b] (Colo. 1894) Under Gen. St. § 3641, providing that no party to a suit, or person directly interested therein, shall testify, where the adverse party sues as administrator, a defendant in a suit by an administrator on a note, who was a joint maker thereof, though not within the jurisdiction of the court, nor served with process, is incompetent to testify for his codefendant.—Williams v. Carr, 4 Colo. App. 363, 36 Pac. 644.

[c] (Ga. 1872) When the maker and indorser of a note are sued in the same action by the administrator of the indorsee, and the maker is dismissed from the action on account of his having received his discharge in bankruptcy, and the issue is whether the indorser was discharged by indulgence granted by the indorsee to the maker, the maker is a competent witness in behalf of the indorser to prove that the indorsee, in his lifetime, gave the maker indulgence on the note for a valuable consideration.—Hayden v. McKnight, 45 Ga. 147.

[d] (Ind. 1867) Where, in a suit by an executor or administrator against several defendants, one of them suffers a default, he is a competent witness for his codefendants in support of issues made by them, in which he is not interested.—Upton v. Adams' Ex'rs, 27 Ind. 432.

[e] (Ind. 1873) In an action by an administrator on a joint note, executed to his decedent by two defendants, of whom one has not been served with process, and as to whom a return of "not found" has been suggested and the cause continued, the latter defendant is not a competent witness under the statute, unless required to testify by the administrator or the court trying the cause.—Jenks v. Opp, 43 Ind. 108.

[f] (Ind. 1887) The term "party," as used in Rev. St. 1881, §§ 498, 499, providing that in certain cases a party shall not be a competent witness, means a party to the issue, and heirs of a decedent who had not only parted with their interest in his estate, but have also been defaulted, and are no longer parties to any issue, are not incompetent.—Scherer v. Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

[g] (Me. 1885) An administrator sued two defendants, but discontinued as to one because of his insolvency. *Held*, that such one was a competent witness in behalf of the other defendant.—Segar v. Lufkin, 77 Me. 142.

[h] (Ohio, 1876) In an action by an administrator on a note made by two parties defendant, where only one of them sets up any defense, the other is a competent witness for his codefendant.—Baker v. Kellogg, 29 Ohio St. 663.

[i] (Ohio, 1883) In an action by a surviving member of a firm against two joint makers of a note, one of the defendants who is in default is a competent witness for the other defendant as to transactions had with plaintiff's deceased partner.—Brinker v. Schreiber, 8 Ohio Dec. 759, 9 Wkly. Law Bul. 294.

[j] (Pa. 1883) In an action against A., principal, and B. and C., sureties, on a joint and several note, judgment was recovered against A. by default, and B. having died before trial his administrator was substituted. The defense was that the sureties were released by extension of time to the principal. *Held*, that as A. was not interested in the result, he was a competent witness as to transactions with B.—Hoskinson v. Miller, 104 Pa. 175.

[k] (Pa. 1889) In an action on a note against W. and S., partners, to sustain W.'s defense, that the note was not a firm note, but was given by S. for his individual debt, S. was called as a witness. The original payee and holder was dead, and the action was brought by his administrator. *Held*, that it was error to permit S. to testify that the debt was not that of the firm, such testimony being in favor of his own interest, against a decedent; and, although judgment by default had been obtained against him, the result of determining that the firm was not liable on the note would be to remove the foundation on which the default judgment rested.—Dick v. Williams, 130 Pa. 41, 18 Atl. 615.

[l] (Pa. 1896) In an action against two members, and the executor of another member, of an unincorporated association, for the price of goods sold them for such association, in which only the executor was served, one of the defendants not served was a competent witness for plaintiff.—Trymby v. Andress, 175 Pa. 6, 34 Atl. 347.

§ 585. Effect of release, assignment, or withdrawal.

[a] (Ill. 1884) Under Rev. St. 1874, pp. 488, 490, §§ 2, 3, the owner of an undivided interest in fee in land, also having a homestead estate

therein, who files a bill to set aside an adverse title against defendants, claiming as devisees and executors, is incompetent to testify to declarations and statements made by testator during his lifetime to impeach his title, and no release or transfer of complainant's interest made solely for that purpose will render him competent.—Dyer v. Hopkins, 112 Ill. 168.

[b] (Iowa, 1882) An action was brought by an administrator against several defendants on a note made to the intestate, and, after one of the defendants had answered, he entered into a stipulation with plaintiff, and withdrew his answer, plaintiff to have the right to take judgment against him for a certain amount. *Held*, that such defendant was no longer a "party to the action," within Code 1873, § 3639, and that his deposition was admissible in evidence in behalf of his codefendants.—Conger v. Bean, 58 Iowa, 321, 12 N. W. 284.

[c] (Mo. 1893) In ejectment by the widow of B., as his heir, against the tenants of the heirs of O. and such heirs, the latter of whom claim title through an alleged lost deed from B. to O., the fact that the heirs of O. withdraw from the case as defendants does not render them competent to testify, on the ground that they are no longer parties to the action, testifying in their own favor, since they are the real parties in interest, the other defendants being merely their tenants.—Messimer v. McCrary, 113 Mo. 382, 21 S. W. 17.

[d] (N. Y. 1871) In an action against the maker and indorsers of a note, brought by the holder during his lifetime and continued by his executrix, the maker is an incompetent witness on behalf of the indorsers to prove that the note was infected with usury, or that the time of payment had been extended by agreement between himself and the holder, without the consent of the indorsers; nor will a release executed by the indorsers to the maker affect his competency as a witness. Defendants cannot by any act of their own change the statute or take away the rights of plaintiff.—Genet v. Lawyer, 61 Barb. 211.

[e] (Tenn. 1881) Where a maker and the executor of a deceased maker of a note are sued, and the executor alone appeals from the judgment, the maker is no longer a party to the suit, and may testify upon its trial in the appellate court.—Fuqua v. Dinwiddie, 74 Tenn. (6 Lea) 645.

[f] (Tenn. 1881) Under Rev. St. § 3813d, rendering parties incompetent as witnesses in actions in which judgment may be rendered for or against an executor or administrator unless called by the opposite party, in a suit brought by a judgment creditor to reach money due from one deceased to the judgment debtor, the latter, made a party to the suit, is not a competent witness to prove the account, since it is an action against the administrator to hold the estate of his intestate liable to defendant for the benefit of complainant, and is equivalent to a suit at law on the alleged indebtedness in the name of defendant for the use of plaintiff, even though the account were transferred to plaintiff pending the suit.—Aymett v. Butler, 76 Tenn. (8 Lea) 453.

§ 586. Interest in general and nominal or unnecessary parties.

[a] (U. S. 1889) A husband who joins his wife in a cross-bill to enforce an alleged trust against a decedent's estate for the benefit of the wife alone is not rendered incompetent as a witness by Pub. Laws Ill. 1867, p. 183, § 2, which provides that no party or interested person shall testify against an adverse party who sues or defends as heir of a decedent, as he is not directly interested.—Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047.

[b] (Cal. 1875) Code Civ. Proc. § 1880, which prohibits parties to an action or proceeding against an executor or administrator upon a claim against the estate from being witnesses, applies not only to parties who have an interest adverse to the estate, but to all nominal parties to the action.—Blood v. Fairbanks, 50 Cal. 420.

[c] (Ga. 1874) In a case in which the title to land in controversy between a widow claiming under her father's will and the guardian of her minor children depends upon whether her husband reduced it to possession in his lifetime so as to cause his marital rights to attach, the widow's brother, who is a nominal party to the record and whose own land is not in controversy, is a competent witness to testify to facts showing a division of the estate of the father under which he also claims, and to acts of ownership by the husband.—Hooper v. Howell, 52 Ga. 315.

[d] (Ga. 1878) Under Code, § 3854, a party may be incompetent, though not interested in the result of the action.—Oatis v. Harrison, 60 Ga. 535.

[e, f] (Ill. 1874) In a suit by the administrator of a mortgagee, to foreclose a mortgage against the mortgagor and subsequent purchasers from him, such subsequent purchasers are interested, and, therefore, are not competent witnesses, on behalf of the defendants, to prove payments on the mortgage; even though they hold under a warranty deed, upon which they might have a remedy over against their grantor in case of their suffering damage from the mortgage.—Boester v. Byrne, 72 Ill. 466.

[g] (Ill. 1893) Suit was brought to set aside a deed from complainant's testatrix to her mother, who died pending suit. A brother of the testatrix was made party defendant. He had conveyed part of the land under a power of attorney, and had failed to account for the proceeds. *Held*, that his liability to account therefor did not disqualify him as a witness, since his liability was the same whether the accounting were made to complainant or to his codefendants.—White v. Ross, 147 Ill. 427, 35 N. E. 541.

[h] (Ill. 1893) Nor is he rendered incompetent as a witness by the fact that he conspired with the other defendants to induce the complainant's testatrix to execute the deed, where it appears that he has transferred all his interest in his mother's estate and in the land conveyed.—White v. Ross, 147 Ill. 427, 35 N. E. 541.

[i] (Ill. 1893) Nor is he rendered incompetent by the fact that he may be liable to account to his mother's estate for money paid by her to him, and for his benefit, since that does not render him interested in the event of the suit.—White v. Ross, 147 Ill. 427, 35 N. E. 541.

[ii] (Ill. 1893) Under Rev. St. c. 51, § 2, which declares parties and interested persons incompetent witnesses where the adverse party is the representative of a decedent, a complainant is not rendered a competent witness in behalf of his co-complainants by proof that he has no interest in the subject-matter of the suit, where he is still retained as a party thereto.—Guild v. Warne, 149 Ill. 105, 36 N. E. 635.

[j] (Ind. 1889) In an action against an administrator to foreclose a school fund mortgage, the auditor of the county where the loan was made, who prepared the mortgage, and who brings the suit as relator of the state, is not a party in interest, and is not disqualified as a witness, within the meaning of the statute prohibiting parties from testifying as witnesses where heirs or administrators are parties.—Works v. State, 120 Ind. 119, 22 N. E. 127.

[k] (Ind. 1889) Rev. St. 1881, § 498, provides that, where an administrator or executor is a party to a suit involving matters which occurred during decedent's lifetime, no one who is a necessary party to the issue or record,

whose interest is adverse to the estate, shall be a competent witness as to such matter, against the estate. *Held* that, in a suit by an administrator to set aside an assignment by decedent of a note and mortgage, a defendant of record, who is not a necessary party to the issue, and who is one of decedent's legatees, is a competent witness for the defense.—Walker v. Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271.

[l] (Iowa, 1879) Under Code 1873, § 3639, providing that no party to any action, nor any person interested in the event thereof, shall be examined as a witness in regard to any personal transaction or conversation between such witness and a deceased person, against the executor, etc., of such deceased person, one of several defendants is not a competent witness to testify to personal transactions between himself and plaintiff's intestate, although he is not interested in the issue for the determination of which his testimony is sought.—Williams v. Barrett, 52 Iowa, 637, 3 N. W. 690.

[m] (Minn. 1893) Under Gen. St. 1878, c. 73, § 8, providing that it shall not be competent for "any party to an action" to testify to any conversation with a deceased party relative to any matter at issue, the term "party to an action" means a party to the issue to which the testimony relates, and not a mere party to the record.—Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817.

[n] (Neb. 1896) In an action by heirs to determine the validity of a gift of money by their ancestor to children of one of the heirs, decedent's agent, who turned the money over to the children, it was claimed, by direction of decedent, was made a party defendant. *Held*, that since, if plaintiffs were successful, the agent would be required to account for the money, he was incompetent to testify in relation to transactions had with the decedent.—Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

[o] (N. J. 1867) A defendant unnecessarily made a party, having no interest in the event of the suit, though complainant sues in a representative capacity, is a competent witness.—Harrison's Adm'x v. Johnson, 18 N. J. Eq. (3 C. E. Green) 420.

[p] (Ohio, 1859) Under Code, § 313, forbidding a party to testify where the adverse party is an administrator, when the facts to be proved transpired before the death of the deceased person, one of several defendants in an action by an administrator is competent to testify on an issue between the plaintiff and his codefendants in which the witness has no interest, as to disqualify the witness he must have a legal interest in the event of the issue, and his interest must be adverse to the estate of the decedent.—Glenn v. Hoffman, 2 Ohio Dec. 131.

[q] (S. C. 1886) In a contest between two claimants under the obligee in a bond for title, Code, § 400, does not prevent the obligor from testifying to communications between himself and the deceased obligee, as such witness, though a party, has no interest in the action.—Wood v. Wood, 25 S. C. 600.

[r] (Tex. 1887) A party to the action, though improperly joined, cannot testify to statements of a deceased ancestor under whom his adversary claims.—Bilger v. Buchanan (Sup.) 6 S. W. 408.

[s] (Tex. 1895) In trespass to try title, a grantor in the chain of title who, though a party, will not be bound by the judgment, is not disqualified, because of interest, from testifying.—Parker v. Cockrell (Civ. App.) 31 S. W. 221.

[t] (W. Va. 1890) A party to a suit, although he have no interest in its result, is incompetent to give evidence of a personal transaction or communication between him and a decedent against a devisee of such deceased person.—Patterson v. Martin, 33 W. Va. 494, 10 S. E. 817.

§ 587. Effect of disclaimer.

[a] (Ill. 1880) In an action to foreclose a mortgage, on the question of usury, a son of the mortgagor, who had been made a party defendant, but who, in his answer, disclaimed all interest in the event of the suit, and who had formally renounced the legacy left him by the mortgagor in his will, is a competent witness, when called by the other defendants.—Mester v. Zimmerman, 7 Ill. App. (7 Bradw.) 156.

[b] (Ind. 1886) The word "party," in Rev. St. 1881, § 499, relative to transactions with deceased persons, means a party to the issue, and not merely a party to the record, and one who is for the first time made a party by the cross-complaint and files a disclaimer, is not incompetent to testify on behalf of the plaintiff.—Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726.

[c] (Ind. 1889) In an action by a son to enforce an alleged trust in land devised by his father to K., L. and N. were made parties defendant and they answered, disclaiming all interest therein. L. was a brother of plaintiff and of defendant K., and one of the heirs at law of the father. N. was L.'s wife. *Held*, that as the contest was between plaintiff and K., in which neither L. nor N. had any interest, they were competent witnesses, and the fact that they were made parties did not disqualify them.—Martin v. Martin, 118 Ind. 227, 20 N. E. 763.

[d] (Kan. 1895) In an action by an alleged heir against his mother, claiming to be widow of testator, and persons claiming under testator's will, to set aside the will, and for partition, where the widow answered, asking the same relief demanded by plaintiff, and the validity of the marriage between testator and the widow was in issue, and the latter was permitted to testify to facts relied on in proof of the marriage in alleged violation of Code Civ. Proc. § 322, the widow did not, by disclaiming at the close of the evidence all interest in the property in her own behalf, render her testimony competent in behalf of plaintiff.—Shorten v. Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

[e] (Mich. 1890) In a suit to set aside a mortgage on the ground of fraud, the agent by whose fraud the mortgage is alleged to have been obtained cannot be dismissed from the case, on filing a disclaimer, so as to enable him to testify to transactions with the deceased mortgagor.—La Prad v. Sherwood, 79 Mich. 520, 44 N. W. 943.

[f] (Miss. 1876) In replevin by an administrator against R. and his wife, in which R. offered himself as a witness, declaring that he neither had, nor had claimed, any interest in the property in controversy, and that the same belonged to his wife, *held*, that his testimony was admissible on that ground, and it was error to exclude him as a witness.—Rushing v. Rushing, 52 Miss. 329.

[g] (Okl. 1896) The fact that a witness was a party to an action to which the representatives of a decedent were parties did not preclude him from testifying as to matters occurring in decedent's lifetime, under St. 1890, § 4529, where he had no interest in the subject-matter of the suit, and made a disclaimer.—Murphy v. Colton, 4 Okl. 181, 44 Pac. 208.

[h] (Tex. 1877) One who has disclaimed interest in the lands in controversy, after which the action proceeds between the persons interested, should not be deemed thereafter a party, within statutory provisions defining competency of a party to testify.—Markham v. Carothers, 47 Tex. 21.

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[i] (Tex. 1882) Where defendant, in an action by an administrator to recover property, disclaims all interest, he is a competent witness to transactions and communications of deceased affecting the title.—Eastham v. Roundtree, 56 Tex. 110.

[j] (Tex. 1892) Where a warrantor is made a party defendant in an action of trespass to try title, so as to render the judgment binding on him in favor of his vendees, he is a "party," within the meaning of the statute which prohibits parties from testifying against the heirs or legal representatives of decedents, even though he has filed a disclaimer in the suit.—Bennett v. Virginia Ranch, Land & Cattle Co., 1 Tex. Civ. App. 321, 21 S. W. 126, distinguishing Markham v. Carothers (1877) 47 Tex. 21, and Eastham v. Roundtree (1882) 56 Tex. 110.

[k] (Tex. 1895) In an action by an heir to try title to land, although testimony by a defendant as to the contents of a lost deed from the deceased to him was not admissible, one disclaiming all interest in the land, and merely a nominal defendant, was not disqualified from testifying as to the contents of such deed.—Britton v. Tischmacher (Civ. App.) 31 S. W. 241.

§ 588. Adverse interest.

[a] (U. S. 1890) A husband who joins his wife in a cross-bill to enforce an alleged trust against a decedent's estate for the benefit of the wife alone is not rendered incompetent as a witness by Pub. Laws Ill. 1867, p. 183, § 2, which provides that no party or interested person shall testify against an adverse party who sues or defends as heir of a decedent, as he is not a party adverse to complainant in the sense of the statute.—Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047.

[b] (Ala. 1885) Where a conveyance is taken to the grantee for life, with remainder over, in an action after the grantee's death to establish a resulting trust on account of purchase money paid by complainant, complainant may testify to transactions between himself and the deceased grantee, his interest not being adverse to the grantee's estate. Code, § 3058.—Bibb v. Hunter, 79 Ala. 351.

[c] (Mich. 1885) Where defendants in ejectment claim title to the land through a decedent, plaintiff grantor is within the rule that facts known only to a decedent and to one adversely interested cannot be shown by the latter.—Youngs v. Cunningham, 57 Mich. 153, 23 N. W. 626.

[d] (N. Y. 1894) Code, § 829, which prohibits parties from testifying in their own behalf, against the personal representatives of a deceased person, concerning a personal transaction with deceased, does not prevent the examination of defendant executor, in favor of the estate, concerning a transaction with deceased in which plaintiff participated.—McLaughlin v. Webster, 141 N. Y. 76, 35 N. E. 1081.

[e] (N. C. 1888) Code, § 590, provides that a witness interested in the event shall not be examined as to a personal communication had with a deceased person against a party deriving his title or interest through such deceased, by assignment or otherwise. *Held*, that in an action by the other devisees for the failure of an executor and devisee to plead limitation to certain debts, the latter may testify as to communications with his testator relating to such debts, since there is not such antagonism of interest between the parties as will exclude the testimony under the statute.—Halliburton v. Carson, 100 N. C. 99, 5 S. E. 912, 6 Am. St. Rep. 565.

[f] (Pa. 1875) A deed of land purchased by a husband and wife was made to the husband alone, but the grantor, at the request of the wife, substituted a second deed to both, which was accidentally burned without having been recorded. After the death of the husband one of his children brought ejectment against his widow, for her share as heir. *Held*, that under Act 1869, the widow was not a competent witness as to transactions before her husband's death. Although her interest was coincident with the husband's in his life, it was adverse to his heirs setting up a claim against her for the land.—Gardner v. McLallen, 79 Pa. (29 P. F. Smith) 398.

[g] (Pa. 1889) The grantee of land is competent to testify in her own behalf as to the consideration paid therefor, in ejectment by the purchaser under judicial sale made to pay debts of the grantor antedating the conveyance to her, though the grantor is dead at the time of the trial, as she does not claim adversely to him.—Van Horne v. Clark, 126 Pa. 411, 17 Atl. 642.

[h] (Pa. 1893) In ejectment by one who had purchased land at sheriff's sale as the property of defendant's husband, defendant, who claimed the land under a prior deed from her husband, is a competent witness, notwithstanding his death, to prove that the land had been paid for with her money, that the title had been taken by the husband in his name without her knowledge, and that she subsequently induced him to reconvey to her, as such testimony is not adverse to the husband, or against his title, within the meaning of Act May 23, 1887 (P. L. 158) § 5, subd. e, which renders any person whose interest shall be adverse to the right of a deceased incompetent to testify to any matter occurring before his death.—Young v. Senft, 153 Pa. 352, 25 Atl. 778, following Van Horne v. Clark (1889) 126 Pa. 411, 17 Atl. 642.

[i] (Tenn. 1873) The competency of a party to the record in an action by or against an executor or administrator to testify as to any transaction with or statement by decedent is conditioned on the fact that his interest must be antagonistic to that of the party calling him as a witness.—Trabue v. Turner, 57 Tenn. (10 Heisk.) 447.

[j] (Tenn. 1882) In an action by the executor of a vendor against the vendee and executor of the vendee's mortgagee, to enforce a vendor's lien, the vendee is a competent witness to prove an agreement that the lien should take precedence of the mortgage, as his interests are not adverse in any respect to the other defendant.—Hill v. McLean, 78 Tenn. (10 Lea) 107.

§ 589. Party deriving title or interest from deceased in general.

[a] (U. S. 1887) On the trial of a bill of interpleader, between a life insurance company and the administratrix of a deceased policyholder, and a claimant of the fund due on the policy, under an alleged assignment, the assignee is incompetent to testify to any transactions with the insured in the lifetime of the latter, either by the law of Georgia (Code, § 3854), or Rev. St. § 858 [U. S. Comp. St. 1901, p. 659].—Mutual Life Ins. Co. v. Watson (C. C.) 30 Fed. 653.

[b] (Ga. 1883) Plaintiff, in a suit for the recovery of chattels which he claims to own, is not precluded from testifying as to his ownership because his father, who gave him the chattels, is dead.—White v. White, 71 Ga. 670.

[c] (Ga. 1883) In an action for trespass by a married woman, she may testify that her husband, since deceased, purchased the property claimed to have been trespassed on from her father, who has also deceased.—Scott v. Mathis, 72 Ga. 119.

[d] (Ill. 1891) Where the husband buys property, and has it conveyed to his wife under a verbal agreement that she shall deed it to him, but she dies without doing so, and he brings suit against his infant daughter, the wife's sole

heir, to have the title decreed in himself, he is incompetent as a witness to the transaction between himself and wife, under Rev. St. 1874, c. 51, § 2, declaring that, in actions by or against the representatives of a decedent, the survivor shall not give evidence of transactions with the decedent.—Johnston v. Johnston, 138 Ill. 385, 27 N. E. 930.

[e] (Iowa, 1888) A defendant who claims title through plaintiff's deceased ancestor is not a competent witness to the facts and circumstances of his purchase as against plaintiffs, under Code 1873, § 3639, providing that no party to an action or proceeding shall be examined as a witness in regard to any personal transaction between such witness and a person at the commencement of such examination deceased, and against the heir at law of such deceased.—Leathers v. Ross, 74 Iowa, 630, 38 N. W. 516.

[f] (N. Y. 1879) Under Code, § 399, a mortgagor having died, plaintiff in an action by a grantee of the premises to have the mortgage canceled as paid is incompetent to testify as to declarations of the deceased.—Foote v. Beecher, 78 N. Y. 155, 7 Abb. N. C. 358.

[g] (N. Y. 1879) In an action by S. to recover from a bank an amount that had been transferred to her credit on her presentation of an order purporting to be that of W., deceased, *held*, that S. might testify as to any material fact, although consisting of personal transactions between herself and W. It is not enough to exclude such testimony that the case is within the spirit and not within the letter of Code, § 399.—Severn v. National State Bank of Troy, 18 Hun, 228.

[h] (N. Y. 1884) A party to a will contest, who was a stranger in blood to the testatrix and was not a legatee under the will which was offered for probate, but who claimed under a prior will, was "a person deriving his title or interest from, through, or under a deceased person," within the meaning of Code, § 829, which prohibits the examination of such a party in his own behalf in an action against the executor.—In re Smith, 95 N. Y. 516.

[i] (N. C. 1887) In an action to declare a trust in land claimed to have been purchased with money received by plaintiff from her father, the deed showing the trust having been destroyed by the burning of the courthouse, plaintiff's testimony that her father, who had since died, had given her the money, is not incompetent, under Code, § 590, as testimony of a personal transaction with a person, since deceased, from, through, or under whom she, or any other party to the suit, derived any title.—Loftin v. Loftin, 96 N. C. 94, 1 S. E. 837.

[j] (Pa. 1879) T., one of the defendants in an action of ejectment for a tract of land, was offered as a witness in his own behalf to prove such actual possession as had vested title in himself. It was objected that he was incompetent, "because B., whose estate still holds the legal title, as shown by plaintiffs in suit, is dead." There was no privity between B. and T., no contract relation, nor were their respective titles links of the same chain; and, aside from these, T. set up title under the statute of limitations. It was not proposed to show by T. anything that B. had ever done or said, and plaintiffs did not show anything tending to prove that there was any communication between them respecting the land. *Held*, that the court erred in rejecting the offer.—Waltman v. Herdic, 90 Pa. 459.

[k] (Wis. 1865) The grantee of land unconditionally conveyed is not an "assignee," within the meaning of Laws 1858, c. 134, § 2, so as to exclude his testimony in his own behalf in an action in which he claims title to such land under such conveyance after the grantor's death.—Wisconsin Bank v. Morley, 19 Wis. 62.

§ 590. Legatee or devisee and heir or distributee.

Husband or wife of legatee, devisee, or heir, see post, § 646.

Interest in event, see post, §§ 603–606.

Surviving party to contract or other transaction or cause of action, see post, § 637.

[a] (Ala. 1877) A distributee of an estate is a "party" within the provision of Code, § 3058, excluding a "party" from testifying as to a transaction with a deceased person.—McCrary's Adm'r v. Rash's Adm'r, 60 Ala. 374.

[b] (Ill. 1886) Where a person died leaving two sons, one of whom, some time afterwards, died also, leaving a widow and children, who brought suit for partition of the estate of the common ancestor against the surviving son, the son was incapable, under Rev. St. 1874, c. 51, § 2, of giving testimony in his own behalf.—Comer v. Comer, 119 Ill. 170, 8 N. E. 796.

[c] (Ind. 1875) A father agreed by parol with his infant son that, if the latter would remain with him and assist him until the son's marriage, the father would convey to him certain land. In an action by the son, after the death of the father, against the other heirs, to enforce specific performance of the contract, one of the defendants was called by plaintiff as a witness in regard to the contract. After he had testified in chief, he stated on cross-examination that he had a similar suit pending in the same court, and that he supposed he would gain it, if plaintiff in this action should gain his suit. Defendants then objected to the competency of the witness on the ground that he had testified that he was interested and had been a party to the suit and had suffered a default. *Held*, that the objection was properly overruled.—Lafollett v. Kyle, 51 Ind. 446.

[d] (Ind. 1886) A conveyance by a father to a child is prima facie an advancement, and in a suit by the father's heirs for partition of his lands, such heirs are, under Rev. St. p. 499, incompetent witnesses to prove declarations of the deceased rebutting this presumption.—Wolfe v. Kable, 107 Ind. 565, 8 N. E. 559.

[e] (Mich. 1887) In an action brought by heirs at law to recover rent, the heirs are competent witnesses, under How. Ann. St. § 7545, relative to the competency of witnesses, to testify as to transactions between the deceased and defendant, since the disqualification of the statute applies only to the testimony of the opposite party.—Pendill v. Neuberger, 64 Mich. 220, 31 N. W. 177.

[f] (N. H. 1865) From a decree charging P., the administrator of E., with certain moneys, an appeal was taken by P.'s administratrix, who was also administratrix de bonis non of E. The cause having been sent to a master, *held*, that an heir at law of E., who appeared on the record as a party in interest to sustain the decree, was not a competent witness for the appellees, under the law of 1858, unless the administratrix elected to testify.—Perkins v. Perkins, 46 N. H. 110.

[g] (N. Y. 1894) In an action against executors on a claim against the testator, one of defendants may testify in behalf of defendant as to conversations with testator though he is also a legatee under the will.—Klock v. Brennan, 82 Hun, 262, 31 N. Y. Supp. 190.

[h] (Pa. 1879) In ejectment by one of the four heirs of an intestate against H., who claimed as the devisee of the widow, evidence offered by H. that the property had been purchased with her money, and that the intestate had so admitted, was properly rejected.—Hess v. Gourley, 89 Pa. 195.

[i] (Pa. 1892) In ejectment against his brother, in possession under a deed from his de-

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ceased father, plaintiff, claiming as heir, was not a competent witness as to the alleged fraudulent procurement of the deed and their father's want of mental capacity.—Crothers v. Crothers, 149 Pa. 201, 24 Atl. 190, 30 Wkly. Notes Cas. 293, following King v. Humphreys, (1890) 138 Pa. 310, 22 Atl. 19.

[j] (Pa. 1893) In an action to establish a resulting trust in land in which plaintiffs claim by descent and defendant claims under a deed directed by decedent to be made to her by one from whom he had purchased, plaintiffs are competent witnesses in their own behalf.—Serfass v. Serfass (Com. Pl.) 14 Pa. Co. Ct. R. 97.

§ 591. Executor or administrator.

Accounting by, see ante, § 571.

Claim against estate of decedent, see ante, § 569.

Husband or wife of executor or administrator, see post, § 647.

Interest in event, see post, § 607.

Surviving party to contract or other transaction or cause of action, see post, § 638.

[a] (U. S. 1890) Under Rev. St. § 858 [U. S. Comp. St. 1901, p. 659]; Act July 16, 1862, c. 189 (12 Stat. 588, Act July 2, 1864, c. 210, § 3, 13 Stat. 351, Act March 3, 1865, c. 113, 13 Stat. 533), providing that no person shall be excluded as a witness in a civil action by reason of being "a party to or interested in the issue tried," except "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court," where, in an action by the administratrix of L. against the administrator of S., plaintiff resigns as administratrix, and an administrator de bonis non is appointed, and allowed to prosecute in her place, she ceases to be a party, and becomes a competent witness. —Snyder v. Fiedler, 139 U. S. 478, 11 Sup. Ct. 583, 35 L. Ed. 218.

[b] (Ga. 1869) A widow who has administered on her husband's estate is under Code, § 3798, a competent witness in an action brought by her as administratrix on a note belonging to her intestate's estate.—Jackson v. Jackson, 40 Ga. 150; McIntyre v. Meldrim, Id. 490.

[c] (Ga. 1869) An administrator who is a party to a suit upon a contract of his intestate is a competent witness, although the other party is not,—McIntyre v. Meldrim, 40 Ga. 490.

[d] (Ill. 1874) An administrator, in an action by him on a note given to the intestate, is not a competent witness on the issue of an alleged alteration of the note by the maker.—Lowman v. Aubery, 72 Ill. 619.

[e] (Ill. 1892) Hurd's Rev. St. 1891, c. 51, § 2, relating to transactions with decedents, does not render a person not a party to a contract with deceased incompetent to testify to deceased's statements as to such contract; and the fact that such witness is the executor of the deceased, and is, as such, made the defendant in an action to enforce the contract, does not render him incompetent.—Boyd v. Jennings, 46 Ill. App. 290.

[f] (Ill. 1895) Rev. St. 1893, c. 51, § 2, which prohibits parties from testifying when the adverse party sues or defends as administrator, does not render an administrator an incompetent witness in his own behalf.—Illinois Cent. R. Co. v. Reardon, 157 Ill. 372, 41 N. E. 871, affirming (1894) 56 Ill. App. 542.

[g] (Ill. 1895) A widow, suing as administratrix of her deceased husband, upon a note payable to him, is not competent as a witness to testify, in her own behalf, to a conversation between her husband and the maker of the note, tending to show that an indorsement upon the note, which it was claimed took it out of the statute of limitations, was correct.—Gedney v. Gedney, 61 Ill. App. 511.

[h] (Ind. 1865) In an action against an executor on a contract not made by him, in which, if plaintiff succeeds, the judgment will be against the testator's estate, the executor is not a competent witness under the statute, where he is not required to testify by the adverse party or by the court.—Thom v. Wilson's Ex'r, 24 Ind. 323.

[i] (Ind. 1867) An administrator, executor, or guardian, who is a party to an action, is not rendered competent, by the statute, to testify in his own behalf, except in cases arising on contract made with him as such administrator, executor, or guardian.—Markel's Adm'r v. Spitler's Adm'r, 28 Ind. 488.

[j] (Ind. 1874) Under the statute providing that "in all suits where an executor, administrator, or guardian is a party in a case where a judgment may be rendered either for or against the estate represented by such executor," "neither party shall be allowed to testify," an executor who has been allowed credit in his partial settlements for payment of a note made by himself, and a note made by himself, the deceased, and another, is not a competent witness, upon the trial of an exception to said allowance, to testify as to the origin and nature of the claims as debts of the decedent, and as to statements in reference thereto made to him by his testator.—Goodwin v. Goodwin, 48 Ind. 584.

[k] (Iowa, 1861) Plaintiff in a replevin suit died, and his administratrix was admitted to sustain the action. *Held* that he was a competent witness therein.—Bradley v. Kavanagh, 12 Iowa, 273.

[l] (Iowa, 1861) Neither of the sections 3978, 3980, and 3982, of the Revision of 1860, operate to exclude the administrator from testifying in a suit brought to recover possession of property belonging to the intestate.—Bradley v. Kavanagh, 12 Iowa, 273.

[m] (Kan. 1878) Laws 1872, c. 165, § 1, provides that a husband and wife are incompetent to testify for or against each other, except concerning transactions where one acted as agent for the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during marriage. Gen. St. p. 691, § 322, provides that no party shall testify in his own behalf in respect to any transaction with a deceased person when the adverse party is the executor. *Held* that, where a replevin suit was revived in the name of plaintiff's widow as executrix, she was a competent witness as to all matters except communication between herself and him during marriage, although defendant was not competent to testify to any transaction personally had with the decedent.—Jaquith v. Davidson, 21 Kan. 341.

[n] (Kan. 1881) In actions against an executor, he may be a witness, for some purposes, in favor of the estate, and in all cases is competent unless declared otherwise by some other provision of the statute than by Code, § 320.—McCartney v. Spencer, 26 Kan. 62.

[o] (Ky. 1880) An executor, sued in his representative capacity, cannot testify concerning transactions between himself and one whose executor is suing him.—Hobbs' Ex'r v. Russell's Ex'r, 79 Ky. 61.

[p] (Mass. 1857) An administrator is a competent witness under St. 1856, c. 188, in an action on a contract made by himself, as such. —Blood v. French, 75 Mass. (9 Gray) 197.

[q] (Mich. 1887) In a suit by the administrator of one estate against the administrator of another, the administrator of either estate is not incompetent as an "opposite party," within the meaning of Laws 1885, p. 156, relating to transactions with decedents, unless it be shown that such person is interested as heir or legatee. Duryea v. Granger's Estate, 66 Mich. 593, 33 N. W. 730.

[r] (Mich. 1891) Where, in an action against an executor individually by an administrator to recover the value of bonds claimed to have been delivered by plaintiff's intestate to defendant as bailee, defendant claims that the bonds belong to his testator's estate, and that he holds them as executor only, and it appears that the action is in reality a contest between the two estates, defendant is not "the opposite party," within the meaning of the statute, and may testify as to the interview with plaintiff's intestate at which he received the bonds from her.—Penny v. Croul, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83.

[s] (Mich. 1891) Pub. Acts 1885, pp. 156, 157, providing that when a suit is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be permitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person, does not prohibit the testimony of an executor or administrator who, though a nominal party, is not interested in the result of the suit otherwise than in his representative capacity.—Penny v. Croul, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83.

[ss] (Mo. 1874) The administrator is a competent witness in an action against himself for embezzling and failing to inventory notes given by him to the deceased.—Stewart v. Glenn, 58 Mo. 481.

[t] (N. H. 1872) In an action by an administrator in New Hampshire, against an administrator in Massachusetts, of the same estate, *held*, that the latter was not so a "party" to the suit as to disqualify him as a witness therein, under the exception in the law of 1865, allowing no party to testify when the opposite party is deceased.—Stearns v. Wright, 51 N. H. 600.

[tt] (N. J. 1892) When both parties to a suit stand upon the record in a representative capacity, either of such parties may call his adversary, or offer himself as a full witness on all points in the cause.—Haines v. Watts, 55 N. J. Law (26 Vroom) 149, 26 Atl. 572.

[u] (N. Y. 1890) In an action for services rendered and for goods furnished to defendant's intestate, testimony of plaintiff's mother, the widow and administratrix of decedent, as to conversations between herself and decedent, is not prohibited, she being only a nominal party to the action, and her testimony being against her interest.—Davis v. Gallagher, 55 Hun, 593, 9 N. Y. Supp. 11.

[uu] (N. Y. 1891) In an action for partition among heirs, a mortgage of the premises, given by the widow of the former owner, who had only her right of dower therein and a life estate in part thereof, was set up as a charge against the property by the executor of the deceased mortgagee. *Held*, that such executor was incompetent to testify to conversations and transactions with one of the heirs, since deceased, to show knowledge of the giving of the mortgage on the part of such deceased heir, as against the children of the latter; the executor being a party interested.—Gennerich v. Ulrich, 58 Hun, 609, 12 N. Y. Supp. 353.

[v] (N. C. 1873) In a suit by an administrator on a note not indorsed, the administrator may testify that his intestate bought the note and gave full value therefor, since the decedent could have given the same testimony had he been alive.—Andrews v. McDaniel, 68 N. C. 385.

[vv] (N. C. 1882) A defendant administrator cannot testify concerning a land transaction between himself and the intestate, in a suit brought by creditors of the estate to subject the land alleged to have been fraudulently conveyed to defendant by the intestate.—Grier v. Cagle, 87 N. C. 377.

[w] (Ohio, 1871) Under Code, § 313, forbidding a party to testify where the adverse party is the administrator of a deceased person when the facts to be proved transpired before the death of plaintiff's decedent, an administrator as plaintiff was competent to testify in his own behalf to facts occurring prior to the death of his intestate.—Doughman v. Doughman, 21 Ohio St. 658.

[ww] (Pa. 1860) Though an administrator may have no personal interest in the suit in which he is a party on the record, he is nevertheless an incompetent witness.—Harwood v. Steel, 4 Phila. 88.

[x] (Pa. 1881) An administrator, party to a suit, who is personally interested in either event thereof, but whose interest clearly preponderates in favor of a recovery by his adversary, is not a competent witness on behalf of the latter.—Guldin's Adm'rs v. Guldin's Adm'r, 97 Pa. 411.

[xx] (Pa. 1881) The incompetency of an administrator who is party to a suit in favor of the party in whose favor his interest preponderates is not removed either by Act March 27, 1865, which provides that a party to the record, acting in a fiduciary or representative capacity, may be examined, or by the act of the same date which enables any party to compel any adverse party to testify in his behalf.—Guldin's Adm'rs v. Guldin's Adm'r, 97 Pa. 411.

[y] (Pa. 1888) On a claim by a widower as administrator on his wife's estate against an executor on a note made by defendant's testator to plaintiff's intestate, the fact that plaintiff was entitled to commissions, and was liable for costs on a prior action brought by him on the note, did not render him incompetent to testify.—In re Ross (Orph. Ct.) 26 Pittsb. Leg. J. (N. S.) 266.

[yy] (S. C. 1896) Code, § 400, providing that no person who has an interest which may be affected shall be a witness as to a transaction between himself and a person deceased, does not render one of two executors, who is a defendant, but who has no interest except in his representative capacity, incompetent as a witness for plaintiff.—Devereux v. McCrady, 46 S. C. 133, 24 S. E. 77.

[z] (Tenn. 1872) The portion of a deposition of the survivor of two obligees, who is a party to the suit, both in his own right and as administrator of a deceased party, relating to statements and transactions with his intestate, cannot be read against objection made at the trial.—Taylor v. Mayhew, 58 Tenn. (11 Heisk.) 596.

[zz] (Tex. 1882) The testimony of an administrator to a conversation between deceased and defendant, to establish the contract on which he sues, is not admissible.—Stringfellow v. Montgomery, 57 Tex. 349.

§ 592. Widow.

Interest in event, see post, § 609.

Surviving party to contract or other transaction or cause of action, see post, § 639.

[a] (Cal. 1867) Plaintiff in an action against an attorney for alleged fraudulent conveyances, who, at the time of the conveyances, was the wife of the client who sold the property, the

subject-matter of the litigation, and whose sole claim of title to the property was derived from the will of her deceased husband, who died before the commencement of the suit, is not, under section 392 of the amended practice act, a competent witness on her own behalf as to events transpiring before the death of her husband.—Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644.

[b] (Colo. 1881) In an action by a widow against her husband's administrator, she cannot testify that certain property sold in her husband's lifetime belonged to her, and that she consented to the sale upon condition that the proceeds should be invested in her name, such testimony being that of a party in his own behalf in a suit to which the personal representative of the other party deceased is a party; nor is there anything in the statutes relating to husband and wife that bears upon or modifies the rule in such cases.—Palmer v. Hanna, 6 Colo. 55.

[c] (Ga. 1874) A complaint for land was brought by certain heirs at law, against defendant, and their right to recover depended on the question as to whether the husband of defendant, when in life, held as tenant of plaintiffs' ancestor. *Held*, that defendant, claiming under her deceased husband, was placed in the same position which he would have occupied, and was therefore incompetent to testify as to the character of his possession.—Tomlinson v. Driver, 53 Ga. 9.

[d] (Ga. 1878) In an action by a widow on an account in favor of her deceased husband which had been set apart to her by appraisers as her year's allowance, plaintiff may testify in her own behalf.—Doyle v. Martin, 61 Ga. 410.

[e] (Ill. 1886) Under 1 Starr & C. Ann. St. c. 51, par. 2, forbidding any party to the record or in interest to testify of his own motion where any adverse party sues or defends as executor or heir, in a suit by heirs against the widow and others to contest a will, the widow is not a competent witness, as she is a party to the record in interest.—Freeman v. Easly, 117 Ill. 317, 7 N. E. 656.

[f] (Ill. 1886) In proceedings for partition by an adopted child against the widow and heirs of his adopted father, the widow is not a competent witness, under the law of Illinois, to prove claims held by her against the state for advances made by her to her late husband.—Barnard v. Barnard, 119 Ill. 92, 8 N. E. 320.

[g] (Ill. 1892) In a suit by the heirs of a deceased person against his widow for partition of land which they allege to belong to the estate of the decedent, and which the widow claims as her own, she is not a competent witness on her own behalf.—Lancaster v. Blaney, 140 Ill. 203, 29 N. E. 870, following Connelly v. Dunn (1874) 73 Ill. 218.

[h] (Ind. 1871) In an action by a widow against the children by a previous marriage of her deceased husband, to recover an interest in real estate on the ground that it had been purchased with money belonging to her, and held by her husband as her separate property, the widow cannot testify on the trial, according to the statutes, unless required by the court or the opposite party as to matters occurring prior to the death of the ancestor.—Noble v. Withers, 36 Ind. 193.

[i] (Ind. 1876) In an action against a widow to recover from her the possession of land the title of which had been fraudulently taken by her deceased husband in his own name, she having paid the consideration, plaintiff claiming under a sale by the sheriff on execution against the husband, *held*, that she was a competent witness to testify as to all matters touching her own rights in said land.—Tracy v. Kelley, 52 Ind. 535.

[j] (Ind. 1878) In an action by an administrator on a note made payable to the decedent, the widow, who has intervened, claiming the note as her private property, is not a competent witness.—Lynam v. Buckner, 60 Ind. 402.

[k] (Ind. 1891) In an action of partition, where the issue is whether a voluntary conveyance of land by a decedent to his son was an advancement, the widow of the deceased, being entitled to one-third of the real estate, irrespective of the question of advancement, has no interest in that issue, though a necessary party to the record, and is not incompetent as a witness thereon, under Rev. St. 1881, § 499, as to evidence of transactions with decedents.—Scott v. Harris, 127 Ind. 520, 27 N. E. 150.

[l] (Iowa, 1883) Under Code 1873, § 3639, providing that no party to an action shall testify to a communication or transaction with a person since deceased, against the heir at law of such decedent, the testimony of a widow as to communications by her deceased husband is not competent in a partition suit by one of the heirs against the others, and in which she is a party defendant, as against the plaintiff, although her only interest in the action was to have her dower assigned, which right was not questioned by any of the other parties thereto.—Burton v. Baldwin, 61 Iowa, 283, 16 N. W. 110.

[m] (Ky. 1884) In an action of dower, the widow is a competent witness to prove the marriage.—Powell v. Calvert, 5 Ky. Law Rep. 768.

[n] (Mo. 1892) A widow, suing to set aside gifts of her husband as in fraud of her dower, is not disqualified to testify under Rev. St. § 8918, on the ground that the adverse party is dead, since the donees, and not her husband, are the adverse parties, but only under section 8922, as to any conversations or admissions of her husband, or acts done by another in connection with a conversation with said husband.—Brandon v. Dawson, 51 Mo. App. 237.

[o] (N. J. 1881) Acts 1880, p. 52, does not render a wife in an action against her husband's representative competent to testify as to transactions with her husband.—Clawson v. Riley, 34 N. J. Eq. (7 Stew.) 348.

[p] (N. Y. 1884) On the trial of an action brought by the creditors of a deceased grantor to set aside conveyances made to his wife, she may testify concerning personal transactions between herself and him, she not holding under him within the meaning of the statute.—Gillies v. Kreuder, 33 Hun, 314.

[q] (N. C. 1892) Evidence sought to be elicited from the alleged wife, one of defendants, to prove her marriage with decedent, under whom plaintiffs claim the lands in suit, was properly excluded under Code, § 590, providing that a person interested in the event of an action shall not be examined as a witness in his own behalf against a person claiming under a decedent concerning a personal transaction with decedent, unless the person so claiming is examined in his behalf in regard to the same transaction.—Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1.

[r] (Pa.) A wife cannot be a witness in a proceeding to vacate a decree of divorce, the husband being dead.—(1878) Peterson v. Peterson, 13 Phila. 82; (1880) Appeal of Fidelity Ins. Co., 93 Pa. 242.

[s] (Vt. 1892) The widow of decedent, annuitant under a conveyance which his administrator sought to set aside as fraudulent, that he might pay a debt, was incompetent to testify to the creditor's acquiescence in an agreement whereby another was to pay the debt, under R. L. § 1003, providing that, when an executor or administrator is a party, the other party shall

not be permitted to testify in his own favor.—Randall's Adm'r v. Randall, 64 Vt. 419, 24 Atl. 1011.

§ 593. Guardian or next friend.

Husband or wife of guardian, see post, § 647.
Interest in event, see post, § 610.

[a] (Ga. 1881) Where the real parties to a contract were minors, the next friend, who represented them in a suit, is not such a party to the suit as to render her an incompetent witness upon the death of the other party. Even if she were the mother of the minors, that fact affects only her credibility.—Kilpatrick v. Strozier, 67 Ga. 247.

[b] (Ill. 1886) A next friend, suing in behalf of a minor, although incompetent before, under a statute rendering incompetent parties to the record when the adverse party defends as executor, becomes a competent witness when the minor comes of age, and the former is thereupon released as a party from the record.—Freeman v. Easly, 117 Ill. 317, 7 N. E. 656.

[c] (N. C. 1876) The liability of the "next friend" of an infant for costs renders him incompetent to testify to any transaction or conversation with a party deceased.—Mason v. McCormick, 75 N. C. 263.

[d] (N. C. 1876) A "next friend" is not a "party" to the suit; for he has no interest in the subject in controversy.—Mason v. McCormick, 75 N. C. 263.

[e] (Tenn. 1873) Under Acts 1869-70, c. 78, § 2 (Thomp. & S. St. § 3813d), providing that in actions by or against executors or guardians "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward," a guardian is not a competent witness against his ward as to any action or proceeding relative to the guardian's management of the ward's estate.—Garwood v. Cooper, 59 Tenn. (12 Heisk.) 101.

[f] (Tex. 1893) The guardian of the minor children of a deceased heir, in an action by him against the other heirs for partition, is incompetent to testify as to declarations made to him by the heirs' intestate under Rev. St. art. 2248.—Ellis v. Stewart (Civ. App.) 24 S. W. 585.

§ 594. Trustee and beneficiary.

Interest in event, see post, § 611.
Surviving party to contract or other cause of action, see post, § 634.

[a] (Ill. 1889) Where a trustee advances money on his cestui que trust's contract of purchase of land, taking the title in his own name, and devises the land, subject to the repayment of such advances, the cestui que trust defendant, in a suit by the devisee to foreclose the lien, is not a competent witness in his own behalf to testify to any transaction between himself and the deceased trustee, nor to testify in his own interest when called by a co-defendant.—Stewart v. Fellows, 128 Ill. 480, 20 N. E. 657.

[b] (Ind. 1868) On the trial of a claim against a decedent's estate for the amount of a legacy received by the decedent in his lifetime in trust for the claimant, *held*, that plaintiff was not a competent witness, unless called by the adverse party or by the court.—Reed's Adm'r v. Reed, 30 Ind. 313.

[c] (Mass. 1870) On an issue in a suit in equity against a trustee of certain land, whether a judgment by default against him on certain writs of entry for the land had been procured by his collusion, *held*, that he was a competent witness, under St. 1804, c. 304, § 1, making mere trustees witnesses, to prove statements made by himself and a deceased cestui que trust to his counsel in those writs that the deceased grantor of the deed of trust was insane and made the conveyance under the undue influence of the cestui que trust, and that the counsel advised him he had no defense.—Brooks v. Tarbell, 103 Mass. 496.

§ 595. Parties to bills and notes.

Interest in event, see post, § 612.
Surviving party to contract or other transaction or cause of action, see post, § 631.

[a] (Ind. 1881) In an action on a note against the administrator of the maker and a surviving maker, each of whom sets up a separate defense, it is in the discretion of the trial court, under Act March 15, 1879, § 1, defining who shall be competent witnesses, to permit the surviving maker to testify.—Meyer v. Morris, 78 Ind. 558.

[b] (Ind. 1884) In a suit against the maker of a note sold by the payee's administrator to plaintiff, defendant is not a competent witness for himself.—Reynolds v. Linard, 95 Ind. 48.

[c] (Mich. 1882) Where an executor brings suit upon negotiable paper, and a third person claims the paper, and takes upon himself the defense of the suit on that ground, he is to be deemed an "opposite party" to the executor, within laws of Michigan, disqualifying such party to testify as to facts which, if true, must have been within the knowledge of testator.—Bachelder v. Brown, 47 Mich. 366, 11 N. W. 200.

[d] (Mich. 1882) The incompetency of such person to testify was not affected by the fact that plaintiff put in no evidence of the ownership of the note by the estate, except what was furnished by his possession of the paper; defendant's evidence having already shown that the sole controversy was whether the note was owned by the witness or by the estate.—Bachelder v. Brown, 47 Mich. 366, 11 N. W. 200.

[e] (Miss. 1877) Where it was sought to charge T., an executor of E.'s estate, with the amount of a note given to E. by T.'s wife, E.'s daughter, for land whereof T. was tenant by the curtesy, and which T. refused to pay, *held*, that T. was incompetent to testify to anything in reference to the note occurring in E.'s lifetime, and tending to defeat its collection; and this, whether the maker was legally capable of executing the note or not.—Troup v. Rice, 55 Miss. 278.

[f] (N. Y. 1886) In an action by the second indorser of a note against the first indorser, the maker being dead, plaintiff is not incompetent to testify as to transactions between himself and deceased.—Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109, affirming (1884) 33 Hun, 349.

[g] (N. Y. 1889) In an action on a joint note against the surviving maker and the executors of deceased maker, the surviving maker, having an interest in rendering his codefendant as well as himself liable, is, as to transactions that occurred between himself and such deceased maker, tending to show the latter's liability, an incompetent witness, under Code Civ. Proc. § 829.—Wilcox v. Corwin, 117 N. Y. 500, 23 N. E. 165, reversing (1888) 50 Hun, 425, 3 N. Y. Supp. 317.

[h] (Ohio, 1883) The maker of a note, and the payee and indorser thereof, who became such before delivery, for the maker's accommodation only, set up by separate answers the same defense to an action on the note by the administrator of the holder. *Held* that, whether in this state of the record the maker would be a competent witness for the payee and indorser as to facts occurring before the holder's death or not, he becomes such upon his setting up by supplemental answer his discharge in bankruptcy, which is admitted by the reply, the

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averments of which, that the debt sued on was one of those excepted from the operation of the discharge, were not proven.—Bonte's Adm'r v. Hinman, 6 Ohio Dec. 1173.

[i] (Pa. 1882) A. and B. made a joint note. A. died. B. and A.'s executor were sued on the note. *Held*, that B. could not testify for plaintiff that A. signed the note.—Alcorn's Ex'r v. Cook, 101 Pa. 209.

§ 596. Mortgagor and mortgagee.

Interest in event, see post, § 614.

Surviving party to contract or other transaction or cause of action, see post, § 636.

[a] (Ind. 1874) In an action by an executor to foreclose a mortgage executed to his testator, another mortgagee filed a cross-bill alleging that his mortgage was first delivered, though bearing date subsequent to the other, and offered the mortgagor as a witness to prove the time of the delivery of the respective mortgages. *Held*, that he was properly excluded under 3 St. p. 560, § 2.—Hoadley v. Hadley, 48 Ind. 452.

[b] (N. Y. 1878) In an action on a bond and mortgage executed by husband and wife on land belonging to the wife to C. and by him assigned to plaintiff's testatrix, judgment for a deficiency was asked against the husband. *Held* that, C. being dead, testimony by the husband to prove usury in the loan was inadmissible under Code Civ. Proc. § 829, providing that a party or person interested in the event, or a person through whom such party or person interested derives his title, shall not be examined against the executor, administrator, or survivor of a deceased person as to transactions had with decedent.—Whitehead v. Smith, 14 Hun, 531.

[c] (N. Y. 1893) In an action to subject to decedent's debts land which had been mortgaged by the devisee, the mortgagor and the personal representatives of the mortgagee were made defendants. *Held*, that the mortgagor was not disqualified from testifying in behalf of plaintiff as to whether he told the mortgagee about the debts of the estate before the mortgage was taken.—Cunningham v. Whitford, 74 Hun, 273, 26 N. Y. Supp. 575.

§ 597. Partners.

Interest in event, see post, § 616.

Surviving party to contract or other transaction or cause of action, see post, § 643.

[a] (Colo. 1891) Where, in a suit against one member of a firm and the estate of a deceased member, the partnership is denied by defendant estate, the surviving partner is not a competent witness to prove the partnership, under Mills' Ann. St. c. 132, § 4816, prohibiting a party directly interested in the event of the suit from testifying when the adverse party sues or defends as administrator of any deceased person.—Cooper v. Wood, 1 Colo. App. 101, 27 Pac. 884.

[b] (Fla. 1883) Plaintiffs who allege a partnership between themselves and a decedent in a suit against his executor are incompetent witnesses to testify to transactions or communications between them and deceased by which they claim the partnership resulted.—Eppinger v. Canepa, 20 Fla. 262.

[c] (Ind. 1881) In a suit against a surviving partner and the administrator of a deceased partner, the former cannot testify unless required by the court or the opposite party under 2 Rev. St. 1876, p. 133.—Wrape v. Hampson, 78 Ind. 499.

[d] (Me. 1878) A surviving partner, who gives bond under Rev. St. c. 69, § 2, and is afterwards sued on a note of the firm, is not therefore a "representative" of his deceased partner, and as such entitled, under chapter 82, § 87, to testify to facts happening before his decease.—Holmes v. Brooks, 68 Me. 416.

[e] (Tenn. 1887) Under Code, § 4565, providing that, "in actions by or against an administrator, neither party shall be allowed to testify against the other as to any transactions with or statement by the decedent, unless called by the opposite party," surviving partners are not competent witnesses for each other as to the terms of a contract made by a deceased partner for their benefit.—Godfrey v. Templeton, 86 Tenn. (2 Pickle) 161, 6 S. W. 47.

[f] (Tex. 1894) On an issue whether defendant was the owner of a note originally a part of the assets of a partnership of which defendant was a member, the court properly refused to allow him to testify that, on dissolution of the firm, the note became his property, his former partner being dead.—Lumpkin v. Montgomery (Civ. App.) 25 S. W. 661.

5. PERSONS INTERESTED IN EVENT.

IN GENERAL, § 598.
NATURE AND EXTENT OF INTEREST IN GENERAL, § 599.
ADVERSE INTEREST, § 600.
RELATIONSHIP OF WITNESS TO PARTY OR PERSON INTERESTED, § 601.
INTEREST IN PROPERTY IN GENERAL, § 602.
LEGATEE OR DEVISEE, § 603.
—— PROBATE OR CONTEST OF WILL, § 604.
HEIR, DISTRIBUTEE, OR NEXT OF KIN, § 605.
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EXECUTOR OR ADMINISTRATOR, § 607.
HUSBAND AND WIFE, § 608.
WIDOW, § 609.
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TRUSTEE AND BENEFICIARY, § 611.
PARTIES TO BILLS AND NOTES, § 612.
PRINCIPAL AND SURETY, § 613.
MORTGAGOR AND MORTGAGEE, § 614.
PRINCIPAL AND AGENT OR OTHER REPRESENTATIVE, § 615.
PARTNERS, § 616.
CREDITORS, § 617.
TRANSFER, RELEASE, OR EXTINGUISHMENT OF INTEREST, § 618.

Grantor, assignor, or other person from whom party derives title or interest, see post, §§ 619–624.

Surviving party to contract or other transaction or cause of action, see post, §§ 625–643.

§ 598. In general.

[a] (U. S.) Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], making both parties in actions by or against executors, administrators, or guardians incompetent to testify as to certain transactions, does not disqualify a person interested in the controversy unless he is an actual party to the record.—(1880) Potter v. Third Nat. Bank of Chicago, 102 U. S. 163, 26 L. Ed. 111; (1882) Berry v. Sawyer (C. C.) 19 Fed. 286; (1890) Stephens v. Bernays (D. C.) 42 Fed. 488.

[b] (Ala. 1877) Under Code, § 3058, a beneficiary in a suit, though not a party, cannot testify in his own behalf.—Drew v. Simmons, 58 Ala. 463.

[c] (Ark. 1885) Only parties to the record are excluded by the constitution from testifying to statements of the testator in actions by or against the executor, and the exclusion is not to be extended to one having an interest in the result, but not a party to the record.—McRae v. Holcomb, 46 Ark. 306.

[d] (Ill. 1875) A daughter who has been provided for in her father's will so as to have no interest in the result of a suit against the ex-

ecutor of her father's estate on a note made by him in his lifetime is a competent witness in such suit, as is her husband.—Kent v. Mason, 79 Ill. 540.

[e] (Me. 1882) An interested witness, who is not a party, can testify in favor of one party in a suit where the adverse party is an administrator.—Rawson v. Knight, 73 Me. 340; Haskell v. Hervey, 74 Me. 192.

[f] (Minn. 1884) Gen. St. 1878, c. 73, § 8, providing "that it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with or admission of a deceased or insane party or person, relative to any matter at issue between the parties," makes a party to or interested in the event of an action incompetent to testify to a conversation with or admission of any deceased or insane person, whether a party to the action or not, relative to a matter at issue between the parties.—Griswold v. Edson, 32 Minn. 436, 21 N. W. 475.

[g] (Miss. 1894) Where a bank pays a judgment obtained against it by a depositor for money of such depositor converted by its cashier, the depositor is a competent witness for the bank in an action by it against the administrator of the cashier to recover the amount converted.—Jones v. Bank of Carrollton, 71 Miss. 1023, 16 South. 344.

[h] (N. Y. 1893) Where testamentary disposition is shown, parties interested in resisting such disposition have no right to testify to personal transactions with testator tending to show that the facts stated by the testator as the reason for his testamentary disposition were untrue.—In re Bedlow, 67 Hun, 408, 22 N. Y. Supp. 290; In re Stilwell, Id.

[i] (Ohio, 1878) Code, § 310, provides that no person shall be disqualified as a witness in a civil action by reason of his interest, and section 313 declares that no "party to a civil action" shall be allowed to testify by virtue of section 310, where the adverse party is a party claiming as heir, grantee, or devisee of a deceased person. *Held*, that in a suit between administrators, the heirs, grantees, or devisees of the deceased person, who were simply interested in the event of the suit, and had no power to control it, were not disqualified from testifying under the provisions of section 313.—Roland v. Griffiths (Super. Ct. Cin.) 3 Wkly. Law Bul. 590, 6 Ohio Dec. 619.

[j] (Pa. 1887) Where the assigns of a decedent are parties to an issue, witnesses whose interest is not in equi librio between the parties to the issue are incompetent.—Kisterbock v. Lanning, 7 Atl. 596.

[k] (Pa. 1895) In a contest for priority between two judgments, the judgment debtor, having no interest in the result, is competent to testify to matters occurring in the lifetime of one of the judgment creditors, since deceased.—McCartney v. Kipp, 171 Pa. 344, 33 Atl. 233.

[l] (Tenn. 1888) In an action against the executors of an attorney for failure to pay over money collected, the debtor is competent to prove payment to the attorney; Mill & V. Code, § 4565, providing that a party to an action by or against a personal representative shall be incompetent to testify to a transaction with decedent, having no application, the exception being made with respect to parties only and not including interested persons who are not parties.—McBrien v. Martin, 87 Tenn. (3 Pickle) 13, 9 S. W. 201.

[m] (Tex. 1887) Rev. St. art. 2248, making incompetent the testimony of a party to an action to which the representative of a decedent is either plaintiff or defendant, in so far as the testimony relates to any conversation or transaction with the decedent, does not exclude the testimony of one not a party to the suit, and not bound by the judgment, although such party may be interested in the issue.—Gilder v. City of Brenham, 67 Tex. 345, 3 S. W. 309.

[n] (W. Va. 1884) A person jointly bound with a decedent may testify in a suit against the latter's representatives to which he is not a party as to personal transactions with decedent, though thereby the entire liability is thrown on the estate of decedent.—Gilmer's Adm'r v. Baker's Adm'r, 24 W. Va. 72.

[o] (Wis. 1894) A person claiming no interest in the suit, and through whom neither party claims, is competent to testify concerning a conversation between plaintiff's manager and a deceased defendant.—Curtis v. Hoxie, 88 Wis. 41, 59 N. W. 581.

§ 599. Nature and extent of interest in general.

[a] (Cal. 1894) In an action against an administratrix for services as nurse to deceased, one who served in the same capacity alternately with plaintiff may testify as to the nature and amount of the services.—Todd v. Martin, 37 Pac. 872.

[b] (Ill. 1886) In determining who is an interested witness, and therefore incompetent, under the statute, as to transactions with deceased persons, as against representatives (1 Starr & C. Ann. St. c. 51, par. 2), the test is whether the witness will either gain or lose by the direct legal operation and effect of the judgment, or whether the record will be legal evidence for or against him in some other action.—McClure v. Otrich, 118 Ill. 320, 8 N. E. 784.

[c] (Ill. 1894) Where two parties have similar claims against the estate of their deceased father, one of them is not an incompetent witness to prove the other's claim.—Clark v. Gibbons, 56 Ill. App. 357; Same v. Kingman, Id. 360.

[d] (Ill. 1895) A person who is interested in the subject-matter of a suit in equity against a decedent's estate, but whose rights will be the same whichever party wins, is a competent witness.—Baker v. Updike, 155 Ill. 54, 39 N. E. 587.

[e] (Ind. 1896) In an action by an assignee of a part of a claim against a deceased member of a corporation, based on a contract between decedent and the assignor, whereby the latter claimed joint ownership in the corporate stock, the refusal of the court to allow the assignor's wife, who was assignee of the other part of the claim, to testify as to the contract, was not an abuse of discretion.—Payne v. Goldbach, 14 Ind. App. 100, 42 N. E. 642.

[f] (Iowa, 1874) The interest which will disqualify a witness in an action in which an administrator is a party must be present, certain, and vested. If the interest is of a doubtful character, it goes to his credibility only.—Wormley v. Hamburg, 40 Iowa, 22.

[g] (Iowa, 1875) Where an administrator is a party to an action, the interest which would disqualify a witness to testify therein is such as would disqualify him at common law, and where he is equally interested on both sides he is competent to testify.—Goddard v. Leffingwell, 40 Iowa, 249.

[h] (Iowa, 1877) A son who had received from his father (since deceased) repayment of a sum of money which the father had borrowed to defray the expenses of a trip was not disqualified by reason of interest from testifying in an action brought by the father's representatives to recover reimbursement for the father's estate, from the party for whom he traveled.—Bixley v. Wormly, 44 Iowa, 347.

[i] (Md. 1885) It is not competent for one against whom a debt is prima facie made out in

favor of the estate of a deceased person to overcome this proof with his own testimony.—Love v. Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290.

[j] (Mich. 1888) In an action by a corporation against an administrator to recover commissions for the sale of certain real estate for defendant's intestate, it is error to exclude the testimony of persons not connected with plaintiff, but introduced by its agents to the intestate, who in their presence recognized the relations between himself and plaintiff relied on for a recovery.—Waterman Real Estate Exch. v. Stephens, 71 Mich. 104, 38 N. W. 685.

[k] (Minn. 1887) Upon an indictment for obstructing a highway, persons owning land near or abutting on the alleged highway are not interested in the event, so as to make them incompetent to testify to admissions of the alleged dedicator, he being dead.—State v. Eisele, 37 Minn. 256, 33 N. W. 785.

[l] (Minn. 1888) Under Gen. St. 1878, c. 73, § 8, forbidding a party to the action or one interested in its event to testify as to any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue, testimony by one to whom a certificate of deposit had been paid that the payee, plaintiff's intestate, had given it to him causa mortis, is incompetent in favor of defendant bank.—Beard v. First Nat. Bank, 39 Minn. 546, 40 N. W. 842.

[m] (Minn. 1893) Under Gen. St. 1878, c. 73, § 8, providing that it shall not be competent for any party to an action, or "interested" in the event thereof, to testify to any conversation with a deceased party relative to any matter at issue, the interest in the event of the action which disqualifies a person as a witness must be a direct and immediate pecuniary interest, adverse to that of the party against whom his testimony is offered.—Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817.

[n] (N. Y. 1885) Where the statute prohibits one "interested in the event" from testifying, the event meant is the event in issue; a remote, contingent, or collateral interest is not meant.—Moore v. Oviatt, 35 Hun, 216.

[o] (N. Y. 1886) One has a disqualifying interest in the event of the suit so as to preclude him from testifying to personal transactions with decedent under Code, § 829, where the judgment for or against either party to the suit would increase or diminish the witness' liability.—Lawton v. Sayles, 40 Hun, 252.

[p] (N. Y. 1888) Plaintiff made an agreement to do certain work for O., and after part performance stopped work because of O.'s failure to pay. Plaintiff alleged that afterwards he entered into an agreement with testator to proceed with the work and complete it according to the terms of the original contract, and that plaintiff had performed this agreement. *Held*, in a suit by plaintiff against the executor of the testator, that O. was not incompetent to testify as to the agreement relied on, under Code Civ. Proc. § 829, forbidding a person or party interested in the event to testify on his own behalf against an executor.—Kitchen v. Taylor, 14 N. Y. St. Rep. 398.

[q] (N. Y. 1888) Under Code Civ. Proc. § 829, forbidding a person or party interested in the event to testify in his own behalf against an executor, the test of interest of the party is whether he will either lose or gain by the judgment, or whether the record will be evidence for or against him, in some other action, and the interest must be certain and vested, and not remote or contingent.—Ehmann v. Scheuerman, 14 N. Y. St. Rep. 705.

[r] (N. Y. 1889) Where the mother of a bastard child is neither a party nor privy to an action against the administratrix of the putative father on his alleged contract for the support of the child, and the plaintiff, by acting in loco parentis, has precluded herself from claiming that she furnished the maintenance on account of the mother, the latter's interest in the action is, at most, "remote, contingent, and uncertain," and her testimony concerning the contract is not incompetent, under Code Civ. Proc. § 829, which provides that a person interested cannot testify in his own behalf against the administrator of a deceased person concerning a personal transaction or communication with the deceased person.—Connelly v. O'Connor, 117 N. Y. 91, 22 N. E. 753, affirming Conolly v. Same (1888) 17 N. Y. St. Rep. 261, 1 N. Y. Supp. 489.

[s] (N. Y. 1891) In an action to enforce against an estate a guaranty given by the decedent, the person whose debt was guarantied is a competent witness, since the result of the suit cannot affect his liability, though it may give him a different creditor.—Beakes v. Da Cunha, 126 N. Y. 293, 27 N. E. 251, affirming (1891) 58 Hun, 609, 12 N. Y. Supp. 351.

[t] (N. Y. 1893) A witness who acquires his interest after the conversation with decedent cannot testify.—Eighmie v. Taylor, 68 Hun, 573, 23 N. Y. Supp. 248.

[u] (N. Y. 1894) Defendant's property was bid in by H., at a foreclosure sale, under an agreement to convey to defendant on repayment by her of the price. Afterwards, H. conveyed the premises to defendant in consideration of her giving plaintiff's testator a mortgage thereon for the sum which defendant had agreed to pay to H., and plaintiff's testator credited the amount on a debt due him from H., as agreed. *Held*, in an action to foreclose the mortgage, that H. did not have such interest in the result as disqualified him from testifying as to communications with testator.—Meaker v. Fiero, 77 Hun, 65, 28 N. Y. Supp. 469, judgment reversed (1895) 145 N. Y. 165, 39 N. E. 714.

[v] (N. Y. 1894) In an action to compel defendant to deliver to plaintiff a deed, placed in defendant's custody by the deceased grantor, the fact that plaintiff's brother occupies the same position in relation to another tract of land as plaintiff does to the premises described in the deed in controversy does not render the brother incompetent to testify to declarations of deceased.—Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189.

[w] (N. C. 1881) Under Code, § 346, disqualifying a person interested in an action from testifying to a transaction with one deceased, the test as to interest is if the verdict in the case cannot be given in evidence in a suit against the witness he shall be deemed disinterested.—Mull v. Martin, 85 N. C. 406.

[x] (Pa. 1882) A witness is not incompetent because interested in the question involved in the case on trial, he must be interested in the case itself.—Appeal of McMurray, 101 Pa. 421.

[y] (S. C. 1876) A party is not excluded as a witness by Code, § 415, from testifying against a party defending the action as administrator, unless he has an interest which may be affected by the event of the action or proceeding.—Twitty v. Houser, 7 S. C. (7 Rich.) 153.

§ 600. Adverse interest.

[a] (Ill. 1880) In an administrator's proceeding to establish a personal claim against the estate, the heirs are competent witnesses.—Douglass' Estate v. Fullerton, 7 Ill. App. (7 Bradw.) 102.

[b] (Ill. 1890) An heir is a competent witness on the trial of a claim against an estate in which he is interested.—Patterson v. Collar, 34 Ill. App. 632, affirmed Collar v. Patterson (1891) 137 Ill. 403, 27 N. E. 604.

[c] (Ind. 1893) Rev. St. 1881, § 498, provides that, in suits in which an administrator is a party, involving matters which occurred during the lifetime of decedent, where a judgment may be rendered for or against the estate, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness. Section 499 disqualifies as a witness parties to suits between heirs, or by or against such, founded on a demand against the ancestor to obtain title to or possession of his property, or to affect it in any manner. *Held*, that in an action against an administrator on a claim against the estate, a son and heir of decedent, who is not a party of record, is a competent witness for defendant. —Sullivan v. Sullivan, 6 Ind. App. 65, 32 N. E. 1132.

[d] (Ind. 1896) In a suit against an administrator to establish a claim against his decedent's estate, involving a note made by decedent in his lifetime, the widow of decedent, when her interest is not adverse to the estate, is not an incompetent witness for the administrator, under Rev. St. 1894, § 506.—Lewis v. Buskirk, 14 Ind. App. 439, 42 N. E. 1118.

[e] (Iowa, 1886) Code 1873, § 3639, provides that no party to any action or proceeding, "nor any person interested in the event thereof," shall testify to a personal transaction or communication with a person who, at the commencement of the examination, was deceased. *Held*, that witnesses coming within the description, who are interested against the party calling them, are within the prohibition of the statute.—Donnell v. Braden, 70 Iowa, 551, 30 N. W. 777, following Ivers v. Ivers (1883) 61 Iowa, 721, 17 N. W. 149.

[f] (La. 1869) Under Act March 13, 1867, p. 143, providing that no interested person shall testify in any suit against the interest of the succession of a decedent in relation to any fact which took place in the lifetime of such decedent, the husband is not a competent witness to testify in any suit, against the interests of the succession of his deceased wife, to any fact which took place during her lifetime.—Succession of Wade, 21 La. Ann. 843.

[g] (Md. 1880) Parties interested as devisees are not excluded under Acts 1864, c. 109, and the supplements thereto, from testifying adversely to a claim made by the executor for services rendered his testatrix.—Bantz v. Bantz, 52 Md. 686.

[h] (Mich. 1885) Heirs can testify as to advancements in a proceeding to determine their rights as distributees under a will, and are not excluded as adversely interested to the representative of their testator's estate.—Appeal of McClintock, 58 Mich. 152, 24 N. W. 549.

[i] (N. C. 1886) An executor is competent to testify to transactions between his intestate and defendant of which he has knowledge which are in favor of the estate and adverse to defendant.—Pittman v. Camp, 94 N. C. 283.

[j] (Pa. 1888) The donee in a gift causa mortis who was one of several heirs of the decedent was a competent witness under Act May 23, 1887, to prove the gift, her claim not being adverse to the estate within the intention of the act, and an election by the widow not to take under the will did not affect the competency of the witness.—In re McCabe's Estate, 6 Pa. Co. Ct. R. 42.

[k] (Pa. 1890) In an action against executors on a contract made by decedent, his executor, widow, and heirs are competent witnesses for defendants, under Act 1887, §§ 4, 5, they having no interest adverse to that of decedent.—Miller v. Miller (Com. Pl.) 1 Pa. Dist. R. 95.

[l] (Pa. 1892) In ejectment by plaintiff as heir against his brother in possession under a deed from his deceased father which plaintiff claimed was fraudulently procured, their sister, who was not a party to the record, and who had no interest adverse to any right of the grantor, was a competent witness in behalf of defendant.—Crothers v. Crothers, 149 Pa. 201, 24 Atl. 190, 30 Wkly. Notes Cas. 293.

[m] (Pa. 1892) Act May 23, 1887 (P. L. 158) § 5 (E), provides that, where any party to a thing or contract in action is dead, and his right has passed to a party on record who represents his interest, the surviving or remaining party, or any other person whose interest is adverse to the right of deceased, shall not be a competent witness to any matter occurring before his death. *Held*, where an execution purchaser sought to show that a former sale of the property, through which defendants claimed title, was made in fraud of creditors, that the original owners had no "adverse interest" which prevented them from testifying to transactions with the first purchaser prior to his death.—Dickson v. McGraw, 151 Pa. 98, 24 Atl. 1043, 30 Wkly. Notes Cas. 538.

[n] (Pa. 1892) In an action against executors, legatees of testator are not incompetent to testify that the claim was paid during deceased's lifetime, under Act May 23, 1887 (P. L. 158) § 5, declaring persons whose interest is "adverse" to the right of deceased incompetent witnesses to matters occurring before deceased's death.—Gerz v. Weber, 151 Pa. 396, 25 Atl. 82, 31 Wkly. Notes Cas. 77.

[o] (Pa. 1893) Act May 23, 1887, provides that when any person to a contract is dead, and his right has passed to a party on the record who represents his interest in the subject in controversy, a surviving party to the contract, or any other person whose interest is adverse to the right of deceased, shall not be a competent witness to any matter occurring before the death of decedent. *Held*, on the presentation of a claim against decedent's estate, that a person interested in the estate was competent to testify to a contract between decedent and claimant.—In re Brose's Estate, 155 Pa. 619, 26 Atl. 766; Appeal of Grove, Id.

[p] (Pa. 1895) In an action by the administrator of H. against a sheriff for levying on and selling the property of H. under an execution against K., the interest of a surety on the indemnity bond given the sheriff is adverse to plaintiff, so that he cannot testify to a conversation with H. in which she admitted that the title to the property was in K.—Kyte v. Foran, 167 Pa. 252, 31 Atl. 575.

[q] (Vt. 1892) Although a person claiming against the estate of a decedent is not competent, under Acts 1887, No. 89, to testify in behalf of such claim, because interested adversely to the decedent, he is competent to testify as to the ownership of certain property with which it is sought to charge the accountant, and other relevant matters, where he is not so interested.—In re Young's Estate, 148 Pa. 573, 575, 24 Atl. 124; Appeal of McHenry, Id.

§ 601. Relationship of witness to party or person interested.

[a] (Ga. 1894) In an action on a contract made with a decedent, plaintiff's daughter has not, by reason of residence with and dependence on plaintiff for support, such an interest in the action as would preclude her from testifying as to the transaction with decedent.—Blount v. Beall, 95 Ga. 182, 22 S. E. 52.

[b] (Mich. 1890) In a suit to enforce a bond executed by a deceased wife, against her estate, plaintiff's daughter, who was a sister of the deceased wife, is a competent witness as to statements made to her by the wife before her death. She is not within the inhibition of How. Ann.

St. § 7545, prohibiting the opposite party from testifying in regard to transactions with a deceased party.—Wilson v. Wilson's Estate, 80 Mich. 472, 45 N. W. 184.

[c] (Mo. 1892) A mother contracted to will certain land to her son, but died without doing so. *Held*, in a suit by the son's daughter, as his heir, to enforce specific performance, that the son's wife, plaintiff's mother, who was not a party, and had no interest in the action, was not disqualified as a witness by the statute.—Fuchs v. Fuchs, 48 Mo. App. 18.

[d] (N. Y. 1889) In an action involving the question whether S. had authority as plaintiff's agent to direct defendant as to the manner of constructing a machine for plaintiff, defendant's minor son, for whose benefit defendant's business was prosecuted, but having no legal interest in it, and not being a party or person from whom defendant had acquired an interest, was not incompetent to testify to directions given by S., who at the time of the trial was dead.—New York Smelting & Refining Co. v. Lieb, 56 N. Y. Super. Ct. 308, 4 N. Y. Supp. 545, judgment affirmed (1890) 121 N. Y. 674, 24 N. E. 1095.

[e] (N. Y. 1893) The mother of a beneficiary under a will is not an interested party, within the statute.—In re Bedlow, 67 Hun, 408, 22 N. Y. Supp. 290; In re Stilwell (Sup.) 22 N. Y. Supp. 290.

[f] (Pa. 1888) Act June 8, 1874, rendering a party or person interested in the result of an action by or against the committee of a lunatic incompetent to testify therein, does not exclude the testimony of the mother of a minor in a proceeding to settle the accounts of the guardian, to which proceeding she is not a party, though such testimony relates to occurrences before the appointment of a committee for said guardian, who has been adjudged a lunatic, and though the mother has received large sums of the money in controversy from said guardian, under a contract to educate and support the minor.—Appeals of Stone, 16 Atl. 731, 23 Wkly. Notes Cas. 285.

[g] (Pa. 1893) In an action by an executrix the brother of defendant is a competent witness in his behalf, in the absence of any interest in the suit, since the relationship affects his credibility only.—Fowler v. Smith, 153 Pa. 639, 25 Atl. 744.

[h] (Tex. 1894) The father of a beneficiary of a will is not an "interested party," so as to be incompetent to testify to the execution of a will.—Stephenson v. Stephenson, 6 Tex. Civ. App. 529, 25 S. W. 649.

§ 602. Interest in property in general.

Surviving party to contract or other transaction or cause of action, see post, § 633.

[a] (Ala. 1895) In an action by the guardian of minor children of a deceased mortgagor, against the legal representatives of the assignee of the mortgage and of such mortgagor, to enjoin the sale of the mortgaged land under a power, the grantee in a warranty deed of a part of such land is not a competent witness to prove payment by him of the mortgage for such mortgagor, under Code, § 2765, as amended by Act Feb. 10, 1891 (Acts 1890-91, p. 557), providing that no person having a pecuniary interest in the result of a suit shall be allowed to testify, against the party to whom his interest is opposed, as to any transactions with, or statement by, the deceased person whose estate is interested in the result.—Hagan v. Easter, 111 Ala. 480, 18 South. 308.

[b] (Ga. 1885) Under Code, § 3854, a lessee who purchases property, giving an acceptance therefor, signed by him as lessee, in violation of restrictions in the lease upon his authority to incumber the property, is incompetent, in an action against living owners and the executors of a deceased owner of the property, to prove a rescission of the lease and appointment of himself as agent of the owners, and that the property was purchased for their use and benefit without disclosing his agency.—National Bank of Augusta v. Bones, 75 Ga. 246.

[c] (Ill. 1880) A., B., and C. procured a third person to purchase certain lands; they to pay the purchase money as it should become due. The three took possession, made payments when due, and verbally agreed on the mode of division. A. having gone away, B. and C., supposing him dead, procured a conveyance of the land to themselves, agreeing that, if A. should return, they would convey his portion to him. After B. died, leaving a widow and children, A. returned and filed a bill to recover the portion belonging to him. *Held*, that C. could testify in such action on behalf of A. against B.'s heirs, since he had no interest which would disqualify him.—Rann v. Rann, 95 Ill. 433.

[d] (Ill. 1888) In an action by the grantor to set aside the deed against the widow and minor heirs of the grantee, a son of the grantor, who had a contingent remainder in the land conveyed by the deed, which was destroyed by the deed, is incompetent as a witness.—Griffin v. Griffin, 125 Ill. 430, 17 N. E. 782.

[e] (Ill. 1892) In a suit to enforce a title inherited by complainants from their father, who held under an unrecorded deed, parties who claim title under subsequent conveyances, made by the grantor of said unrecorded deed, are not competent witnesses, being adverse in interest to the heirs.—Morrison v. Morrison, 140 Ill. 560, 30 N. E. 768.

[f] (Ill. 1895) Where, in a suit against executors to compel the delivery of a deed executed by testator, a decree for complainants will establish also the validity of a certain lease given by testator, the lessee is so interested as to be incompetent to testify against the executors.—Miller v. Meers, 155 Ill. 284, 40 N. E. 577.

[g] (N. Y. 1886) One who has caused the title to land to be taken in the name of another has not the direct legal interest in a proceeding to foreclose a mortgage on the land which, under Code, § 829, is required to render his testimony incompetent.—Gourlay v. Hamilton, 41 Hun, 437.

[h] (N. Y. 1889) A parol agreement was sought to be enforced, by which it was alleged that plaintiff's father was to give a deed of his land to her, and take back a lease to himself and wife during their respective lives. *Held*, the father having died, that plaintiff's mother, who was interested as beneficiary of the life lease, was incompetent, under Code Civ. Proc. § 829, to testify to the father's declarations in support of the alleged contract.—Devinney v. Corry, 52 Hun, 612, 5 N. Y. Supp. 289.

[i] (N. Y. 1889) Where the grantee in a conveyance made to defraud creditors mortgages the property to secure a debt of the grantor, and the judgment creditor of the fraudulent grantor brings an action against the administratrix of the deceased mortgagee to set aside the mortgage as fraudulent, neither the fraudulent grantor nor the fraudulent grantee, who covenanted in the mortgage to pay the grantor's debt, are competent witnesses as to the consideration of the mortgage, as they are both interested in the event, and, it appearing that the grantor's debt is barred by limitation if not paid by the mortgage, and that the grantee's debt is solely on the mortgage, their interest is not balanced.—Brooks v. Wilson, 53 Hun, 173, 6 N. Y. Supp. 116.

[j] (N. C. 1878) Where land is conveyed in trust for a religious society, to be used as a site for a church, "so that the congregation of

said church may * * * enjoy the privileges of divine worship," a member of the congregation has no such interest as to prevent him from testifying to the declarations of a deceased person, in an action affecting the title of the land.—Lawrence v. Hyman, 79 N. C. 209.

[k] (N. C. 1882) A vendee having a bond for title from plaintiffs in ejectment, and who would be directly affected by the result of the action, is incompetent, under Code Civ. Proc. § 343, to testify to a communication of defendant's ancestor concerning an alleged deed from him, the genuineness of which is disputed.—Love's Ex'rs v. Harbin, 87 N. C. 249.

[l] (N. C. 1894) In an action for land, a person living as a member of plaintiff's household on the land, and aiding in her support, is not a party "interested in the action" (Code, § 590), so as to be incompetent to testify in regard to a transaction with the deceased father of defendants.—Jones v. Emory, 115 N. C. 158, 20 S. E. 206.

[m] (Pa. 1892) One, as whose property goods found in the possession of a decedent at the time of his death are levied upon, is not a competent witness to prove title thereto in himself.—Hause v. Sloyer (Com. Pl.) 3 Pa. Dist. R. 320.

[n] (S. C. 1895) On an issue as to whether there was a mistake on the part of the scrivener in drawing a deed under direction of the grantor therein to the grantor's son, another son is not rendered incompetent to testify by the fact that he claimed under a similar deed from the father.—Brock v. O'Dell, 44 S. C. 22, 21 S. E. 976.

[o] (W. Va. 1889) A., for a valuable consideration, purchased property of B., which, by the terms of sale, was conveyed to C., who promised to pay a debt due from A. to D. *Held* that, in an action to charge C.'s estate after C.'s death, B. was a competent witness to prove C.'s promise, as he has no interest in the action.—Hooper v. Hooper, 32 W. Va. 526, 9 S. E. 937.

§ 603. Legatee or devisee.

Husband or wife of legatee or devisee, see post, § 646.

Parties to action, see ante, § 590.

Surviving party to contract or other transaction or cause of action, see post, § 637.

[a] (Ill. 1895) A daughter of a testator is not an incompetent witness upon the question of the ademption of a legacy to her brother in her father's will, where the legacy, if adeemed, would go to her children, under the will.—Tanton v. Keller, 61 Ill. App. 625.

[b] (Ind. 1883) A son entered into a written contract with his father, whereby he agreed, in consideration of a conveyance of lands to him by the father and mother, to pay each of his sisters a certain sum after the death of the father and mother. *Held*, that the claim of such sisters for the amount so promised was not that of heirs or devisees, within the meaning of Rev. St. 1881, § 499, prohibiting parties claiming as heirs or devisees from testifying.—Creamer v. Sirp, 91 Ind. 366.

[c] (Kan. 1881) In an action against an executor, a devisee may be a witness for some purposes in favor of the estate.—McCartney v. Spencer, 26 Kan. 62.

[d] (N. Y. 1851) In an action against an executor for services rendered the decedent, a residuary legatee is a competent witness for the executor, under Code, §§ 398, 399, providing that no interest disqualifies, except as applied to a party to an action, or to a person for whose "immediate benefit" the action is prosecuted or defended.—Weston v. Hatch, 6 How. Prac. 443.

[e] (N. Y. 1886) One who by a will is directed for a compensation to care for the testator's invalid son is neither a legatee nor a devisee, and is not prohibited by Code, § 829, from testifying to personal transactions with the testator.—In re Chase's Will, 41 Hun, 203.

[f] (N. Y. 1889) In an action to set aside a transfer of stock by a deceased person, it appearing that there was not sufficient property to pay the debts of the deceased, aside from that derived from the sale of the stock, a legatee under the will is a person "interested in the event," and is incompetent to testify as to a change that took place in the deceased affecting her memory, etc., and as to her feeble physical condition.—Brigham v. Gott, 51 Hun, 636, 3 N. Y. Supp. 518.

[g] (Ohio, 1878) Under Code, § 313, in a suit between administrators of different estates, legatees who will derive the general benefit from the result of the suit, but are not parties thereto, are not disqualified from testifying.—Roland v. Griffiths, 1 Cleve. Law Rep. 211, 7 Am. Law Rec. 115, 4 Ohio Dec. 287, 6 Ohio Dec. 619.

[h] (Pa. 1890) A grandson of decedent is competent to testify against a claim for services, where the estate is sufficient for the payment of his legacy, whether the claim is allowed or disallowed. In such a case the possibility of a deficiency, which might arise if other claims should be presented, is too remote to disqualify him.—In re Sayers' Estate, 8 Pa. Co. Ct. R. 32.

[i] (Pa. 1895) Under P. L. 1887, § 5, subd. "e," providing that, when any party to a thing or contract in action is dead, no person whose interest is adverse to the decedent's rights therein shall be a competent witness to any matter occurring before decedent's death, unless the issue relate to the property of a decedent, and the controversy be between parties respectively claiming such property by devolution on the death of the owner thereof, a legatee who received the amount of her legacy from testator after the making of his will, but before his death, is incompetent to testify that testator told her that the payment was a gift, and should not affect her legacy.—In re Turner's Estate, 167 Pa. 609, 31 Atl. 867; Appeal of Whitney, Id.

[j] (S. C. 1882) Testator left the residuum of his estate, consisting of land, to his son F., with a provision that this should be accounted for by him at its fair value, and should be divided between him and testator's two other children. F. died intestate after settling with one of the other two children. *Held*, in a proceeding by the third child on a claim against the estate, payable out of such residuum, the other surviving child was not competent as a witness in relation to communications made to him by F., as against an administrator of the latter; he being interested in the result of the suit.—Earle v. Harrison, 18 S. C. 329.

[k] (S. C. 1890) In an action by a tenant against the executors of his former landlord for the unlawful seizure of crops for rent alleged to be due, it is competent for a legatee, who also claims to own the land by gift from the deceased, and to whom the tenant has attorned, to testify as a witness to the arrangement between himself and the deceased landlord whereby he became entitled to the rents, he not being a "party" to the action, and having no interest therein, within the meaning of Code Civ. Proc. § 400, which prohibits parties and privies from testifying as to transactions with a deceased person in an action to which the executor is a party.—Huff v. Latimer, 33 S. C. 255, 11 S. E. 758.

[l] (Vt. 1887) Where the issue was as to certain items in the account of a deceased executor

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which he had charged as having paid for the benefit of the estate, and D., a devisee under the will, was allowed to testify, under objection, that he had paid the amounts himself under an arrangement with the executor, *held*, that under R. L. §§ 1001–1003, which prohibit the testimony of parties in interest where any one of the parties to the contract is dead, D. had an interest in the result of the action antagonistic to that of the estate of the deceased executor, and that he was incompetent to testify.—Barnes v. Dow, 59 Vt. 530, 10 Atl. 258.

[m] (Wis. 1896) A legatee who claims an interest in the property in controversy from and under the deceased is precluded by Rev. St. § 4069, from testifying "in respect to any transaction" had "personally" with the deceased, except where the opposite party has first offered evidence of such transaction.—In re Valentine's Will, 93 Wis. 45, 67 N. W. 12.

§ 604. —— Probate or contest of will.

[a] (Ill. 1889) A defendant who is a devisee under a will is not an incompetent witness for complainant in a suit to set aside the will, unless it is shown that he would receive a larger part of the estate as heir than as devisee.—Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

[b] (Ky. 1877) The devisees of the deceased are competent witnesses in a controversy over the probate of a will.—Milton v. Hunter, 76 Ky. (13 Bush) 163.

[c] (Ky. 1877) In proceedings to procure probate of a will, contested on the ground of incapacity, fraud, and undue influence, persons who will take under the will, if established, are not on that account incompetent witnesses.—Cave's Devisees v. Cave's Heirs, 76 Ky. (13 Bush) 452.

[d] (Me. 1858) Under Rev. St. 1857, c. 82, § 83, the heirs of the testator are not "heirs of a deceased party," and are competent witnesses upon the question of the probate of the will.—Nash v. Reed, 46 Me. 168.

[e] (Mich. 1885) In a proceeding to probate a will, a legatee not a party thereto is not disqualified from testifying to matters which, if true, must have been equally within the knowledge of the testator.—In re Disbrow's Estate, 58 Mich. 96, 24 N. W. 624.

[f] (Mo. 1873) A person is not incompetent to testify in support of a petition to establish a will because he will take a legacy or devise under it.—Gamache v. Gambs, 52 Mo. 287.

[g] (N. H. 1861) In an appeal from the decree of the judge of probate allowing the probate of a will, the legatees in the will, not being appellants, though interested, are not parties in interest, so as to be excluded from testifying as witnesses, though the executor does not elect to testify.—Wheeler v. Towns, 43 N. H. 56.

[h] (N. J. 1851) A devisee, whose share of the estate as one of the heirs at law would be greater than the share devised to him, is incompetent to testify against the will.—Canfield v. Ball, 8 N. J. Eq. (4 Halst. Ch.) 582.

[i] (N. Y. 1882) Under Code, § 829, one named in the will as legatee, on condition that he render certain religious services, is by his interest in the event disqualified from testifying on a probate contest as to conversations of the testator with him.—In re Burke, 5 Redf. Sur. 369.

[j] (N. Y. 1885) A legatee named in a disputed will is incompetent to testify in his own interest concerning a personal transaction or communication between himself and the testator.—Cadmus v. Oakley, 3 Dem. Sur. 324.

[k] (N. Y. 1888) M. died leaving a will by which she bequeathed all her property to her sister C. for life, remainder over, and named T. as executor. C., apparently in ignorance of the will, qualified as M.'s administrator, and took possession of the estate as heir. C. afterwards died, having bequeathed the entire estate. After C.'s death the wills of M. and C. were both offered for probate. A hearing was had in the contest as to M.'s will pending the other case. *Held*, that the interest of a legatee under C.'s will was too remote to disqualify him, under Code Civ. Proc. § 829, to testify as to conversations had with M. on the subject of the controversy.—Todd v. Dibble, 6 Dem. Sur. 35.

[l] (N. Y. 1890) Where a witness, in case the will propounded should be admitted to probate, would take as legatee, and in case probate should be denied would take as heir of testator, then his interest in the event is sufficiently apparent to exclude his testimony as to personal transactions with the testator.—In re Lassak's Will, 56 Hun, 647, 10 N. Y. Supp. 80, judgment affirmed In re Lasak (1892) 131 N. Y. 624, 30 N. E. 112.

[m] (N. Y. 1890) Under Code Civ. Proc. § 829, an heir and legatee cannot, on the probating of a will, testify as to conversations and transactions had by deceased, either with him, or with third persons in his presence, tending to show mental unsoundness and undue influence, as against one who is a legatee in a relatively large amount.—In re Dunham, 121 N. Y. 575, 24 N. E. 932, affirming In re Dunham's Will (1888) 48 Hun, 618, 1 N. Y. Supp. 120.

[n] (N. Y. 1891) A legatee under a prior will, who was the housekeeper and personal attendant of testator, cannot testify as to transactions and communications in immediate connection with the execution of the subsequent will, seen and heard by her, as bearing on testator's capacity, and the question of undue influence and deceit practiced on him.—In re Bartholick, 59 Hun, 616, 12 N. Y. Supp. 640, reversing In re Bartholic (1889) 1 Con. Sur. 373, 5 N. Y. Supp. 842.

[o] (N. Y. 1892) A devisee, present at the execution of the will under which he claims, is not incompetent to corroborate the statements of an attesting witness to the will, as to the due execution thereof.—In re Bernsee, 63 Hun, 628, 17 N. Y. Supp. 669.

[p] (N. C. 1884) A devisee under a prior will cannot testify to conversations with the testator tending to impeach a later will.—Hathaway v. Hathaway, 91 N. C. 139.

[q] (Tenn. 1877) A devisee is a competent witness as to declarations of testator relating to execution of his will.—Beadles v. Alexander, 68 Tenn. (9 Baxt.) 604.

[r] (Tex. 1876) Parties interested in a nuncupative will cannot testify as to statements by or acts of the deceased, which are claimed to constitute such will.—Lewis v. Aylott's Heirs, 45 Tex. 190.

[s] (Tex. 1889) Under Rev. St. art. 2248, providing that in actions by or against the heirs or legal representatives of a decedent, arising out of any transaction with decedent, neither party shall be allowed to testify against the others as to statements by the testator, unless called to testify by the opposite party, testatrix's husband, a legatee under the will, cannot testify in his own behalf as to declarations made by his wife bearing on the validity of the will.—Brown v. Mitchell, 75 Tex. 9, 12 S. W. 606.

[t] (Vt. 1892) In the contest of his wife's will by the husband of testatrix, the fact that he is a legatee under the will does not render him incompetent as a witness.—In re Buckman's Will, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930.

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§ 605. Heir, distributee, or next of kin.

Husband or wife of heir, see post, § 646.
Parties to action, see ante, § 590.
Surviving party to contract or other transaction or cause of action, see post, § 637.

[a] (U. S. 1824) The heirs of a deceased mortgagor are not competent to prove that an assignment by the deceased was without consideration and void; for they are directly interested in the matter in issue, as their title as heirs will be established by setting aside the assignment.—Randall v. Phillips, Fed. Cas. No. 11,555 [3 Mason, 378].

[b] (Colo. 1887) In an action between the administrator of a deceased woman and one claiming property as a gift causa mortis from her, the husband and heir of deceased is not a competent witness on behaf of the administrator as to matters occurring before his wife's death, under Gen. St. 1883, c. 116, § 1, which provides that no party to an action, or person directly interested in the event thereof, shall testify therein of his own motion when any adverse party sues or defends as the executor or administrator of any deceased person.—Conner v. Root, 11 Colo. 183, 17 Pac. 773.

[c] (Ga. 1869) In a suit in equity by an administrator to compel a reconveyance of lands which his intestate had been induced by trickery to convey to defendant for an inadequate consideration, the son is a competent witness for complainant.—Adams' Ex'rs v. Jones' Adm'r, 39 Ga. 479.

[d] (Iowa, 1856) The father of a son deceased without wife or children is incompetent from interest to testify in behalf of the estate in a suit conducted by the son's administrator.—Cushman v. Blakesly, 3 G. Greene, 542.

[e] (Iowa, 1891) In a suit to set aside a distribution by a father among his children, one of the sons, not being a party to the suit, is not incompetent, under Code 1873, § 3639.—Muir v. Miller, 82 Iowa, 700, 47 N. W. 1011, 48 N. W. 1032.

[f] (Ky. 1873) The distributee of an estate is not a competent witness for the administrator of his intestate in an action in the name of the administrator against the administrator of another deceased person.—Manion's Adm'r v. Lambert's Adm'x, 73 Ky. (10 Bush) 295.

[g] (Ky. 1877) The heirs at law of the deceased are competent witnesses in a controversy over the probate of a will.—Milton v. Hunter, 76 Ky. (13 Bush) 163.

[h] (Ky. 1887) A testator devised his estate to his wife for the purpose of educating and maintaining his children. The widow gave all the money to a friend to invest at his discretion, taking no written evidence as to the amounts furnished; upon his death she sued his administrator to recover the money or its value. The widow died, and the trustee appointed under the will was made plaintiff. One of the daughters was offered as a witness to prove that certain bonds had been converted into money, and loaned, and that the widow's friend had evidence of such loans in his possession shortly before his death, as she learned from conversations between her mother and him. *Held*, that the daughter was not a competent witness, under Civ. Code, § 606, subsec. 2, providing "that no person shall testify for himself concerning any verbal statement of, or any transaction with or act done, or omitted to be done by, any one who is dead, * * * except for the purpose and to the extent of affecting one who is living," but that she might testify as to the amount of her father's estate.—Hopkins' Adm'r v. Faeber, 86 Ky. 223, 5 S. W. 749.

[i] (Mich. 1891) In an action against an executor individually by an administrator to recover the value of bonds claimed to have been delivered by plaintiff's intestate to defendant as bailee, an heir of plaintiff's intestate, being interested in the result, though not an actual party to the action, is an "opposite party," within the meaning of the statute, and cannot testify as to any facts equally within the knowledge of defendant's testator.—Penny v. Croul, 87 Mich. 15, 49 N. W. 311, 13 L. R. A. 83.

[j] (N. H. 1861) In an appeal from the decree of the judge of probate allowing the probate of a will, the heirs of the testator, not being appellants, though interested, are not parties in interest, so as to be excluded from testifying as witnesses, though the executor does not elect to testify.—Wheeler v. Towns, 43 N. H. 56.

[k] (N. Y. 1875) In an action brought by an heir at law of a deceased grantor to set aside deeds because of incompetency and for fraud and undue influence, other heirs, not parties to the action, are not interested in the event thereof, within the meaning of Code, § 399, and may testify as to personal transactions and communications between them and the deceased, and to any facts which any other witnesses might testify to. The success of plaintiff would not affect them, as the deeds would still be valid against them. At most, they are only interested in the questions involved; but this does not disqualify them, only going to their credibility.—Hobart v. Hobart, 62 N. Y. 80.

[l] (N. Y. 1884) Code Civ. Proc. § 829, prohibiting witnesses who are interested in the result of the action from testifying to personal transactions or communications between themselves and one at the time of the trial deceased, excludes, in an action to set aside the assignment of a bond, brought by the administrator of the assignor, the testimony of the next of kin relative to such transactions or communications.—Holcomb v. Holcomb, 95 N. Y. 316, reversing (1883) 17 Wkly. Dig. 226.

[m] (N. Y. 1887) Code, § 829, forbidding a person or party interested in the event from testifying against an executor, administrator, or survivor of a deceased person, did not include a second cousin of an intestate, who had no other interest than that of being entitled to participate in the estate of a decedent as one of the next of kin of the intestate in the event of the death of all the first cousins, who were so numerous as to render such contingency exceedingly improbable.—In re Hanley, 9 N. Y. St. Rep. 76, 44 Hun, 539.

[n] (N. Y. 1893) Neither defendant, in an action for the possession of land, nor his brother, to whom a portion of the land would descend in case plaintiff's deed was held invalid, can testify as to the condition of their father, since deceased, at the time of making the deed under which plaintiff claims, since the next of kin are interested in the event of the action, within Code, § 829.—Richards v. Crocker, 66 Hun, 629, 20 N. Y. Supp. 954, judgment affirmed (1894) 143 N. Y. 631, 37 N. E. 827.

[o] (Ohio, 1878) Under Code, § 313, in a suit between administrators of different estates, heirs who will derive the general benefit from the result of the suit, but are not parties thereto, are not disqualified from testifying.—Roland v. Griffiths, 1 Cleve. Law Rep. 211, 7 Am. Law Rec. 115, 4 Ohio Dec. 287, 6 Ohio Dec. 619.

[p] (Pa. 1884) In an action against an executor on an instrument alleged to have been executed by his testator payable to the latter's heirs, *held*, that one of the heirs, who was a subscribing witness, was not competent through interest to prove the execution of the instrument.—Mackrell v. Wolf, 104 Pa. 421.

[q] (Pa. 1891) In a suit by the administrator of a decedent against the administrator of another decedent for a debt due from defendant's

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to plaintiff's intestate, the son of defendant's decedent is not a competent witness on behalf of defendant, as he is interested and disqualified, under Act 1887, § 5, cl. "e" (P. L. 159), prohibiting the testimony of interested parties in actions by and against the representatives of decedent.—Keener v. Zartman, 144 Pa. 179, 22 Atl. 889.

[r] (Pa. 1892) A witness whose only interest is contingent on inheritance from his living children is not incompetent to testify.—Shaeffer's Adm'r v. Geary's Heirs (Com. Pl.) 3 Pa. Dist. R. 418.

[s] (Tenn. 1873) Acts 1867–70, c. 78, § 2 (Thompson & S. St. § 3813d), providing that "in actions or proceedings by or against executors * * * neither party shall be allowed to testify against the other as to any transaction with or statement by the testator intestate," etc., does not render heirs incompetent to testify as to such transactions or statements.—Hughlett v. Conner, 59 Tenn. (12 Heisk.) 83.

[t] (Wash. 1884) Where an estate cannot be affected by the result of a judgment, a distributee thereof is a competent witness.—McCoy v. Ayers, 2 Wash. T. 307, 5 Pac. 843.

[u] (W. Va. 1888) One who would inherit a part of the testator's property but for the will, under Code, c. 130, § 23, is incompetent to speak of the testator's capacity to make the will.—Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

§ 606. —— Effect of insolvency of estate.

[a] (N. Y. 1883) A son of a deceased person is not interested, when the estate is insolvent, within the meaning of Code, § 829, providing that a person interested shall not be examined against an executor, administrator, or survivor of a deceased person concerning a personal transaction between the witness and the deceased person.—Lathrop v. Hopkins, 29 Hun, 608.

[b] (N. C. 1878) In an action involving the validity of a trust deed, where the grantor is dead, his son is a competent witness as to his declarations in regard to the trust, provided the father's estate is insolvent.—Gidney v. Logan, 79 N. C. 214.

§ 607. Executor or administrator.

Husband or wife of executor or administrator, see post, § 647.

Party to action, see ante, § 591.

Surviving party to contract or other transaction or cause of action, see post, § 638.

[a] (Ala. 1885) Where the effect of testimony of an administrator as to declarations made by his intestate, explanatory of his possession of certain property, would be to increase the assets of the estate, such testimony is inadmissible against the opposing party.—Adler v. Pin, 80 Ala. 351.

[b] (Ala. 1895) An administrator who has paid a claim against decedent's estate, and for which he is personally liable by reason of the estate's having proved insolvent, is, as interested, an incompetent witness as to such transactions between the claimant and decedent as would establish the claim as a preferred one.—Hullett v. Hood, 109 Ala. 345, 19 South. 419.

[c] (Ark. 1857) An administrator is a competent witness to prove the loss of a bond for title given by his intestate for an interest in land sold by him in his lifetime, though the administrator has, in pursuance of law, executed a deed with warranty to the purchaser in accordance with the bond.—Moore v. Maxwell, 18 Ark. 469.

[d] (Ga. 1875) Under the evidence act of 1866, on the trial of an issue of devisavit vel non, an executor is a competent witness.—Harris v. Harris, 58 Ga. 678.

[e] (Ga. 1875) An administrator, though a creditor of his intestate, is a competent witness to show, by debts of the estate other than his own, the necessity to sell land, and to show his acts and the state of his account since the administration, but not to prove any debt due to him from the intestate, arising from a partnership between them or otherwise.—Finch v. Creech, 55 Ga. 124.

[f] (Ga. 1887) In a suit by the heirs at law of an intestate, to set aside a deed by the administrator on the ground of fraud, the administrator, when not made a party, is a competent witness to discredit the deed, although the grantee in the deed is dead, if the administrator's liability on his individual warranty in the deed is more than his liability for misappropriation of personalty into which the land conveyed had been converted by agreement between all the parties interested in the estate.—Lasseter v. Simpson, 78 Ga. 61, 3 S. E. 243.

[g] (Ill. 1892) In an action against a decedent's estate for services performed for decedent, the fact that a witness is administratrix of the estate does not disqualify her from testifying on behalf of plaintiff.—Robnett v. Robnett, 43 Ill. App. 191.

[h] (Ind. 1873) On the trial of a claim for services rendered to the decedent in his lifetime, the personal representative cannot testify as a witness, unless called by the opposing party or by the court.—Ginn v. Collins, 43 Ind. 271.

[i] (Kan. 1881) In an action to set aside a will, the executor, who is also a devisee, cannot testify in his own behalf as to personal communications with the testator.—Rich v. Bowker, 25 Kan. 7.

[j] (Me. 1859) In a hearing before a master in chancery to determine the amount of rents and profits due by mortgagees alleged to have been in possession, the administrator of a person who would necessarily have been, if living, a party to the suit, may testify that the mortgagees have received no rents and have had no possession; but he cannot testify as to the value of the premises.—Bailey v. Myrick, 52 Me. 132.

[k] (Mass. 1764) Administrators are incompetent witnesses in matters affecting the estates of their intestates, except where such estates are insolvent.—Allison v. Cockran, Quincy, 94.

[l] (Mo. 1873) In an action by an administrator de bonis non against the sureties of the former administrator, the testimony of the administrator of such predecessor is admissible to prove payments made by such predecessor on demands against the estate.—State, to Use of Burrough, v. Farmer, 54 Mo. 439.

[m] (Mo. 1890) On final settlement of the accounts of an administrator of one who was his former partner, who paid out of the individual estate of the deceased a note executed by both as joint makers, such administrator is not competent to testify on the question whether such note was a joint obligation.—McClelland v. McClelland, 42 Mo. App. 82.

[n] (N. Y. 1873) Persons named as executors in a will, or to whom a legacy is left in such will, are admissible as witnesses before the surrogate on its probate.—Harper v. Harper, 1 Thomp. & C. 351.

[o] (N. Y. 1877) Where, by the will, the person named as executor is given a fixed sum (in addition to what he may become entitled to as commissions) for his services "in taking care of and settling the estate," this does not make him interested in the event of the probate proceedings as a legatee under the will, so as to

render him incompetent as a witness in such proceedings, since he is to render services for the sum given him, under Code, § 399.—Reeve v. Crosby, 3 Redf. Sur. 74.

[p] (N. Y. 1880) The executor is a competent witness to establish the execution of the will.—Rugg v. Rugg, 21 Hun, 383, affirmed (1881) 83 N. Y. 592.

[q] (N. Y. 1892) In the probate of a will a witness who is named as executor is not an interested party.—In re Gagan's Will (Sur.) 20 N. Y. Supp. 426.

[r] (N. Y. 1893) On a contest of a will, the interest of the executor, to the extent of his fees for administration, does not disqualify him as a witness for proponent.—In re Folts' Will, 71 Hun, 492, 24 N. Y. Supp. 1052.

[s] (N. Y. 1894) A mortgage was foreclosed by the deceased mortgagee's executors, and L., one of the executors, purchased the land, and took a deed in his own name. After L.'s death a controversy arose over the ownership of the land, the deceased mortgagee's heirs claiming that the executor purchased for the estate, and the representatives of L. claiming that he bought the land for himself. *Held*, under Code Civ. Proc. § 829, which provides that a person is incompetent to testify as to a personal transaction with a deceased person against the interest of that person's representatives, and in his own interest, that a coexecutor who had an interest in the deceased mortgagee's estate was incompetent to testify as to whether L. paid for the land the alleged purchase price.—Duane v. Paige, 82 Hun, 139, 31 N. Y. Supp. 310.

[t] (N. C. 1885) An administrator, who has been paid money in a representative capacity, is not a competent witness in an action which, if successful, will compel him to refund.—Owens v. Phelps, 92 N. C. 231.

[u] (Pa. 1866) A creditor held a book account against claimant, who was also indebted to decedent. The claimant transferred all his property to decedent, who verbally undertook to pay claimant's indebtedness to creditor, but subsequently refused to do so, whereupon the creditor sued claimant and recovered his claim, and the amount of this recovery claimant set up against decedent's estate. *Held*, that the executor of decedent, being a stranger in interest to him, was a competent witness to prove a settlement between the claimant and the decedent, in which the subject-matter of the claim was included, under Act March 27, 1855 (P. L. 88).—In re Borkley's Estate, 2 Woodw. Dec. 163.

[v] (Pa. 1885) Where the effect of the testimony of an executor or administrator is to relieve himself of liability, though he may have no interest in the estate, such executor or administrator is an incompetent witness.—Appeal of Heydrick, 109 Pa. 610, 1 Atl. 31, distinguishing Cox v. McKean (1867) 56 Pa. (6 P. F. Smith) 243.

[w] (Tex. 1881) A party named as executor in a nuncupative will is incompetent to testify in a suit to establish the will.—Watts v. Holland, 56 Tex. 54.

§ 608. Husband and wife.

Husband or wife of party or other person excluded from testifying, see post, §§ 644–649.

—— *of person from whom party derives title or interest, see* post, § 623.

[a] (Ill. 1880) In a proceeding relating to the separate property of a deceased wife, the husband is a competent witness in behalf of her administrator.—Ledford v. Weber, 7 Ill. App. (7 Bradw.) 87.

[b] (Neb. 1879) The husband of plaintiff in a suit on a note as her separate property has not "a direct legal interest in the result," within Gen. St. p. 582, § 329, which will render him incompetent to testify, where defendant is an executor.—Gillette v. Morrison, 9 Neb. 395, 2 N. W. 853.

[c] (Neb. 1895) Under Code Civ. Proc. § 329, providing that no person having an interest in the result of any civil action, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction had between the deceased person and the witness, a wife cannot testify, in an action to establish the title of her husband in land, as to conversations with the decedent, whose representatives are the adverse parties to the action, though, being a joint heir, she had an interest not adverse to such representatives.—Wylie v. Charlton, 43 Neb. 840, 62 N. W. 220.

[d] (N. Y. 1874) In an action by the executors of a mortgagee to foreclose a mortgage, where the defense was usury, *held*, that the wife of the mortgagor who signed the mortgage was a competent witness for defendant; but her inchoate right of dower rendered her interested in the event of the suit, so as to disqualify her, under Code, § 399, from testifying to a personal transaction with the testator.—Farnsworth v. Ebbs, 5 Thomp. & C. 1, 2 Hun, 438.

[e] (N. Y. 1882) A woman's possible right of dower in the event of her surviving her husband does not disqualify her from testifying, in a proceeding for probate of her husband's father's will, to transactions had with her husband's father, although, if the will should be disallowed, her husband would inherit.—Scherrer v. Kaufman, 1 Dem. Sur. 39.

[f] (N. Y. 1884) In an action against an administratrix to have a mortgage executed to her decedent declared void for want of consideration, plaintiff's husband, who was not a party, was offered as a witness; and it appeared that he originally owned the mortgaged premises, and conveyed them to W., who executed the mortgage in question, and thereafter deeded the premises to the plaintiff. *Held*, that the allegation in the answer, unsupported by proof, that the consideration for the mortgage was a debt due the deceased from W., was not sufficient to establish the fact, so as to reject the witness on the ground of interest.—Wilson v. Munoz, 6 Civ. Proc. R. 71.

[g] (N. Y. 1884) In an action against an administratrix to have a mortgage executed to her decedent declared void for want of consideration, plaintiff's husband, who was not a party, was offered as a witness; and it appeared that he originally owned the mortgaged premises, and conveyed them to W., who executed the mortgage in question, and thereafter deeded the premises to plaintiff. *Held*, that he had no interest in the action and was a competent witness.—Wilson v. Munoz, 6 Civ. Proc. R. 71.

[h] (N. Y. 1886) A husband has not a disqualifying interest in a suit involving the title to his wife's land.—In re Clark, 40 Hun, 233.

[i] (N. Y. 1887) In proceedings against the estate of a decedent by a married woman to collect a claim owing to her individually, her husband is not an interested party, and is not prohibited from testifying, under Code Civ. Proc. § 829, forbidding a person or party interested from testifying in their own behalf in proceedings against the executor or administrator of a deceased person.—Burley v. Barnhard, 9 N. Y. St. Rep. 587.

[j] (N. Y. 1887) In an action against the heirs of a deceased trustee, to have certain lands purchased by the trustee with the trust funds, and conveyed to him individually, declared to be trust property, and for an accounting between the various beneficiaries of the trust, the whole of whom are made parties defendant, the evi-

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dence of the husband of a beneficiary who was entitled to the income of the estate which was in arrear, and who has died since the commencement of the action, not offered or given in his own behalf, as to declarations of such deceased trustee concerning the disposal of the trust fund, is not incompetent under Rev. St. § 829.—Conklin v. Snider, 104 N. Y. 641, 9 N. E. 880.

[k] (N. Y. 1888) In an action to charge defendants as trustees of certain stocks alleged to be plaintiff's, plaintiff's husband, who was alleged to have fraudulently delivered the stocks to defendants' testator, is incompetent to testify, as a witness for her, whether he delivered the stocks to testator, and under what circumstances, under Code Civ. Proc. § 829, disqualifying a party or person interested in the event of an action against a personal representative from testifying to a personal transaction had with the decedent, as he would be relieved from responsibility for his fraud by a recovery against defendants.—Redfield v. Redfield, 110 N. Y. 671, 18 N. E. 373.

[l] (N. Y. 1889) A parol agreement was sought to be enforced by which it was alleged that plaintiff's father was to give a deed of his land to her, and take back a lease to himself and wife during their respective lives. *Held*, the father having died, that plaintiff's husband, who was interested as prospective tenant by the curtesy, was incompetent, under Code Civ. Proc. § 829, to testify to the father's declarations in support of the alleged contract.—Devinney v. Corry, 52 Hun, 612, 5 N. Y. Supp. 289, judgment affirmed Same v. Corey (1891) 127 N. Y. 655, 28 N. E. 254.

[m] (N. Y. 1889) Plaintiff's wife is interested in the event of the action, within Code, § 829, where her inchoate right of dower in certain land would attach on recovery of a judgment by plaintiff.—Erwin v. Erwin, 54 Hun, 166, 18 Civ. Proc. R. 11, 7 N. Y. Supp. 365.

[n] (N. Y. 1890) In an action to foreclose a mortgage, defendant's husband was a competent witness to prove that the consideration of the mortgage given by defendant was a gambling debt of the husband, although the mortgagee had died before suit, since the husband was not an interested witness, within Code Civ. Proc. § 829.—Luetchford v. Lord, 57 Hun, 572, 11 N. Y. Supp. 597, judgment reversed (1892) 132 N. Y. 465, 30 N. E. 859.

[o] (N. Y. 1891) In an action by a married woman to recover back money paid by her on an oral contract for the purchase of real estate from executors of the deceased vendor, her husband, having no interest in the result otherwise than that his feelings may be enlisted in favor of her success, is not "interested in the event," within Code Civ. Proc. § 829, so as to be precluded from testifying to a transaction or conversation with the deceased.—Fogal v. Page, 59 Hun, 625, 13 N. Y. Supp. 656.

[p] (N. Y. 1892) A tenant by the curtesy initiate is not incompetent to testify, by reason of interest, as to acts and declarations of a testatrix showing the validity of a will under which his wife claims as devisee.—Bowen v. Sweeney, 63 Hun, 224, 22 Civ. Proc. R. 79, 17 N. Y. Supp. 752.

[q] (N. Y. 1894) A husband's right of curtesy initiate does not give him such an interest in his wife's land as to disqualify him, under Code Civ. Proc. § 829, from testifying in favor of his wife as to communications with decedent concerning the land.—Cooper v. Monroe, 77 Hun, 1, 28 N. Y. Supp. 222.

[r] (N. Y. 1895) In an action to determine the validity of the will, the wife of a devisee, who is made a defendant with her husband on account of her contingent dower interest in the land devised to him, is incompetent to testify, as a witness on behalf of the defendants, to a conversation with testator, under Code Civ. Proc. § 829, providing that a person interested cannot be examined as a witness to such transactions in his or her own behalf.—Johnson v. Cochrane, 91 Hun, 165, 36 N. Y. Supp. 283.

[s] (N. Y. 1895) Code Civ. Proc. § 829, providing that on the trial of an action a person interested in the event shall not be examined as a witness in his own behalf against the executor of a deceased person, does not exclude the testimony of the husband of the mortgagor in an action of foreclosure.—Humphrey v. Sweeting, 92 Hun, 447, 36 N. Y. Supp. 967.

[t] (S. C. 1891) Under Code, § 400, which provides "that no * * * person who has a legal or equitable interest which may be affected by the event of the action * * * shall be examined in regard to any transaction * * * between such witness and a person at the time of such examination deceased," a husband may testify as to conversations had with a deceased mortgagee who held a mortgage upon the separate property of the wife, when she seeks to enjoin the sale of the premises upon the ground that the husband received the benefits of the mortgage.—Griffin v. Earle, 34 S. C. 246, 13 S. E. 473.

[u] (Tex. 1896) In a suit by an administrator to recover money belonging to his intestate's estate, where the judgment against defendant, if rendered, would be collectible out of the community property, defendant's wife is an incompetent witness as to transactions between defendant and deceased, by reason of interest, within Sayles' Civ. St. art. 2248.—Paddock v. Lewis, 13 Tex. Civ. App. 265, 35 S. W. 320.

§ 609. Widow.

Party to action, see ante, § 592.

Surviving party to contract or other transaction or cause of action, see post, § 639.

[a] (Ga. 1869) In a suit in equity by an administrator to compel a reconveyance of lands which his intestate had been induced by trickery to convey to defendant for an inadequate consideration, the widow is a competent witness for complainant.—Adams' Ex'rs v. Jones' Adm'r, 39 Ga. 479.

[b] (Ill. 1875) The fact that the husband is dead does not render his widow incompetent as a witness against his administrator, when her property is replevied in a suit by a person claiming under her against the administrator.—Primmer v. Clabaugh, 78 Ill. 94.

[c] (Ill. 1877) Where it is sought to partition lands among a portion of the heirs of a decedent, and to exclude one heir on the ground of an agreement between him and deceased whereby he was to accept a conveyance of certain land in full of his share, the widow, who is not a party to the action, is a competent witness to testify as to a conversation and transaction which took place with deceased in his lifetime.—Galbraith v. McLain, 84 Ill. 379.

[d] (Ill. 1880) In an action to foreclose a mortgage, the widow of the mortgagor, as a legatee under his will, is not a competent witness to prove the defense of usury in the mortgage notes.—Mester v. Zimmerman, 7 Ill. App. (7 Bradw.) 156.

[e] (Ill. 1892) The fact that Rev. St. c. 39, § 1, subd. 4, gives a widow, under certain circumstances, one-third of her husband's personalty, does not disqualify her from testifying on behalf of a third person suing the estate for services rendered to decedent.—Robnett v. Robnett, 43 Ill. App. 191.

[f] (Ind. 1872) Under the second proviso in Act March 11, 1867 (3 Rev. St. p. 559), defining who shall be competent witnesses, the word "heirs" includes all persons who take any por-

tions of the estate under the statute of descents, or who would have thus taken did they not take by virtue of a will. A widow taking by will is an heir.—Peacock v. Albin, 39 Ind. 25; Fitzgerald v. Cox, Id. 84.

[g] (Iowa, 1861) In an action against an administrator for boarding the wife of the intestate, she is a competent witness; Revision 1860, § 3980, affecting only the competency of a party or person in whose behalf an action is brought against an administrator of a decedent.—Romans v. Hay's Adm'r, 12 Iowa, 270.

[h] (Iowa, 1864) A widow is a competent witness in favor of plaintiff, in an action against her husband's heirs, to testify to a conversation between her husband and plaintiff.—Pratt v. Delavan, 17 Iowa, 307.

[i] (Me. 1859) In a suit brought by an executor, the widow of the testator is, under the statute, a competent witness for him, notwithstanding the interest which she may have in the suit. —Walker v. Sanborn, 46 Me. 470.

[j] (Mass. 1869) In an action by an executor on a note made to his testator, the testator's widow is a competent witness on his behalf to show a part payment made on the note during her husband's lifetime.—Litchfield v. Merritt, 102 Mass. 520.

[k] (Mo. 1872) Upon the trial of a petition to require certain of the distributees interested in a decedent's estate, to account for and refund advancements they have received, so that the shares of other distributees may be made equal, the widow of the decedent is a competent witness; for the decedent could have no interest in this controversy.—Spradling v. Conway, 51 Mo. 51.

[l] (Mo. 1878) A widow is not a competent witness to prove a contract made by her deceased husband.—Willis v. Gammill, 67 Mo. 730.

[m] (N. Y. 1861) A widow, whose interest under either of two wills would be the same, the execution of the first being duly shown, is a competent witness for those contesting the second will, as the presumption in case of its invalidity is that the first will is valid; and this, although her interest would be to avoid both wills.—Talbot v. Talbot, 23 N. Y. 17.

[n] (N. Y. 1883) One who, if a will were declared void, would have an inchoate right of dower in the testator's lands, is so interested in the event of a suit to declare the will void as to be precluded, under the statute, from testifying as to personal transactions or communications had with the deceased.—Steele v. Ward, 30 Hun, 555.

[o] (N. Y. 1884) In an action brought by the heirs of a deceased grantor to set aside a conveyance made by him, his widow, who, as his wife, joined in the conveyance, is "a person interested in the event of the action," within the meaning of Code, § 829, and therefore incompetent to testify to personal transactions or communications between herself and the deceased.—Sanford v. Ellithorp, 95 N. Y. 48, affirming Same v. Ellithorpe (1882) 14 Wkly. Dig. 154.

[p] (N. Y. 1888) Where plaintiff claims land as son and only heir of the deceased owner, his mother is not competent to prove her marriage with deceased, as, in the event of recovery, she would be entitled to dower.—Eisenlord v. Eisenlord, 49 Hun, 340, 2 N. Y. Supp. 123, judgment reversed Same v. Clum (1891) 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836.

[q] (N. Y. 1891) In ejectment, where plaintiff claims as the son of a decedent, and defendants claim as decedent's sole heirs, on the ground that plaintiff is illegitimate, plaintiff's mother has no "interest in the event" of the action sufficient to render her incompetent to testify as to her marriage with decedent before plaintiff's birth, within the meaning of Code Civ. Proc. § 829, relating to testimony as to transactions with a decedent, as the judgment in such action would not be admissible on her behalf in any action she might bring for dower in the land.—Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836, reversing Same v. Eisenlord (1888) 49 Hun, 340, 2 N. Y. Supp. 123.

[r] (Ohio, 1884) In an action to recover realty, in which the question was whether the deed under which plaintiffs claimed from their deceased father was ever executed and delivered, *held*, that his widow, not being a party, was a competent witness, though her dower right might be involved.—Keyes v. Gore, 42 Ohio St. 211.

[s] (Pa. 1881) A widow may testify, in support of claims against her husband's estate, with regard to ordinary business transactions in which third persons have participated.—Appeal of Robb, 98 Pa. 501.

[t] (Pa. 1893) A widow who has received from the administrator payment of a claim against her husband's estate in the lifetime of a witness who could have proved such claim, not being liable over for said voluntary payment, is a competent witness to prove her claim before an auditor on exceptions to said payment.—In re Fulmer's Estate (Orph. Ct.) 3 Pa. Dist. R. 457.

[tt] (Pa. 1895) The mere fact that witness was the widow of a deceased party in interest did not render her incompetent to testify, her incompetency being determinable by that to which she attempted to testify.—Dicken v. Winters, 169 Pa. 126, 32 Atl. 289.

[u] (S. C. 1887) In an action of ejectment, where both parties claim title under a common grantor, the widow of the grantor, who purchased at a sale under an execution against her husband, is, under Code, § 400, competent to testify whether, when she purchased, it was understood between her and her husband that she was to take subject to a mortgage by her husband, she having no interest in the result of the action.—Blohme v. Lynch, 26 S. C. 300, 2 S. E. 136.

[v] (Tenn. 1871) The widow of a deceased trustee is not a competent witness to prove that the trustee had received a certain sum of trust money, part of which he loaned and the remainder had been paid over by her to his administrators.—State v. McAuley, 51 Tenn. (4 Heisk.) 424.

[w] (Tenn. 1872) The widow of a deceased testator is an incompetent witness on a contest of his will, whether it be attacked upon the ground of fraud or undue influence exerted by her, or upon the ground of testamentary incapacity.—Wisener v. Maupin, 61 Tenn. (2 Baxt.) 342.

§ 610. Guardian and ward.

Party to action, see ante, § 593.

[a] (Ga. 1895) Under Acts 1889, p. 86, § 1, subd. d, plaintiff's guardian was a competent witness to testify on an issue whether defendant's intestate took the money sued for from the guardian with knowledge that it belonged to plaintiff, since the guardian's interest in fixing liability on the estate of defendant's intestate was counterbalanced by the fact that he would be liable over to the administrator of that estate for any amount which might be recovered from the latter by plaintiff.—Crawford v. Parker, 96 Ga. 156, 23 S. E. 196.

[b] (Neb. 1896) In an action by heirs to determine the validity of a gift by their ancestor to minor children of one of the heirs, the parent heir, being also the guardian and trustee of

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the defendant children, is incompetent to testify in their behalf as to transactions with the decedent.—Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

[c] (Pa. 1895) A ward is incompetent to testify in proceedings against the estate of his deceased guardian, and this incompetency extends to an action against the surety on the deceased guardian's bond.—In re Miller's Estate (Orph. Ct.) 26 Pittsb. Leg. J. (N. S.) 344.

§ 611. Trustee and beneficiary.

Party to action, see ante, § 594.

Surviving party to contract or other transaction or cause of action, see post, § 634.

[a] (Ala. 1891) Under Code 1886, § 2765, providing that "there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that neither party shall be allowed to testify against the other as to any * * * statement by any deceased person whose estate is interested in the result," a trustee, under testatrix's will, of property part of which is in the hands of a firm of which he is a member, who is individually indebted to testatrix's estate, is competent, in an action to which he is not a party, for rent due said estate, to testify to testatrix's statements, since he is not "interested in the issue."—Cromwell v. Horton, 94 Ala. 647, 10 South. 358.

[b] (Ga. 1875) Land was settled on a trustee for the use of the wife and family of A., and at the death of A. and wife to their children. A., purporting to act as "trustee of his wife," sold the property to B. *Held* that, on the trial of a bill filed by the children against B.'s executor to recover the property, A. was a competent witness to show that B. knew the truth as to the trust and its nature, and acted with full knowledge thereof.—Virgin v. Wingfield, 54 Ga. 451.

[c] (Ga. 1878) A cestui, for whose benefit a suit is brought by a trustee, is not competent to testify as to a transaction with a party to the cause of action who is dead.—Gabbett v. Sparks, 60 Ga. 582.

[d] (Ga. 1891) In an action by the beneficiaries of a trust fund against the surviving members of a firm which was alleged to have purchased land from the trustee with knowledge of its trust character, the trustee is prima facie incompetent as a witness for the plaintiffs to affect the partnership with notice of the trust, by means of a transaction or communication between himself and a member of the partnership now deceased, since Witness Act 1889, cl. "b," renders a party to an action against partners incompetent to testify in his own favor as to a transaction with a deceased partner, and clause d renders a "person interested in the result of the suit" incompetent to testify if he would be incompetent as a party.—Morgan v. Johnson, 87 Ga. 382, 13 S. E. 710.

[e] (N. Y. 1889) One who is appointed trustee to carry out the provisions of a will has not such an interest in a proceeding to revoke the probate as will disqualify him under Code Civ. Proc. § 829, from testifying as to personal transactions with testator.—In re Palmer's Will, 52 Hun, 612, 5 N. Y. Supp. 213.

[f] (Ohio, 1884) A., holding the legal title to land in trust for the grantor, conveyed it, without the knowledge of the grantor, to another on the same trust. *Held*, that A. was a competent witness for the grantor in an action by him against the heirs of the second grantee to enforce the trust, since he was not a necessary party to the action.—Ryan v. O'Connor, 41 Ohio St. 368.

[g] (Pa. 1893) A trustee under an express trust in a deed, who is also one of the beneficiaries thereunder, is incompetent to testify as to transactions with a decedent, adversely to the interests of the decedent's grantees, under Act May 23, 1887, § 5, cl. "e."—Brothers v. Mitchell, 157 Pa. 484, 27 Atl. 760.

§ 612. Parties to bills and notes.

Party to action, see ante, § 595.

Surviving party to contract or other transaction or cause of action, see post, § 631.

Transferror from whom party derives title, see post, § 622.

[a] (U. S. 1894) A joint maker of a note, though interested in having certain securities held to have been put up as collateral for the note by another maker, may, in a suit to which he is not a party, testify to declarations of the deceased payee relative thereto.—McMullen v. Ritchie (C. C.) 64 Fed. 253.

[b] (Ala. 1890) In an action by the indorsee of a note against the administrator of a deceased indorser, the maker, not being a party or beneficiary, is not prohibited from testifying as to transactions with deceased, to show that the note was for deceased's accommodation, by Code, § 2765, which provides that neither party shall be allowed to testify against the other as to any transaction with any deceased person whose estate is interested in the suit.—Morris v. Birmingham Nat. Bank, 93 Ala. 511, 9 South. 606.

[c] (Ga. 1880) In a contest between the indorser and the payee of a note, not affecting the maker's liability, he is not rendered an incompetent witness by the payee's death.—Freeman v. Bigham, 65 Ga. 580.

[d] (Ill. 1890) In trover by an administrator against a bank for notes belonging to the intestate, but pledged to defendant by his son, defendant offered the maker of the notes to testify as to declarations made by the intestate to show the son's authority to deal with the notes as he did. The maker had paid interest to the son after the father's death. *Held*, that he was incompetent, though not a party; for, if the administrator recovered, he would be liable to pay again the interest already paid to the son.—First Nat. Bank v. Bressler, 38 Ill. App. 499.

[e] (Ill. 1891) In an action on a note against the administrator of a deceased signer, the payee is not competent to testify that the executrix of the person to whom he had indorsed it had released him as indorser.—Bevan v. Fitzsimmons, 40 Ill. App. 108.

[f] (Ill. 1891) It is error, in an action of trover brought by an administrator to recover the value of certain notes alleged to have been converted by defendant to his own use, to allow the maker and others interested adversely to the administrator to testify in behalf of defendant.—Bressler v. Baum, 42 Ill. App. 190.

[g] (Ind. 1878) In an action by an administrator on a note made payable to the decedent, the maker of the note is a competent witness for the widow, who has intervened, claiming the note as her private property.—Lynam v. Buckner, 60 Ind. 402.

[h] (Iowa, 1882) In an action to enforce a judgment on a note in favor of the estate of a decedent against the indorser, the principal debtor was a competent witness as to transactions between the indorser and the deceased, as he had nothing to gain or lose, whatever the result might be.—Fuller v. Lendrum, 58 Iowa, 353, 12 N. W. 340.

[i] (N. Y. 1878) In an action on a note, made by W. and signed by defendant for accommodation, to the order of B., who died before the suit, testimony by W. as to transactions with B. was not incompetent, under Code Civ. Proc.

§ 829, providing that a party or person interested in the event, or a person through whom such party or person derives his title, shall not be examined against the executor, administrator, or survivor of a deceased person as to transactions had with the decedent.—Allis v. Stafford, 14 Hun, 418.

[j] (N. Y.) Notes signed with G.'s name, by A., his agent, were delivered to B., and owned by B. at the time of B.'s death. One of them had been indorsed to B. by the payee, F.; but F. had never been charged as indorser thereon. In an action on the notes by B.'s administrator, *held*, that F. was a competent witness for G to prove B.'s declarations to G. that the notes were paid.—(1878) Nearpass v. Gilman, 16 Hun, 121, affirmed (1887) 104 N. Y. 506, 10 N. E. 894; (1887) Id., 25 Wkly. Dig. 459.

[k] (N. Y. 1880) In an action against the indorser's executors, the maker has not such an interest as precludes him, under Code, § 829, from testifying concerning a personal transaction between himself and the deceased indorser.—New York Nat. Exch. Bank v. Jones, 9 Daly, 248.

[l] (Pa. 1893) Intestate, a short time before his death, sent for H., and told him that he had a certain sum deposited in bank, which he wanted to give to T., whereupon intestate delivered his check therefor to H., drawn to the latter's order, and H. in turn gave a duebill in the same sum to T. *Held*, where such check was drawn to H.'s order simply for convenience, and he had no beneficial interest therein, that he was competent to prove the declarations of decedent when he signed the check.—In re Taylor's Estate, 154 Pa. 183, 25 Atl. 1061, 18 L. R. A. 855; Appeal of Ruffell, Id.

§ 613. Principal and surety.

Surviving party to contract or other transaction or cause of action, see post, § 632.

[a] (Ala. 1882) In a proceeding to allot to a widow and infant children a homestead, levied on under an execution against deceased, a surety for the debt on which the judgment was rendered is incompetent to testify to any transaction between plaintiff and deceased.—Keel v. Larkin, 72 Ala. 493.

[b] (Ga. 1895) Under Acts 1889, p. 86, § 1, subd. d, a surety on the bond of plaintiff's guardian was incompetent to testify on an issue whether defendant's intestate took the money sued for from the guardian with knowledge that it belonged to plaintiff, since he was interested in the result of the suit.—Crawford v. Parker, 96 Ga. 156, 23 S. E. 196.

[c] (Ill. 1874) The surety of an administrator is not a competent witness in an action by the latter on a note given to his intestate as to an alleged alteration of the note.—Lowman v. Aubery, 72 Ill. 619.

[d] (Ill. 1880) In a bill by an alleged surety against the administrator of the payee of a note to restrain the prosecution of a suit thereon, on the ground that the payment of the note had been extended without his knowledge, the principal in the note is a competent witness for complainant to show said extension.—Combs v. Bradshaw, 6 Ill. App. (6 Bradw.) 115.

[e] (Ill. 1882) In a suit against the executor of one of two makers of a note, the surviving maker, for whom the other maker was a surety, may testify in behalf of plaintiff.—Sconce v. Henderson, 102 Ill. 376.

[f] (Ill. 1893) In an action against a surety, his principal is a "person directly interested in the event thereof," within the meaning of Rev. St. 1892, c. 51, § 2, par. 2, making such persons incompetent as witnesses where the adverse party represents a decedent.—Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248.

[g] (Ind. 1894) Plaintiff having paid a note signed by himself, decedent and R., as joint makers, sought to recover the amount from decedent's estate, claiming to have been only surety for decedent. He alleged that the note was a renewal of a note in which R. was principal, but that when the renewal note was made, because of some transactions between decedent and R., it was agreed that decedent should be the principal. *Held*, that, because of his interest, R. was incompetent to testify for plaintiff, under Rev. St. 1881, § 498.—Thornburg v. Allman, 8 Ind. App. 531, 35 N. E. 1110.

[h] (Ky. 1895) The maker of two notes having different sureties thereon, and who cannot gain, whatever be the determination as to the relative liability of the sureties, may testify to a transaction between all parties, by which the responsibility of certain sureties was assumed by the others, though one of the sureties be dead.—Adams v. Brown, 32 S. W. 282.

[i] (N. Y. 1879) A surety on the bond of a nonresident executor is "interested," within Code, § 399, and incompetent to testify on the principal's behalf to a personal transaction between him and the deceased.—Miller v. Montgomery, 78 N. Y. 282.

[j] (N. Y. 1880) In an action by an administrator on a note signed by H. as surety, wherein H.'s defense was that the note had been altered without his consent, F., the maker, is "a person interested in the event," within Code, § 829, and incompetent to testify for H.; and this, although plaintiff afterwards swore to the facts to which F. was erroneously allowed to testify.—Church v. Howard, 79 N. Y. 415, reversing (1879) 17 Hun, 5.

[k] (N. Y. 1889) In an action on a guaranty, the principal debtor was not made a party, nor was any notice given to him to defend the suit, nor did he undertake the defense. *Held* that, as the judgment would not bind him, he was not interested in the event, within Code Civ. Proc. § 829, disqualifying such a person from testifying against the executor of a deceased person.—Wallace v. Straus, 113 N. Y. 238, 21 N. E. 66.

[l] (N. C. 1877) In an action on a bond against the executor of a deceased obligor, the principal obligor is a competent witness to prove the execution of the bond by defendant's testator.—Peebles v. Stanley, 77 N. C. 243.

[m] (Pa. 1893) One is not incompetent to testify to a claim against a decedent's estate, as being a person in interest, because he is a surety of the claimant, and may in a certain contingency become his creditor.—In re Spotts' Estate, 156 Pa. 281, 27 Atl. 132; Appeal of Beetem, Id.

[n] (S. C. 1872) Under Code, § 415, allowing no witness, except the representative of a deceased person, to be excluded by reason of his interest in the event of the action, in an action by a trustee, appointed by the court in place of a former deceased trustee, against a surety in a bond, the principal obligor is a competent witness for defendant to prove payment of the bond to the deceased trustee.—Guery v. Kinsler, 3 S. C. (3 Rich.) 423.

§ 614. Mortgagor and mortgagee.

Party to action, see ante, § 596.

Surviving party to contract or other transaction or cause of action, see post, § 636.

[a] (U. S. 1871) In a proceeding by an assignee for relief from a mortgage for usury, the mortgagors, though not parties, are not competent against the executors of the deceased mortgagee, to testify as to transactions with or

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statements made by testator. Act March 3, 1865.—Bromley v. Smith, Fed. Cas. No. 1,922 [2 Biss. 511].

[b] (Ill. 1883) On a bill against the heir of a mortgagor to foreclose the mortgage, which was assigned to plaintiff, with the notes secured thereby, without recourse, after the death of the mortgagor, whose estate is insolvent, the mortgagee, being liable upon his implied warranty that the face value of the note was actually due, cannot testify as to why certain payments made by the mortgagor are not applied on the mortgage debt, as, according to defendant's claim, they should have been.—Plain v. Roth, 107 Ill. 588.

[c] (Neb. 1882) A mortgagor called to testify in behalf of one of two mortgagees against the administrator of the other mortgagee in a contest between them for priority, though he disclaims all interest in the controversy, is liable for costs, and therefore, having a "direct legal interest in the result of the cause," is incompetent to testify.—Ransom v. Schmela, 13 Neb. 73, 12 N. W. 926.

[d] (N. H. 1865) Upon a writ of entry to foreclose a mortgage, it appeared that the mortgagor had formerly conveyed by a warranty deed two-thirds of his equity of redemption to defendant, the tenant, but that before the commencement of the action the tenant reconveyed the premises to the mortgagor by a quitclaim deed; that defendant had released the mortgagor from all liability to him arising out of the action; and that the mortgagor had never assumed the defense, or been notified to do so. *Held*, that the mortgagor was not such a party in interest as to be an incompetent witness for the defense, although plaintiff was an administrator who did not elect to testify.—Townsend v. Riley, 46 N. H. 300.

[e] (N. Y. 1882) In an action brought to foreclose a mortgage, a subsequent mortgagee is a party interested in the event, within Code, § 829, forbidding testimony of a party or person interested as to transactions with a decedent. —Hadsall v. Scott, 26 Hun, 617.

[f] (N. Y. 1892) 1 Rev. St. p. 663, §§ 16, 17, provide that mortgages on land, executed in consideration of money won at betting or gaming, shall be void as to the mortgagees, and shall inure to the sole benefit of such person as would have been entitled to the mortgaged property if the mortgagor had died immediately upon the execution of the mortgage. *Held* that, in an action by the assignee of a deceased mortgagee to foreclose a mortgage, as the mortgagor would be released from personal liability on the bond to secure which the mortgage was given, he has such an interest in the result as to preclude him, under Code Civ. Proc. § 829, from testifying that the mortgage and bond were given to secure the payment of money won at gaming.—Luetchford v. Lord, 132 N. Y. 465, 30 N. E. 859, reversing (1890) 57 Hun, 572, 11 N. Y. Supp. 597.

[g] (S. C. 1884) One who formerly, when he was clerk of court, held as such a senior mortgage, is not incompetent, in a suit to foreclose a junior mortgage, to testify to communications between the deceased mortgagee and himself relating to the ownership of the land.—Moffatt v. Hardin, 22 S. C. 9.

[h] (Wash. 1896) In an action to cancel a mortgage given to defendants' intestate, a person not a party to the record, but who once owned an interest in the property, which he had conveyed to one of the plaintiffs by a deed, absolute in form, but accompanied by a contemporaneous agreement for reconveyance on payment of the debt due his grantee, is interested in the suit adversely to defendants, and hence cannot testify in relation to transactions with intestate.—Thorne v. Joy, 15 Wash. 83, 45 Pac. 642.

§ 615. Principal and agent or other representative.

Agent of party or person interested in general, see ante, §§ 577–579.

Surviving party to contract or other transaction or cause of action, see post, § 640.

[a] (Ala.) In an action against an administrator to charge the estate with a debt contracted by an agent, whose authority is denied, the agent is a competent witness to prove his agency and the extent of his authority; Code, § 2765, excluding the testimony of persons interested in the estate of a decedent, not applying to such a case.—(1896) Garrett v. Trabue, 82 Ala. 227, 3 South. 149; (1891) Davis v. Davis, 93 Ala. 173, 9 South. 736.

[b] (Fla. 1896) In an action by an administrator against the trustees of the internal improvement fund on interest coupons, payable to bearer, defendants alleged that the coupons belonged to them; that possession of part of them was acquired by plaintiff's intestate by his taking them up as agent for defendants; and possession of the remainder was acquired through intestate's settlement as agent with C. a former treasurer of defendants. *Held* that, conceding C. to be otherwise incompetent to testify as to the fact that he settled with intestate, by reason of interest in the event of the suit, since he acted in the settlement as agent of the trustees, he was not precluded from testifying as to those matters.—Adams v. Board of Trustees of Internal Imp. Fund, 37 Fla. 266, 20 South. 266.

[c] (Ga. 1877) In a suit against a sheriff for a default by his deputy in not paying over money collected by the latter on a fi. fa., the testimony of the deputy that, after he had collected such money, he turned it over to plaintiffs' attorney, and then borrowed a portion thereof, is inadmissible after the attorney's death.—Odom v. Gill, 59 Ga. 180.

[d] (Ga. 1879) An agent not a party to a suit is a competent witness to show the agency, not disclosed at the time of the transaction in controversy, although his principal may be dead, and although the effect of establishing the agency may be to make the estate of the principal liable, instead of the agent individually.—Lowrys v. Candler, 64 Ga. 236.

[e] (Ga. 1880) On a daughter's bill against S., the grantor, and D., the administrator of M., her husband, to reform a deed, it appeared that B., her father, paid to S. the purchase money, and the deed was made to M. *Held*, on an issue as to whether it should have been made to M. as trustee for her, that M.'s death did not prevent B. from testifying as to instructions given by him to M. in regard to the manner of taking the title, while M. was acting as B.'s agent for that purpose.—Davis v. McLester, 65 Ga. 132.

[f] (Ga. 1883) In an action by a successor of a trustee against one of two attorneys to recover a sum collected by the attorneys and trustee as joint litigants, the trustee being dead, the attorney, not a party, was a competent witness to testify as to conversation between defendant and the deceased trustee.—Bigham v. Coleman, 71 Ga. 176.

[g] (Ga. 1891) An attorney was employed only to procure a bond for one charged with a criminal offense, and did so, taking from him a deed to indemnify him against loss on account of said bond, and afterwards the defendant in such criminal case borrowed money from another to settle the same, and the attorney, at the request of said defendant, quitclaimed the property to the lender as a security for such money. *Held*, that in a controversy as to the title of the land between the estate of the lender and that of said defendant, both being dead, the

attorney was a competent witness to prove the above-recited facts, and also an admission by the lender that the money he advanced upon such quitclaim deed had all been repaid, since he had no interest in the matter and was not at the time the agent or attorney of either of them.—Rodgers v. Moore, 88 Ga. 88, 13 S. E. 962.

[h] (Ind. 1890) Where money was deposited with the cashier of a bank to be given on the death of the depositor to certain third parties, the cashier is the trustee for the donees, and not the agent of deceased, and is a competent witness in an action involving the validity of the gift.—Devol v. Dye, 123 Ind. 321, 24 N. E. 246.

[i] (N. Y. 1884) A deputy sheriff, liable for an official act to the sheriff, is interested in the event of an action by the sheriff against the executors of a deceased indemnitor to recover damages because of such act, and therefore cannot testify as a witness in such action.—Barton v. Scramling, 31 Hun, 467.

[j] (N. C. 1887) An attorney to whom the note sued on had formerly been intrusted by the intestate for collection upon an agreement, and who, upon the death of the intestate, had returned the note to his administrator without collecting anything, is not incompetent under Code, § 590, rendering "a person interested in the event" incompetent as to communications or transactions with the deceased person in an action by or against his representative.—White v. Beaman, 96 N. C. 122, 1 S. E. 789.

[k] (N. C. 1887) In an action against the estate of an administrator to recover amounts fraudulently credited to him in the settlement of his accounts as such, and alleging fraud and collusion between him and others in the sale of real estate by him as administrator, a witness who acted as attorney for the collection of certain notes against the estate is not disqualified, by reason of his compensation, from testifying as to the terms of such collection.—Grant v. Hughes, 96 N. C. 177, 2 S. E. 339.

§ 616. Partners.

Party to action, see ante, § 597.

Surviving party to contract or other transaction or cause of action, see post, § 643.

[a] (Ala. 1873) In an action on a note payable to plaintiff's intestate, S., where the defense was that by the direction of S. the principal debtor had paid the note to a mercantile firm of which his codefendant was a partner, and which had indemnified him against the suit, *held*, that another partner in the firm, though not a party to the record, was, within the meaning of the proviso in Rev. Code, excluding a "party" from testifying "as to any transaction with or statement by the testator or intestate."—Stallings' Adm'r v. Hinson, 49 Ala. 92.

[b] (Ala. 1888) Plaintiff did business under the name of H. & Son. The son had no interest in the business, but was only a clerk in his father's store. It did not appear that there were any debts arising out of the business, or that the father was not able to meet any liabilities that might exist. *Held*, that the liability for debts incurred by the son was too remote an interest to disqualify him, under Code 1886, § 2765, to testify in an action to recover land sold under a mortgage executed by a decedent to his father as to the circumstances under which the mortgage was executed.—Huckaba v. Abbott, 87 Ala. 409, 6 South. 48.

[c] (Ga. 1883) H., as a member of a firm, contracted with T. H. left the firm, which continued to do business with T. In a suit between T. and the firm, arising out of the transactions since H. left the firm, *held*, that H. was a competent witness, T. being dead, and that the case fell within none of the exceptions in the statute.—Flournoy v. Wooten, 71 Ga. 168.

[d] (Ill. 1882) A. and B., partners in a firm formerly consisting of A., B., and C., were not competent witnesses in a suit brought against the estate of C., deceased, upon a note signed by the firm. Although A. and B. were not defendants in the suit, they were directly interested in its result.—Hurlbut v. Meeker, 104 Ill. 541.

[e] (Ind. 1896) Under Rev. St. 1894, § 506 (Rev. St. 1881, § 498), providing that in suits in which an estate is interested, and to which its administrator or executor is a party, "any person who is a necessary party to the issue or record, and whose interest is adverse to such estate," shall be incompetent to testify against the estate as to matters occurring during the lifetime of the decedent, in an action to charge an estate with a claim on the ground that the decedent was a member of a firm, another member of the alleged firm, though not a party, is incompetent to prove the partnership as against the estate, but he is competent to show the correctness of plaintiff's account.—Leach v. Dickerson, 14 Ind. App. 375, 42 N. E. 1031.

[f] (Iowa, 1892) Notice of an action for the recovery of goods sold, against a firm alleged to be composed of three members, was served on but one, who answered, denying that he was a partner, and upon his death, pending the action, his administrator was made defendant. Neither of the other defendants ever appeared, and plaintiff subsequently filed, in vacation, a written dismissal as to them. Afterwards plaintiff filed the deposition of one of these partners, which on motion of defendant was suppressed on the trial. *Held*, that deponent was a person interested in the event of the action within Code 1873, § 3639, which provides that no such party shall testify as to any personal transactions with a person at the commencement of such examination deceased, and his deposition should be suppressed.—Giesecke Boot & Shoe Mfg. Co. v. Seevers, 85 Iowa, 685, 52 N. W. 555.

[g] (Minn. 1880) In a proceeding by an administrator de bonis non against an administratrix who had been removed for a final settlement of her accounts, the administratrix contended that, as to certain property, a partnership had existed between decedent and one G.; that G. had taken possession of such property as surviving partner; and that therefore she was not liable therefor as administratrix. *Held*, that G. was not disqualified from testifying as to conversations with decedent tending to show the existence of the partnership, by Gen. St. c. 73, § 8, which prohibits "a party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties"; it appearing that G. was not a party or in privity with either of the parties, that he had no interest in the estate, as next of kin, creditor, etc., nor was he interested in the event of the proceeding, since a judgment therein would not conclude him on the question of the partnership.—Marvin v. Dutcher, 26 Minn. 391, 4 N. W. 685.

[h] (N. Y. 1882) In H.'s action, brought after A.'s death, against B. and C. on the firm note of A. & Co., as A.'s survivors, judgment was recovered by H., and execution returned unsatisfied. In H.'s action thereon against executors of D., whom H. alleged, and the defendants denied, to be a member of the firm, *held*, that B. should not be allowed to testify as to conversations and transactions with D. tending to show that D. was a member; B. being, within

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Code, § 829, a "person interested in the event."—Hunter v. Herrick, 26 Hun, 272.

[i] (Pa. 1879) In a suit by an assignee in bankruptcy against the estate of one deceased, a partner of the bankrupt cannot testify for plaintiff.—In re Zeh's Estate, 13 Phila. 272.

[j] (Pa. 1890) Where the transferee of an insurance policy was a member of a firm to which the insured was indebted, and individually assumed the debt due the firm on receiving the assignment of the policy, his partner is a competent witness to conversations had with the insured during his lifetime, for such partner is not interested in the event of the suit.—Shaak v. Meily, 136 Pa. 161, 20 Atl. 515, 26 Wkly. Notes Cas. 569.

[k] (Pa. 1893) A partner of decedent is not incompetent, by reason of interest, to testify that property standing in the name of decedent is partnership property, though witness will be benefited by having it held partnership property; the only question being whether it shall first be applied to decedent's individual, and the balance to the partnership, debts, or whether it shall all be applied to partnership debts.—In re Miller's Estate (Orph. Ct.) 14 Pa. Co. Ct. R. 147, 2 Pa. Dist. R. 854.

[l] (Va. 1878) An action was brought against a sheriff and his surviving sureties for a failure to pay over money collected by one of the sheriff's deputies, on an execution against a firm. *Held*, that a member of that firm was not so directly interested in the result of the suit as to render him incompetent to testify.—Grandstaff v. Ridgely, 30 Grat. 1.

§ 617. Creditors.

[a] (U. S. 1881) Under Rev. St. § 1079, creditors of an estate, for whose sole benefit a suit is prosecuted by the administrator, cannot be witnesses for him.—Henegan v. United States, 17 Ct. Cl. 155.

[b] (Ala. 1891) Where a decedent's estate is declared insolvent, a creditor of the estate, being interested in increasing the assets, is incompetent to testify in favor of the decedent's administrator de bonis non, on the settlement of accounts with the administrator in chief, as to a transaction with decedent.—Dunlap v. Mobley, 71 Ala. 102.

[c] (Pa. 1894) Creditors of a decedent, who have been paid in full by the executors, are not competent witnesses to prove, for the purpose of establishing the executors' claim for credit for such payments, the terms of the contract with decedent out of which their claims arose.—In re Burton's Estate (Orph. Ct.) 15 Pa. Co. Ct. R. 367, 3 Pa. Dist. R. 755.

§ 618. Transfer, release, or extinguishment of interest.

[a] (Ala. 1877) A person contracting with the decedent is not, by having transferred his claim to another, rendered a competent witness to prove the contract, in his own behalf, in a suit against the personal representative.—Drew v. Simmons, 58 Ala. 463.

[b] (Ala. 1889) One to whom plaintiff had given an interest in a contract, but who within a few days thereafter sold it back to plaintiff, is not a competent witness for plaintiff as to conversations between the latter and one of the other parties to the contract, who has since died, and whose administrator is a party to the suit, under Code 1886, § 2765, which provides that neither party shall be allowed to testify against the other as to any transactions with, or statements by, any deceased person whose estate is interested in the result, unless called to testify thereto by the opposite party.—Sublett v. Hodges, 88 Ala. 491, 7 South. 296.

[c] (Ala. 1893) In an action on a note alleged to have been executed by defendant's intestate, it appeared that plaintiff had transferred the note to his wife in consideration of her agreement to pay a debt her brother owed plaintiff, and that after suit was brought he caused the clerk to enter the cause on the docket to the use of his wife, and so notified defendant. The wife testified that, a few minutes before she was called to testify, she "formally recanted" the agreement with her husband, without the advice of her attorney; but it was not shown that the husband was present, or was a party to the "recantation," or on what consideration it was done. *Held*, that no bona fide retransfer took place, and that the wife was disqualified to testify.—Glover v. Gentry, 104 Ala. 222, 16 South. 88.

[d] (Ala. 1896) Under Acts 1890–91, p. 557, which excludes as a witness to transactions with decedents any one having a pecuniary interest in the result of the suit, and provides that no incompetent witness shall make himself competent by transfer of his interest, a wife is not a competent witness, in an action by her husband against an administrator, to transactions between plaintiff and deceased, where she had a pecuniary interest pending the suit, and rescinded the contract by which she acquired such interest for the purpose of making her a competent witness.—Glover v. Gentry, 112 Ala. 500, 20 South. 386.

[e] (Ga. 1882) In an action against an administrator on notes of his intestate, an heir who has assigned his interest in the estate is a competent witness.—Bower v. Thomas, 69 Ga. 47.

[f] (Ga. 1888) If A.'s claim against B. is barred by the statute of limitations, B. is a competent witness to prove payment to A.'s attorney, in an action by A. against the executor of his attorney.—Shepherd v. Crawford, 71 Ga. 458.

[g] (Ga. 1886) Although, at the time of the trial of an ejectment suit, the person under whom defendant claims, and who had an understanding as to the dividing lines with a coterminous landowner, is dead, yet such coterminous owner is a competent witness, upon a showing that he held the lands under a contract of purchase, which he has relinquished by a noncompliance therewith, and that at the time of the trial neither he nor decedent had any interest in the subject-matter of the suit.—Wood v. Crawford, 75 Ga. 733.

[h] (Iowa, 1883) Code 1873, § 3939, provides that a party interested in an action shall not testify as to communications between himself and a person deceased at the commencement of the action against the heirs or administrator of such decedent. *Held*, in an action by an administrator to recover property of the estate, an heir cannot testify to personal communications; nor will the execution of a disclaimer of all interest in the action and the personal estate of the deceased render such witness competent, where such disclaimer does not operate as a release.—Ivers v. Ivers, 61 Iowa, 721, 17 N. W. 149.

[i] (Ky. 1833) Civ. Code, § 606, subsec. 2, provides that "no person shall testify for himself concerning any verbal statement of, or any transaction with, one who is dead," etc. Subsection 9 provides that "the assignment of a claim by a person who is incompetent to testify himself shall not make him competent to testify for another." *Held* that, in an action by the surety of one D., a discharged guardian, against the surviving member of a partnership to recover certain moneys owing to D., on the ground that it was loaned the firm by D. from the trust fund, to which action defendant pleaded a set-off against D., the fact that D. now has no interest in the ward's estate, does not make him competent to testify that the deceased partner, with whom the transaction was

had, knew when he borrowed the money that it belonged to the ward.—Alexander's Ex'rs v. Alford, 89 Ky. 105, 20 S. W. 164.

[j] (Ky. 1882) A person once interested cannot, by assigning his interest to a co-partner, render himself competent to testify as to the statements of an agent who is dead.—Harpending's Ex'rs v. Daniel, 80 Ky. 449.

[k] (Md. 1886) A person who has assigned a lease, and has been discharged, under the insolvent law of the state, from all obligations created by the lease, and has fully released his trustee in insolvency from all claims or demands on account of the insolvent estate, is competent to testify in relation to the transactions under which the lease was made, notwithstanding he was a party to a special contract in relation thereto, and the lessor is dead.—Grand United Order of Odd Fellows v. Merklin, 65 Md. 579, 5 Atl. 544.

[l] (Neb. 1882) A person incompetent to testify under Code Civ. Proc. § 329, against the executor of a deceased person by reason of interest, will not be rendered competent to testify by the transfer of his interest to another pending the suit.—Magemau v. Bell, 13 Neb. 247, 13 N. W. 277.

[m] (N. H. 1865) In an action by an administratrix against a sheriff for default of his deputy, the latter, on being released by the sheriff, is a competent witness.—Stevens v. Colby, 46 N. H. 163.

[n] (N. Y. 1877) The fact that a sum of money is given by the will to the person named as executor for his services in settling the estate, in addition to the ordinary fees to which he is entitled, does not make him an interested party in the probate, so as to exclude him as a witness in proceedings for the probate of the will to "any communication or transaction" (Code, § 399), especially if he has executed a release of such sum to the estate.—Reeve v. Crosby, 3 Redf. Sur. 74.

[o] (N. Y. 1883) If a legatee releases his interest under the will to the executor, he is no longer incompetent, on the ground of interest, to testify as a witness on the probate of the will.—Whelpley v. Loder, 1 Dem. Sur. 368.

[p] (N. Y. 1886) An executor who is also a legatee, but who has put in evidence a release under seal of his legacy, may be competent to prove the will, and also to testify as to conversations and transactions had by him with the testator, at the time of its preparation, in relation to its contents and execution; his interest as legatee being extinguished by the release, and going to the residuum, to be distributed under the will.—In re Wilson's Will, 103 N. Y. 374, 8 N. E. 731.

[q] (N. Y. 1888) In an action to enforce the liability of a surety on a note, the maker, who is not a party, and in favor of whom the statute of limitations has run, has no such interest in the event of the suit as will render him incompetent to testify that he gave a chattel mortgage to secure such note and paid it by labor performed for the payee, who has since died, under Code Civ. Proc. § 829, relating to testimony as to transactions had with decedents.—Ehmann v. Scheuerman, 14 Daly, 411.

[r] (N. Y. 1888) Under Code Civ. Proc. § 829, providing that a party to the proceeding or an interested person shall not be examined in his own interest, against the representative of a deceased person, concerning a personal transaction or communication with deceased, one who is executor and legatee under a will may become competent to testify as to communications with testatrix by filing a release of all his interest as legatee.—Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874, affirming Whelpley v. Loder (1883) 1 Dem. Sur. 368.

[s] (N. Y. 1889) A legatee who has been paid her legacy, and has given a full release to the estate, is not disqualified by interest, under Code Civ. Proc. § 829, from testifying in an action on behalf of the estate against an insane person as to transactions with defendant.—Brown v. Klock, 52 Hun, 613, 5 N. Y. Supp. 245, judgment reversed 117 N. Y. 340, 22 N. E. 944.

[t] (N. Y. 1893) Plaintiffs' father, in consideration of their conveying to him certain land for a home during life, promised that he would will the land to them. He made a will accordingly, but it was lost. *Held*, in an action against one of his heirs to compel specific performance of decedent's contract, that plaintiffs' sisters, who had deeded their interest in the land to plaintiffs without consideration, could testify as to conversations with their father relating to the agreement and the will, since they were not persons interested in the event of the action.—Korminsky v. Korminsky (Super. N. Y.) 2 Misc. Rep. 138, 21 N. Y. Supp. 611.

[u] (N. Y. 1893) Where the object of an action is to recover a debt due to the estate of a testator, a legatee who takes a life estate in the testator's property becomes a competent witness upon relinquishing her interest in the fund in controversy without relinquishing her interest in the rest of the estate.—O'Brien v. Weiler, 68 Hun, 64, 22 N. Y. Supp. 627, judgment affirmed 140 N. Y. 281, 35 N. E. 587.

[uu] (N. Y. 1894) A release of "all my interest, of whatsoever name and nature," in the estate of a decedent, without naming a releasee, is invalid, and does not render the releasor competent to testify in favor of contestant on a contest of decedent's will.—In re Torkington's Will, 79 Hun, 128, 29 N. Y. Supp. 433.

[v] (N. C. 1875) Under the Code of Civil Procedure an obligor of a bond is not a competent witness to prove any transaction between himself and the obligor, when such obligor is dead at the time of the trial, although he may have previously assigned the bond.—Woodhouse v. Simmons, 73 N. C. 30.

[vv] (N. C.) Under Code, § 343, a witness is incompetent to testify concerning a transaction with a person deceased, if such witness ever had an interest in the event of the action.—(1877) Peebles v. Stanley, 77 N. C. 243; (1879) Mason v. McCormick, 80 N. C. 244.

[w] (Pa. 1874) In an action brought on a bond by an executor of the obligee, judgment having been obtained against the principal, he is a competent witness for the surety.—Simpson's Ex'r v. Bovard, 74 Pa. (24 P. F. Smith) 351.

[ww] (Pa. 1880) Where a chattel has been sold by a firm, the surviving partner, after he has been released by the vendee from all liability on his implied warranty of title, is a competent witness for him.—Wright v. Funck, 94 Pa. 26.

[x] (Pa. 1887) An interested person is not rendered a competent witness against the estate of a decedent by a release to his wife.—Boustead v. Cuyler, 116 Pa. 551, 8 Atl. 848.

[xx] (Pa. 1889) A distributee of an intestate's estate who has released and assigned away all her interest in the fund in controversy is a competent witness in an action by the administrator against a debtor of the intestate.—Heft v. Ogle, 127 Pa. 244, 18 Atl. 19, 24 Wkly. Notes Cas. 276, 14 Am. St. Rep. 839.

[y] (Pa. 1891) In an action for a debt due from defendant's decedent to plaintiff's decedent, the son of defendant's decedent, who has received a farm as a gift from his father, is not a competent witness, even though he assign his interest in his father's estate; for, if the father did not leave personal property

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enough to satisfy the debt, the donated farm could be subjected to its payment, and the son would therefore still have a disqualifying interest in the event of the suit.—Keener v. Zartman, 144 Pa. 179, 22 Atl. 889.

[yy] (Pa. 1894) Where the incompetency of a witness arises simply from interest in the result of the suit, he may be made competent by the execution of a release or assignment, even though the same be executed for the sole purpose of rendering him competent.—In re Stewart's Estate (Orph. Ct.) 15 Pa. Co. Ct. R. 380, 3 Pa. Dist. R. 747.

[z] (Va. 1879) Since one competent as a witness at common law is not rendered incompetent by Code, c. 172, §§ 21, 22, where, in an action on a bond, three of the four obligors in which were dead, the fourth, being released from payment by his discharge in bankruptcy, was a competent witness to prove the payment pleaded, as he has no interest in the controversy, and therefore does not testify "in his own favor."—Reynolds' Ex'r v. Callaway's Ex'r, 31 Grat. 436.

[zz] (W. Va. 1881) A widow who has renounced the will is a competent witness in a will contest.—McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

6. GRANTOR, ASSIGNOR, OR OTHER PERSON FROM WHOM PARTY DERIVES TITLE OR INTEREST.

IN GENERAL, § 619.
GRANTOR OR VENDOR, § 620.
ASSIGNOR, § 621.
TRANSFERROR OF BILL OR NOTE AND MORTGAGE, § 622.
HUSBAND AND WIFE, § 623.
EFFECT OF RELEASE, § 624.

§ 619. In general.

[a] (Iowa, 1875) The provisions of Code 1873, § 3639, disqualifying as a witness in an action against an administrator "any person from, through, or under whom the plaintiff derives any interest or title, by assignment or otherwise," do not apply to nor exclude the testimony of one who may have been at any prior time the holder of a mere equitable interest in the property in controversy.—Zerbe v. Reigart, 42 Iowa, 229.

[b] (N. Y. 1871) The prohibition in Code, § 399, of the assignor of any title or interest from being a witness against the executors of a deceased person, is not limited to an examination in those matters pertaining to the parts of the action assigned, but extends to the entire action.—Lyon v. Snyder, 61 Barb. 172.

[c] (N. Y. 1871) Code, § 399, which excludes every person through whom a party to an action derives "any interest or title, by assignment or otherwise," from being a witness against the executors of a deceased person in regard to any personal transaction or communication between such witness and deceased, must be construed to mean any interest or title in or to the subject-matter of the action.—Lyon v. Snyder, 61 Barb. 172.

[d] (N. Y. 1887) In an action by the administrators of an indorser against the maker, to recover the amount due on a note, the payee and indorser is not, under the provision of Code Civ. Proc. § 829, that a person from, through, or under whom a party or interested person derives his title or interest, cannot be examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, etc., of a deceased person, disqualified, where he is not called on behalf of the indorsee (the party succeeding to his title), but on behalf of the maker, and against the indorsee; and the note being long due, it appears from the evidence that he received no notice of nonpayment, so as to preserve recourse against him.—Nearpass v. Gilman, 104 N. Y. 506, 10 N. E. 894.

[e] (N. Y. 1887) Where, in an action on a note against the executors of the obligor, it appeared that plaintiff had once pledged the note as security for a debt, but had redeemed it before the beginning of the action, the pledgee was not an incompetent witness for him, under Code, § 829, providing that a person from, through, or under whom a party derives his interest shall not be examined as a witness in his own behalf as to transactions with decedent, as plaintiff did not hold under the witness, but through the original title.—Wilson v. Law, 7 N. Y. St. Rep. 672.

[f] (N. Y. 1887) W. gave a mortgage to H., who died, and W. became his executor. W., as executor, assigned the mortgage to plaintiff, who sued to foreclose it. C. had a judgment junior to the mortgage, and was a party to the foreclosure suit, and offered to prove, by W., that the mortgage was fraudulent as to creditors. *Held*, that the transaction was one with a decedent; that C. derived title through W., within the meaning of Code Civ. Proc. § 829; and that the evidence was therefore inadmissible.—Geissmann v. Wolf, 46 Hun, 289.

[g] (N. Y. 1892) Defendant, when a child, was surrendered by her parents to decedent and husband, they agreeing, in consideration thereof, to adopt her as their daughter, and leave their property to her. Defendant seeks to enforce such promise. *Held*, that the testimony of defendant's mother as to the agreement with decedent and husband is not inadmissible.—Godine v. Kidd, 64 Hun, 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335.

[h] (N. Y. 1893) Testator left a life interest in his estate to his executrix, with remainder to his executor. The executor and executrix sued to recover money deposited by testator, but claimed by the administrator of an intestate, and the executrix released to the executor all her interest in the deposit. *Held*, that the executrix, though no longer a party in interest, was incompetent, under Code Civ. Proc. § 829, to testify to conversations with intestate concerning the deposit, since the executor had acquired through her an interest in the deposit, both personally and as executor.—O'Brien v. Weiler, 140 N. Y. 281, 35 N. E. 587, reversing 68 Hun, 64, 22 N. Y. Supp. 627.

[i] (N. Y. 1895) In an action against the grantee and the administrator of a decedent to set aside a deed made by decedent, as in fraud of creditors, the administrator may testify in favor of the grantee as to decedent's statements concerning her indebtedness to the grantee, in consideration of which the deed was alleged to have been made, as the grantee does not hold from the administrator, and he does not testify in his own behalf or interest, within the meaning of Code Civ. Proc. § 829.—Swan v. Morgan, 88 Hun, 378, 34 N. Y. Supp. 829.

[j] (W. Va. 1890) In a suit in equity to enforce the settlement of an administrator's accounts, a person to whom the administrator has paid a debt which is claimed to exist against the estate of his intestate, and from whom he receives a voucher, and derives title as administrator to such claim, is not a competent witness to prove such claim a valid debt against the estate, under Code 1887, c. 130, § 23, prohibiting one from whom a party derives title from testifying as to transactions had with a decedent, against the heirs at law of such decedent.—Dawson v. Hemelrick, 33 W. Va. 675, 11 S. E. 31.

§ 620. Grantor or vendor.

[a] (Ala. 1880) In ejectment, or the corresponding statutory action, by one of several

heirs at law against the grantee by quitclaim of another heir, the defendant's grantor cannot be permitted to testify that the deceased ancestor gave him the land and promised to make him a title to it. Though the witness is not a nominal party to the record, he is within the spirit of Code, § 3058, which prohibits a party from testifying to "any transactions with or statements by a deceased person whose estate is interested in the result of the suit," and the action is within the terms of the statute.—Boykin v. Smith, 65 Ala. 294.

[b] (Ala. 1888) The title of defendant in ejectment, claiming under a warranty deed, was assailed because plaintiffs' decedent claimed to have acquired a lien on the premises in controversy before the deed was recorded, he not having notice of the conveyance from a change of possession or otherwise. *Held*, that the grantor of defendant, not being liable on his covenant of warranty in case defendant should lose the suit, was competent to testify that after his conveyance to defendant, and before plaintiffs' decedent had acquired his alleged lien, he had informed the latter of such conveyance.—Fitzgerald v. Williamson, 85 Ala. 585, 5 South. 309.

[c] (Ala. 1895) In an action for land by the legal representatives of R., deceased, claiming by inheritance from him, where defendant defends on the asserted validity of title acquired by N. from R., it is incompetent for N. to testify to transactions with or statements by R., or to conversations with L., also deceased, son of R. and father of some of the plaintiffs, from whom they directly inherit whatever interest they have.—Wisdom v. Reeves, 110 Ala. 418, 18 South. 13.

[d] (Ga. 1880) A., after executing a deed to B., executed to C. a deed of the same land. *Held*, in ejectment on an issue as to which chain of title should prevail, that A. was a competent witness, although B. was dead, to show that the deed to B. was without consideration, and was executed simply to avoid the land's being made subject to payment of his debts; A.'s interest being equally balanced as between the two parties.—Allen v. Davis, 65 Ga. 179.

[e] (Ga. 1884) In ejectment between one who holds under the grantee of a trustee and the daughter of the maker of the trust deed, the grantee is competent to testify as to the character of the deed first made by the trustee to him, which is lost, although the trustee is dead.—White v. Cook, 73 Ga. 164.

[f] (Ill. 1874) Grantors with covenants of warranty are not competent witnesses to prove their ownership and conveyance of the property described in lost deeds, under the burnt records act, as against a party who defends as an heir at law of a deceased person.—King v. Worthington, 73 Ill. 161.

[g] (Ill. 1883) Where one, long after executing a deed, conveys the same premises to another, who files a bill against the original grantee's heirs to have the first deed set aside as delivered on conditions never performed, and the bill is brought for the mutual benefit of the grantor and complainant, the former is not a competent witness against the original grantee's heirs to prove the grounds on which the first deed is sought to be avoided.—McCann v. Atherton, 106 Ill. 31.

[h] (Ill. 1884) In a suit brought by a son, holding a warranty deed from his mother, to set aside a prior deed by her to a deceased son, the mother is a party in interest, and is incompetent as a witness for plaintiff as to facts occurring in the lifetime of the deceased son.—Ferbrache v. Ferbrache, 110 Ill. 210.

[i] (N. Y. 1858) The vendor of a personal chattel was not "an assignor of a thing in action or contract," within the meaning of Code, § 399, providing that such assignor shall not be permitted to testify in behalf of any person claiming title through him against an assignee, or an executor or administrator, unless the other party to such contract or thing in action is living and his testimony can be procured.—Crosby v. Nichols, 16 N. Y. Super. Ct. (3 Bosw.) 450.

[j] (N. Y. 1881) A mortgagor, after conveying the mortgaged premises, was made a party defendant to a foreclosure suit. No money judgment was asked against him, and he did not answer. *Held*, that his testimony in behalf of his grantee, concerning a personal transaction between himself and plaintiff's intestate, was inadmissible.—Smith v. Hathorn, 25 Hun, 159.

[k] (N. Y. 1885) One through whom plaintiff claims title to land cannot testify as to the genuineness of the signature of one deceased, under whom defendant claims, in an action relating to the title.—Garvey v. Owens, 37 Hun, 498.

[l] (N. Y. 1888) Where land was conveyed to one partner, as trustee for the firm, and he executed a conveyance of a designated interest to each of the other partners, the original grantor is a competent witness for the remaining partners, in ejectment by the devisee of the first-named partner, such case not falling within Code Civ. Proc. § 829; he neither having an interest in the suit, nor being a person through whom defendant claimed.—Rank v. Grote, 110 N. Y. 12, 17 N. E. 665.

[m] (N. Y. 1892) Where plaintiff acquired the title of decedent to a strip of land dedicated as an alley, which had been abandoned as such, by mesne conveyances from decedent's son, to whom it was conveyed by decedent's assignee for the benefit of his creditors, and plaintiff contended that a mortgage under which he claimed was made with reference to certain maps so as to embrace the alley, *held*, that decedent's son was competent to testify in behalf of plaintiff as to conversations with deceased in regard to the preparation of the maps.—Bell v. Howe, 64 Hun, 637, 19 N. Y. Supp. 569; Howe v. Bell, Id.

[n] (N. Y. 1893) Plaintiffs' father, in consideration of their conveying to him certain land for a home during life, promised that he would will the land to them. He made a will accordingly, but it was lost. *Held*, in an action against one of his heirs to compel specific performance of decedent's contract, that plaintiffs' sisters, who had deeded their interest in the land to plaintiffs without consideration, could testify as to conversations with their father relating to the agreement and the will, since they were not persons from whom plaintiffs' claim was derived by assignment.—Korminsky v. Korminsky (Super. N. Y.) 2 Misc. Rep. 138, 21 N. Y. Supp. 611.

[o] (N. C. 1879) In a controversy as to which of two parties was the grantee of a lost deed, the grantor, when he stands indifferent between the litigants, is competent to testify that he made the deed to one deceased at the time of the trial.—Gregg v. Hill, 80 N. C. 255.

[p] (N. C. 1880) A. made a deed to his son B., and B. to C., upon the understanding that C. would pay B. $200 if a recovery was had in C.'s action of ejectment against D., who derived his title from a purchaser at execution sale against A. *Held*, that under Code, § 343, A. being dead, B. was not a competent witness.—Williams v. Johnston, 82 N. C. 288.

[q] (N. C. 1889) Code, § 590, renders incompetent a party or interested person, "or a person from, through, or under whom such party or interested person derives his interest," to testify as a witness "in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, adminis-

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trator or survivor of a deceased person, * * * or a person deriving his title or interest from, through, or under a deceased person," concerning a personal transaction between the witness and decedent. *Held*, in an action to establish a trust in land against the heirs of a decedent, where plaintiff claims by virtue of paying part of the purchase money, and that the deed was made to defendant's decedent, a witness is not competent to testify for plaintiff that the latter and defendant's decedent purchased from witness the land in controversy, in the absence of evidence that defendant's decedent was not present at such purchase, as plaintiff derives his interest from such witness.—Carey v. Carey, 104 N. C. 171, 10 S. E. 156.

[r] (N. C. 1889) The witness is incompetent to testify that defendant's decedent borrowed money from him, mortgaging the land to secure it, and that plaintiff paid part of such borrowed money.—Carey v. Carey, 104 N. C. 171, 10 S. E. 156.

[s] (S. C. 1885) In an action by a widow for dower, her husband's grantor may testify to communications between the grantee and himself relating to the ownership of the land.—Brown v. Cave, 23 S. C. 251.

[t] (Tenn. 1882) The statute providing that, in actions by or against executors or administrators, "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator," does not prevent plaintiff's vendor, in an action of replevin, where defendant claimed as administrator, from testifying as to an agreement between such witness and the deceased as to the chattel in question.—Rielly v. English, 77 Tenn. (9 Lea) 16.

§ 621. Assignor.

[a] (Ala. 1874) In an action against an executor or administrator, founded on an account or other nonnegotiable contract for the payment of money, which has been assigned, plaintiff's assignor or transferror is not a competent witness for him, to prove any transaction with or statement by the decedent in his lifetime.—Louis' Adm'r v. Easton, 50 Ala. 470.

[b] (Iowa, 1887) Under Code 1873, § 3639, relating to the competency of interested witnesses to testify as to personal transactions with parties deceased or becoming insane, the testimony of the assignor of an account, in an action thereon by his assignee against deceased's executors, is inadmissible so far as it relates to his personal transactions with deceased.—Parcell v. McReynolds, 71 Iowa, 623, 33 N. W. 139.

[c] (Miss. 1873) Though a party has assigned his claim against a decedent's estate "without recourse," and it is being prosecuted by his assignee, Rev. Code 1857, p. 510, art. 190, which provides that no person shall establish his own claim by his own testimony against the estate of any decedent for any sum exceeding $50, applies.—Reinhardt v. Evans, 48 Miss. 230.

[d] (Miss. 1877) Code 1871, § 758, providing that "no person shall testify as a witness to establish his own claim of any amount for or against the estate of a deceased person, which originated during the lifetime of such deceased person," does not apply where the witness has before suit conveyed his claim by deed of gift, and the suit is prosecuted by his grantee. This is not a case of testifying to establish one's own claim.—Rothschild v. Hatch, 54 Miss. 554.

[e] (Miss. 1879) Under Acts 1878, p. 190, A., a claimant who has assigned his title after the death of B., the party in possession, cannot, in ejectment by his assignee against the heir of B., testify that B. held only by A.'s permission.—Jones v. Sherman, 56 Miss. 559.

[f] (N. J. 1850) A. by deed of assignment conveyed to B. real and personal property, in trust, after paying the expenses of the trust, to pay, first, certain moneys he owed to B., and then certain debts he owed to other persons. B., after selling the trust estate, died intestate July, 1846. In August, 1846, A. assigned all his interest in the trust to C., his son, who exhibited his bill against the administrator of B. for an account of the trust, and payment, etc. The bill charged that A., after the execution of the trust deed to B., paid out of his own money, in no way derived from the trust fund, several large items, stating them, of the said debt due from A. to B., and also several of the debts to the other persons provided for in the trust deed to B. *Held*, that A. was an incompetent witness to prove such payments.—Campbell v. Zabriskie, 8 N. J. Eq. (4 Halst. Ch.) 356.

[g] (N. Y. 1852) The assignor of a claim against a deceased's estate will not be received as a witness for the assignee in the surrogate's court.—Woodruff v. Cox, 2 Bradf. 223.

[h] (N. C. 1889) The testimony of plaintiff's assignor as to payments made him, before the assignment of the claims, by a deceased person, is not admissible for plaintiff in an action against the heirs of such deceased person, under Code, § 590, providing that upon the trial of an action a person from whom a party derives his interest by assignment shall not be examined as a witness in behalf of the assignee against a person deriving title through a deceased person concerning a personal transaction between the witness and the deceased person.—Shields v. Smith, 104 N. C. 57, 10 S. E. 76.

[i] (Pa. 1879) Where, in an assignment of a lease by the lessee, he is held in express terms to all the covenants in the lease, he is not a competent witness in an action for a breach of one of the covenants, brought by the executors of his deceased lessor against his assignee.—Whitney v. Shippen, 89 Pa. 22.

[j] (Pa. 1883) In an action by an administrator, an assignor, through whose assignment plaintiff claims, is not a competent witness for plaintiff, though the assignment, rehearsing matters occurring in the lifetime of deceased, was admissible.—Tinstman v. Croushore, 104 Pa. 192.

[k] (Pa. 1887) The rule of law which, in certain cases, excludes the assignor of a chose in action from testifying in support of it, is founded in public policy, and existed independently of and long before the passage of Act April 15, 1869, and is applicable only to suits upon choses in action.—Barbour v. Wiehle, 116 Pa. 308, 9 Atl. 520.

[l] (W. Va. 1874) Where the assignor and assignee of a chose in action are both parties to a suit brought to recover the money due, and the debtor is not living, the assignor is incompetent to testify as a witness in favor of the assignee.—White v. Heavner, 7 W. Va. 324.

[m] (Wis. 1861) "The assignor of a thing in action or contract" (Rev. St. c. 137, § 51) refers only to transferrors of contracts and things in action then made assignable at law, but not so previously.—McConnell v. McCraken, 14 Wis. 83.

§ 622. Transferror of bill or note and mortgage.

[a] (Ky. 1896) Civ. Code, § 606, cl. 2, provides that no person shall testify for himself concerning any transaction with a decedent. Clause 9 provides that the assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another. *Held* that, as against the administrator of the payee of a note, a per-

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son appearing by indorsement on the note to be the assignee of the payee, who has reassigned the note during the life of the payee, is incompetent to testify, in favor of his assignee, as to the assignment by the payee to him.—Neale's Adm'r v. Neale, 36 S. W. 526.

[b] (Mo. 1881) Where persons offered as witnesses were, after the death of the maker, assignors of his notes in suit, they are competent.—Million v. Ohnsorg, 10 Mo. App. 432.

[c] (N. Y. 1878) One who has indorsed a note for the accommodation of the maker for a special purpose does not, upon its transfer by the maker to a third person for value in violation of such special purpose, become the assignor of such transferee, within the meaning of Code, § 399; and, in an action against such transferee to recover the amount he has been compelled to pay under his contract of indorsement, he is a competent witness to prove transactions with the maker, who has died prior to the trial.—Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142.

[d] (N. Y. 1884) A. indorsed a note for B.'s accommodation. B. delivered it to C. for money lent. C. sued A.'s executrix. *Held*, that B.'s testimony as to admissions of A. were not inadmissible as evidence, on the ground that C. derived his title to the note from B., who, therefore, was interested in the event of the action.—Converse v. Cook, 31 Hun, 417.

[e] (Wis. 1861) The holder of a mortgage note payable to bearer transferred the note after maturity and assigned the mortgage. In the assignee's suit to foreclose against the administrator and heirs of the mortgagor, *held*, that the assignor was a competent witness for the assignee.—McConnell v. McCraken, 14 Wis. 83.

[f] (Wis. 1868) The term "assignor of a thing in action" in Rev. St. c. 137, § 51, does not include a person who transfers a note or bill by indorsement or delivery, and he is not thereby excluded from testifying as to the transaction.—McHose v. Cain, 22 Wis. 486.

[g] (Wis. 1887) In an action for the foreclosure of a mortgage in which the title of plaintiffs, who claim as assignees of the mortgage and note, is disputed, and the same are claimed as belonging and having been paid to the mortgagee's wife, statements made by the mortgagee, since deceased, to a third party, tending to show that he had parted with the note and mortgage to plaintiffs' assignors, are admissible, there being no party through whom plaintiffs derived title to testify to communications of the deceased on that subject. Rev. St. § 4069, rendering incompetent testimony as to transactions with deceased persons, applies only when offered by a party of those through whom he derives title.—Lehman v. Sherger, 68 Wis. 145, 31 N. W. 733.

§ 623. Husband and wife.

Husband or wife of party or other person excluded from testifying, see post, §§ 644–649.

[a] (Iowa, 1877) In an action by a husband against the representative of decedent to recover for services rendered decedent by his wife, the wife is an incompetent witness for plaintiff, under Code, § 3639.—Ashworth v. Grubbs, 47 Iowa, 353.

[b] (Mich. 1887) How. Ann. St. § 7545, as amended in 1885 (Pub. Acts 1885, pp. 156, 157), renders the assignor of a claim against an estate equally incompetent as a witness with the party. On the trial of a claim for the board of the deceased, it appeared that W., the husband of claimant, was the head of the house, but he claimed to have given the board to his wife, and that it was understood she should receive the amount due for it. *Held*, that he was an assignor, within the statute, and that his testimony as to the time deceased boarded at the house, and the amount to be paid, was inadmissible.—Stackable v. Stackable's Estate, 65 Mich. 515, 32 N. W. 808.

[c] (N. Y. 1890) In an action to enforce a lien on a bond held by a bank, of which plaintiff was receiver, as collateral security, the debtor's wife claimed the bond; but there was no evidence that she derived any title or interest therein from the debtor. *Held*, under Code Civ. Proc. § 829, that the debtor was not disqualified from testifying as to a demand, on behalf of his wife, made by him, on plaintiff's deceased predecessor, for the bond.—Olcott v. Kohlsaat, 55 Hun, 607, 8 N. Y. Supp. 116, 117.

[d] (N. Y.) A husband suing for services rendered by his wife does not derive his claim from her, as he is entitled to the value of her services by virtue of his marital rights; and therefore the wife may testify as to conversations between herself and decedent, to whom the services were rendered.—(1892) Porter v. Dunn, 131 N. Y. 314, 30 N. E. 122; (1895) Hopkins v. Clark, 90 Hun, 4, 35 N. Y. Supp. 360.

[e] (N. Y. 1894) A husband, who agreed with his wife to allow her to board decedent and receive the compensation therefor, is not his wife's assignor of the claim for board.—Sands v. Sparling, 82 Hun, 401, 31 N. Y. Supp. 251.

[f] (N. Y. 1895) In an action for services rendered defendant's estate by plaintiff, after agreement by plaintiff with her husband that such services should be for and on her separate account, she does not claim as assignee of her husband.—Lashaw v. Croissant, 88 Hun, 206, 34 N. Y. Supp. 667.

§ 624. Effect of release.

[a] (N. H. 1861) Where defendant is the assignee of the mortgagor with covenants of warranty, but the mortgagor is still the defendant in interest, the latter is not a competent witness against the administrator, although the warranty be released.—Little v. Riley, 43 N. H. 109.

[b] (W. Va. 1874) When an assignor and assignee of a chose in action are both parties to a suit brought to recover the money due upon such chose in action, and the debtor is dead, the assignor being rendered incompetent by Code, c. 130, § 23, to testify as a witness in such suit in favor of his assignee, a release, made by the assignee to the assignor, from all and every liability to recourse or otherwise as assignor of the chose in action, does not make the assignor a competent witness to testify in favor of his assignee.—White v. Heavner, 7 W. Va. 324.

7. SURVIVING PARTY TO CONTRACT OR OTHER TRANSACTION OR CAUSE OF ACTION.

IN GENERAL, § 625.
PARTIES AND PERSONS WHOSE TESTIMONY IS EXCLUDED IN GENERAL, § 626.
PARTIES OF RECORD AND INTEREST IN EVENT, § 627.
ADVERSE PARTY, § 628.
NATURE OF ACTION OR ISSUE, § 629.
SURVIVING PARTY TO CONTRACT, § 630.
PARTIES TO BILLS AND NOTES, § 631.
PRINCIPAL AND SURETY AND PARTIES TO OR PERSONS LIABLE ON BONDS, § 632.
GRANTOR AND GRANTEE OR VENDOR AND VENDEE, § 633.
TRUSTEE AND BENEFICIARY, § 634.
DONOR AND DONEE, § 635.
MORTGAGOR AND MORTGAGEE AND LESSOR AND LESSEE, § 636.
DEVISEE AND HEIR OR NEXT OF KIN, § 637.
EXECUTOR OR ADMINISTRATOR, § 638.

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WIDOW, § 639.
PRINCIPAL AND AGENT, § 640.
MEMBER, STOCKHOLDER, OR OFFICER OF CORPORATION, § 641.
JOINT PARTIES IN GENERAL, § 642.
SURVIVING PARTNERS, § 643.

Admissibility of testimony as against principal of agent deceased, see post, § 661.
Husband or wife of surviving party, see post, § 648.
Incompetency of testimony as against joint parties to contract or other transaction or cause of action, see post, §§ 658, 659.

§ 625. In general.

[a] (Ga. 1868) The proper construction of the provision that, "when one of the original parties to the contract is dead, the other party shall not be admitted to testify in his own favor," is that the parties must have been on different sides of the contract or cause of action, or must be parties with conflicting interests in the issue on trial, to exclude the survivor as a witness on the death of one of the parties.—Perry v. Hodnett, 38 Ga. 103.

[b] (Ga. 1877) One party to the record is not a competent witness to prove transactions touching an issue in the case between himself and the other party, who is dead at the time of the trial.—Perry v. Mulligan, 58 Ga. 479.

[c] (Pa. 1871) Under P. L. 1869, p. 30, a party to a thing or contract in action is not a competent witness when the other party is dead, and his rights have passed, either by his own act or that of the law, to another, who represents his interest.—Karns v. Tanner, 66 Pa. (16 P. F. Smith) 297.

[d] (Pa. 1877) Where one of the parties to a transaction is dead, the survivor cannot be permitted to testify to matters in relation thereto that occurred during the lifetime of the deceased.—Arthurs v. King, 84 Pa. 525.

[e] (Pa. 1879) Act April 15, 1869, permits parties to a civil action to testify, provided it shall not apply where the assignor of the thing or contract in action may be dead. *Held*, that the assignor of the thing or contract within the proviso was one whose right passed by his own act or by law to a party in the action.—Hess v. Gourley, 89 Pa. 195.

[f] (Pa. 1884) Laws 1869, p. 30, declares that interest shall not exclude a party or person from being a witness, provided this act shall not apply where the assignor of the contract or thing in action is dead. *Held*, that an assignor of a mortgage is a competent witness in an action on the mortgage by the personal representatives of the deceased assignee; and, there being no deceased assignor of the mortgage in the case, the proviso of Act 1869 does not apply.—Woodrow v. Blythe, 2 Del. Co. R. 94.

[g] (Pa. 1887) When a party to a contract or thing in action is dead, and his rights have passed, either by his own act or by that of the law, to another, who represents his interest in the subject of controversy, the surviving party to that subject cannot testify to matters occurring in the lifetime of the adverse party.—Carey v. Fairchild, 9 Atl. 328.

§ 626. Parties and persons whose testimony is excluded in general.

[a] (Ga. 1883) In an action against the estate of a deceased attorney for money collected, the party from whom the money is alleged to have been collected is incompetent as a witness from interest; nor is this incompetency removed by Code, § 3854, providing that no witness shall be excluded by reason of interest, but excepting cases where one of the original parties to the contract or cause of action is dead.—Daniel v. Burts, 72 Ga. 143.

[b] (Ga. 1885) Defendant in an execution is not a competent witness to prove, upon an affidavit of illegality to the execution on the ground of payment, that he made payment to plaintiff's counsel, who has since died.—Doerflinger v. Nelson, 76 Ga. 101.

[c] (Md. 1885) In an action by a married woman, suing by her husband as next friend, against an executor to recover money due from deceased, *held*, that a next friend was not a "party to the suit," and so rendered incompetent by the death of the other contracting party, even though the husband, because of his liability over to the wife on the debt sued for, is directly interested in fixing it on the estate of the decedent.—Trahern v. Colburn, 63 Md. 99.

[d] (Mo. 1871) Under Gen. St. 1865, p. 586, § 1, where one of the parties to a contract or cause of action is dead, the other party in interest is excluded from testifying, but not his children.—Anderson v. Hance, 49 Mo. 159.

[e] (Pa. 1881) A., the purchaser at sheriff's sale of a leasehold sold as the property of B., brought ejectment therefor against C., D., and E., partners, who claimed under a previous sheriff's sale of the leasehold as the property of B. A. having died, his administrators were made parties, and C., also dying, his executors were brought in by scire facias, but did not plead nor take any part in the suit. A. having alleged that defendants perpetrated a fraud at the sale, *held*, that neither the death of A. and the devolution of his title upon his administrators, nor the death of B. and the devolution of his title upon his surviving partners, rendered D. incompetent to testify as to what took place at the sale and subsequently, prior to the death of either A. or B., under the clause of the act of 1869, which excepts from its operation cases where the assignor of a chose in action is dead.—Oram v. Rothermel, 98 Pa. 300.

[f] (Pa. 1894) Plaintiff in interpleader, on the death of defendant in interpleader, is incompetent to testify, being a surviving party to the thing in action, and a person whose interest is adverse to the right of the deceased party, within Act May 23, 1887, § 5, cl. "e."—Smith v. Rishel, 164 Pa. 181, 30 Atl. 239, 35 Wkly. Notes Cas. 365.

[g] (Vt. 1865) In an action of book account by an administrator, defendant cannot, under the provisions of Gen. St. c. 36, § 24, be a competent witness to testify to a settlement of the account with the intestate. The restriction imposed by the statute applies to the party living, whether plaintiff or defendant.—Johnson v. Dexter, 37 Vt. 641.

[h] (Va. 1880) Code 1873, c. 172, § 21 et seq., providing that an original party to any contract or cause of action shall be incompetent to testify in his own favor, in case of the death of another party, in an action for overflowing plaintiff's land by reason of a dam built on a stream by defendant's decedent, renders plaintiff incompetent to testify as to matters occurring in the lifetime of the decedent.—Ellis v. Harris' Ex'r, 32 Grat. 684.

§ 627. Parties of record and interest in event.

[a] (Mass. 1860) Gen. St. c. 131, § 14, providing that, "when one of the parties to the original contract or cause of action is dead, the other party shall not be permitted to testify in his own favor," does not exclude a party to the original contract who is not a party to the action, as, e.g., in an action by the assignee in insolvency of one of the parties to the contract against the administrator of the other.—Jones v. Wolcott, 81 Mass. (15 Gray) 541.

[b] (Mass. 1862) Only parties of record are excluded from being witnesses by Gen. St. c. 131, § 14, which provide that, where one of

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the original parties to the contract or cause of action in issue and on trial is dead, the other party shall not be admitted to testify in his own favor.—Gay v. Gay, 87 Mass. (5 Allen) 157.

[c] (Minn. 1876) Under Gen. St. 1866, c. 73, tit. 1, § 8, providing that, where one party to a contract is dead, the other party shall not be admitted to testify as to such contract in his own favor, etc., such surviving party cannot testify in his own favor as to such contract in an action where he is interested, although he is not a party to the record.—Allen v. Baldwin, 22 Minn. 397.

[d] (Mo. 1870) The provision that when, upon the trial of an action, one of the original parties to the contract or cause of action in issue and on trial is shown to be dead, etc., the other party shall not be permitted to testify in his own favor, relates wholly to persons who are parties to the issue which is on trial, and not to those who were parties to the original contract merely.—Looker v. Davis, 47 Mo. 140.

[e] (Mo. 1886) Rev. St. 1879, § 4010, providing that where an administrator is a party, the other party shall not testify, unless the contract was made with the party still living and competent to testify thereto, excludes only a witness who is both a party to the contract sued on and a party to the suit.—Pritchett v. Reynolds, 21 Mo. App. 674.

[f] (Mo. 1887) One of the original parties to a contract being dead, the other party is incompetent as a witness in his own favor, though he is not a party to the suit.—First Nat. Bank of St. Charles v. Hunt, 25 Mo. App. 170.

[g] (Mo. 1890) Although one of the parties to a contract be dead, the other is competent, under Rev. St. 1879, § 4010, which provides that a party to a contract, when the other party is dead, shall not testify in his own favor, to testify in regard to it in a controversy between other persons involving said contract, to which he is not a party, and in which he has no interest.—Ford v. O'Donnell, 40 Mo. App. 51.

[h] (Pa. 1871) C. purchased land at sheriff's sale under a judgment against B.; the title being in B.'s wife. C., alleging that the land belonged to B., brought ejectment against B., but died before the trial. *Held*, that under Act 1869, allowing parties in interest to be witnesses, except where the assignor of the thing or contract in action is dead, B. was a competent witness to prove that his wife purchased with her own money; he not being a party in interest, nor called to testify against his wife, nor to anything whereto he and C. were parties.—Craig v. Brendel, 69 Pa. (19 P. F. Smith) 153.

[i] (Pa. 1872) Where one of the parties to a contract is dead, the other, though not a party to the record, in an action thereon cannot testify; and this is not altered by Act April 15, 1869, permitting the parties to an action to testify, but expressly declaring that it shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing in action or contract may be dead.—Watts v. Leidig, 20 Leg. Int. 293.

[j] (Pa. 1888) Act May 23, 1887, § 4, provides that no interest or policy of law, except as is provided in section 5, shall make any person incompetent as a witness. Section 5, cl. "e," provides that, where a party to a thing or contract is dead, the surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the right of the deceased, shall be a competent witness to any matter occurring before the death. *Held*, that a party to a contract with the decedent is incompetent to testify against the representatives, without regard to the adverse interest.—In re Neely's Estate, 4 Pa. Co. Ct. R. 644.

[k] (Vt. 1876) A party to a contract in issue and on trial, but who is not a party to the record, is not a competent witness to the contract, where the other party thereto is dead.—Davis v. Windsor Sav. Bank, 48 Vt. 532.

§ 628. Adverse party.

[a] (Mo. 1887) Rev. St. § 4010, providing that, in actions where one of the parties to the contract is dead, the other "party" may not testify in his own favor, means the other party to the contract, not to the action.—First Nat. Bank of St. Charles v. Hunt, 25 Mo. App. 170; Thiemann v. Meier, Id. 306.

[b] (Pa. 1893) On the question whether there was a breach in a contract between defendant and decedent, the fact that defendant is disqualified as a witness as to transactions with decedent, under Act May 23, 1887, § 5, cl. "e," does not disqualify plaintiff, who is otherwise competent.—Smith v. Hay, 152 Pa. 377, 25 Atl. 562, 31 Wkly. Notes Cas. 360.

[c] (Va. 1880) A party in interest and on the record is not incompetent to testify in relation to a contract to which he is not a party, though one of the parties to the contract is dead and the other is incompetent to testify.—Knick v. Knick, 75 Va. 12.

[d] (Va. 1880) Under Code 1873, c. 172, §§ 21, 22, a witness not a party to a contract, the subject of investigation, is not disqualified on account of interest only, though one of the original parties to the contract be dead, insane, or incompetent to testify by reason of infamy or other legal cause, and for that reason the other party is rendered incompetent.—Simmons v. Simmons' Adm'r, 33 Grat. 451.

§ 629. Nature of action or issue.

[a] (Ga. 1873) S. executed a deed to H., and afterwards died. H. conveyed the property to his widow. The property was levied on as S.'s property after his death, and sold by the sheriff, by virtue of an execution issued against S. in his lifetime, and bought by W., who went into possession. Mrs. S. brought ejectment. The issue was made by defendant, W., that S.'s deed to H., who was his father-in-law, was fraudulent and void. One badge of fraud alleged was continued possession of the property in S. after making the deed to H. *Held*, that Mrs. S., not being a party to the cause of action the other party to which was dead, nor the administrator or executor of S. being a party to the suit, she was a competent witness for herself.—Willingham v. Smith, 48 Ga. 580.

[b] (Md. 1886) It is only where the suit is upon the cause of action to which one party is dead that the other party is excluded as a witness, and the doctrine of mutuality does not apply where the contract upon which mutuality is claimed to exist is only incidentally introduced into the case on trial as a matter of evidence.—Horner v. Frazier, 65 Md. 1, 4 Atl. 138.

[c] (Mass. 1858) In an action by the husband and administrator of a married woman to recover money deposited in a bank by a deceased person, in trust to pay the interest to the depositor for life, and then the principal to the wife, and paid after the depositor's death to his executor, the "cause of action in issue and on trial" is the trust created by the depositor, and plaintiff is not a competent witness, under St. 1857, c. 305, § 1.—Ayres v. Ayres, 77 Mass. (11 Gray) 130.

[d] (Mo. 1876) In an action brought by C. against A., on an engagement or undertaking given by A. that, in consideration of a note given by B. to A., A. will pay the debt of B. to C., plaintiff, C., is not rendered incompetent as a witness by the death of B., the maker of the note.—Amonett v. Montague, 63 Mo. 201.

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[e] (Mo. 1885) In the statutory action of ejectment, the title to the premises and all documents on which the right of plaintiffs to recover is based are put in issue; and, where plaintiff has died before the trial, defendant is incompetent as a witness in his own behalf to overthrow by his testimony any instrument on which the title of plaintiff depends and of which defendant was one of the original parties.—Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469.

[f] (Mo. 1895) Under Rev. St. § 8918, declaring that, in actions where one of the original parties to the "contract or cause of action in issue and on trial" is dead, the other party thereto cannot testify in his own favor, or that of any party to the action claiming under him, while a party to an action by heirs for partition cannot testify that money received by him from deceased was a gift, and not an advancement, he can testify to this effect in the case of money received by another party; these questions being separate issues and independent of the general questions involved.—Gunn v. Thruston, 130 Mo. 339, 32 S. W. 654.

[ff] (Pa. 1886) Act April 15, 1869, forbidding the living party to a contract to testify in relation to it when the other party is dead, applies to suits on choses in action only. It does not apply to actions involving title to real estate.—Warren v. Steer, 112 Pa. 634, 5 Atl. 4.

[g] (Pa. 1894) The surviving party in trespass, as well as in an action on contract, is incompetent to testify; Act May, 1887, § 5, cl. "e," excluding him, making no distinction between civil actions.—Irwin v. Nolde, 164 Pa. 205, 30 Atl. 246.

[h] (Vt. 1867) An arrangement was made between F., L., and C. that the former should pay a note made by L., indorsed by C., and discounted for F.'s benefit at a bank of which he was president. F. did not pay the note, and L. and C. were notified. Upon inquiring at the bank, they were informed by the cashier that the note had been charged to F.'s account, and that they need not trouble themselves about it. Consequently L. paid to F. a sum of money of his nearly equal to the amount of the note. F. became insolvent and died, and afterwards a suit was brought by the bank against L. on the note. *Held*, that L. and C. were competent witnesses to the facts relating to the contract between them and F., as such contract was not "in issue and on trial," within the meaning of the statute which provides that, when one party to "a contract or cause of action in issue and on trial" is dead, the other party shall not be permitted to testify in his own favor.—Manufacturers' Bank v. Scofield, 39 Vt. 590.

[i] (Vt. 1872) By the term "contract in issue," in Gen. St. c. 36, § 24, is meant the contract in issue and on trial, and not one which comes into the case collaterally.—Morse v. Low, 44 Vt. 561.

[j] (Vt. 1879) In trover for a wagon, it appeared that defendant bought it of the administrator of A., the original owner. Plaintiff offered to testify that he bought it of A. in his lifetime. *Held*, that as the alleged contract of sale from A. to plaintiff was not collaterally involved, but was really "in issue and on trial," within the meaning of Gen. St. c. 36, § 24, plaintiff was an incompetent witness.—Hall v. Hamblett, 51 Vt. 589.

[k] (Vt. 1883) In ejectment, plaintiff and defendant claimed under the same party, deceased at the time of trial; plaintiff as an heir, and defendant under a contract. *Held* that, under the statute, defendant could not testify to a parol agreement made and carried out by such deceased person to convey the premises in controversy to defendant; this being the contract "in issue and on trial."—Pember v. Congdon, 55 Vt. 58.

[l, m] (Vt. 1886) In order to determine whether a case comes within the statute excluding one of the parties to a contract in issue and on trial when the other party is dead, the real substance, and not the technical form, of the issue will govern. So, where the question in issue was whether the deceased maker of a note secured by mortgage, and afterwards assigned, and the assignee had agreed to substitute a new note for the old one under the mortgage, the original payee, who was present at the time of the alleged substitution, was a competent witness.—Richardson v. Wright, 58 Vt. 367, 5 Atl. 287.

[n] (Vt. 1886) In an action in trover brought against a defendant who claims title to the property as legatee under a will, where the evidence shows the title of plaintiff to have been derived from an entirely different source, no claim thereto being made by virtue of any contract with the deceased person, *held*, that plaintiff's title is not the cause of action in issue, and that he is not prohibited from being a witness in his own behalf by R. L. §§ 1001–1003, which provide that, "in actions against an estate, except actions of book account, where one of the original parties to the contract or cause of action in issue is dead, * * * the other party shall not be admitted to testify in his own favor," etc.—Walling v. Newton, 59 Vt. 684, 10 Atl. 827.

[o] (Vt. 1892) In a suit by an administrator to recover, for the payment of debts, lands that had been conveyed by decedent without valuable consideration, defendants contended that decedent had provided for one of the alleged debts by a loan to T., in consideration of which T. agreed to pay the creditor, and that the latter, since deceased, had notice of the arrangement, and assented to it. *Held*, that the "cause of action in issue" was not whether the debt was still subsisting, but whether decedent had disposed of his property without making ample provision for its payment; and therefore, under Rev. Laws, § 1002, providing that, where one of the original parties to a "cause of action in issue" is dead, the other party shall not be admitted to testify in his own favor, T. was incompetent to testify that the creditor had agreed to accept him as the payor of the debt.—Randall's Adm'r v. Randall, 64 Vt. 419, 24 Atl. 1011.

[p] (Vt. 1892) Where the cause of action relied on is the conversion of certain hay, and plaintiff claims title to the hay through a chattel mortgage given by a third person, the giving of the mortgage is a collateral issue, and, though the mortgagor is dead, plaintiff can testify that the mortgage covered the hay in question.—Banister v. Ovitt, 64 Vt. 580, 24 Atl. 1117.

[q] (Vt. 1892) One who has made a contract with another to support him for life in consideration of property conveyed to him by the latter is a competent witness on the contest of a will by such person reciting that it confirms and approves the contract, and bequeathing to him his personal property, as that contract is in no sense in issue and on trial, since the establishment of the will, if it can affect the contract, can only do so incidentally and collaterally.—Manley's Ex'r v. Staples, 65 Vt. 370, 26 Atl. 630.

[r] (Va. 1878) A statute providing that, where one of the original parties to a contract or other transaction which is the subject of investigation is dead, the other party shall not testify in his own favor, or in favor of any party having an interest adverse to that of decedent, does not prevent a deputy sheriff from testifying, in an action brought against the sheriff and the sureties on his bond on account of a

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default of the deputy, though some of the sureties be dead; they not being parties to the transaction which is the subject of investigation.—Grandstaff v. Ridgely, 30 Grat. 1.

§ 630. Surviving party to contract.

[a] (U. S. 1868) In Massachusetts, where an executor or administrator is a party, the other party cannot testify in his own favor, unless the contract was originally made with a party who is living and competent to testify.—Robinson v. Mandell, Fed. Cas. No. 11,959 [3 Cliff. 169].

[b] (D. C. 1879) In a suit against executors on a parol contract of their testator, plaintiff cannot, under Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], testify to conversations had with the deceased, unless called by defendants or by the court.—Meguire v. Corwine, 3 MacArthur, 81.

[c] (Ga. 1869) In cases arising under the ordinance of 1865 for the adjustment of Confederate contracts, either party to the suit may be a witness, notwithstanding one of the contracting parties is dead.—Horne v. Young, 40 Ga. 193.

[d] (Ga. 1875) In an action against an administrator on a contract between plaintiff and deceased, plaintiff is incompetent as a witness, in the absence of anything in his declaration or the pleadings of either party to show that any benefit was claimed by virtue of the ordinance of 1865, under Act Dec. 18, 1868, declaring that in all cases arising under the ordinance of 1865 either party shall be a competent witness to prove any of the facts authorized to be proved by such ordinance.—Tippin v. Byrd, 54 Ga. 119.

[e] (Ga. 1877) Where one party to the contract is dead, the other, if a party to the record, is not competent to testify to any transactions touching said contract, or varying its terms, or in respect to its fulfillment or not, by the dead party.—Hays v. Callaway, 58 Ga. 288.

[f] (Ga. 1878) A discharge in bankruptcy will not render a witness competent who would otherwise be incompetent on account of the death of the opposite party to the contract.—Oatis v. Harrison, 60 Ga. 535.

[g] (Ga. 1883) Under Code, § 3854, one party to a contract being dead, the other party cannot testify in his own favor in a suit brought on the contract by the executor of the party deceased.—Huggins v. Huggins, 71 Ga. 66.

[h] (Ga. 1888) The caveator is not a competent witness to prove a contract with the deceased, and his own compliance therewith, where such contract is the basis of his objection to the year's support of the widow as assigned by the appraisers.—Robson v. Harris, 82 Ga. 153, 7 S. E. 926.

[i] (Ky. 1895) On an issue as to whether defendant executed to decedent a certain contract, defendant's testimony is incompetent.—Raison's Adm'x v. Steele, 29 S. W. 454.

[j] (Md. 1887) Where a bill is filed by a trustee, appointed by the court to carry out the trusts contained in a will, against the executor of the widow and sole devisee of a mortgagor, praying a partial subrogation to the rights of the mortgagee, on the ground that his testatrix, with the consent and approval of the mortgagor (who was her brother), had advanced money to pay off part of the mortgage, the sister of the testatrix is not an incompetent witness to prove the agreement between her brother and sister because she is co-complainant with the trustee. She is not within the exception to Evidence Act 1864, c. 109, removing all disqualification founded upon interest, providing that "where an original party to a contract or cause of action is dead, * * * or where an executor or administrator is a party to the action, either party may be called as a witness by his opponent, but shall not be permitted to testify on his own offer, or upon the call of his coplaintiff or codefendant, other than now by law allowed, unless a nominal party merely," since she is not a party to the agreement.—Robertson v. Mowell, 66 Md. 530, 8 Atl. 273.

[k] (Md. 1890) In an action to enforce a mechanic's lien for work done and material furnished under a contract with the owner of the property, since deceased, plaintiff's testimony as to the contract is inadmissible, under Code, art. 35, § 2, providing that, when the original party to a contract is dead, the opposite party shall not testify on his own offer.—Gunther v. Bennett, 72 Md. 384, 19 Atl. 1048.

[l] (Mich. 1886) One of the parties to a written contract being dead, the testimony of the survivor is inadmissible against deceased as to any matters which transpired between them; and, unless it appears that the contract was impaired by the acts of deceased, its efficacy will be presumed.—Seligman v. Ten Eyck's Estate, 60 Mich. 267, 27 N. W. 514.

[m] (Miss. 1873) The surviving party to a contract with a deceased person involving personal liability is incompetent as a witness to exonerate himself.—Buckingham v. Walker, 48 Miss. 609.

[n] (Mo. 1876) In a suit against C. by A., for himself, and as administrator of B., C. is inadmissible as a witness to prove a contract of settlement with B. during his lifetime.—Kellogg v. Malin, 62 Mo. 429.

[o] (Mo. 1877) Where one of the parties to a contract is dead, the surviving party is not a competent witness, in an action for specific performance, to prove that such contract has been partly performed.—Sitton v. Shipp, 65 Mo. 297.

[p] (Mo. 1881) Where one of the parties to a contract is dead, the testimony of the survivor is not admissible thereon.—Wood v. Matthews, 73 Mo. 477.

[q] (Mo. 1881) In a suit on a contract, brought by a person for whose benefit the contract was made, and who can sue thereon, the contract having been made in Louisiana, defendant can testify, although the other party to the contract is dead.—Amonett v. Montague, 75 Mo. 43.

[r] (Mo. 1885) Where, in an action against an administrator, the defense was a receipt to plaintiffs, purporting to be signed by plaintiffs' decedent, plaintiffs were not competent witnesses as to its genuineness, under Rev. St. 1879, § 4010, providing that, where an administrator is a party, the other party shall not testify, unless the contract was made with a party still living and competent to testify thereto.—Kaho v. King, 19 Mo. App. 44.

[s] (Mo. 1886) In an action against a tenant in default, for possession and rent, by the heirs of a deceased lessor, a third party who claims the land, and to whom defendant has paid the rent under an indemnifying contract, is incompetent as a witness for defendant to testify as to the ownership of the land, both under Rev. St. 1879, § 4010, providing "that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, * * * the other party shall not be permitted to testify in his own favor," and also at common law, by reason of his interest in the indemnity.—Meier v. Thieman, 90 Mo. 433, 2 S. W. 435.

[t] (N. J. 1885) The administrator of a married woman paid a bill presented by a physician against the estate, and her husband excepted to its allowance in the settlement of the administrator's account. *Held*, that the physician

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was incompetent to testify to a promise by the decedent to pay the bill.—Baker v. Galpin, 39 N. J. Eq. (12 Stew.) 491.

[u] (Pa. 1874) The exception in Act 1869, removing the disqualification of interest in a witness, as to the survivor of a deceased assignor, does not apply to the death of an intervening purchaser. Both of the parties to the original contract being alive, either is a competent witness.—Pattison v. Armstrong, 74 Pa. (24 P. F. Smith) 476.

[v] (Pa. 1887) Defendant in ejectment claimed title from one whose title was acquired under an execution sale on a judgment rendered on a bond which had been assigned to him for his use by one deceased. *Held*, that the assignee was a competent witness to testify as to the bona fides of the transfer of the bond by such deceased person to him, under the rule by which the surviving party to a contract is excluded as a witness, since the object of the rule is to protect the deceased party from the adverse testimony of the living one, and the witness in this case was not within the mischief the rule was intended to prevent.—Adams v. Bleakley, 117 Pa. 283, 10 Atl. 884.

[w] (Pa. 1893) In an action involving the ownership of land, the title to which was in plaintiff, but which was claimed by defendants by virtue of the alleged payment by their intestate of part of the purchase price of a larger tract, under an agreement with plaintiff to divide, plaintiff is incompetent to testify as to his acquisition of title under Act May 23, 1887, § 5, cl. "E," providing that, where any party to a thing or contract in action is dead, and his rights therein have passed to a party of record, neither the surviving party nor any other person whose interests are adverse to the rights of the deceased shall be a competent witness to matters occurring before his death.—Wolf v. Wolf, 158 Pa. 621, 28 Atl. 164, 33 Wkly. Notes Cas. 505.

[x] (Pa. 1894) Where a legacy attached is claimed under a prior assignment, the validity of which is attacked, and pending proceedings the attaching creditor dies, the debtor and claimant are competent witnesses as to the validity of the assignment, the deceased creditor not being a party thereto within Act May 23, 1887, § 5.—In re Kuhns' Estate, 163 Pa. 438, 30 Atl. 215, 35 Wkly. Notes Cas. 155.

[y] (Vt. 1871) A power of attorney from an intestate soldier, authorizing a town to pay his town bounty to W., and a receipt signed by W., to the effect that the town had paid the bounty over to him, showed prima facie that W. had received the same to the use of the intestate, under such circumstances that the law would imply an undertaking by W. to pay over the money on request. In an action therefor brought against W. by the administrator, *held*, that defendant was not a competent witness under the statute, allowing the parties to testify, to contradict or explain away such circumstances.—Walker v. Taylor, 43 Vt. 612.

§ 631. Parties to bills and notes.

[a] (Ga. 1867) The indorsee of a note brought an action thereon against A., B., and C., as makers, and D. as security. Pending suit, C. died, and no representative of his estate was before the court at the trial. A. and B. pleaded non est factum, and offered themselves as witnesses to prove that C. signed their names to the note without authority. *Held*, that, as the only parties to be affected by judgment in the case were living and before the court, they were competent witnesses against each other.—Field v. Walker, 36 Ga. 520.

[b] (Ga. 1871) On the trial of an issue joined to ascertain whether defendant was in possession of the land for which the note, the foundation of the action, was given, at the commencement of the suit, *held*, that the death of one of the parties to the note, the survivor being the one to whom the deed was made, did not exclude plaintiff as a witness from testifying.—Rawson v. Cherry, 44 Ga. 73.

[c] (Md. 1873) In a suit on a note by the indorsees against the executrix of the indorser, the maker is a competent witness for plaintiffs to prove that at the time the deceased indorsed the note he was indebted to the witness in an amount exceeding the amount of the note, and that the witness owed plaintiffs the sum mentioned in the note, and that, if not being convenient for the deceased to pay the money he owed the witness, it was agreed between them that the deceased should indorse the note to be given to plaintiffs, and that he would pay it at maturity. The maker having no interest which would disqualify him, his competency does not depend on Acts 1868, c. 116, excluding the other party as a witness when one party to the contract is dead.—Schley v. Merritt, 37 Md. 352.

[d] (Md. 1879) In an action on the parol promise of the defendant's testator, made, more than 12 years after the maturity of a bill single (that was barred by limitation), to the executors, jointly, of the payee of the bill, under Acts 1868, c. 116, rendering incompetent as a witness an "original party to a contract or cause of action" in case of the death of the other party, one of them who was also a son of the payee, was not a competent witness.—Wright v. Gilbert, 51 Md. 146.

[e] (Mass. 1861) In an action by the indorsee against the maker of a note, if the payee is dead, defendant is incompetent to testify, under St. 1857, c. 305, but plaintiff is competent; and St. 1859, c. 230, § 2, does not apply to such a case.—Byrne v. McDonald, 83 Mass. (1 Allen) 293.

[f] (Mass. 1861) If a note is taken by A. in his own name, for the benefit of B., and A. dies, defendant is not a competent witness in an action on the note by an indorsee.—Hubbard v. Chapin, 84 Mass. (2 Allen) 328.

[g] (Mo. 1876) In suit by the indorsee against the maker of a note, the payee whereof is dead at the date of the suit, defendant is incompetent to testify at all in the case as a witness in his own behalf.—Angell v. Hester, 64 Mo. 142.

[h] (Mo. 1876) In a suit by the administrator of an indorsee against the indorser of a note, the latter will not be allowed to testify in his own behalf that he never received notice of protest.—Lewis v. Weisenham, 1 Mo. App. 222.

[i] (Mo. 1880) Where the maker of a note is dead, the payee cannot testify in his own behalf as to payments thereon by deceased.—Goddard v. Williamson's Adm'r, 72 Mo. 131.

[j] (Mo. 1890) Under Rev. St. 1879, § 4010, providing that a party to a contract shall not testify in his own favor in an action thereon where the other party is dead, the maker of a note is not a competent witness in a suit thereon against him by an indorsee, if the payee indorsing it be dead, though such payee was merely an accommodation indorser, and was also released from liability by want of due presentment of the note for payment.—Ashbrook v. Letcher, 41 Mo. App. 369.

[k] (Mo. 1890) Under Rev. St. 1889, § 8918, which provides: "Where one of the original parties to a contract * * * is dead, * * * the other party shall not be admitted to testify either in his own favor, or in favor of any party to the action claiming under him"—the maker of a note secured by mortgage is incompetent to testify, in behalf of a grantee of the mortgaged premises, in a controversy as to the ownership of the note, between such grantee and a person claiming the note as transferee of the payee in a suit to foreclose the mortgage, to which such maker was a party defendant, that the admin-

istrator of the payee had notified him (the maker) of the finding of the note among the intestate's effects, and had demanded payment of him (the maker).—Rice v. McFarland, 41 Mo. App. 489.

[l] (Mo. 1894) In an action on a note by the executor of the indorsee against the maker, defendant is not competent to testify that deceased told him he purchased the note after its maturity.—Jones v. Burden, 56 Mo. App. 199.

[m] (Mo. 1894) The death of a lodge treasurer will not disqualify the indorsee of a note indorsed to him by the lodge's trustees from testifying as to such indorsement, where all the parties to the assignment and such trustees are alive.—Mayer v. Old, 57 Mo. App. 639.

[n] (Vt. 1867) In an action of trover brought by an administrator for the conversion of a note belonging to his intestate, one who without authority sold the note to defendant was a competent witness to prove the good faith of the transaction, not coming within the terms or intent of the statute excluding as a witness a living party to the cause of action or contract in issue where the other party is dead.—Benior v. Paquin, 40 Vt. 199.

[o] (Vt. 1880) The payer of a negotiable note is not a witness to the fact of a payment; the note having been assigned subsequently, the payee being dead, and suit brought in the name of the assignee.—Farmers' Mut. Fire Ins. Co. v. Wells, 53 Vt. 14.

[p] (Vt. 1884) In an action by an administrator on a note, defendant cannot be a witness in his own behalf to prove that the note had been given him by the intestate.—Rooney v. Minor, 56 Vt. 527.

[q] (Vt. 1891) Under R. L. § 1002, providing that where one of the original parties to the contract in issue is dead the other cannot testify in his own behalf except as to circumstances occurring after the death of the other party, defendant in an action on notes, the payee of which is deceased, cannot testify that his wife was his agent in the conduct of all the business done with the payee.—Sanborn v. Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

§ 632. Principal and surety and parties to or persons liable on bonds.

[a] (Ga. 1889) Under Code, § 3854, providing that where one party to the contract or cause of action is dead the other shall not be a witness, a surety to whom an execution against his principal was assigned on payment of the debt cannot testify that the conveyance to him of the land, on the purchase of which the debt arose, was not to be in satisfaction of his claim, where his principal is dead, and the other parties to the action are administrators of execution creditors of his deceased principal.—Nesbitt v. Parrott, 84 Ga. 142, 10 S. E. 589.

[b] (Mo. 1874) In an action on a note, the surety offered to prove by the principal debtor that the son and agent of the obligee had extended the time of payment without such surety's consent. *Held*, the obligee being dead and the witness being a party to the suit, his evidence was inadmissible; the agent alone being competent to testify on this point.—Leeper v. McGuire, 57 Mo. 360.

[c] (Va. 1877) Under Code 1873, c. 172, § 22, obligors in a bond, sued by an assignee of a deceased obligee, are not competent to testify in their own behalf.—Grigsby v. Simpson, 28 Grat. 348.

[d] (Va. 1878) A. and B., commissioners, sold land to C., who executed his bonds for the deferred payments, with D. and E. as his sureties, and subsequently sold the land to F. A. being dead, *held*, that D., E., and F. are incompetent witnesses to prove the payment of the bonds by C. to A., since they fall within the exception of Code 1873, p. 1109, c. 172, § 22, providing that when one of the original parties to the contract or transaction is dead the other shall not be admitted to testify in his own favor.—Parent's Adm'r v. Spitler's Adm'r, 30 Grat. 819.

[e] (Va. 1879) In an action on a bond by the obligee against the surviving sureties and the representative of one deceased, the plea was payment, which consisted of notes given by one surety to obligee. *Held*, that this surety was incompetent as a witness, under Code, c. 172, § 21, which provides that, when one of the original parties to a contract is dead, the other party shall not be admitted to testify in his own favor.—Carter v. Hale, 32 Grat. 115.

[f] (Va. 1887) In an action by the administrator of a surety, against the principals and a co-surety, to obtain reimbursement for money paid by him on their obligation, the co-surety is not a competent witness as against plaintiff to show that others of the defendants sued as principals were not such.—Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751, 1 S. E. 193.

[g] (Va. 1888) Under Acts 1876–77, c. 256, § 1, p. 265, providing that, when one of the original parties to a contract or other transaction is dead, the other cannot testify, one not a party to a bond, but who has agreed with the obligor to pay it, and has received from him money for that purpose, may prove payment, though the obligee is dead.—Wager v. Barbour, 84 Va. 419, 4 S. E. 842.

§ 633. Grantor and grantee or vendor and vendee.

[a] (Ala. 1883) In a suit for specific performance by a purchaser against the vendor's heirs, the former is not a competent witness as to the terms of his contract with the vendor.—Goodlett v. Kelly, 74 Ala. 213.

[b] (Ala. 1888) The vendor of land, who transferred to complainant the purchase-money notes in suit, having died, the testimony of defendant, the vendee, as to transactions and statements between himself and the deceased vendor, in regard to the sale, is incompetent, and properly excluded.—Hodges v. Denny, 86 Ala. 226, 5 South. 492.

[c] (Ga. 1877) In an action by the guardian of a child of a divorced wife, after the death of the latter, to establish an antenuptial deed settling certain property on the wife, and to cancel a postnuptial deed made by the husband, all of the parties to such antenuptial deed at the time of its execution, except the husband, being now dead, he was not a competent witness to testify that the deed had been destroyed by the trustee.—Barclay v. Waring, 58 Ga. 86.

[d] (Ga. 1884) In ejectment, where plaintiff claimed title under one who had a deed from defendant, but who was dead at the time of the trial, defendant is incompetent to show that such deed was not delivered to deceased.—Niles v. Groover, 73 Ga. 808.

[e] (Ga. 1889) Where, in ejectment, defendant, who claimed under certain legatees under the will of plaintiff's grantor, offered evidence by an uninterested witness that the deed from decedent to plaintiff was made in fraud of creditors, and redelivered to decedent in his lifetime, plaintiff, as a witness in his own behalf, is not competent to show that he gave up his deed to decedent to aid him in writing another, under Code, § 3854, subd. 1, providing that, where one of the original parties to the contract or cause of action on trial is dead, the other party shall not be admitted to testify in his own favor.—McBride v. McBride, 82 Ga. 714, 9 S. E. 1111.

[f] (Ga. 1891) Defendant purchased land, taking a bond for a deed. After he had paid

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the purchase money, the vendor executed to a daughter of the defendant a warranty deed. In a suit by her heirs to recover the land, defendant contended that at the request of his wife, and to satisfy her, his vendor executed the deed and delivered it to defendant, telling him to keep it, and not deliver it to the daughter, and at the proper time the vendor would make a deed to him. With this understanding defendant surrendered his bond, and took the deed, which was never delivered to his daughter, but was, without his knowledge, abstracted from his house and put on record. Code, § 3854, par. 1, provides that, "where one of the original parties to the contract or cause of action is dead, * * * the other party shall not be admitted to testify in his own favor." *Held*, that defendant was not, but that his vendor was, a competent witness to establish the defense.—Harrison v. Perry, 86 Ga. 813, 13 S. E. 88.

[g] (Ill. 1873) On a bill filed by the heirs of a deceased grantor, to have his deed declared a mortgage, and to redeem, the grantee is not a competent witness to prove a settlement between him and the deceased grantor, at the time of the execution of the deed of conveyance, and the amount found to be due him, the consideration for the deed, or anything occurring, at the time, between him and the deceased, such as giving his note for the balance due for the land conveyed, or its subsequent payment.—Ruckman v. Alwood, 71 Ill. 155.

[gg] (Mass. 1869) On an issue as to title between a grantee and an heir of the deceased grantor, the grantee is not a competent witness in her own behalf, under Gen. St. c. 131, § 14, to prove performance of a condition on which the deed was given; "one of the original parties to the contract" being dead, and the grantee being "the other party."—Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494.

[h] (Mo. 1876) On a mandamus against the clerk of a township board of education, to enforce the payment of a school warrant, where the defense was that certain furniture, etc., for which the warrant was issued, was never furnished, the district clerk, on whom the warrant was drawn, was not rendered incompetent as a witness by the death of the alleged vendor, who was the payee, and plaintiff's indorser, since the vendor was not a party to the suit, and the clerk was not an original party to the contract.—State ex rel. Seely v. Huff, 63 Mo. 288.

[i] (Mo. 1881) In ejectment, plaintiff claimed under a deed from defendant to his son, since deceased. Defendant claimed under a verbal contract with his son, rescinding the deed. His claim was accompanied by possession. *Held*, that defendant could not testify as to the contract with his son.—Hughes v. Israel, 73 Mo. 538.

[j] (Mo. 1885) In ejectment by the devisee, whose testator held under a deed from defendant, defendant is incompetent to testify to the nondelivery of such deed.—Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469, overruling Bradley v. West (1878) 68 Mo. 69.

[k] (N. J. 1884) Where the purchaser of land seeks against an administrator d. b. n. c. t. a. a decree for the specific performance of the contract of sale made by the executor under a testamentary power, the purchaser is incompetent to prove the contract.—Palmateer v. Tilton, 39 N. J. Eq. (12 Stew.) 40.

[l] (Pa. 1876) A vendor of personal property is incompetent to testify as to a verbal contract with his vendee, since deceased, in reference thereto, in a suit brought by the executors of the vendee against another in relation to such property.—Gray's Ex'rs v. Whitney, *81 Pa. (32 P. F. Smith) 332.

[m] (Pa. 1879) If the grantor of the title to land in dispute is dead, and he never had any transaction or communication of any kind with the adverse party to a suit brought to try the title to the land, he was not an "assignor of the thing or contract in action" within the meaning of Act 1869, and the adverse party is competent as a witness.—Waltman v. Herdic, 90 Pa. 459.

[n] (Pa. 1883) Where the grantee in a deed, absolute on its face, is dead, the grantor cannot show that it was intended as a conveyance in trust for himself.—Murray v. New York, L. & W. R. Co., 103 Pa. 37.

[o] (Pa. 1894) Under Act May 23, 1887, prohibiting the surviving party to a contract, or one whose interest is adverse to deceased's right therein, to testify against deceased's successor in interest as to anything that happened before his death, where plaintiff alleges his and his wife's deed to defendant's deceased grantor to be a forgery, neither he nor his wife can testify that on the day when the deed purports to have been executed they were in another county.—Sutherland v. Ross, 160 Pa. 29, 28 Atl. 437.

[p] (Pa. 1895) Pending ejectment by a husband and wife against their grantee, based on the wife's defective acknowledgment of the deed, the grantee conveyed the land to the terre-tenant, and subsequently died. His executors filed a bill against the husband and wife and the terre-tenant to have the acknowledgment reformed, which was dismissed, and judgment in the ejectment suit was given for plaintiffs therein, who obtained a rule on the terre-tenant to bring second ejectment. *Held* that, in the second ejectment by the terre-tenant against the husband and wife, the husband was not a competent witness to testify as to the acknowledgment of the deed, since the grantee therein was dead.—New York & O. Land Co. v. Weidner, 169 Pa. 359, 32 Atl. 557.

[q] (Vt. 1872) In trover for property which once belonged to W., deceased, defendant claimed title thereto by virtue of a written contract signed by W. and his wife, who was still living. Plaintiff claimed that said contract was void, for want of sufficient capacity in W. to execute it. Defendant claimed that it was but the reduction to writing of a verbal contract which he had previously made with W. alone, at a time when it was conceded that he was capable of contracting, and in which his wife was in no way interested. *Held*, that defendant was not a competent witness to such verbal contract.—Wood v. Shurtleff, 46 Vt. 325.

[r] (Va. 1888) In an action to recover property claimed by a son under an alleged sale from his father, now deceased, the son cannot testify in his own behalf, under Code 1873, c. 172, § 22, as amended and re-enacted by Acts 1876–77, c. 256, p. 265, providing that, when one of the original parties to a contract is dead, or incompetent to testify, the other shall not testify in his own favor, or in favor of any other person having an interest adverse to that of the party incapable of testifying, unless called to testify on behalf of the last-mentioned party, or unless some person having an interest adverse to that of the party incapable of testifying shall have testified to some fact occurring before such inability accrued.—Saunders v. Greever, 85 Va. 252, 7 S. E. 391.

§ 634. Trustee and beneficiary.

[a] (Ga. 1876) Where, on a bill filed by the children of a cestui que trust, against the administrator of the purchaser of property sold by the trustee, to recover the same, the defense is title by prescription, the trustee is an incompetent witness to prove what passed between him and the purchaser at the time of the execution of the deed relied on as color of ti-

tle, in order to show that such instrument originated in fraud.—Virgin v. Wingfield, 56 Ga. 474.

[b] (Mass. 1865) In an action against an administrator to recover money given to his intestate in trust to deposit in a savings bank for plaintiff, and which the intestate deposited in his own name as trustee, plaintiff cannot be a witness in his own favor.—Farrelly v. Ladd, 92 Mass. (10 Allen) 127.

[c] (Mo. 1870) In a suit against the heirs of a deceased person for certain land, on the claim that the estate had been purchased by deceased with the money of plaintiff and without his consent, the testimony of claimant as to money advanced deceased, and other facts touching the purchase, is incompetent under the statute relating to witnesses.—Johnson v. Quarles, 46 Mo. 423.

[d] (Mo. 1892) Since, under Rev. St. 1889, § 8918, where an administrator is a party, the other party is incompetent to testify in his own favor unless the contract in issue was made with a person who is living and competent to testify, except as to acts and contracts done or made since "the appointment of the administrator," defendant, in a suit by a public administrator, cannot testify in his own behalf as to a trust declared by him where the other parties thereto, and the conveyancer who prepared it, are dead; nor can he testify as to what was said in regard to his liability at a meeting of the heirs, attended by him, which was held before plaintiff took charge of the estate, although evidence was admitted as to defendant's declarations on the occasion.—Leeper v. Taylor, 111 Mo. 312, 19 S. W. 955.

[e] (Pa. 1885) Defendant trustee is not a competent witness as to matters between himself and a deceased cestui que trust, but is a competent witness as to matters between himself and living cestuis que trust.—Appeal of Taylor, 11 Atl. 307.

[f] (Pa. 1888) A trustee to a marriage contract agreed to use and improve the covenants made to him so as to exonerate the estate of the one who first died from all claims of the survivor. The widow petitioned the orphans' court for a citation against the executors to file an account and to award her the widow's allowance, alleging that the contract was not binding on her by reason of circumstances attending its execution. *Held*, that the trustee was not a competent witness for her to prove the circumstances under Act May 23, 1887, § 5, cl. e, providing that, where any party to a contract is dead, any surviving or remaining party to the contract, or any other person whose interest is adverse to the right of the deceased, is not a competent witness to any matter occurring before the death.—In re Neeley's Estate, 4 Pa. Co. Ct. R. 644.

§ 635. Donor and donee.

[a] (Mo. 1892) Under Rev. St. 1889, § 8918, providing that, where one party to a contract or cause of action is dead, the other party cannot testify in his own favor, plaintiff, claiming the property in dispute as a gift causa mortis from the prior owner, cannot testify against defendant, claiming as distributee of such owner.—Scott v. Riley, 49 Mo. App. 251.

[b] (Pa. 1869) B. and wife, daughter of decedent, gave bond to decedent, which stipulated, inter alia, that the principal should be paid to B.'s wife on decedent's death. On distribution B. and wife were offered as witnesses to prove that the consideration of the bond was intended as a gift to B.'s wife, and not as an advancement. *Held*, that they were incompetent witnesses, and that their incompetency was not removed by the act of 1869, which provided that it should not apply "where the assignor of the thing or contract in action may be dead."—In re Knabb's Estate, 1 Leg. Chron. 311.

[c] (Pa. 1881) In ejectment, plaintiff showed title to the premises in her husband, who died seised thereof, and devised it to her. Defendant, who was testator's son, claimed title by adverse possession during his father's lifetime, and was permitted to testify in his own behalf, and on cross-examination also testified as to the circumstances of an alleged parol gift by his father to him. *Held*, that defendant was within the proviso of Act April 15, 1869, and was therefore clearly incompetent to prove the facts and circumstances to which he testified as having occurred during the lifetime of his father, and that testator must be regarded as plaintiff's assignor within the fair intendment and meaning of the act.—Ewing v. Ewing, 96 Pa. 381.

[d] (Pa. 1887) One who claims personalty by virtue of a parol gift from one deceased is not a competent witness to testify as to the gift. The deceased, in such case, is "the assignor of the thing in action," within the meaning of Act April 15, 1869 (P. L. 30).—Patterson v. Dushane, 115 Pa. 334, 8 Atl. 440.

[e] (Pa. 1893) In an action by a donor to set aside a gift to a decedent, she was not a competent witness to testify against the estate of the donee.—Yeakel v. McAtee, 156 Pa. 600, 27 Atl. 277, 33 Wkly. Notes Cas. 144.

[f] (Vt. 1881) In a suit to set aside a gift induced by undue influence, the donee being dead, the donor, under the statute, is not a competent witness in his own behalf.—Wade v. Pulsifer, 54 Vt. 45.

[g] (Vt. 1884) Defendant's intestate, being both father and guardian of plaintiff, purchased an organ for her while he had some money of hers in his possession, and it being a question whether this was a gift, *held*, that she was not a competent witness.—La Mountain v. Miller, 56 Vt. 433.

§ 636. Mortgagor and mortgagee and lessor and lessee.

[a] (Ala. 1882) On a bill to foreclose a mortgage, the mortgagee cannot testify as to transactions between himself and the deceased mortgagor.—Junkins v. Lovelace, 72 Ala. 303.

[b] (Mass. 1867) A mortgagor who has been joined as a defendant in a writ of entry to foreclose the mortgage, and who has conveyed his equity of redemption before the commencement of the action, is not competent as a general witness to testify, after the death of the mortgagee, to facts tending to impeach the original validity of the mortgage.—Straw v. Greene, 96 Mass. (14 Allen) 206.

[c] (Minn. 1863) S. executed a chattel mortgage to A. for consideration furnished by F. *Held*, in an action by A. against B., a creditor of S., after the death of F., to recover the property which had been levied upon under an execution against S. by B., he claiming such mortgage to be fraudulent, that S. was a competent witness for A. to prove the transaction, under the provision of the statutes prohibiting a party to the cause of action from testifying where the other party is dead or insane.—Foster v. Berkey, 8 Minn. 351 (Gil. 310).

[d] (Pa. 1887) A. and B. conveyed a certain lot to C., who on the same day executed a mortgage to D. as security for a loan. D. died, and his administrators caused the property to be sold under an execution on the mortgage, and bought it in. They then brought ejectment against B. and C., who were in possession. C. having disclaimed, B. offered to show by him that the inducement and consideration for her conveyance to C. was a promise from D. to repay the amount she had paid on the property, and that she (B.) was to remain in possession

until that was paid. *Held*, that this would be impeaching the mortgage, which C., the mortgagor, was not competent to do, since the mortgagee was dead.—Carey v. Fairchild, 9 Atl. 328.

[e] (Pa. 1889) Act May 23, 1887, provides that where any party to a thing or contract in action is dead, and his right has passed to a party on the record, who represents his interest in the subject in controversy, neither any surviving or remaining party to any such thing or contract, nor any other person whose interest shall be adverse to said right of such decedent, shall be a competent witness to any matter occurring before the death of said party. Plaintiff succeeded to the rights of a lessee of a decedent, and defendant to the rights of decedent. *Held*, that neither plaintiff nor the original lessee could testify, in an action by plaintiff against defendant involving the rights under the lease, as to declarations of deceased showing that the lease did not correctly express the contract.—Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 25 Wkly. Notes Cas. 32.

[f] (Pa. 1889) The fact that plaintiff had given to the original lessee a written release of "all liability upon any covenants that may be in his conveyance" does not remove the disqualification, as the lessee's incompetency does not arise out of his present interest, and plaintiff is a party to the suit.—Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 25 Wkly. Notes Cas. 32.

§ 637. Devisee and heir or next of kin.

[a] (Ga. 1877) A devisee is not a competent witness to prove that the testator made her a parol gift of the land devised, for the reason that the testator is dead.—Bothwell v. Dobbs, 59 Ga. 787.

[b] (Md. 1872) In a contest between the widow and next of kin of an intestate, as to the manner in which the estate shall be distributed, the next of kin are competent witnesses in their own behalf under Acts 1868, c. 116, excluding the other party as a witness when one party to the contract is dead.—Jones v. Jones, 36 Md. 447.

[c] (Mo. 1872) Under Wag. St. p. 1372, § 1, which provides that where one of the original parties to the contract or cause of action is dead, the other party shall not be permitted to testify, in proceedings to test the validity of a will, the beneficiaries under the will are competent witnesses.—Garvin's Adm'r v. Williams, 50 Mo. 206.

[d] (Mo. 1893) In ejectment by the widow of B., as his heir, against the tenants of the heirs of O. and such heirs, the latter of whom claim title through an alleged lost deed from B. to O., the heirs of O. are incompetent as witnesses to establish the deed, under Rev. St. 1889, § 8918, which provides that, in actions where one of the original parties to the contract or cause of action is dead, the other party cannot testify either in his own favor or in favor of any party claiming under him; and no party to such suit, whose right of action or defense is derived from one who is, or, if living, would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor.—Messimer v. McCray, 113 Mo. 382, 21 S. W. 17.

[e] (Pa. 1893) A devisee who has refused to accept a devise of land is not a "remaining party" to the "thing or contract in action," under Act May 23, 1887, § 5, cl. e, and therefore incompetent as a witness in ejectment by the other heirs against persons holding under an execution sale of the land as the property of the devisee, because the purchaser at such sale was dead.—Tarr v. Robinson, 158 Pa. 60, 27 Atl. 859, 33 Wkly. Notes Cas. 189.

§ 638. Executor or administrator.

[a] (Ga. 1867) The statute providing that when one of the parties to a contract is dead, the other shall not be a witness in his own favor, does not prevent the executor of the deceased party from testifying in an action on such contract.—Crenshaw v. Robinson, 37 Ga. 118.

[b] (Md. 1893) Code, art. 70, § 2, provides that when an original party to a contract is dead, or where an administrator is a party, either party may be called as a witness by his opponent, but shall not testify on his own offer, unless a nominal party merely, except where the party to such suit has died after testifying for himself, when the opposite party may testify as to matters which such decedent testified to. *Held*, that an administratrix of a party to the contract on which suit was brought could not testify, in her own behalf, to a promise made her by defendant's testator to pay her intestate certain money alleged to have been due from him to her intestate.—Bowie v. Bowie, 77 Md. 311, 26 Atl. 405.

[c] (Mo. 1892) In an action against the sureties of an executor to recover a legacy, where defendants plead payment, and evidence is offered to prove that plaintiff had authorized a certain person to collect for her the said legacy, but such person is since dead, it is not competent for the executor, who is not a party, to testify to such payment.—Leach v. McFadden, 110 Mo. 584, 19 S. W. 947, distinguishing Bates v. Forcht (1886) 89 Mo. 121, 1 S. W. 120.

[d] (N. H. 1883) Under the statute excluding testimony of survivors against a deceased party to a contract, the administrator of deceased, claiming a personal interest in the estate, stands on the same footing as any other person claiming adversely to the estate, and cannot testify as matter of right.—Tuck v. Nelson, 62 N. H. 469.

[e] (N. J. 1888) An executor cannot testify that a mortgage held by the testator against him was mere security for his payment of notes that testator had indorsed for him.—Terhune v. Oldis, 44 N. J. Eq. (17 Stew.) 146, 14 Atl. 638.

[f] (R. I. 1892) Under Pub. St. c. 214, § 33, providing that when an original party to a contract or cause of action is dead, or when an executor is a party to the suit, the "other party" cannot testify on his own offer, the words "the other party" in the former case mean the other original party to the contract or cause of action; and hence, in a suit between the executrix of one of the original parties to a contract and the heir at law of the other original party thereto, the former is a competent witness on her own behalf.—Kenyon v. Peirce, 17 R. I. 794, 24 Atl. 825.

§ 639. Widow.

[a] (Ga. 1880) In a suit on a note, the maker and payee whereof were both dead, the maker's wife could testify that she paid it for him, since she was not one of the original parties to the contract or cause of action, and she was not called to testify in her own favor.—Rush v. Ross, 65 Ga. 144.

[b] (Md. 1873) Under Acts 1864, c. 109, as modified by Acts 1868, c. 116, excluding the other party as a witness when one party to the contract is dead, a woman claiming to be the widow of an intestate, and entitled as such to administer on his estate, is not a competent witness to establish the factum of her marriage to the deceased.—Redgrave v. Redgrave, 38 Md. 93.

[c, d] (Md. 1878) The provision of Acts 1864, c. 109, § 2, that "when an original party to a contract or cause of action is dead, either party may be called as a witness by his opponent, but shall not be admitted to testify on his own offer," does not render incompetent as a witness a widow in a proceeding to set aside a pro confesso decree of sale of land under a deed

of trust, alleged by her to have been executed by her under duress of threats by her husband, since these acts constituted no cause of action against the husband or his estate.—First Nat. Bank v. Eccleston, 48 Md. 145.

[e] (Mo. 1888) Plaintiff, with her present husband, brought an action for dower, and for specific performance of an alleged oral gift of land to her former husband from his father. Both the father and son were dead. *Held*, that the widow, being the real party in interest in the suit, and not a party to the original contract, was a competent witness, under Rev. St. § 4010, providing that, in an action where one of the original parties to the contract is dead, the other party shall not testify in his own favor.—O'Bryan v. Allen, 95 Mo. 68, 8 S. W. 225.

[f] (Mo. 1891) Rev. St. 1889, § 8918, provides that where one of the original parties to a contract is dead the other party cannot testify either in his own favor or in the favor of a person claiming under him. *Held*, where a note was executed to a husband and wife to secure the price of land sold by the wife, and which was her property, and the note was given to the wife by the husband, that she was not disqualified to testify to that fact, since it was given her, not as a gift, but because it represented her land and belonged to her.—Magee v. Burch, 108 Mo. 336, 18 S. W. 1078.

[g] (Mo. 1894) Under Rev. St. 1889, § 8918, providing that, in actions where one of the original parties to the contract is dead, the other party shall not testify, a widow is not, in ejectment against the heirs, prohibited from testifying to her marriage.—Green v. Green, 126 Mo. 17, 28 S. W. 752, 1008.

[h] (Mo. 1896) Under Rev. St. 1889, § 8918, disqualifying as a witness in his own favor a party to a contract, in an action on such contract after the death of the other party thereto, a widow who is a party to an action on an antenuptial contract between her and her deceased husband, the event of which action may affect her share of the decedent's personalty, is incompetent to contradict the agreement.—Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 54 Am. St. Rep. 663, 31 L. R. A. 810.

[i] (N. J. 1884) A woman is not a competent witness to prove a gift from her deceased husband.—Sherman v. Lanier, 39 N. J. Eq. (12 Stew.) 249.

[j] (Pa. 1877) A wife is a competent witness to prove a marriage contract between herself and her deceased husband, in a contest where the legality of the marriage is in question.—Greenawalt v. McEnelley, 85 Pa. 352.

[k] (Pa. 1894) Under Act May 23, 1887, § 5, cl. E, providing that where a party to a contract is dead, and his rights therein have passed to a party on the record, who represents his interests in the subject in controversy, the surviving party to such contract is not a competent witness as to any matter occurring before his death, the surviving wife of deceased, who is also a creditor, and one of the administrators of the estate, which is insolvent, cannot testify, in a proceeding to surcharge the administrators' accounts with certain horses claimed by her sons by gift from her, as to a contract between her and her husband, whereby she obtained title to such horses.—In re Irwin's Estate, 160 Pa. 82, 28 Atl. 505.

[l] (Vt. 1873) On petition of a woman's guardian to annul her marriage to a man deceased, on the ground that her consent was obtained by fraud, she is not a competent witness.—Davis v. Town of Plymouth, 45 Vt. 492.

[m] (Vt. 1876) On appeal from a decree of the probate court giving defendant all the estate of a decedent as his widow, she was a competent witness as to the fact of her marriage with the decedent, as the marriage contract was only collaterally in issue.—Stevens v. Joyal, 48 Vt. 291.

§ 640. Principal and agent.

[a] (Ga. 1878) In a suit by the administrator of a deceased principal to recover money collected by agents they are incompetent witnesses in the case under Code, § 3854, par. 1.—Harper v. Dillon, 60 Ga. 498.

[b] (Md. 1878) Acts 1876, c. 222, provides that, where one of the two original parties to a contract is dead, the other cannot testify on his own offer in an action on the contract. *Held*, that an agent who signs his own name, without disclosing any agency, is within the statute.—Standford v. Horwitz, 49 Md. 525.

[c] (Mass. 1861) In a suit in equity, in which plaintiff alleges that a mortgage given by him is now held by defendants as devisees of one who was employed in his lifetime by plaintiff as an agent to procure a discharge thereof, but fraudulently took an assignment of the same to himself, plaintiff is not a competent witness, under Gen. St. c. 131, § 14, to prove the fraud.—Smith v. Smith, 83 Mass. (1 Allen) 231.

[d] (Mass. 1865) An agent cannot testify in his own favor under St. 1865, c. 207, in an action brought by him against the administrator of his principal for services performed for the principal.—Brown v. Brightman, 93 Mass. (11 Allen) 226.

[e] (Vt. 1868) Where a note is signed B. by C. the latter is a competent witness in a suit on said note against the estate of B. after his decease, Gen. St. c. 36, § 242, and the proviso thereto, disqualifying one party as a witness when the other is dead, applying only to the parties and not to the agent of one of the parties.—Lytle v. Bond's Estate, 40 Vt. 618.

[f] (Vt. 1889) An agent is not a party to a contract made by him with another for his principal, and is not incompetent to prove the agency and nature and scope of the contract, under R. L. § 1002, prohibiting the surviving party to a contract from testifying in an action thereon.—Gifford v. Thomas' Estate, 62 Vt. 34, 19 Atl. 1088.

[g] (Vt. 1892) Intestate, an invalid, caused two letters to be written to plaintiff, in which he agreed to give plaintiff all his property if she would take care of him during his life. Plaintiff accepted the proposition, and entered upon performance of the contract. Intestate died without executing a deed to plaintiff. *Held*, in an action for specific performance, that the persons who wrote the letters for intestate to plaintiff, not being parties to the contract, were competent to show that intestate authorized them to write and send them.—Smith v. Pierce, 65 Vt. 200, 25 Atl. 1092.

[h] (Va. 1888) In an action to charge the estate of a decedent with bonds which he had assigned, where the defense was want of due diligence on the part of the assignee, the attorney of the latter may testify that, in an interview with the assignor, he informed him that witness was directed by his client not to bring suit on the bonds unless requested to by the assignor, and that he would do so with the understanding that in that case assignor's liability should continue, as the witness was not a party to the transaction testified to.—Hall v. Rixey, 84 Va. 790, 6 S. E. 215.

§ 641. Member, stockholder, or officer of corporation.

[a] (Mo. 1886) It is error to exclude the evidence of the president of a bank, the payee of a note, and the only one present at the execution of the note except the person who executed it, on account of the death of the latter. Such evidence being competent at common law, Rev. St. § 4010, being an enabling and not a

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disabling act, does not render it incompetent.—Bates v. Forcht, 89 Mo. 121, 1 S. W. 120.

[b] (Mo. 1886) In a suit by the assignee of a note, the evidence of a stockholder, corporator, and cashier of the payee bank is not incompetent, on the ground that he is a party in interest, either at common law or by Rev. St. § 4010.—Bates v. Forcht, 89 Mo. 121, 1 S. W. 120.

[c] (Mo. 1896) Where a stockholder of a corporation did not act as its agent in negotiating a contract it has sued on, he is not an incompetent witness, as a party to the contract, within Rev. St. 1889, § 8918 (formerly Rev. St. 1879, § 4010), providing that a party in interest shall be incompetent where one of the original parties to the contract in issue is dead.—Banking House of Wilcoxson & Co. v. Rood, 132 Mo. 256, 33 S. W. 816.

[d] (Pa. 1891) In an action against a limited company for rent on an oral lease, it appeared that plaintiff's grantor had leased part of the premises to a company which defendant had succeeded, assuming all its liabilities, and that plaintiff had from time to time leased other parts to it. Defendant's liability depended on whether the lettings were from year to year, as claimed by plaintiff, or from month to month, as claimed by defendant. *Held*, that a member of the defendant company, who was a member of the company to which the original lease was made, was incompetent to testify to conversations with the original lessor, since deceased, for the purpose of showing that the lease was from month to month, under Act 1887, § 5e (P. L. 159), making a surviving party to a contract incompetent to testify against decedent's successor in interest as to any matter accruing before decedent's death.—Arrott Steam-Power Mills Co. v. Way Mfg. Co., 143 Pa. 435, 22 Atl. 699, 28 Wkly. Notes Cas. 378.

§ 642. Joint parties in general.

[a] (Md. 1878) In an action by the obligee of a joint and several bond of indemnity, against the administrator of one of the obligors, the other obligor being dead, defendant cannot testify on his own offer as to a conversation between himself and plaintiff in respect of the claim sued for.—Orendorff v. Uts, 48 Md. 298.

[b] (Mo. 1878) In a suit against the makers of a note, prosecuted by the administrator of the deceased payee, a defendant is not a competent witness for his codefendant to prove a failure of consideration.—Hisaw v. Sigler, 68 Mo. 449.

[c] (Mo. 1893) In ejectment by the widow of B., as his heir, against the tenants of the heirs of O. and such heirs, the latter of whom claim title through an alleged lost deed from B. to O., the fact that the alleged lost deed was signed also by plaintiff to release her dower does not render the heirs of O. competent witnesses under the rule that where a contract is entered into by a party with two persons, and only one of them is dead, the other party is not disqualified, since a wife, by joining in her husband's deed to relinquish her dower, does not become a party to the contract between her husband and the vendee, and for the further reason that, O. being dead, she, also, is incompetent to testify.—Messimer v. McCray, 113 Mo. 382, 21 S. W. 17.

[d] (Pa. 1889) Act May 23, 1887, § 5, clause e (Laws 1887, p. 158), prohibits any surviving party to a contract, whose interest shall be adverse to any party to the record whose interest is derived from a deceased party to the contract, from testifying as to any transaction before the death of such decedent, "unless the proceeding is by or against the surviving or remaining partners, joint promisors, or joint promisees of such deceased, and the matter occurred between such surviving or remaining partners, joint promisors, or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors, or promisees and the person having an interest adverse to them; in which case any person may testify as to such matters." *Held*, in ejectment, where plaintiffs claim under the grantors in a certain deed, and defendants under the deed, that a grantor in such deed, who has conveyed away her interest in the property in question, without covenants for title, and whose fellow grantors are deceased, is within the exception to the statute, and may testify, for plaintiffs, that the deed did not include such property, where the grantee in the deed is alive, and competent to testify as to the same matters.—Palmer v. Farrell, 129 Pa. 162, 18 Atl. 761, 15 Am. St. Rep. 708.

[e] (Vt. 1890) In a suit to establish title, it appeared that defendant had frequently admitted possession of an instrument under which plaintiff claimed, but refused to produce it. *Held*, that testimony of plaintiff's father, who, with his wife, was a party to the agreement, is competent as to its contents in a suit against defendant, who was also a party with his wife, though both wives are dead.—Orr v. Clark, 62 Vt. 136, 19 Atl. 929.

[f] (Va. 1876) After the death of one of the obligors in a bond given for the price of a chattel sold with a warranty, the other obligors are incompetent, under the statute, to testify as to conversations had with themselves, long after the sale, relating to the alleged breach of warranty.—Mason v. Wood, 27 Grat. 783.

§ 643. Surviving partners.

[a] (Ga. 1873) On the trial of a bill by a surviving partner against the representatives of a deceased partner for an account and settlement of the partnership affairs, the survivor is not a competent witness to testify in his own favor; nor does it alter the case that a portion of the matter in dispute is a Confederate transaction and involves the value of Confederate money, except that the survivor may testify as to the value of said money.—Graham v. Howell, 50 Ga. 203.

[b] (Ga. 1878) When the partner who signed the firm name to the note sued on is dead, his copartner, pleading non est factum, is a competent witness, as against plaintiff, to prove the signature unauthorized and for what the note was given, though he would be incompetent as against the representatives of the deceased.—Bryan v. Tooke, 60 Ga. 437.

[c] (Md. 1875) A firm, through its agent, L. S., entered into a contract with T. who sued for a breach of the contract. At the trial, T. the plaintiff testified that L. S. was dead. Thereupon defendant offered to prove by H. S., one of the defendants, that L. S. was a member of the firm, and beneficially interested in the contract, for the purpose of impeaching T.'s competency as a witness. Plaintiff objected on the ground that H. S. was not a competent witness. *Held*, that H. S. was a competent witness to prove that L. S. was a member of the firm.—Spencer v. Trafford, 42 Md. 1.

[d] (Md. 1875) In a proceeding to obtain an account of partnership affairs, a partner, though not a party of record, cannot testify in reference to the partnership transactions, his copartner being dead and his executors being parties to the cause.—McKaig v. Hebb, 42 Md. 227.

[e] (Md. 1879) Acts 1876, c. 222, providing that where an original party to a contract is dead, or where an executor or administrator is a party to a suit, neither party shall be permitted to testify on his own offer, does not render incompetent as a witness parties to a contract made by a partnership simply because of the death of one of the partners, who was a non-

resident and not actually engaged in the business.—Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

[f] (Pa. 1874) When a party to partnership articles is dead, and his rights have passed by his own act, or that of the law, to another representing his interest in the controversy, the survivor to that subject cannot, under the witness act of 1869, testify to matters occurring in the life of the deceased party.—Hanna v. Wray, 77 Pa. (27 P. F. Smith) 27.

[g] (Pa. 1877) A surviving partner is included within the exception to the witness act of 1869, which provides that the act shall not apply to actions, "where the assignor of the thing or contract in action may be dead."—Standbridge v. Catamach, 83 Pa. 368.

[h] (Pa. 1879) In an action by G. against the executor of H., to recover a balance claimed to be due from H. and P., as partners in an oil well, for supplies, *held*, that P. was not a competent witness for G. to prove the partnership and account.—Hogeboom v. Gibbs, 88 Pa. 235.

[i] (Pa. 1895) Act 1887, § 5, cl. e, providing that where any party to the thing or contract in action is dead, and his right therein has passed to a party on the record, who represents his interest, a surviving party to the thing or contract, whose interest shall be adverse, shall not be competent as a witness, does not disqualify one sued as surviving partner on a note signed in the firm name from testifying that the note was made by the deceased partner, without authority, for his own private benefit, and that the partnership received no value therefor.—Lancaster County, Nat. Bank v. Henning, 171 Pa. 399, 33 Atl. 335, 37 Wkly. Notes Cas. 112.

8. HUSBAND OR WIFE OF PARTY, OR OTHER PERSON EXCLUDED FROM TESTIFYING.

HUSBAND OR WIFE OF PERSON INTERESTED IN GENERAL, § 644.
HUSBAND OR WIFE OF PARTY, § 645.
HUSBAND OR WIFE OF LEGATEE, DEVISEE, OR HEIR, § 646.
HUSBAND OR WIFE OF EXECUTOR, ADMINISTRATOR, OR GUARDIAN, § 647.
HUSBAND OR WIFE OF SURVIVING PARTY, § 648.
ESTABLISHMENT OF CLAIM, § 649.

As deriving interest from other, see ante, § 623.
Effect of examination as witness by adverse party, see post, § 723.
Interest in event, see ante, § 608.

§ 644. Husband or wife of person interested in general.

[a] (Pa. 1886) Under the act of 1869, in actions by or against executors or administrators (including the settlement of estates in the orphans' court), or where the assignor of the thing or contract in action is dead, neither a husband nor a wife is competent to testify in favor of the other except as to facts subsequent to the death of the person whose estate is being distributed, or the subject of the controversy.—In re Findley's Estate, 3 Lanc. Law Rev. 190.

[b] (Pa. 1890) In actions by or against executors, neither husband nor wife is a competent witness to testify in favor of the other in cases where either would be excluded upon the ground of interest.—In re Smith's Estate, 8 Pa. Co. Ct. R. 29.

§ 645. Husband or wife of party.

[a] (Ill. 1878) On a bill against the heirs of a deceased person, to enforce an agreement claimed to have been made by deceased with complainant, the latter's husband, is not incompetent to testify in her behalf under Rev. St. 1874, c. 51, §§ 1, 2, as he is not interested and there is no disqualification because of the marriage relation.—Marshall v. Peck, 91 Ill. 187.

[b] (Ill. 1880) Where one of the daughters of a testator filed a bill to set aside his will, which bequeathed all his lands to his sons, making her brothers and sisters defendants, and an issue as to the validity of the will was submitted to a jury, *held*, that complainant and her sisters, but not their husbands, were, under Rev. St. 1874, c. 51, §§ 2, 5, incompetent to testify to statements of the testator or to his mental capacity.—Corderey v. Hughes, 6 Ill. App. (6 Bradw.) 401.

[c] (Ill. 1886) 1 Starr & C. Ann. St. c. 51, § 5, declares that husband and wife shall not be competent to testify for or against each other, except in certain instances, when they may testify "as other parties may." Section 2 provides that "no party" shall testify of his own motion, in his own behalf, when any adverse party sues or defends as the executor of any deceased person. *Held* that, even in the instances enumerated, husband and wife are incompetent to testify for or against each other, when an adverse party sues or defends as the executor of a deceased person.—Treleaven v. Dixon, 119 Ill. 548, 9 N. E. 189.

[cc] (Ill.) Under Rev. St. 1893, c. 51, par. 5, § 5, which forbids husbands and wives to testify for or against each other, except in certain cases, a husband cannot testify for his wife, even in one of the specified cases, if they are both parties and there are adverse parties defending as representatives of a decedent; since in such case he could not testify even though his wife were not a party.—(1886) Treleaven v. Dixon, 119 Ill. 548, 9 N. E. 189; (1895) Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999.

[d] (Ill. 1888) The word "parties" in Rev. St. c. 51, § 5, which provides that, in certain cases, "the husband and wife may testify for or against each other in the same manner as other parties may under the provisions of this act," means "party to a suit or party in interest in the suit," thus referring to section 2, and rendering the testimony of defendant's husband in her behalf incompetent, when she is incompetent by reason of the adverse party suing as heir, etc.—Way v. Harriman, 126 Ill. 132, 18 N. E. 206, affirming Harriman v. Sampson (1887) 23 Ill. App. 159.

[e] (Ill.) Under Rev. St. c. 51, § 5, allowing husbands and wives to testify for or against each other "as other parties," a husband is not a competent witness for his wife in a suit where she herself cannot testify, under chapter 51, § 2, because the adverse party defends as heir of a decedent.—(1888) Way v. Harriman, 126 Ill. 132, 18 N. E. 206; (1889) Shaw v. Schoonover, 130 Ill. 448, 22 N. E. 589.

[f] (Ill. 1894) A husband is not a competent witness for his wife as to transactions with a testator when the opposite party sues or defends as executor.—Giffert v. McGuern, 51 Ill. App. 387.

[g, h] (Ill. 1894) Where a party is an incompetent witness because the adverse party defends as the devisee of a decedent, such party's wife is also incompetent.—Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056.

[i] (Ind. 1882) Rev. St. 1881, § 299, providing that in all suits by or against heirs or devisees, founded on a contract with the ancestor, neither party shall be a competent witness as to any matter which occurred prior to the death of the ancestor, does not include the wife of a party.—Williams v. Riley, 88 Ind. 290.

[j] (Ind. 1884) Where, in an action against the heirs of a deceased person, plaintiff was not

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a competent witness as to matters which occurred prior to the death of the ancestor, his wife was also incompetent.—Creighton v. Hoppis, 99 Ind. 369.

[k] (Iowa, 1889) In an action on a note by the administrator of the deceased payee, defendant's wife was a competent witness as to transactions between the deceased payee and defendant, at which she claimed to have been present, under Code 1873, § 3641, making husband and wife competent as witnesses for each other in civil actions.—Auchampaugh v. Schmidt, 77 Iowa, 13, 41 N. W. 472.

[l] (Iowa, 1896) Code 1873, § 3639, provides that no party to any action, and no husband or wife of any party, shall be examined as a witness in regard to any personal transaction between such witness and a person deceased. *Held*, in an action against an administrator to recover back money alleged to have been paid in excess of the amount due on a note executed by a husband and wife, said wife, who alleged that she was present when her husband paid money to deceased, was not competent to testify that on one occasion, at decedent's request, she made the indorsement on the note for the money paid thereon.—Erusha v. Tomash, 98 Iowa, 510, 67 N. W. 390.

[m] (Me. 1871) Rev. St. 1871, c. 82, § 82, provides that a husband or wife may be a witness when either is called to testify with the consent of the other, except in suits in which executors or administrators or heirs are parties. *Held*, that in an action by a married woman against an administrator the husband of plaintiff cannot testify to facts happening before the death of defendant's intestate, unless the latter had testified in the case, or the administrator offers his own testimony.—Jones v. Simpson, 59 Me. 180.

[n] (Me. 1878) The husband is not a competent witness for his wife where she is a party and the adverse party is a representative of a deceased person.—Hunter v. Lowell, 64 Me. 572.

[o] (N. H. 1872) Where one party to a suit is an executor and does not elect to testify, thereby precluding his adversary from testifying, the wife of the adversary may be called as a witness either for or against her husband, if no violation of marital confidence is involved.—Clements v. Marston, 52 N. H. 31.

[p] (N. Y. 1878) In an action by an administrator to recover certain personal property which defendants contended had been given to them by plaintiff's intestate, *held*, that under Code, §§ 829, 830, excluding evidence as to transactions between a deceased person and the husband or wife of the party interested, defendant and his wife were not competent to testify as to the alleged giving.—Waver v. Waver, 15 Hun, 277.

[q] (N. Y. 1880) Under Code Civ. Proc. § 830, if a party was, by section 829, precluded from testifying concerning a transaction with a deceased person, the husband or wife of the party was also incompetent to testify.—Whitehead v. Smith, 81 N. Y. 151.

[r] (N. Y. 1892) Under Code Civ. Proc. § 829, in an action for the possession of land, where defendant claimed title under a parol agreement with his deceased father, who was plaintiff's grantor, it was error for defendant's wife to testify to a conversation between decedent and defendant in relation to the transfer of the property.—Hoffman v. Hoffman, 63 Hun, 635, 18 N. Y. Supp. 387.

[s] (N. C. 1874) In an action by an executor to recover the amount of a certain bond which defendant had collected and had not paid over to the testator, his father-in-law, defendant's wife, a daughter of the testator, is a competent witness to prove that her husband, the defendant, offered to pay her father the money, but was told by him to keep it, as he intended it as an advancement to himself and the witness, as she is not a party to or interested in the event of the action, and there is nothing in the marriage relation which renders her incompetent.—Bradsher v. Brooks, 71 N. C. 322.

[t] (Pa. 1886) A wife is not made a competent witness for her husband in a suit against a decedent's estate by Act 1869, §§ 1, 2, declaring that no interest or policy shall exclude a party or person from being a witness provided the act shall not apply to actions by or against executors, administrators, or guardians.—In re Findley's Estate, 3 Lanc. Law Rev. 190.

[u] (Pa. 1891) In ejectment for land claimed by defendant under a deed from a grantor who is deceased, where plaintiff is incompetent to testify to certain matters occurring before decedent's death, plaintiff's wife is also incompetent to testify thereto.—Sutherland v. Ross, 140 Pa. 379, 21 Atl. 354, 28 Wkly. Notes Cas. 17.

[v] (Tex. 1894) In trespass to try title, defendant's wife may testify as to an agreement with plaintiff's grantor, fixing the boundary line, though such grantor be dead.—Eddie v. Tinnin, 7 Tex. Civ. App. 371, 26 S. W. 732.

[w] (W. Va. 1886) Nothing in the statutes has changed the common-law rule under which, in an action by an administrator, defendant's wife cannot testify against plaintiff in regard to transactions or communications had between her and her husband and the intestate.—Kilgore's Adm'r v. Hanley, 27 W. Va. 451.

§ 646. Husband or wife of legatee, devisee, or heir.

[a] (Ill. 1891) In an action on the note of an intestate maker, the husband of one of the heirs is competent as a witness for the administrator.—Graves v. Safford, 41 Ill. App. 659.

[b] (Kan. 1881) In an action against an executor, the husband or wife of a devisee may be a witness in favor of the estate for some purposes.—McCartney v. Spencer, 26 Kan. 62.

[c] (Ky. 1877) On a will contest, it is not error to exclude the deposition of the husband of one of the heirs against her interest, where she is not a party to the record and is not resisting probate, although a refusal of probate of the will would result to her advantage.—Milton v. Hunter, 76 Ky. (13 Bush) 163.

[d] (La.) The husband of one of the heirs of a succession can testify for or against coheirs or their creditors, touching the interest of the coheirs in the succession.—(1879) Boisse v. Dickson, 31 La. Ann. 741; (1893) Starns v. Hudnot, 45 La. Ann. 318, 12 South. 561.

[e] (Miss. 1870) The wife of H. was the daughter and presumptive heiress of defendant. In a suit by an administrator, the sister, and one of the heirs at law of plaintiff's intestate, *held*, that H. was a competent witness for defendant.—Whitfield v. Whitfield, 44 Miss. 254.

[f] (N. Y. 1889) In an action by an administrator against an executor for an accounting and distribution, a husband and wife, who had signed an agreement with plaintiffs' intestate, providing for a different disposition of the testator's property than that made by the will, are incompetent to testify that they were induced to sign it by false representations made by plaintiffs' intestate, each testifying as to the representations made to the other, where the interest which such husband and wife take under the will is joint, with right of survivorship.—Hard v. Davison, 53 Hun, 112, 6 N. Y. Supp. 69, judgment reversed Hard v. Ashley (1890) 117 N. Y. 606, 23 N. E. 177.

[g] (Tex. 1894) A husband of one of the heirs of a deceased person, who is a party defendant,

is incompetent to testify as to transactions between deceased and plaintiff.—Hicks v. Hicks (Civ. App.) 26 S. W. 227.

[h] (Pa. 1885) The husband of an heir at law, who has assigned her interest in a mortgage which was part of a decedent's estate, is a competent witness in an action of ejectment by decedent's administrators.—Brant v. Dennison, 5 Atl. 869.

[i] (Wis. 1896) The husband of a legatee incompetent as a witness under Rev. St. § 4069, cannot testify in her behalf in a proceeding to which he is not a party.—In re Valentine's Will, 93 Wis. 45, 67 N. W. 12.

§ 647. Husband or wife of executor, administrator, or guardian.

[a] (Ind. 1889) In a suit against a guardian and ward, where they have answered separately, but both have an interest in the subject-matter adverse to plaintiff, the wife of the guardian is not a competent witness on behalf of the ward, under Rev. St. 1881, § 591, providing that "when the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded."—Walker v. Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271.

[b] (N. H. 1869) A minor dying after entry of her suit by her next friend, and her administrator being admitted to prosecute—*held*, that the wife of the next friend was a competent witness for plaintiff; the next friend being no longer liable for costs.—Taylor v. Grand Trunk Ry. Co., 48 N. H. 304, 2 Am. Rep. 229.

[c] (Pa. 1893) In the settlement of an executor's account his wife is competent to testify that certain past-due notes executed by deceased to such executor were in her custody immediately after the death of the maker, and that she handed them over to her husband, to show that the latter held them in his own right, and not as executor.—In re Hoffer's Estate, 156 Pa. 473, 27 Atl. 11; Appeal of Earnest, Id.

[d] (Vt. 1875) The administrator of defendant estate was brother of plaintiff and of the intestate, and husband of the intestate's widow. *Held*, the administrator being interested in the estate in right of his wife, and, for aught that appeared, in his own right as heir, that his wife was not a competent witness to matters that transpired between plaintiff and the intestate.—Davis v. Davis' Estate, 48 Vt. 502.

§ 648. Husband or wife of surviving party.

[a] (Iowa, 1885) Where persons claim that certain property was transferred to them by a deceased person, in consideration of their agreement to support him, the husband of one of the parties who joined in the execution of the agreement is not competent to prove the delivery of such agreement.—Samson v. Samson, 67 Iowa, 253, 25 N. W. 233.

[b] (Me. 1879) If the surviving party introduces as evidence, in an action by or against an executor or administrator, a memorandum of the deceased, he must be content with its legal import and effect, unless he can explain or control it by the testimony of disinterested witnesses. The husband or wife of such surviving party is not a competent witness in such cases when the surviving party is not.—Berry v. Stevens, 69 Me. 290.

[c] (Pa. 1888) The husband of the surviving party to a contract with the decedent is a competent witness for his wife, and is not within the provisions of Act May 23, 1887, forbidding the surviving party to such contract to testify.—Levan v. Bickel, 5 Pa. Co. Ct. R. 610.

[d] (Pa. 1889) Act May 23, 1887 (P. L. 158) § 5, provides that where a party to a thing or contract in action is dead, and his right has passed to a party on the record, who represents his interest in the subject in controversy, the surviving party to such thing or contract shall not, nor shall any other person whose interest shall be adverse to the right of the decedent, be a competent witness to any matter occurring before the death of the decedent, unless, etc. *Held*, that a wife is not a competent witness for her husband in an action by him against an executor to recover for personal services rendered to the testator, her interest being one with that of the husband.—Bitner v. Boone, 128 Pa. 507, 18 Atl. 404, 24 Wkly. Notes Cas. 404.

§ 649. Establishment of claim.

[a] (Iowa) Rev. St. § 3982, prohibiting a party from testifying where the adverse party is an executor, does not disqualify the wife of a claimant against the estate.—(1870) Shafer v. Dean, 29 Iowa, 144; (1871) Wendeling v. Besser, 31 Iowa, 248.

[b] (Mich. 1885) The wife of a person presenting a claim against a decedent's estate is a competent witness as to matters within the knowledge of the decedent.—Cotherman v. Cotherman's Estate, 58 Mich. 465, 25 N. W. 467.

[c] (Miss. 1876) If a husband, having a claim against a deceased person, brings suit upon it, the wife is a competent witness to establish such claim in favor of the husband.—Barry v. Sturdivant, 53 Miss. 490.

[d] (Miss. 1886) Under Code, § 1602, which provides that no person shall testify as a witness to establish his own claim for or against the estate of a deceased person, which originated during the lifetime of such deceased person, in an action by a married woman, against the estate of a person deceased, to rescind a sale of her lands made by her, jointly with her husband, to such deceased person during his life, on the ground of fraud, she is not, but her husband is, a competent witness in her behalf.—Ellis v. Alford, 64 Miss. 8, 1 South. 155.

[e] (Miss. 1894) Code 1892, § 1739, provides that a husband and wife may testify for each other "in all cases." Section 1740 provides that a person cannot testify "to establish his own claim" against the estate of a deceased person which originated during the life of decedent. *Held*, that a wife is a competent witness for her husband in establishing his claim against a decedent's estate arising out of a deed to him from decedent.—Saffold v. Horne, 72 Miss. 470, 18 South. 433.

[f] (Pa. 1872) A husband cannot testify in the distribution of an estate in support of a claim for services rendered by his wife to the deceased, since in law the claim belongs to the husband.—In re Blantz's Estate, 4 Lanc. Bar, No. 27, p. 2.

9. PARTIES AS AGAINST WHOM TESTIMONY IS EXCLUDED.

IN GENERAL, § 650.
REPRESENTATIVES OF ESTATE OF DECEASED PERSON IN GENERAL, § 651.
EXECUTOR, ADMINISTRATOR, OR TRUSTEE, § 652.
PERSONS DERIVING TITLE OR INTEREST FROM OR SUSTAINING LIABILITY THROUGH DECEDENT IN GENERAL, § 653.
GRANTEE OR ASSIGNEE, § 654.
LEGATEE, DEVISEE, OR HEIR, § 655.
WIDOW, § 656.
CREDITORS, § 657.
SURVIVOR OF JOINT PARTIES TO CONTRACT OR OTHER TRANSACTION OR CAUSE OF ACTION, § 658.

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— SURVIVING PARTNERS, § 659.
PARTY AS TO WHOM PERSON DECEASED ACTED IN REPRESENTATIVE OR FIDUCIARY RELATION, § 660.
PRINCIPAL OF AGENT DECEASED, § 661.
PARTIES THEMSELVES INCOMPETENT TO TESTIFY, § 662.

§ 650. In general.

[a] (N. Y. 1870) Plaintiff, having enlisted in the United States service during the war, entered into an agreement with his mother that he would, from time to time, send her money, and that she should take care of and restore it to him on his return. Under this agreement he sent several sums of money to her. She subsequently married defendant, and died, leaving him her executor. In an action to recover a portion of the money, which, it was claimed, had come to the hands of defendant, *held* that, under Code, § 399, plaintiff was not a competent witness to establish the agreement, as against defendant, who, if he had the money in question, took it by assignment by way of gift or loan, or as agent of the deceased, or as her executor.—Mosner v. Raulain, 66 Barb. 213.

[b] (N. Y. 1886) Plaintiff in an action against a corporation was competent to testify to a transaction with the president of defendant and its agent, notwithstanding the death of such president, the case not coming within the prohibition contained in Code, § 829, providing that the party or person interested shall not testify against an executor, administrator, or survivor of a deceased person, except where such executor, administrator, or survivor, testified in his own behalf.—Hunt v. Providence & Stonington S. S. Co., 9 Civ. Proc. R. 291.

[c] (N. Y. 1886) In an action to establish a deed alleged to have been made to her husband by a wife who derived her title from his previous grantee of the same premises, testimony by one of the parties plaintiff who claimed as heir of the deceased husband under the latter's ownership of the property by virtue of the deed sought to be established, as to a conversation between the deceased husband, the wife, and the witness, is not within Code Civ. Proc. § 829, excluding such testimony as against the representative of a decedent or one claiming title under him.—Blaesi v. Blaesi, 42 Hun, 159.

[d] (N. Y. 1889) In ejectment, where defendant claims under an oral contract with plaintiffs' grantor to convey or devise to her and one P. the premises in question, in consideration of their moving thereon and taking care of her for the remainder of her life, defendant may introduce evidence of a personal transaction had with P., who has since died, as plaintiffs are not the executors, administrators, or survivors of P., and do not derive title nor any interest from, through, or under him.—Kenyon v. Youlan, 53 Hun, 591, 6 N. Y. Supp. 784.

[e] (N. C. 1881) Code, § 343, prohibits the examination of a party to an action in regard to any transaction between such witness and a person at the time deceased, as a witness against a party then prosecuting or defending the action as executor, etc. *Held*, in an action against the sureties on a deceased's administrator's bond to recover a balance due to the estate, that it was competent for plaintiff to testify to a transaction between himself and the deceased heir of the administrator, defendants not sustaining any of the relations mentioned in the statute.—Hawkins v. Carpenter, 85 N. C. 482.

[f] (Ohio, 1871) Swan & C. St. p. 556, allowing no party to testify where the adverse party claims or defends as heir or devisee of a deceased person, except, etc., permits the testimony of an adverse party to be used against only one of the plaintiffs or defendants, and not against the others, when there are two parties, plaintiffs or defendants, claiming several interests, and the adverse party is competent against one and incompetent against the other.—Hubbell v. Hubbell, 22 Ohio St. 208.

[g] (S. C. 1882) The remote alienee of land from one deceased being neither "executor, administrator, heir at law, next of kin, assignee, legatee, devisee, nor survivor" of the deceased within the meaning of the proviso to Code, § 415, *held*, in a suit by such alienee for the recovery of land, that defendant might testify to conversations and transactions concerning the land, had by him with the deceased.—Cantey v. Whitaker, 17 S. C. 527.

[h] (Wash. 1896) Where the relief demanded against C., one of the defendants in an action to cancel a mortgage, was merely incidental to the principal object sought by the action against the mortgagee's executors, the testimony of plaintiffs as to an arrangement entered into at a meeting of all the parties, including decedent, was properly excluded, even as against C.—Thorne v. Joy, 15 Wash. 83, 45 Pac. 642.

§ 651. Representatives of estate of deceased person in general.

[a] (Cal. 1864) In the statute which provides that no party to a suit shall be allowed to testify "when the adverse party or the party for whose immediate benefit the action is prosecuted or defended is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person," the word "representative" applies to the executor or administrator of the deceased person, and also to the party who has succeeded to the right of the deceased, whether by purchase, or descent, or operation of law.—Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157.

[b] (Cal. 1869) The statute prohibiting a party from being a witness where the opposite party is the representative of a deceased person covers all cases coming within its general terms, and makes no distinction depending on privity or connection between the parties.—Satterlee v. Bliss, 36 Cal. 489.

[c] (Iowa, 1862) A plaintiff in replevin, seeking to recover attached property from the sheriff, is not, under Revision, § 3982, rendered incompetent to testify, by the death of the plaintiff in the attachment suit, since defendant does not represent decedent either as executor in fact or in law.—Bevan v. Hayden, 13 Iowa, 122.

[d] (Miss. 1876) W. executed a mortgage on his crop to S., for the benefit of M., to secure advances made and to be made. M. died, and W. sold 1,200 pounds of his crop of cotton to J. & S. S., the trustee, brought his action of trover against J. & S. to recover the cotton or the value thereof. *Held*, that W., the mortgagor, was a competent witness to prove that the debt secured by the mortgage was paid off and satisfied before he sold the cotton to J. & S.; this was not testifying against the estate of a deceased person, although the cestui que trust had died before the commencement of the suit.—Stadeker v. Jones, 52 Miss. 729.

[e] (Neb.) The word "representative," as used in Code Civ. Proc. § 329 (1 Gen. St. 1873, p. 582, § 329), relating to testimony of transactions with a decedent, includes any person who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law.—(1874) Wamsley v. Crook, 3 Neb. 344; (1896) Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

[f] (Neb. 1882) Under Code Civ. Proc. § 329, which provides that "no person having a direct legal interest in the result of any civil cause * * * shall be a competent witness therein,

when the adverse party is an executor * * * or legal representative," etc., a mortgagee is not a competent witness in an action between himself and an assignee for creditors of the deceased mortgagor.—Housel v. Cremer, 13 Neb. 298, 14 N. W. 398.

[g] (Nev. 1872) Where a person was employed by another to work at a mill for an association to which the employer had assigned a lease thereof, and after the death of the employer the employé sued the association for work and labor, the association was not sued as "the representative of a deceased person" within the meaning of Prac. Act, § 879, and the employé was a competent witness on his own behalf as to the employment.—Fulton v. Day, 8 Nev. 80.

[h] (N. H. 1883) Gen. Laws, c. 228, § 16, prohibiting either party from testifying when the adverse party is an "executor or administrator" applies not only to executors and administrators, but also to all persons holding the estate of a deceased person in an official representative capacity,—Clark v. Clough, 65 N. H. 43, 23 Atl. 528.

[i] (N. J. 1886) Where neither party to an action represents a testator or intestate, although one of the parties to the transaction out of which the suit grows is dead, the living party is competent to speak as a witness as to what was said and done by the other.—Lehigh Coal & Navigation Co. v. Central R. Co., 41 N. J. Eq. (14 Stew.) 167, 3 Atl. 134.

[j] (N. Y. 1861) Code Civ. Proc. § 399, allowing parties to be examined in their own behalf, except as against "representatives of a deceased person," in respect to transactions between such deceased person and the witness, means as against executors or administrators, and does not include a party whose interest in lands in suit is that of a guardian in socage, an heir, or a dowress.—McCrary v. McCrary, 12 Abb. Prac. 1.

[k] (N. Y. 1862) A defendant in ejectment undertook to defeat the title proved by plaintiff, by showing an outstanding title derived from plaintiff through two mortgages to a party since deceased, whose administrator had foreclosed them. *Held*, that plaintiff was a competent witness to prove a payment by himself in person of these mortgages to the mortgagee before his death; and the case was not within Code, § 399, since plaintiff was examined only against defendant, who was in no sense the representative of the deceased mortgagee.—Schenck v. Warner, 37 Barb. 258.

[l] (N. C. 1880) The administrator of a deceased guardian is a competent witness to prove the execution to said guardian by a debtor of a bond for the payment of money, such testimony not being against the representatives of a deceased person.—Thompson v. Humphrey, 83 N. C. 416.

[m] (Pa. 1892) Act May 23, 1887, § 5, cl. e, provides that where any party to a thing or contract in action is dead, and his right thereto has passed to a party on the record, who "represents his interest in the subject in controversy," no surviving party to such thing or contract shall be a competent witness to any matter occurring before the death of said party. *Held* that, where a wife buys land, but the deed is made to her husband by mistake, neither, after the grantor's death, is disqualified to testify, in ejectment by one claiming under an execution sale against the husband, that the wife was the real purchaser, since they do not "represent" the grantor's "interest in the subject in controversy," within the meaning of the act.—Brown v. Carey, 149 Pa. 134, 23 Atl. 1103, 30 Wkly. Notes Cas. 111.

[n] (Pa. 1895) A claimant is not an incompetent witness merely because a former owner of the thing or contract in action is dead, but only when his "right thereto has passed to a party on the record who represents his interest."—Royer v. Borough of Ephrata, 171 Pa. 429, 33 Atl. 361, 37 Wkly. Notes Cas. 257.

§ 652. Executor, administrator, or trustee.

Representative or other capacity or title or interest of party in general, see ante, § 556.

[a] (Ala. 1884) Where the administrator of the deceased wife is a party defendant to a suit between the children of the deceased husband, relating to property which is claimed as belonging to the estate of each, one of the plaintiffs is not competent to testify to transactions with the deceased wife under Code, § 3058.—Skinner v. Chapman, 78 Ala. 376.

[b] (Ga. 1894) In an action against an executor, plaintiff cannot testify as to transactions between himself and the testatrix.—Medlock v. Miller, 94 Ga. 652, 19 S. E. 978.

[c] (N. H. 1883) Under Gen. Laws, c. 228, § 16, providing that "neither party shall testify in a cause when the adverse party is an executor or administrator," plaintiff, in an equity suit against the trustees under the will of a decedent, brought for an accounting of plaintiff's and decedent's transactions, and for the discharge of certain mortgages executed by plaintiff to decedent, cannot testify as to matters concerning which decedent, if alive, could have testified.—Clark v. Clough, 65 N. H. 43, 23 Atl. 526.

[d] (Tex. 1886) Where plaintiff sues as the representative in part of her husband's estate, it is not error to reject evidence as to transactions between her deceased husband and one of defendants, since testimony of a party to a suit as to a transaction with a decedent, under whom the other party claims, is prohibited by Rev. St. art. 2248.—Harrell v. Houston, 66 Tex. 278, 17 S. W. 731.

[e] (Tex. 1894) Rev. St. art. 2248, providing that in an action by or against an administrator evidence as to transactions with or statements by his decedent shall not be admitted unless the witness is called by the party against whom it will operate, applies to an action by a surviving partner to enforce a firm debt, where he sues also as sole executor of the deceased partner.—Stuart v. Altman, 8 Tex. Civ. App. 657, 28 S. W. 461.

[f] (Tex. 1896) Rev. St. 1879, art. 2248, making testimony of transactions with a decedent inadmissible as against his legal representatives, does not apply to an action against the executors and a devisee to recover property devised which is simply held in trust by the executors for the devisee.—Caffey's Ex'rs v. Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738.

§ 653. Persons deriving title or interest from or sustaining liability through decedent in general.

[a] (Mo. 1878) The decease of the grantor does not render the grantee incompetent to testify as to the execution of a deed, when the question arises in a suit between the grantee and a stranger to the deed.—Bradley v. West, 68 Mo. 69.

[b] (N. Y. 1863) The testimony of a party, offered to prove a transaction between himself and a party deceased, in his own behalf, as against the executors of the latter, is only excluded when it is offered against a party who has acquired title to the cause of action immediately from such deceased person, and not when the party has acquired such title from such deceased person mediately or remotely; and in all other cases parties are competent to testify to such facts, as much as to any other.—Prouty v. Eaton, 41 Barb. 409.

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[c] (N. Y. 1863) Plaintiff in a suit to foreclose a mortgage was originally the immediate assignee of a deceased mortgagee, but had transferred the title thus acquired to the executors of such mortgagee, and this title was reassigned to him by such executors. *Held*, that his title to the cause of action was derived immediately and entirely from the executors, and that the reassignment did not restore him to his original condition of immediate assignee of the deceased mortgagee.—Prouty v. Eaton, 41 Barb. 409.

[d] (N. Y. 1875) In an action by a widow to determine the validity of an assignment by her of a life insurance policy to secure a debt of her former husband, plaintiff was called as a witness as to the transaction between herself and husband at the time of executing the assignment. This was objected to on the ground that she was not competent under Code, § 399. *Held*, that the objection was not tenable, as defendant did not derive title from the deceased person.—Patterson v. Patterson, 59 N. Y. 574. 17 Am. Rep. 384.

[e] (N. Y. 1886) Decedent, after conveying land to a third party, married defendant, to whom the third party then conveyed the land. After decedent's death his heirs brought an action to establish an alleged conveyance from defendant to decedent, and one of the heirs testified to a conversation between himself, decedent, and defendant. *Held*, that as defendant took title from a party other than decedent, the testimony was not prohibited by Code Civ. Proc. § 829, providing that a person or party interested shall not testify against an administrator, executor, or survivor of a deceased person concerning a personal transaction between the witness and the deceased.—Blaesi v. Blaesi, 3 N. Y. St. Rep. 431, 42 Hun, 159.

[f] (N. Y. 1887) Under Code, § 829, providing that the party or person interested shall not testify against an executor, a party cannot testify as to a personal transaction between himself and the decedent, through whom his adversary claims title to a policy of insurance which is the subject of the suit.—Simmons v. Henry, 12 Civ. Proc. R. 204.

[g] (N. Y. 1888) Plaintiff deposited with defendants' testator, for safe-keeping, certain bonds, which, after testator's death, came into defendants' possession. On their refusal to deliver the bonds, plaintiff sued defendants individually for their possession. The sole defense was that plaintiff had deposited the bonds as a gift to her daughter, for whom defendants held them, and that they could therefore deliver them to no one without the daughter's consent. *Held*, that plaintiff was competent to testify as to the circumstances of the deposit, and to explain why testator had in his possession the receipt originally given by him to her, as defendants did not claim or derive title through their testator. — Hildick v. Williams (City Ct. Brook.) 3 N. Y. Supp. 817.

[h] (N. Y. 1888) A warehouseman, who surrenders to the executors of an estate property left with him by testator's wife, is, in an action by the wife for conversion, one who claims title through or under a deceased person under Code Civ. Proc. § 829, and the wife cannot testify in her own behalf as to personal transactions with her husband.—Mullins v. Chickering, 110 N. Y. 513, 18 N. E. 377, 1 L. R. A. 463.

[i] (N. Y. 1892) Testimony of plaintiff in an action against a railroad company upon a contract by him with it to build its railroad, as to conversations between him and a person since deceased, who supplied funds to the company for the construction of the road, is not excluded, as the company does not hold under such person.—Curnan v. Delaware & O. R. Co., 63 Hun, 628, 17 N. Y. Supp. 714, judgment modified (1893) 138 N. Y. 480, 34 N. E. 201.

[j] (N. Y. 1893) In an action on a bond and mortgage, the existence and validity of which are denied, it is error to permit plaintiff to testify as to personal transactions with, or declarations by, a deceased mortgagee under whom defendants claim. — Rice v. Daley, 66 Hun, 628, 20 N. Y. Supp. 941.

[k] (N. Y. 1894) A party who derives title from a decedent is not prohibited from testifying as to personal transactions with him as against a party who does not derive his title from decedent.—Lyon v. Whittaker, 77 Hun, 107, 28 N. Y. Supp. 296.

[l] (N. Y. 1895) In an action to establish a partnership between plaintiff's intestate and defendants, it appeared that one S., a former partner, at the time of withdrawing from the firm executed an assignment of his interest to defendants and plaintiff's intestate, who also signed it, reciting that plaintiff's intestate had been admitted to the partnership. *Held*, that defendants could not, after the death of S., testify that at the time they had objected to such recital as untrue, to which S. replied that he wanted them all bound by the agreement, and that for this reason they executed the assignment in that form, since plaintiff to some extent derived title from S.—Sheldon v. Sheldon, 84 Hun, 422, 32 N. Y. Supp. 419.

[m] (N. Y. 1895) In an action on a note, testimony of defendant as to statements made to him by a deceased person, through whom plaintiff claims title, tending to establish payment of the note, is inadmissible, under Code Civ. Proc. § 829, excluding testimony of statements by or transactions with decedents.—German-American Bank v. Slade (Super. Buff.) 15 Misc. Rep. 287, 36 N. Y. Supp. 983.

[n] (S. C. 1886) Under Code, § 400, providing that no party to an action shall be examined relative to personal transactions or communications with one at the time of the trial deceased, as a witness against one prosecuting or defending the action as executor, administrator, heir at law, etc., of the decedent, defendant to an action for partition is not incompetent to testify as to communications between himself and a trustee of the property, deceased at the time of the trial, where plaintiff, though claiming under such trustee, holds none of the relations named in the section.—Minton v. Pickens, 24 S. C. 592.

[o] (Wis. 1882) Rev. St. § 4069, prohibiting a party from testifying as to any transaction had by him personally with a deceased person where the opposite party derives his title or "sustains his liability to the cause of action" through or under such deceased person, applies in ejectment, where defendant had charge of men cultivating the land under deceased, as the head of a colony.—Bill v. Stoll, 55 Wis. 216, 12 N. W. 444.

[p] (Wis. 1890) Rev. St. § 4069, provides that no party shall be examined as a witness in respect to any transaction with a deceased person in any civil action "in which the opposite party derives title from such deceased person." *Held*, in ejectment by the heirs of a testator, brought after the death of the latter's wife, against the grantee of land devised to the wife, that defendant was competent to testify as to the contract entered into between himself and the deceased wife, as plaintiffs did not derive their title from her.—Larsen v. Johnson, 78 Wis. 300, 47 N. W. 615.

[q] (Wis. 1892) Rev. St. § 4069, precluding "a person from, through, or under whom a party derives his interest or title" from testifying to "any transaction or communication by him personally with a deceased person" in an action "in which the opposite party derives his title or sustains his liability to the cause of action from, through, or under such deceased person," does not apply to testimony as to com-

munications by a deceased grantor to his grantee in trust, in an action of ejectment by the cestui que trust against persons claiming adversely under tax titles.—Begole v. Hazzard, 81 Wis. 274, 51 N. W. 325.

§ 654. Grantee or assignee.

[a] (Fla. 1878) Under Laws, c. 1983, regulating testimony in case of decease, etc., on a bill to foreclose, brought by the assignee of a deceased mortgagee, no party interested in the result can be a witness against the complainant, as to any transaction with the mortgagee.—Tunno v. Robert, 16 Fla. 738.

[b] (Ill. 1870) In an action by an assignee of a note against the maker, the maker is a competent witness on a plea that the execution of the note was obtained by fraud, notwithstanding the original payee of the note was dead, as plaintiff did not sue in the capacity of an executor, and therefore the case was not within the exception of the act of 1867, making parties competent except in actions against an executor.—Leach v. Nichols, 55 Ill. 273.

[c] (Ill. 1895) Rev. St. 1893, c. 51, § 2, which forbids a litigant to testify in his own behalf when the adverse party sues or defends as the executor, administrator, heir, legatee, or devisee of any deceased person, does not apply to a case where the adverse party, although claiming title to the land in controversy through his deceased ancestor, derives his title through a deed from such ancestor.—Goelz v. Goelz, 157 Ill. 33, 41 N. E. 756.

[d] (Kan. 1895) Neither a sheriff levying an attachment on personalty nor the attachment creditor is an "assignee" of the attachment debtor, within Code Civ. Proc. § 322; and hence a vendee of a deceased attachment debtor may, in an action by him against the sheriff and the attaching creditor for conversion of the property, testify in his own behalf to the transaction whereby he claims title from decedent.—Burlington Nat. Bank v. Beard, 55 Kan. 773, 42 Pac. 320.

[e] (Ky. 1895) Under Civ. Code, § 606, subsec. 2, making evidence by one in his own interest of a transaction with a person dead when the evidence is offered inadmissible against another not present when the transaction took place, a parol agreement between the grantor and grantee of land, by which the grantor remained in possession, is inadmissible against the defendant in an action by such grantee against a subsequent grantee of the same grantor, not present when the agreement was made, after their common grantor is dead.—Girdner v. Girdner, 32 S. W. 266.

[f] (Mich. 1876) The statute, which in controversies with the representatives of deceased persons precludes evidence of matters equally within the knowledge of the deceased, does not apply to controversies with third persons acting in their own right as purchasers during the life of the deceased, and not taking by any post mortem estate.—Twiss v. George, 33 Mich. 253.

[g] (Mich. 1891) Under How. Ann. St. § 7545, which provides that in a suit in which the heirs, assigns, or personal representatives of a decedent are parties, "the opposite party, if examined as a witness on his own behalf, shall not be permitted to testify" to matters equally within the knowledge of decedent, in an action to enforce a trust in defendant, who held title to land by successive quitclaim deeds from the deceased trustee, complainant could not testify to any matters equally within the knowledge of the deceased trustee.—Ripley v. Seligman, 88 Mich. 177, 50 N. W. 143.

[h] (N. Y. 1871) Code, § 399, which renders the testimony of a party to an action or person interested, as to any transaction or communication between him and a person deceased at the time of the examination, incompetent, against the "executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person," is intended to exclude the testimony as to all persons who have succeeded to or acquired the right of the deceased which may be affected by the testimony. Hence the deceased's grantees of real estate must be deemed to be included in the word "assignee," although that term is more appropriately used respecting personal property.—Mattoon v. Young, 45 N. Y. 696.

[i] (N. Y. 1876) The president of a bank purchased shares of mining stock through one of the bank clerks to whom the bank made a loan for the price and took the shares as collateral. Subsequently the clerk loaned the president certain shares of M. stock to enable him to meet an examination into the affairs of the bank by its directors, and the president delivered both the M. and the mining stock to the bank as collateral for the loan to the clerk. After the death of the president, plaintiff brought an action against the bank to recover the M. stock, alleging that it was the property of his testator, who had placed it in the hands of the clerk. *Held*, that the bank held the stock as the assignee of the deceased president, and it was error to permit the clerk to testify for plaintiff under Code, § 399, forbidding an assignor to be examined with respect to a transaction with a deceased person in an action against parties who are the assignees of a deceased person and have acquired title immediately from him.—Andrews v. National Bank of North America, 7 Hun, 20.

[j] (N. Y. 1879) In an action by H. to recover two bonds alleged to have been indorsed in blank and deposited by H. for safe-keeping with F., since deceased, assignor of defendant, testimony of H. to show that F.'s name, written in the blank, had been inserted without his, H.'s, authority, knowledge, or consent, is inadmissible under Code, § 399.—Hill v. Heermans, 17 Hun, 470.

[k] (N. Y. 1882) Under Code Civ. Proc. § 829, prohibiting a party to an action from testifying in his own behalf against "a person deriving his title or interest from, through, or under a deceased person," concerning a personal transaction or communication between the witness and the deceased person, a party cannot testify to a conversation between himself and a deceased grantor, under whose conveyance the opposite party claims, although the latter was not the immediate grantee of the deceased, but derived title through mesne conveyances.—Pope v. Allen, 90 N. Y. 298.

[l] (N. Y. 1887) In an action to compel the specific performance of a covenant to renew a lease, the original lessee was dead, and plaintiff derived title to the lease by assignment from his executrix. The defense was that the lease was obtained by fraudulent representations. *Held*, that defendant could not testify to personal transactions or communications with the deceased lessee under Code Civ. Proc. § 829, providing that a person or party interested shall not testify in their own behalf in an action against an executor except where the executor is examined in his own behalf.—Kolasky v. Michels, 11 N. Y. St. Rep. 357, affirmed (1890) 120 N. Y. 635, 24 N. E. 278.

[m] (N. Y. 1887) In an action to cancel, so far as it affected plaintiff's right of dower, a deed which was executed to defendant by herself and husband, during the latter's lifetime, plaintiff alleged that her signature was obtained by the false and fraudulent representations of her husband, and offered to testify to a certain conversation between herself and deceased husband. *Held* inadmissible under Code Civ. Proc. § 829, which provides that a person interested in the event of an action shall not be examined in his own behalf or interest, against

a person deriving title from, through, or under a deceased person, concerning a personal communication between the witness and decedent.—Witthaus v. Schack, 105 N. Y. 332, 11 N. E. 649, affirming (1886) 38 Hun, 560.

[n] (N. Y. 1889) Code Civ. Proc. § 829, which forbids a party or interested person from testifying on his own behalf against a person deriving his title or interest from, through, or under a deceased person, does not prevent the wife of a deceased mortgagor from testifying in her own behalf against an assignee of the mortgage during the life of the mortgagee, since such assignee does not derive his interest from the mortgagor.—Holcomb v. Campbell, 118 N. Y. 46, 22 N. E. 1107, affirming (1886) 42 Hun, 398.

[o] (N. C. 1888) In a suit to restrain defendant from using a trade-mark, which plaintiff claimed by purchase from a person since deceased, with whom defendant alleged that he designed and used the trade-mark as a partner, questions put to defendant by his counsel relative to his interest in the trade-mark, and where it was originated, were properly excluded under Code, § 590.—Blackwell's Durham Tobacco Co. v. McElwee, 100 N. C. 150, 5 S. E. 907.

[p] (Ohio, 1877) 68 Ohio Laws, p. 127, which excludes a party from testifying in a civil action where the adverse party claims as "grantee" of a deceased person, does not apply to the assignee of a chose in action.—Elliott v. Shaw, 32 Ohio St. 431.

[q] (Ohio, 1877) In an action on a note against one purporting to be the maker, by an assignee of the note from its original holder and owner, who died after the assignment, defendant is a competent witness to prove any fact material to the issue in the case, whether it transpired before or after the death of the assignor.—Elliott v. Shaw, 32 Ohio St. 431.

[r] (S. C. 1878) A purchaser from a person since deceased is not rendered incompetent to prove declarations of such person, by Code, § 415, excluding interested persons, where, by death or lunacy, the means of contradiction are lost, as against plaintiff claiming as a purchaser under a foreclosure sale in which the decedent was a party demanding foreclosure, since he is not her assignee within the meaning of the statute.—Jones v. Plunckett, 9 S. C. (9 Rich.) 392.

[s] (S. C. 1893) An alienee, by executor's sale of land of a deceased person, is not deceased's "assignee," within the protection of Code, § 400, against testimony of an adverse party as to the latter's transactions with deceased.—Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680.

[t] (W. Va. 1875) Surviving partners are not assignees, in law, of their deceased partners, and Code, c. 130, § 23, providing that a party shall not be examined in his own behalf in respect to transactions with a deceased person against the assignee of such decedent, does not apply to actions against such survivors, where a party defendant is a witness to prove payment to a deceased partner during his life.—Carlton v. Mays, 8 W. Va. 245.

§ 655. Legatee, devisee, or heir.

Actions by or against heirs or next of kin, see ante, § 558.

—— *legatees or devisees, see* ante, § 559.

[a] (Ala. 1895) One of two heirs of deceased cannot, as against the other, testify to a deed from deceased to her of all his interest in the land.—Hillens v. Brinsfield, 108 Ala. 605, 18 South. 604.

[b] (Ill. 1888) Under Starr & C. Ann. St. c. 51, par. 1, § 2, in a suit to set aside a deed, brought against the widow and minor heirs of the grantee, the grantor is competent to testify in rebuttal to the facts testified to by the widow of the grantee, but is not a competent witness generally against the minor heirs of the grantee.—Griffin v. Griffin, 125 Ill. 480, 17 N. E. 782.

[c] (Kan. 1896) All the parties claiming title to certain real estate directly from an ancestor, as heirs, evidence of the defendants as to communications had personally with him was inadmissible, under Civ. Code, § 322.—Renz v. Drury, 57 Kan. 84, 45 Pac. 71.

[d] (Ky. 1895) Evidence of a surety is inadmissible to prove that his co-surety orally agreed to hold him harmless on a bond, where the co-surety is dead, and his heirs are before the court by warning order only.—Overfield v. Overfield, 30 S. W. 994.

[e] (Mich. 1878) Acts 1875, No. 155, under which in suits conducted by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the testimony of the opposite party as to matters which must have been equally within the knowledge of the deceased is excluded, applies to an heir who sues as administratrix of another estate, but not to an heir and distributee who has assigned her claim and is not interested in the result of the case.—Howard v. Patrick, 38 Mich. 795.

[f] (N. Y. 1863) Persons claiming land as heirs at law of one to whom the lands were devised are not representatives of the devisor within the meaning of Code, § 399; devisees take by purchase, not by descent.—Traphagen v. Traphagen, 40 Barb. 537.

[g] (N. Y. 1863) Where a legatee took from the executors as a portion of his legacy a bond and mortgage formerly given to the testator, the mortgagor was a competent witness in his own behalf, in an action to foreclose the mortgage, to prove a payment to the testator under Code, § 399, permitting a party to be examined in his own behalf, provided that he shall not be examined in respect to any transaction had personally by him with a deceased person against parties who are the executors, administrators, heirs at law, next of kin, or assignees of such deceased person, where they have acquired title to the cause of action immediately from said deceased person, or have been sued as such executors, administrators, etc.—Wildey v. Whitney, 25 How. Prac. 75.

[h] (N. Y. 1866) An assignor of a judgment against a testator is not excluded from testifying against a "legatee," when suit is brought to recover from such legatee the amount of the judgment, since a legatee is not, within the meaning of the words of Code, § 399, "an assignee, or executor, or administrator."—Hight v. Sackett, 34 N. Y. 447.

[i] (N. Y. 1876) In an action by assignee of a devisee, defendant is not precluded by Code, § 399, from testifying to personal communications between himself and the devisor.—Theall v. Steitz, 6 Daly, 482.

[j] (W. Va. 1881) The devisees of real estate are testator's assignees, within the meaning of Code, c. 130, § 23, relating to the competency of witnesses.—McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

§ 656. Widow.

Actions or proceedings by or against widows, see ante, § 560.

[a] (W. Va. 1886) In designating the persons against whom a party to a suit shall not testify in his own behalf as to certain transactions, the statute, in the words "survivor" and "next of kin," includes the decedent's widow.—Seabright v. Seabright, 28 W. Va. 412.

§ 657. Creditors.

[a] (Iowa, 1882) Code 1873, § 3639, making a party to an action or person interested therein

incompetent to testify against the personal representative of a deceased person as to a personal transaction or communication had with such person during his lifetime, does not disqualify an heir and distributee from testifying for the defendant in an action by a creditor of the estate, who is also heir and distributee, against the executor.—Leasman v. Nicholson, 59 Iowa, 259, 12 N. W. 270, 13 N. W. 289, followed Harrow v. Brown (1888) 76 Iowa, 179, 40 N. W. 708.

[b] (N. Y. 1884) On an application to sell land to pay debts of one deceased, a creditor objected to the allowance of claims in favor of certain sisters, heirs and survivors. *Held*, that their evidence of conversations or transactions with the deceased was admissible, the provision against parties testifying "against the executor, administrator, or survivor of a deceased person" not applying.—In re Barron, 67 How. Prac. 346.

[c] (N. Y. 1888) In an action by creditors to set aside a conveyance of lands by the debtor to another, and by the latter to the debtor's wife, the defense being that the lands had long been the property of the wife, the debtor, his wife, and the intermediate grantor, can testify as to declarations of the former owner of the land from whom they derived title, since deceased, the plaintiffs being neither representatives nor survivors of deceased, nor as judgment creditors having derived any title or interest from him.—Uhlmann v. Brownell, 50 Hun, 602, 3 N. Y. Supp. 699, judgment affirmed (1890) 121 N. Y. 652, 24 N. E. 1091.

[d] (S. C. 1887) In an action by creditors of a partnership to subject the lands of a deceased partner to the firm debts, where defendant claims an equitable mortgage upon said lands, said defendant is not prohibited by Code, § 400, from testifying as to communications and transactions between himself and the deceased as to the land in question; the testimony not being against any one belonging to the classes mentioned in said section, but against creditors.—Hutzler v. Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687.

[e] (S. C. 1888) On a bill against a judgment debtor and creditor, to set aside the judgment as a fraud on other creditors, where the debtor dies before a hearing, and the suit is prosecuted against the creditor alone, he is not prevented from being a witness for himself by Code Civ. Proc. § 400, providing that no one who is or has been interested as assignor in the event of an action shall be examined as to any transaction or communication between him and a person then deceased, against one prosecuting or defending as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor, as plaintiff occupies none of these positions.—Martin v. Adams, 29 S. C. 597, 6 S. E. 860.

[f] (S. C. 1889) In an action by the creditors of a deceased grantor to set aside a fraudulent conveyance, the testimony of the grantee as to conversations and transactions between the grantor and himself is admissible, since it is not against any of the classes mentioned in Code Civ. Proc. § 400, prohibiting testimony relating to transactions or communications with decedents.—Jackson v. Lewis, 32 S. C. 593, 10 S. E. 1074.

[g] (W. Va. 1896) In a suit brought by a creditor to set aside a deed for fraud as to his debt, the grantee is not incompetent to testify in support of his title and the good faith of his conveyance for the reason that it necessarily involves transactions and communications had with a deceased grantor, whose personal representatives or heirs are made parties defendant to the suit.—Farmers' Bank of Fairmont v. Gould, 42 W. Va. 132, 24 S. E. 547.

§ 658. Survivor of joint parties to contract or other transaction or cause of action.

Competency of surviving party to contract or other transaction or cause of action, see ante, §§ 625–643.

[a] (Cal. 1890) Though an action by an attorney for services is brought jointly against two defendants, one of whom has since died, and though under Code Civ. Proc. § 1880, relating to testimony of transactions with a person since deceased, testimony by the attorney as to the value of his services is incompetent as against the executors of the deceased defendant, it should be admitted as against the other defendant, as a several judgment could be entered against the survivor.—Shain v. Forbes, 82 Cal. 577, 23 Pac. 198.

[b] (Ga. 1873) In an action to reform a deed on the ground of mistake, the fact that one of defendants has died pending the suit does not preclude plaintiff from testifying in his own behalf to conversations, negotiations, etc., between himself and the living defendant, in which the alleged mistake arose.—Payne v. Elyea, 50 Ga. 395.

[c] (Ga. 1874) On trial of an issue upon a contract entered into between L. of the one part and several persons of the other part, all present and fixing the terms, L. is a competent witness, although one of those persons has since died.—North Georgia Min. Co. v. Latimer, 51 Ga. 47.

[d] (Ga. 1878) In a suit by an executor, defendant is competent to prove all relevant conversations between himself and the living parties with whom they were had, though one of the parties, executor's testator, is dead.—Clark v. Bell, 61 Ga. 147.

[e] (Iowa, 1890) Under Code 1873, § 3639, providing that no party to an action shall be examined as a witness in regard to any personal transaction between such witness and decedent, against the survivor of such decedent, plaintiff cannot testify in regard to transactions between herself and a deceased wife, in an action against the husband for money due as family expenses, under a contract with the wife, under Code 1873, § 2214, which provides that family expenses are chargeable on the property of both husband and wife, and in relation thereto they may be sued jointly or severally.—Gavin v. Bischoff, 80 Iowa, 605, 45 N. W. 906.

[f] (Md. 1872) Acts 1864, c. 109, § 1, made certain classes competent as witnesses who were incompetent under the common law, and the second section, as amended by Acts 1868, c. 116, excepted from the first section all parties to the contract or cause of action when an original party to it was dead or insane, or when an executor or administrator was a party to the suit. *Held* that, in an action on a joint and several note against one of the makers, the other maker being dead, it was not competent for plaintiff, who was the payee of the note, to testify that the deceased maker made a payment on the note, and at the time of such payment indorsed it on the note in his own handwriting, such testimony being offered in order to remove the note from the operation of the statute of limitations.—Miller v. Motter, 35 Md. 428.

[g] (Mass. 1866) The death of one of two joint contractors who are the original defendants in a suit does not render the opposite party incompetent to testify as within the exceptions of Gen. St. c. 131, § 14.—Goss v. Austin, 93 Mass. (11 Allen) 525.

[h] (Mo. 1878) The fact that of the two persons constituting one party to the contract sued on one has since died does not disqualify the

adverse party from testifying in the case.—Fulkerson v. Thornton, 68 Mo. 468.

[i] (Mo. 1883) Where one of two parties jointly bound by a contract is dead, in a suit between the survivor and the adverse party to the contract the latter is a competent witness.—Nugent v. Curran, 77 Mo. 323.

[j] (Mo. 1884) Although the fact that one of the adverse parties to a contract sued on is dead does not of itself disqualify the opposite party as a witness, provided a surviving adverse party remains, yet the opposite party is disqualified if it appears that the contract or transaction sued on was, on the part of the survivors, effected solely by or through the deceased party.—Williams v. Perkins, 83 Mo. 379.

[k] (Mo. 1887) The death of one of several parties to one side of a contract does not disqualify the opposite party thereto as a witness, when all the parties who actually made the contract are living.—Wallace v. Jecko, 25 Mo. App. 313.

[l] (N. H. 1880) The fact that one of the trustees of a family of Shakers, and the one with whom plaintiff had his dealings, was dead, does not render plaintiff incompetent as a witness in a suit against the trustees.—Davis v. Dyer, 60 N. H. 400.

[m] (N. Y. 1882) In an action against a joint maker of a note, the other joint maker being dead, plaintiff may testify as to personal transactions had with such deceased joint maker.—Sprague v. Swift, 28 Hun, 49, 3 N. Y. Civ. Proc. R. 34.

[n] (N. C. 1884) Under Code, § 590, excluding evidence of transactions between the witness "and a person at the time of such examination deceased," a witness may testify to a conversation had with two partners concerning a contract made by him with them, although one of them is dead.—Peacock v. Stott, 90 N. C. 518.

[o] (Pa. 1881) Act May 28, 1853, providing that in all civil proceedings by or against surviving partners, the policy of the law shall not exclude any party to the record from testifying to matters having occurred between the surviving party and the adverse party to the record, is a remedial statute, and will be liberally construed so as to include the case of any two who may jointly contract, even though not strictly partners. Therefore, if two persons jointly execute a note, and one die, in an action between the holder and the survivor, the former may testify as though the makers had been partners.—Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818.

[p] (Pa. 1881) In suit on a note under seal against two joint obligors, the third being dead, the note, upon being put in evidence, appeared to have an alteration on its face, to explain which plaintiff, the obligee, testified that he had received it in its altered condition from one of the joint obligors, but he could not remember which. He had answered, two questions on cross-examination when his competency was objected to. *Held*, that, since he might have received the note from the deceased obligor, he was incompetent to testify against the survivors.—Dean v. Warnock, 98 Pa. 565.

[pp] (Tex. 1881) The rule excluding evidence "as to any transaction with or statement by" a deceased person does not apply when the suit is against codefendants, of whom only one is dead, and the contract was made either with the living codefendant or with the living and the dead concurrently.—Bennett v. Frary, 55 Tex. 145.

[q] (Vt. 1868) Under Gen. St. p. 327, § 24, in an action on a note signed by two persons, the testimony of plaintiff concerning the consideration of the note is admissible, notwithstanding the death of one of the signers of the note.—Read v. Sturtevant, 40 Vt. 521.

[r] (Vt. 1895) In an action, after the death of P., to foreclose a mortgage given to B. and P. jointly, to secure the payment of two notes to B. and two other notes of the same amount to P., the mortgagor is competent to testify concerning the scope of the mortgage, B. being alive.—Paddock v. Potter, 67 Vt. 360, 31 Atl. 784.

[s] (Va. 1881) Code 1873, c. 172, § 22, providing that where one of the original parties to an action is dead the other party shall not be admitted to testify in regard thereto in his own favor, does not prevent an agent of a state board of public works, in a suit to recover advances made by him to assist in constructing a railroad, from being a competent witness to prove an arrangement made between him and the members of the board, at one of its regular meetings, that he should be repaid for his advances, even though two of such members have died.—Kelly v. Board of Public Works, 75 Va. 263.

[t] (W. Va. 1885) Under Code, c. 130, § 23, as amended by Acts 1882, c. 160, § 23, neither plaintiff nor one for whose use the suit is brought is a competent witness against a defendant, who together with a deceased party jointly executed the note sued on, in regard to any personal transaction or communication between either of them and such deceased party.—Heflebower v. Detrick, 27 W. Va. 16.

§ 659. —— Surviving partners.

[a] (Ala. 1874) In an action by a surviving partner to recover a debt due to the late partnership, defendant may testify as to transactions with the deceased partner.—Bragg v. Clark, 50 Ala. 363.

[b] (Ala. 1874) In an action by or against a surviving partner, a party may testify to a transaction had with the deceased partner.—Bradley v. Patton, 51 Ala. 108.

[c] (Ga. 1868) Under Act Dec. 16, 1866 (Code, § 3798), providing that a party shall not testify where one of the original parties to the contract or cause of action is dead, a party is not incompetent to testify against the other party, a partnership, simply because one of the firm is dead, but, to exclude the witness, it must appear that the transaction about which he testifies was had with the deceased, and with no other member of the firm.—Leaptrot v. Robertson, 37 Ga. 586; Moore v. Harlan, Id. 623.

[d] (Ga. 1869) In a suit against a surviving partner, plaintiff is not a competent witness to prove a contract made with a deceased partner.—Long v. McDonald, 39 Ga. 186.

[e] (Ga. 1870) In an action against the administrator of a deceased partner and the surviving partner, on a partnership contract made with the knowledge and participation of both, plaintiff may be a witness.—McGehee v. Jones, 41 Ga. 123.

[f] (Ga. 1878) Where A. contracted with B. (a member of the law firm of B. & C.) and D. for their joint prosecution of a suit for him, and gave them his notes in payment for their services, A. was a competent witness in a suit on one of the notes brought by C., although B. was dead.—Hammond v. Drew, 61 Ga. 189.

[g] (Ga. 1880) A suit was brought against partners, one of whom died pending the suit. *Held*, that plaintiff could not testify concerning transactions with the deceased partner, in the absence of the survivor.—Ford v. Kennedy, 64 Ga. 537.

[h] (Ga. 1880) Where A. sold to B. A.'s interest in a note of C. payable to the firm of A. & B., and died, C., in a suit by B., was not a competent witness to show payment to A.—McWhorter v. Sell, 66 Ga. 139.

[i] (Ga. 1887) In an action against a partnership for goods sold, plaintiffs cannot testify to the circumstances of an alleged contract which they claimed had been entered into by them with a member of a firm in the firm's behalf, which member was deceased at the time of the trial, under Code, § 3854, subd. 1.—Adams v. Eatherly Hardware Co., 78 Ga. 485, 3 S. E. 430.

[j] (Ind. 1878) In an action by a surviving partner on a partnership debt defendant is a competent witness in his own behalf.—Nicklaus v. Dahn, 63 Ind. 87.

[k] (Ind. 1879) In an action by the payee of a note executed by two partners, against one partner and the administrator of the other, the payee is a competent witness, since being competent against the surviving partner the fact that the administrator of deceased was joined would not render him incompetent.—Dodds v. Rogers, 68 Ind. 110.

[l] (Ind. 1890) In an action against two physicians, as partners, for malpractice, where one has died, pending suit, plaintiff can testify as to declarations made by the deceased partner while engaged in resetting the dislocated limb; such declarations not being within the prohibition of Rev. St. 1881, § 498, which provides that in a suit where an administrator is a party, involving matters in decedent's lifetime, where a judgment may be rendered against the estate, a necessary party, whose interests are adverse to the estate, shall not be a competent witness against the estate.—Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90

[m] (Ind. 1864) In an action by a surviving partner on book account, defendant is competent to testify to payments by him to the deceased partner on the account.—Wood v. Stewart, 9 Ind. App. 321, 36 N. E. 658.

[n] (Kan. 1874) Where certain persons purchase lumber on credit from a firm composed of three persons, and afterwards one of the members of the firm dies, and another member of the firm becomes the owner of the partnership assets, including said debt for lumber, and the last-named member of said firm sues the purchasers of said lumber for said debt. *Held*, that neither of the defendants can testify in such suit in his own behalf concerning any transaction or communication had personally by such defendant with the deceased member of said firm.—Hook v. Bixby, 13 Kan. 164.

[o] (Mass. 1860) St. 1857, c. 305, providing that, where one of the original parties to the contract or cause of action then in issue and on trial is dead, the other party shall not be admitted to testify in his own favor, does not render incompetent the testimony of a plaintiff in an action on a contract with a partnership, against the surviving members, though the partner with whom the contract was made is dead.—Hayward v. French, 78 Mass. (12 Gray) 453.

[p] (Mass. 1864) In an action against the surviving partner of a firm, plaintiff is a competent witness.—Brady v. Brady, 90 Mass. (8 Allen) 101.

[q] (Mich. 1888) 2 How. Ann. St. § 7545, as amended by Acts 1885, p. 156, provides that when any suit is defended by a surviving partner, the opposite party, if examined in his own behalf, shall not testify to matters which, if true, must have been equally within the knowledge of the deceased partner, and not within the knowledge of the surviving partner. *Held*, in replevin against a firm by a mortgagee of chattels bought by the mortgagor from the partnership on a conditional sale, that the mortgagor was competent, although the partner, with whom alone the contract was made, had died, pending suit.—Hood v. Olin, 68 Mich. 165, 36 N. W. 177.

[r] (Mich. 1889) In an action for the price of goods sold and delivered, it appearing that the firm, of which plaintiff is the survivor, dealt with defendant's husband as her agent, and not as owner of the business for which the goods were bought, the husband is not barred, as being the real party in interest, from testifying that he made the payment to plaintiff's deceased partner, by How. Ann. St. § 7545, declaring the opposite party incompetent to testify in actions by surviving partners.—Doolittle v. Gavagan, 74 Mich. 11, 41 N. W. 846.

[s] (Miss. 1870) In an action at law on a note against the survivor of a partnership, to recover money borrowed in the name of the firm by the deceased partner, plaintiff, the lender, is a competent witness to establish the debt.—Faler v. Jordan, 44 Miss. 283.

[ss] (Miss. 1879) In a suit by A. against B., survivor of C., on a partnership contract of B. & C., A. may testify as to a conversation of B. upon the contract, although occurring in C.'s lifetime.—McCutchen v. Rice, 56 Miss. 455.

[t] (Mo. 1867) In an action on a quantum meruit brought by surviving partners, defendant is not a competent witness, under the statutes of this state, to prove by his own testimony a special contract made between him and the deceased partner.—Stanton v. Ryan, 41 Mo. 510.

[tt] (Mo. 1888) In an action against a surviving partner on a partnership note executed by the deceased partner, plaintiff is not a competent witness in his own behalf, unless defendant testifies for himself; in which case plaintiff may then testify as to facts in rebuttal.—Wiley v. Morse, 30 Mo. App. 266.

[u] (Nev. 1868) In an action against a surviving partner in relation to a transaction wholly within the knowledge of the deceased partner with whom the subject-matter of the suit was transacted, plaintiff is not a competent witness for himself.—Romey v. Buckland, 4 Nev. 45.

[uu] (Nev. 1878) Surviving partners are not "representatives of a deceased person," within Civ. Prac. Act, § 379, so as to exclude a party sued by them from testifying in his own behalf as to a contract made with the decedent.—Crane v. Gloster, 13 Nev. 279.

[v] (Nev. 1891) Under St. 1881, p. 80, prohibiting a person from testifying when the other party to the transaction is dead, or when the opposite party to the action is the representative of a deceased person, as to facts which transpired before the death of such deceased person, defendant, in a suit by a surviving partner to foreclose a mortgage, cannot testify that the deceased partner accepted property under a verbal agreement in satisfaction of the mortgage.—Gage v. Phillips, 21 Nev. 150, 26 Pac. 60, 37 Am. St. Rep. 494.

[vv] (N. Y. 1858) Code, § 399, provides that a party or person interested will not be examined in his own behalf unless the adverse party or person in interest is living near when the opposite party shall be the assignee, administrator, executor, or legal representative of a deceased person, nor unless ten days' notice of such intended examination shall be given in writing to the adverse party. *Held*, that where the person interested had given such notice he might be examined, notwithstanding the action was against the survivor of a firm as such, which consisted of three persons when the transaction occurred, two of whom were since dead, as the survivor alone was the adverse party within the meaning of that section.—Bissell v. Hamlin, 16 N. Y. Super. Ct. (3 Bosw.) 383.

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[w] (N. Y. 1865) After the dissolution of a partnership by the death of one of its members, the survivor holds the assets as partnership property, and by virtue of his original power as partner. Hence, he is in no sense the assignee of the deceased partner; and the restriction of Code, § 399, as to the reception of evidence of transactions with a deceased person, against the executors or assignees of the deceased, does not extend to an action against him.—Tremper v. Conklin, 44 Barb. 456, affirmed (1870) 44 N. Y. 58.

[ww] (N. Y. 1870) Prior to the amendment of 1866 to the Code a party could be a witness in his own behalf in a suit brought against the survivor of a firm, in regard to transactions with the deceased partner. Such a case does not come within the proviso of section 399, prohibiting the reception of the evidence of a party against executors, administrators, heirs at law, next of kin, or assignees of a deceased person, and allowing the admission of the evidence of parties in all other cases.—Tremper v. Conklin, 44 N. Y. 58, affirming (1865) 44 Barb. 456.

[x] (N. Y. 1884) Conversations between a deceased and a surviving partner are inadmissible in evidence against the latter.—Farley v. Norton, 67 How. Prac. 438.

[xx] (N. Y. 1896) Under Code Civ. Proc. § 829, which prohibits a party from testifying in his own behalf, against the personal representatives or survivor of a deceased person, as to a personal transaction between the witness and such deceased person, where, in an action by a partnership, one of the partners died before the trial, the testimony of defendant as to an oral warranty made by the deceased partner was incompetent.—Manning v. Schmitt, 4 App. Div. 131, 38 N. Y. Supp. 640.

[y] (Ohio, 1875) Defendant, in a civil action brought by a surviving partner, is not a competent witness, under Code Civ. Proc. § 313, as amended by 67 Ohio Laws, p. 113, to prove transactions or conversations with the deceased partner, which took place in the absence of the partner surviving.—Baxter v. Leith, 28 Ohio St. 84.

[yy] (R. I. 1894) Pub. St. c. 214, § 33, providing that "whenever an original party to the contract or cause of action is dead the other party may be called as a witness by his opponent, but shall not be allowed to testify on his own offer," does not prevent defendant in an action by a surviving partner from testifying as to a conversation with the deceased partner, as, the conversation being with the partnership, the death of the partner is not the death of the "other party," within the statute.—Clapp v. Hull, 18 R. I. 652, 29 Atl. 687.

[z] (Tex. 1879) Under 2 Pasch. Dig. arts. 6826, 6827, permitting a party or person interested to testify, except that in actions against an administrator or executor he shall not testify to transactions with the decedent, a defendant in an action on a contract was not incompetent because the contract was made between him and a partner of plaintiff who had subsequently died.—Hicks v. Patterson, 1 White & W. Civ. Cas. Ct. App. § 349.

[zz] (Tex. 1889) Rev. St. art. 2248, disqualifying a party from testifying as to transactions with decedents, with the provision that it shall "extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent," did not preclude defendant, in an action on an account brought by a surviving partner, from testifying to a payment made to the deceased partner.—Campbell v. Wallace, 3 Willson, Civ. Cas. Ct. App. § 433.

§ 660. Party as to whom person deceased acted in representative or fiduciary relation.

[a] (Ala. 1887) Under Code, § 2765, providing that no one shall testify as to any transaction with or statement by any deceased person who acted as a fiduciary to the adverse party, a plaintiff cannot testify that he made an agreement with his coplaintiff in behalf of defendant company, under the instructions of the president of the company, who is deceased.—Stanley v. Sheffield Land, Iron & Coal Co., 83 Ala. 260, 4 South. 34.

[b] (Ala. 1888) Evidence of one interested in a suit to recover on labor tickets issued by defendant corporation as to a conversation had with the president of the defendant, deceased, at the time of trial, is inadmissible under Code 1886, § 2765, providing that such evidence shall be incompetent where the decedent occupied a fiduciary relation to the party against whom such evidence is sought to be introduced.—Tabler v. Sheffield Land, Iron & Coal Co., 87 Ala. 305, 6 South. 196.

[c] (Ala. 1888) Code, § 2765, provides that neither party to a suit shall be allowed to testify against the other as to any transaction with or statement by any deceased person who at the time of such transaction or statement acted in any representative or fiduciary relation whatever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the opposite party. *Held*, that in a suit to set aside a mortgage as fraudulent the defendant mortgagor is not competent to testify against a bank, his mortgagee and codefendant, as to transactions had with the deceased cashier of such bank, though a decree pro confesso has been entered against the mortgagor, as he still remains a necessary party on the record.—Mobile Sav. Bank v. McDonnell, 87 Ala. 736, 6 South. 703.

[d] (Ala. 1890) Code, § 2765, provides that neither party to a suit shall be allowed to testify against the other, as to any transaction with any deceased person, who acted in any representative or fiduciary relation whatever to the party against whom such testimony is sought to be introduced, unless called to testify by the opposite party. *Held*, that complainant's testimony as to a verbal contract with a corporation, made with the secretary alone, was incompetent, after the death of the latter.—Downing v. Woodstock Iron Co., 93 Ala. 262, 9 South. 177.

[e] (Ga. 1885) A tax collector, proceeded against by the county, is not a competent witness to prove a payment made by him to the county treasurer, since deceased.—Langford v. Wilkinson County Com'rs, 75 Ga. 502.

[f] (Mich. 1892) Plaintiff held notes against E. for money loaned, which were presented as claims against E.'s estate, and allowed; but, the estate proving insolvent, claim was made against defendant, a corporation, of which E. was president, on the ground that the money was received by it. *Held*, that plaintiff's conversations with E. were inadmissible under 3 How. Ann. St. § 7545, providing that, in a suit against a corporation, the opposite party cannot testify in relation to matters within the knowledge of a deceased officer of the corporation, and not within the knowledge of any surviving officer.—Baumann v. Manistee Salt & Lumber Co., 94 Mich. 363, 53 N. W. 1113.

[g] (Ohio, 1884) Under Rev. St. §§ 5241, 5242, relative to the competency of witnesses; plaintiff in an action against a bank is not incompetent to testify as to an oral contract for a deposit made with defendant's cashier, who has died prior to the trial.—First Nat. Bank v. Cornell, 41 Ohio St. 401.

[h] (S. C. 1880) In an action against a town, plaintiff may testify to transactions between

himself and a former intendant of the town, since deceased.—Coleman v. Chester, 14 S. C. 286.

§ 661. Principal of agent deceased.

[a] (Ala. 1886) A party cannot testify for himself to any transaction with, or statement by, a deceased person, who acted at the time as agent of the adverse party, under Code 1876, § 3058, providing that neither party shall testify against the other as to any transaction with, or statement by, a deceased person, who, at the time thereof, acted in any representative relation to the party against whom the testimony is offered.—Warten v. Strane, 82 Ala. 311, 8 South. 231.

[b] (Ga. 1867) Under the statute authorising parties to testify in their own behalf, an agent under a del credere commission, who takes a purchaser's note payable to himself, is to be deemed a party to the original contract, and his death extinguishes the surviving party's right to become a witness.—Archer v. Greer, 36 Ga. 107.

[c] (Ga. 1876) Where a person is employed as a general agent for an administratrix, his statements in connection with such agency are admissible after his death to bind the estate.—Hines v. Poole, 56 Ga. 638.

[d] (Ga. 1881) Where, by consent of the attorney who had represented an intestate, the administrator was made a party to the suit, *held*, on a motion by him to set aside the judgment, that he was not disqualified as a witness by the death of the attorney.—Turner v. Jordan, 67 Ga. 604.

[e] (Ga.) Where the agent of plaintiff, a corporation, through whom all the corporate transactions were had with defendant, is dead, defendant is not a competent witness in his own behalf as to what transpired between himself and the deceased agent.—(1885) Langford v. Wilkinson County Com'rs, 75 Ga. 502; (1887) Parish v. Weed Sewing-Mach. Co., 79 Ga. 682, 7 S. E. 138.

[f] (Ga. 1889) Plaintiff, in an action for personal injuries, may testify to the circumstances under which he signed an instrument alleged to be a release of his demand, and that the instrument introduced by defendant, to which his signature is attached, and which he was asked if he had signed, was not in fact the instrument signed by him, though defendant's vice-president, who procured the release, be deceased.—Carlton v. Western & A. R. Co., 81 Ga. 531, 7 S. E. 623.

[g] (Ga. 1889) A parol agreement, claimed to have been entered into between the maker of an absolute note under seal and the attorney of the payee, the payee not being present, to the effect that the note was not to pass from the attorney to the payee until certain conditions were performed, cannot be shown by the maker after the death of the attorney.—Johnson v. Hart, 82 Ga. 767, 9 S. E. 1110.

[h] (Ga. 1891) In an action against a railroad company for injuries sustained by an employé, alleged to have resulted from the negligent act of defendant's engineer in managing his engine, plaintiff is incompetent to testify as to the alleged negligence of the engineer if the latter is dead, and no other officer or agent of defendant was present, under Act Oct. 29, 1889 (Pamph. Laws, p. 85), which provides that where suit is defended by a corporation the opposite party shall not be admitted to testify in his own behalf to transactions solely with a deceased officer or agent of the corporation, and not also with surviving persons, officers, or agents.—Mayfield v. Savannah, G. & N. A. R. Co., 87 Ga. 374, 13 S. E. 459.

[i] (Ill. 1890) Upon suit on a contract made with defendants' agent, it was stipulated that the stenographic report of the agent's testimony at a former trial might be read as a deposition. Before the second trial the agent died, and the plaintiff at that trial offered the report of his testimony taken at said former trial. *Held* inadmissible, under Rev. St. c. 51, § 4, which provides that a party to a suit "who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness" as to such contract.—Trunkey v. Hedstrom, 131 Ill. 204, 23 N. E. 587, affirming (1889) 33 Ill. App. 397.

[j] (Iowa, 1890) Under Code 1873, § 3639, providing that no party to an action against the executor, etc., or survivor of a deceased person, shall testify to any personal transaction had with deceased, the assured can testify, in an action against the company on his policy, to conversations had with the agent, since deceased, who took the application for insurance, as defendant company is not the "survivor" of the agent within the meaning of the statute.—Reynolds v. Iowa & Nebraska Ins. Co., 80 Iowa, 563, 46 N. W. 659.

[k] (Iowa, 1891) A vendee of land is a competent witness to testify to transactions with a deceased agent of his vendor.—Bellows v. Litchfield, 83 Iowa, 36, 48 N. W. 1062.

[l] (Ky. 1820) Declarations of a deceased agent should form part of the res gestæ between parties litigant to be competent evidence against either.—McClure v. Purcel, 10 Ky. (3 A. K. Marsh.) 61.

[m] (Ky. 1882) The rule excluding a person's testimony in his own behalf as to a transaction with a principal who is dead applies also to a transaction with an agent who is dead; and the fact that the agent testified at a former trial does not change the rule.—Harpending's Ex'rs v. Daniel, 80 Ky. 449.

[mm] (Ky. 1896) In an action against a corporation, to recover on a contract of employment, it is error to permit plaintiff to testify that the contract was made with defendant's agent, who died before the trial, no one interested in decedent's estate having testified against plaintiff with reference to such transaction.—William Tarr Co. v. Kimbrough, 34 S. W. 528.

[n] (Md. 1875) Where a firm, through an agent, enters into a contract, the person with whom the contract is made, on his suit against the firm for a breach of the contract, is a competent witness, although the agent is dead. St. 1868, c. 116.—Spencer v. Trafford, 42 Md. 1.

[nn] (Md. 1888) In an action against a corporation for trespass, plaintiff is not rendered incompetent to testify to a parol lease, made by a director as an agent of the corporation, by the fact that the director is dead. Code 1888, art. 35, §§ 1, 2, provides that no person shall be rendered incompetent by reason of interest, etc., except when the original party to the contract is dead.—South Baltimore Co. v. Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

[o] (Md. 1888) In an action against a corporation for trespass, plaintiff having leased the premises of defendant, there being evidence that a director, who made the lease, was the agent of the company for the renting of the land, it was competent to prove an oral agreement between him and plaintiff, that the latter might continue as a yearly tenant after the lease expired, though the director was dead.—South Baltimore Co. v. Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507.

[oo] (Mich. 1888) An attorney cannot testify to a contract to act for a firm, made with a beneficiary acting as its agent, in an action, after the death of the agent, to recover damages for nonemployment in a suit relating to the trust, of which the firm was trustee, under Pub. Acts 1885, p. 156, relating to evidence of trans-

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actions with deceased persons; for, if the attorney recover, the interest of the agent as beneficiary must contribute to the judgment.—Cutcheon v. Loud, 71 Mich. 433, 39 N. W. 569.

[p] (Mo. 1878) After the death of the chief clerk of an insurance company, employed to attend to the general business in the office of a general agent, it appeared that such clerk had made a contract to repair a house insured in one of the companies represented by the agency. *Held*, in an action to recover for work and labor done in making plans and estimates for the repairs, that the contractor was a competent witness.—Hilton v. Newman, 6 Mo. App. 304.

[pp] (Mo. 1887) Rev. St. § 4010, providing that where one of the parties to the contract in issue is dead, the other shall not testify in his own favor, prohibits a party from testifying to an oral contract between him and a corporation, when the latter's agent, who made the contract for the corporation, is dead.—Williams v. Edwards, 94 Mo. 447, 7 S. W. 429.

[q] (Mo. 1888) Under Rev. St. § 4010, providing that, where one of the parties to the contract in issue is dead, the other shall not testify in his own favor, one who contracts with the agent of a corporation is not a competent witness in his own favor as to such contract, or the admissions and declarations of the agent, after the latter's death.—Nichols, Shepard & Co. v. Jones, 32 Mo. App. 657.

[qq] (Mo. 1889) In an action by a corporation against partners, one of the latter testified as to what occurred between him and an agent of plaintiff in relation to an adjustment of accounts, although it was shown that the agent had since died. *Held*, that the testimony was incompetent, under Rev. St. § 4010, prohibiting one party to a transaction from testifying in regard to it when the other is dead.—Aultman, Miller & Co. v. Adams, 35 Mo. App. 503.

[r] (Mo. 1889) The death of the agent of one of the parties to a contract, who carried on the negotiations, disqualifies the other party to testify in an action by the principal on such contract.—Robertson v. Reed, 38 Mo. App. 32.

[rr] (Neb. 1889) Plaintiff sued defendant for the price of a wagon sold to defendant. The defense pleaded was that defendant had purchased the wagon from plaintiff's agent, not knowing of his agency, but believing the wagon belonged to the vendor; that he had paid therefor, with the exception of $25, for which he offered to let judgment be rendered in favor of plaintiff. It was shown that the agent was deceased. On the trial the court permitted defendant, when upon the witness stand, to state the contract of purchase from the deceased; plaintiff at that time objecting. *Held* no error, and not a violation of Civ. Code, § 329, relating to testimony of transactions with decedents; plaintiff not being the representative of deceased.—Kansas Mfg. Co. v. Wagoner, 25 Neb. 439, 41 N. W. 287.

[s] (N. Y. 1828) A statement of account by an agent, entered in his agency book at the time of settlement, is, after the death of the agent, admissible in evidence against his principal.—Van Rensselaer v. Morris, 1 Paige, 12.

[ss] (N. Y. 1875) Code, § 399, does not prohibit a party to an action from testifying to a transaction or communication between himself and deceased agent of an opposite party, nor from testifying to a conversation, heard by him, between a principal and agent, both deceased, as against a successor in interest of the principal.—Hildebrant v. Crawford, 65 N. Y. 107, affirming (1871) 6 Lans. 502.

[t] (N. C. 1873) Testimony as to transactions between defendant and an agent, since deceased, is admissible in an action brought by the principal against defendant, especially if the agent's acts and agreements were afterwards communicated to the principal and assented to by him.—Howerton v. Lattimer, 68 N. C. 370.

[tt] (N. C. 1873) Under Code Civ. Proc. § 343, which provides that no party shall be examined as to any transaction between him and a person deceased "as a witness against a party then prosecuting or defending as heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person," testimony as to transactions which took place between defendant and an agent, since deceased, is admissible in a suit brought by the principal against such defendant.—Howerton v. Lattimer, 68 N. C. 370.

[u] (N. C. 1879) Defendant on a motion to vacate a default judgment may depose in his affidavit therefor to the declarations of a deceased attorney for plaintiffs as to the conditions under which the default was secured, where it appears that neither the attorney's estate nor the interest of any one claiming under him can be affected by the event of the action, as Code, § 343, providing that no party to an action shall be examined regarding a transaction or communication between such witness and a person at the time of such examination deceased, then prosecuting or defending as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such decedent, does not apply in such case.—Molyneux v. Huey, 81 N. C. 106.

[uu] (N. C. 1882) A party to a suit is not disqualified as a witness by Code, § 343, to speak of transactions with a deceased agent of a deceased principal.—Morgan v. Bunting, 86 N. C. 66.

[v] (N. C. 1891) Plaintiff, in an action against a railroad company on a shipping contract, made with defendant's agent, since deceased, does not derive his claim under the contract from the agent, within Code, § 590, which forbids a party to an action to testify as to a personal transaction with a decedent from whom he derives his interest; and plaintiff may testify as to making such contract with the deceased agent.—Roberts v. Richmond & D. R. Co., 109 N. C. 670, 14 S. E. 106.

[vv] (N. C. 1893) In an action against a principal, founded on contracts made with plaintiff by a deceased agent, plaintiff may testify as to his transactions with said agent, and the latter's declarations as a part thereof.—Sprague v. Bond, 113 N. C. 551, 18 S. E. 701.

[w] (Ohio, 1883) Defendant is a competent witness to transactions with a deceased agent of plaintiff, though not occurring in his presence, if within the scope of such agent's authority.—Cochran v. Almack, 39 Ohio St. 314.

[ww] (Pa. 1877) In trover for the value of 3,000 barrels of oil which plaintiffs alleged their agent had delivered to defendant in payment of his own debt, *held*, that defendant was a competent witness, although the agent was dead. Defendant was not excluded by the act of 1869, providing that, where the assignor of the thing or contract in action may be dead, the survivor shall not be allowed to testify, if a party to the suit.—Hostetter v. Schalk, 85 Pa. 220.

[x] (Tex. 1893) Rev. St. art. 2248, relating to testimony as to transactions with decedents, does not apply to corporations, so as to exclude testimony as to contracts made with their officers and agents who have since died.—Bexar Building & Loan Ass'n v. Newman (Civ. App.) 25 S. W. 461.

[xx] (Tex. 1893) Where a principal was made a party to an action, and a judgment rendered against him on a contract made by his agent, he cannot object that evidence as to the contract should not be admitted, because of the agent's death, where it does not appear that the agent was dead when the principal was made

a party, and that his deposition could not have been had after notice of the issues from the pleadings.—Bexar Building & Loan Ass'n v. Newman (Civ. App.) 25 S. W. 461.

[y] (Vt. 1871) Under Gen. St. c. 36, § 24, providing that, where one of the original parties to a contract is dead, the other party shall not be allowed to testify in his own favor, an agent or officer through whom another makes a contract is, in no legal sense, a party to the contract; therefore his death does not exclude the other party from testifying.—Poquet v. Town of North Hero, 44 Vt. 91.

[yy] (Wis. 1859) The statute does not allow a party to testify to any transactions made by an agent of the opposite party unless that agent be living. *Held*, that one partner is an agent of his copartners within this rule.—Rogers v. Brightman, 10 Wis. 55.

[z] (Wis. 1866) In an action brought by the administrator of a deceased partner on a demand in favor of the partnership assigned to such administrator by the surviving partner as a part division of the assets of the firm, defendant may testify in his own behalf, though not as to anything that occurred between himself and the deceased in the absence of the surviving partner, or of which such survivor had no personal knowledge; his testimony on those points being excluded by the third clause of Rev. St. c. 137, § 51, on the ground that each partner is an agent of the firm as to the business which he transacts for it.—Lawrence v. Vilas, 20 Wis. 381.

[zz] (Wis. 1870) The person dealing with an agent, since dead, is not a competent witness by whom to prove the statements of the agent in relation to a transaction had between those parties.—Cornell v. Barnes, 26 Wis. 473.

§ 662. Parties themselves incompetent to testify.

[a] (Fla. 1895) A party to a suit against the guardian of an insane person cannot testify to any transactions or communications between himself and such insane person, if such person was insane at the time of such examination, unless the guardian has testified to the same transactions, or the testimony of such insane person thereto has been given in evidence.—Edwards v. Rives, 35 Fla. 89, 17 South. 416.

[b] (Mass. 1864) Evidence that a party to a suit was, at the time of the trial, nearly 70 years old, had had a paralysis within 3 years, was of weak mind and poor memory, had an idiotic look, was sometimes stupid, but brighter some days than others, and that on one occasion within a few days of the trial he was unable to move or dress himself, and did not seem to understand anything about his business, does not so clearly show that he was insane, within the meaning of Gen. St. c. 131, § 14, as to require this court to grant a new trial on account of the admission of the other party to testify in his own favor.—Doud v. Hall, 90 Mass. (8 Allen) 410.

[c] (Mass. 1865) A statute providing that where one of the parties to a contract or cause of action is insane the other party shall not be admitted to testify in his own favor does not apply where the insane party has sufficient capacity to testify.—Kendall v. May, 92 Mass. (10 Allen) 59.

[d] (Mo. 1887) A mere excitable condition of mind, which renders a party's appearance in court inadvisable, is not such insanity as will render the opposing party incompetent as a witness.—McCormick v. Hickey, 24 Mo. App. 362.

[e] (N. H. 1860) A party may be a witness, though the adverse party is disabled to testify by his insanity, and the suit is prosecuted or defended by his guardian.—Crawford v. Robie, 42 N. H. 162.

[f] (N. H. 1880) Where plaintiff was incompetent by reason of insanity, a guardianship decree establishing his insanity was not necessary in order to debar defendant from testifying.—Bailey v. Harvey, 60 N. H. 152.

[g] (N. J. 1884) In a suit by an insane person through his guardian, defendant cannot testify as to transactions between himself and the insane person.—Demarest v. Vandenberg, 39 N. J. Eq. (12 Stew.) 130.

[h] (N. Y. 1893) In an action by the husband and two children of P. against a son of the latter to recover money found on P. when she was committed to an insane asylum, it appeared that the money was given to defendant by the commissioners of charities on his agreement to keep it for his mother. The complaint alleged that P. was committed to an asylum for the insane, being of unsound mind, and so far deprived of her reason as to be unable to govern herself or manage her affairs. There was no question of her insanity at the time of the trial, and it seemed to be conceded by all. *Held*, that the fact that there was no proof offered of P.'s insanity did not render the evidence of plaintiffs as to personal transactions with her admissible.—Peters v. Peters (Com. Pl.) 3 Misc. Rep. 264, 22 N. Y. Supp. 764.

[i] (Ohio, 1889) Under Rev. St. § 5246, providing that a party to an action shall not be a competent witness, where the opposite party is the guardian of an insane person, as to any transaction or conversation had with such insane person, a party to the suit is incompetent to testify as a witness when the opposite party is the guardian of an imbecile, since the prohibition as to insane persons extends to cases where the opposite party is an imbecile.—Ross v. Todd, 2 O. C. D. 385.

[j] (Wis. 1876) Under the provisions of Laws 1874, c. 295, a divorced wife who asks a revision of the judgment, as to alimony, is incompetent to testify on her own behalf at the hearing, if the former husband is insane.—Thomas v. Thomas, 41 Wis. 229.

[k] (Wis. 1889) Rev. St. § 4971, subd 7, declares that the words "insane persons" shall be construed to include every idiot, non compos, lunatic, and distracted person. By section 4069, no person can be examined as a witness in respect to any transaction or communication by him personally with a person then insane, in any civil action in which the opposite party claims under such insane person. On foreclosure by an assignee of a mortgage, it appeared that the assignor, for some months before the trial, was afflicted with softening of the brain, and constantly grew worse; that his disease was incurable; that within two weeks before the trial he fell into a comatose state, and remained unconscious for 16 hours; and that he was clearly incapable of testifying on the trial, or giving a coherent statement of past events. *Held*, that he was insane, within the meaning of the statute, and that testimony by the mortgagor as to transactions with him which were adverse to the assignees was inadmissible.—Whitney v. Traynor, 74 Wis. 289, 42 N. W. 267.

10. NATURE AND SUBJECT-MATTER OF EVIDENCE IN GENERAL.

IN GENERAL, § 663.
TRANSACTIONS OR COMMUNICATIONS BETWEEN WITNESS AND PERSON SUBSEQUENTLY DECEASED IN GENERAL, § 664.
TESTIMONY NOT RELATING TO PERSONAL TRANSACTIONS OR COMMUNICATIONS, § 665.
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FACT OF TRANSACTION OR COMMUNICATION, § 668.
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PAYMENT OR TRANSMISSION OF MONEY, § 681.
PHYSICAL CONDITION AND MENTAL CAPACITY, § 682.

§ 663. In general.

[a] (Ga. 1872) On the trial of an issue raised by the filing, by an administrator defendant, of a traverse of the affidavit of plaintiff, on which an attachment was granted, plaintiff is a competent witness, although the contract on which he sues was made with the intestate.—Ouzts v. Seabrook, 47 Ga. 359.

[b] (Iowa, 1869) In an action against the executor of a vendor of real estate, the petition alleged that plaintiff sent a sum of money to the deceased according to an agreement for the purchase of land, and that the latter failed to make a deed, and sought to recover back the money sent. *Held*, that plaintiff was a competent witness to prove the amount of money sent by him in a package deposited in an express office, as he would have been competent at common law.—Sykes v. Bates, 26 Iowa, 521.

[c] (Mass. 1867) Under the statute making the widow a witness for the administrator, but not as to her conversations with her husband, she may, in an action against the maker of a note belonging to the intestate's estate, testify of conversations with defendant before the husband's death, and of the husband's practice to carry the note in his pocket; and defendant is not a competent witness to contradict her.—Robinson v. Talmadge, 97 Mass. 171.

[d] (Mo. 1876) A party may testify in his own behalf as to matter not directly relating to the contract in issue, even though the other party to the contract be dead.—Ring v. Jamison, 2 Mo. App. 584, reversed (1877) 66 Mo. 424.

[e] (Mo. 1890) In an action by an execution debtor for specific performance of a contract by the grantee in the sheriff's deed to convey to the execution debtor, where the grantee in the sheriff's deed is dead, testimony of the execution debtor as to improvements made by him after the alleged parol purchase is properly excluded.—Emmel v. Hayes, 102 Mo. 186, 14 S. W. 209, 22 Am. St. Rep. 769, 11 L. R. A. 323.

[f] (Nev. 1878) The fact that a witness is excluded by Civ. Prac. Act, § 379, from testifying to any of the issues raised by the pleadings, does not disqualify him to testify to incidental matters addressed solely to the judge.—Higgs v. Hanson, 13 Nev. 356.

[g] (N. Y. 1886) A wife claimed money from the estate of her deceased husband under an antenuptial contract. It became material to know whether he or she provided necessaries for the household. She was asked the question, and answered: "We both did it. He got some things and I got the rest." *Held*, that the question and answer were admissible.—Denise v. Denise, 41 Hun, 9.

[h] (N. C. 1880) The prohibition, in Code, § 343, against the testimony of interested parties, does not apply to affidavits needed in the progress of a cause. Thus the assignee of a judgment against a decedent may, in support of a motion for an alias execution, make affidavit that the deceased party had not paid the judgment.—Latham v. Dixon, 82 N. C. 55.

[i] (Pa. 1879) L., one of the legal plaintiffs, was called by defendant to prove matters that occurred while the legal plaintiffs were the owners of the bond in suit. *Held*, that he was competent, under Act March 27, 1865, and Act 1869, § 2, providing that a party may be examined as if under cross-examination by the adverse party, such testimony not relating to acts or declarations of L. after the assignment to the deceased assignee.—Gamble v. Hepburn, 90 Pa. 439.

[j] (Tex. 1887) In an action on a note the executrix of the alleged maker of the note is not incompetent to testify against plaintiff, as the other party to the execution of the note, as to the making of the affidavit of the plea of non est factum.—Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848.

§ 664. Transactions or communications between witness and person subsequently deceased in general.

[a] (Ala. 1875) A party in interest is not a competent witness to prove transactions had with decedent in his lifetime, when the purpose of the evidence is to diminish the rights of the decedent or those claiming in succession to him.—Key v. Jones, 52 Ala. 238.

[b] (Fla. 1886) Under Act 1874 (McClel. Dig. p. 518, c. 1983, § 24) which renders incompetent evidence from a party to an action against the executor or assignee of a deceased person, in regard to transactions of such party with the person deceased, a party to an action against the representative of a deceased person cannot be examined as a witness in his own behalf concerning "a transaction or communication" had with deceased, although one jointly interested with and represented by the deceased, yet not in fact participating in the transaction, still survives.—Harris v. Bank of Jacksonville, 22 Fla. 501, 1 South. 140, 1 Am. St. Rep. 201.

[c] (Ga. 1875) Where, upon an accounting between an executor and the legatees, a note made by the former was found in his inventory of the property of the testator and embraced in the appraisement thereof, which he claimed to represent an advancement made to him by such testator, *held*, that he was a competent witness to show how he came to return said note in the inventory, but incompetent as to any matters which passed between the testator and him as to the same.—Williams v. McDowell, 54 Ga. 222.

[d] (Ill. 1879) In an action on a penal bond against the sureties of a deceased principal, the obligee is not, under Rev. St. p. 486, § 4, a competent witness as to any conversation by the deceased, unless one or more of the sureties were present at the time they were made.—Henry v. Tiffany, 5 Ill. App. (5 Bradw.) 548.

[e] (Ind. 1885) A widow who claims that lands were held in trust for her by her husband, in a suit against a purchaser thereof under execution against her husband, is incompetent to testify to conversations with him during his life, respecting the subject-matter of such claim.—Hyland v. Milner, 99 Ind. 308.

[f] (Me. 1876) In an action by an administrator of an insolvent to recover money given by the insolvent to defendant, defendant cannot testify as to the transaction in the absence of previous testimony in regard thereto on behalf of the administrator.—McLean v. Weeks, 65 Me. 411.

[g] (Md. 1884) One claiming under an assignment of an insurance policy from one de-

ceased is not, in a suit between himself and others claiming under the same assignment, precluded from testifying in his own behalf; the original transaction between himself and the deceased is only incidentally involved.—Diffenbach v. New York Life Ins. Co., 61 Md. 370.

[h] (Neb. 1892) Under Code, § 329, a person having a direct legal interest in the result of an action in which the adverse party is the representative of a deceased person is precluded from testifying to any transaction or conversation had with such deceased person, unless the evidence of deceased has been taken and read on the trial by the adverse party in regard to such transaction or conversation, or unless such representative has introduced a witness who has testified in regard to such transaction or conversation.—Rakes v. Brown, 34 Neb. 304, 51 N. W. 848.

[i] (N. Y. 1866) In an action against an executor, plaintiff cannot testify to what passed between him and the deceased.—Clarke v. Smith, 46 Barb. 30.

[j] (N. Y. 1874) Neither the entry in books nor the sworn evidence of a party is admissible against a deceased person in regard to a personal transaction with such deceased person.—Elmore v. Jaques, 4 Thomp. & C. 679.

[k] (N. Y. 1875) In an action by an administrator, defendant, who claimed that the person whose estate was being administered was not dead, could not be allowed to testify as to conversations had with the alleged intestate prior to the issuing of the letters of administration, with the object of showing that the person was still living.—Parhan v. Moran, 4 Hun, 717.

[l] (N. Y. 1886) It is not error, under Code Civ. Proc. § 829, to permit testimony as to a fact tending to corroborate in some degree evidence given which involves a transaction between the witness and a deceased person, if the fact itself is an independent one and does not involve any such transaction.—Tomlinson v. Seifert, 2 N. Y. St. Rep. 283.

[m] (N. Y. 1887) A party in interest is not precluded from testifying to the existence of a fact because his testimony may tend to show that a personal transaction with one since deceased took place.—Taber v. Willets, 44 Hun, 346.

[n] (N. Y. 1887) In a controversy between the beneficiary of a life insurance policy and the wife of the deceased, her testimony as to personal transactions with the deceased was not competent to prove that her right derived from him was superior to that of the person appointed by him as beneficiary, as Code, § 829, expressly forbids testimony by a party to transactions with decedent.—Sabin v. Grand Lodge A. O. U. W., 6 N. Y. St. Rep. 151.

[o] (N. Y. 1891) In an action against an executor for money alleged to be due for boarding relatives of decedent at her request, plaintiff, under Code Civ. Proc. § 829, cannot testify as to conversations between himself and decedent.—Heyne v. Doerfler, 124 N. Y. 505, 26 N. E. 1044, reversing Same v. Dorflier (1890) 57 Hun, 591, 10 N. Y. Supp. 908.

[p] (N. C. 1870) Under Code, § 343, allowing a party to be examined in his own behalf except as to a transaction or communication between him and a person deceased, an administrator could not testify to a transaction between himself and his intestate, whereby a prima facie indebtedness of his own to the estate was discharged.—Whitesides v. Green, 64 N. C. 307.

[q] (N. C. 1873) Direct evidence of a conversation and understanding with plaintiff's testator is, under Code Civ. Proc. § 343, relative to transactions with decedents, incompetent.—Gilmer v. McNairy, 69 N. C. 335.

[r] (N. C. 1873) In an action against a surety on a constable's bond, alleging certain breaches of a condition of the bond by the constable, now dead, plaintiff is not a competent witness to prove any transaction or conversation between himself and such deceased constable in regard to the matters in controversy.—Bryant v. Morris, 69 N. C. 444.

[s] (N. C. 1877) The general rule, under Code Civ. Proc. § 343, as to competency of parties and interested persons, is that all cases except where the proposed evidence is as to a transaction, etc., with a person deceased, etc., the common-law disqualifications of being a party and of interest in the event of the action are removed; but as to such transaction, etc., the disqualifications are preserved. — Peebles v. Stanley, 77 N. C. 243.

[t] (N. C. 1881) Where a witness is incompetent, under Code, § 343, to testify as to a transaction between himself and a person deceased, it is error to receive the witness' testimony of his subsequent unsworn declarations made to others, in regard to the same transaction.—Perry v. Jackson, 84 N. C. 230.

[u] (N. C. 1883) Though direct evidence of a conversation with one deceased is incompetent, a rehearsal of the same in a conversation with a son of the deceased may be competent, if part of the res gestæ.—Tredwell v. Graham, 88 N. C. 208.

[v] (Pa. 1884) In sci. fa. on a sheriff's recognizance by an execution creditor whose fi. fa. he had returned nulla bona, the sheriff claimed title to the property, while plaintiff claimed it was in execution defendant, who had died since the issuing of the writ. *Held*, that the sheriff could not testify to transactions between himself and decedent which occurred prior to the death of one of the sureties in the recognizance whose administrator was a party defendant.—Henry v. Commonwealth, 107 Pa. 361.

[w] (Wis. 1875) In a suit by an administrator, defendant cannot testify as to agreements or conversations between him and plaintiff's intestate.—Koenig v. Katz, 37 Wis. 153.

§ 665. Testimony not relating to personal transactions or communications.

[a] (U. S. 1896) The competency of parties as witnesses as defined by Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], is not affected by any state statute, and hence an interested party cannot be wholly excluded as a witness in an action brought in a federal court by an administratrix, but only such part of his testimony can be rejected as relates to transactions with, or to statements made by, the intestate.—De Beaumont v. Webster (C. C.) 71 Fed. 226.

[b] (Ala. 1878) A legatee or devisee under the propounded will is only disqualified from testifying as to "transactions with or statements by a deceased person," whose estate is interested, etc., under Code, § 3058.—Conoly v. Gayle, 61 Ala. 116.

[c] (Ala. 1878) A party is only incompetent to testify as to transactions with and statements by deceased.—Alabama Gold Life Ins. Co. v. Sledge, 62 Ala. 566.

[d] (Ark. 1871) A constitutional provision that in all actions by or against an executor or guardian neither party shall be allowed to testify as to any transactions with or statements made to the testator or ward is not designed to exclude the testimony of such parties as to all matters in controversy in which the testator or ward had been interested, but only as to such matters as were strictly personal, and in which, from the nature of the case, the privilege of testifying could not be

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reciprocal and of mutual advantage.—Giles v. Wright, 26 Ark. 476.

[e] (Fla. 1883) It is only as to transactions and communications had with one deceased that the survivor is an incompetent witness, under Laws 1874, c. 1983.—Belote v. O'Brian's Adm'r, 20 Fla. 126.

[f] (Ga. 1876) In a suit by an administrator to the use of another—in this case the widow—against an alleged debtor to the estate, defendant is incompetent as a witness in his own behalf only as to transactions with the intestate, and he may testify as to the identity of assets purchased by him at an administrator's sale in respect whereof he is sued.—Sheibley v. Hill, 57 Ga. 232.

[g] (Ga. 1888) A vendee claiming under a deceased person may testify to any fact or act with which his vendor had no connection.—Terry v. Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

[h] (Iowa, 1881) The only restriction upon the subject-matter of the testimony of a party to a transaction, where the other party is dead, imposed by Code 1873, § 3639, is as to personal transactions between the two.—Haverly v. Alcott, 57 Iowa, 171, 10 N. W. 326.

[i] (Kan. 1872) Code, § 322, does not prohibit a party sued by an administratrix for a debt due the deceased from testifying as to any question raised by the issues, where such testimony is not in respect to any transaction or communication had personally by such party with the deceased.—McKean v. Massey, 9 Kan. 600.

[j] (Neb. 1895) Code Civ. Proc. § 329, does not render a party adversely interested to the representative of a deceased person incompetent as a witness in an action, but only renders his testimony as to transactions and conversations with deceased incompetent.—Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727.

[k] (N. J. 1882) In a suit by the executor of a deceased partner against the surviving member of the firm, the latter is a competent witness on questions not involving any personal intercourse between the witness and the deceased.—Besson v. Cox, 35 N. J. Eq. (8 Stew.) 87.

[l] (N. Y. 1868) On the trial of a complaint against defendants as heirs at law of C., deceased, to compel the specific performance of a contract, alleged to have been made by C., for the conveyance to plaintiff of certain lands, plaintiff was not allowed to be sworn as a witness in his own behalf. *Held*, that he was competent to testify to any relevant matters not a transaction with the deceased personally.—Card v. Card, 39 N. Y. 317.

[m] (N. C. 1872) Plaintiff is not a competent witness to prove any transaction between himself and his deceased guardian; but he is competent to prove any other transaction of his guardian; e. g., a sale of his property by his guardian.—Dobbins v. Osborne, 67 N. C. 259.

[n] (N. C. 1887) Defendant, in claim and delivery by an administrator to recover a note drawn to the order of his intestate, and not indorsed by him, is not an incompetent witness, where it is not made to appear upon trial that the only source of her information is "a personal transaction between her and the deceased."—Thompson v. Onley, 96 N. C. 9, 1 S. E. 620.

[o] (Tenn. 1873) Under the statutes, either party in an action by or against an administrator is a competent witness except as to transactions with, or statements by, the intestate.—Jones v. Waddell, 59 Tenn. (12 Heisk.) 338.

[p] (Tex. 1880) Rev. St. art. 2,248, does not disqualify a party to a suit by an administrator from testifying except as to a transaction with or statement by the intestate.—Potter v. Wheat, 53 Tex. 401.

[q] (Wis. 1870) Laws 1868, c. 176, restricting the examination of a surviving party to a transaction against the representative of the party deceased, only forbids his testifying as to any transaction or communication had personally with the deceased.—Daniels v. Foster, 26 Wis. 686.

§ 666. Transactions or communications between witness and former executor, administrator, or guardian.

[a] (Ala. 1871) The exceptions in Code, § 2704, as to the competency of witnesses notwithstanding their interest in the suit, or being parties to it, applies to transactions with a deceased administrator or executor in suits by or against his successors in the administration as well as to those with the decedent himself.—Waldman v. Crommelin's Adm'r, 46 Ala. 580.

[b] (Ark. 1880) A party in a suit in which an administrator de bonis non is the adverse party is not prohibited by Const. 1874 from testifying as to statements and conversations of the former administrator, who is dead.—Wassell v. Armstrong, 35 Ark. 247.

[c] (Ill. 1880) An executor made a contract with A. to convey land upon the payment of notes given for the purchase money. A. assigned his contract to B., and by an arrangement between all parties A.'s notes were given up, and B.'s taken instead. B. paid his notes to the executor's successor, and brought suit against him, alleging that he had paid more interest than agreed on, and that the rate stated in the notes was a mistake. *Held*, that B.'s evidence as to matters between him and the deceased executor should be excluded.—Redden v. Inman, 6 Ill. App. (6 Bradw.) 55.

[d] (Iowa, 1875) In an action against an administrator de bonis non, a witness may testify to transactions and communications with the former administrator; such evidence is not within the prohibition of Code 1873, § 3639.—Dunne v. Deery, 40 Iowa, 251.

[e] (N. J. 1885) The proviso in the statute under which witnesses are not permitted to testify as to a transaction with or statement by any testator or intestate represented in the action has no reference to testimony in respect to a contract with an executor, since deceased, of such testator.—Palmateer v. Tilton, 40 N. J. Eq. (13 Stew.) 555, 5 Atl. 105.

[f] (N. C. 1876) One sued on his note, given to a third person, since dead, as guardian of plaintiff, is not a competent witness to prove that he paid the note to the guardian before the latter's death.—Lewis v. Fort, 75 N. C. 251.

[g] (N. C. 1885) Where it is sought in a suit by an administrator de bonis non to have a payment by a debtor of a decedent applied to a particular debt designated by the deceased's administrator who drew an order on such debtor to pay a certain sum to be credited on a certain debt, evidence of a conversation after payment of the order by the debtor between him and the deceased's administrator is inadmissible to change the application of the payment.—Long v. Miller, 93 N. C. 233.

[h] (N. D. 1895) In an action on a debt due an intestate, by an administrator appointed to succeed a deceased administrator, defendant was not precluded by Comp. Laws, § 5260, from testifying to a payment of the debt made by him to the deceased administrator.—St. John v. Lofland, 5 N. D. 140, 64 N. W. 930.

[i] (S. C. 1888) Under Code Civ. Proc. § 400, disqualifying a party to an action against an administrator from testifying on his own behalf, as to any personal transaction or com-

munication had with the decedent, a surviving executor, in an action against the administrator of his late co-executor, cannot testify as to what assets he did or did not receive from the deceased, or what passed between them relative to preparing the inventory of the estate.—Williams v. Mower, 29 S. C. 332, 7 S. E. 505.

[j] (Va. 1885) The committee of a lunatic is a competent witness to testify as to a contract made by him with a former committee concerning the lunatic's affairs.—Carter v. Edmonds, 80 Va. 58.

§ 667. Nature of testimony in general.

[a] (U. S. 1872) Acts La. 1858, p. 148, No. 208, § 2, provides that parol evidence shall not be received to prove any acknowledgment of a decedent to pay any debt against his succession in order to take such debt out of prescription, or to revive it after prescription has run, but in all such cases the acknowledgment or promise to pay shall be proved by written evidence signed by the party to be charged or by his specially authorized agent. *Held*, that oral statements of conversations with a decedent tending to prove the acknowledgment of a debt as due within the period of prescription, and also indorsements by him on the bond of payments made up to a time which took it out of such period of prescription, are inadmissible in an action against his estate.—Adger v. Alston, 82 U. S. (15 Wall.) 555, 21 L. Ed. 234.

[b] (Ala. 1880) In an action revived by the administrator of a plaintiff who died during the suit, defendant cannot, under Code 1876, § 3058, testify to the fact that the intestate sued him before a justice on the same cause of action, and was adjudged not entitled to recover.—Beadle v. Graham's Adm'r, 66 Ala. 99.

[c] (Ala. 1891) Code 1886, § 2765, providing that neither party shall be allowed to testify against the other "as to any transaction with, or statement by, any deceased person whose estate is interested in the result of the suit," does not render plaintiff, in an action to recover the proceeds of a note collected by defendant's intestate, incompetent to testify generally as to "whether she had ever received anything for the said note."—Gamble v. Whitehead, 94 Ala. 335, 11 South. 293.

[d] (Ga. 1879) Plaintiff in an action on a negotiable instrument barred on its face by the statute of limitations is not a competent witness to prove acts or admissions of the maker, which came to plaintiff's knowledge while he was disinterested, tending, with the aid of written evidence, to establish a new promise alleged to have been made to the payee, the maker being now dead, and the action being against his administrator.—Dobson v. Dickson, 62 Ga. 639.

[e] (Ga. 1893) In an action by an administratrix upon a note, where the statute of limitations is sought to be avoided on the ground that, at the time the note was made, defendant resided in this state, and subsequently removed therefrom, defendant is a competent witness to prove in his own behalf where he was domiciled at that time, since his domicile was not part of any transaction or communication with the deceased payee.—Trimble v. Mims, 92 Ga. 103, 18 S. E. 362.

[f] (Ill. 1895) In an action against a railroad company by a widow, as administratrix, for the death of her husband, the widow is a competent witness (she having been with deceased at the time of the accident) as to what she saw at the time.—Lingreen v. Illinois Cent. R. Co., 61 Ill. App. 174.

[g] (Iowa, 1877) In a suit for the foreclosure of a title bond or agreement by plaintiff's intestate to convey certain lands to one of the defendants upon repayment of money loaned her husband and codefendant, the latter's testimony as to how much was due on a certain judgment lien on the land, held by a third person, and that the witness paid thereon a certain sum besides what deceased paid, is not incompetent as relating to a personal communication or transaction with deceased.—Wormley v. Hamburg, 46 Iowa, 144.

[h] (Iowa, 1879) On a settlement between defendant and plaintiff's husband a note and mortgage were executed in plaintiff's name, no consideration moving from her, and before suit the husband died. He had always retained the beneficial interest in the note. *Held*, that testimony of defendant as to what occurred at the settlement and as to payments made to plaintiff's husband prior thereto were inadmissible, under Code 1873, § 3639, but evidence of the subsequent declarations of plaintiff's husband as to the amount actually due on the note and mortgage was admissible.—Willcox v. Jackson, 51 Iowa, 208, 1 N. W. 513.

[i] (Iowa, 1881) In an action by an administratrix for the malicious killing of her intestate, where the evidence was wholly circumstantial, defendant is not debarred from testifying as to the facts and circumstances other than the act of killing itself, by Code 1873, § 3639, excluding any one from being a witness "in regard to any personal transaction or communication" between such witness and a party deceased.—Miller v. Dayton, 57 Iowa, 423, 10 N. W. 814.

[j] (Iowa, 1894) In a suit to establish a claim against an estate, it was in evidence that plaintiff had sold to deceased a stock of goods, for which he had traded with one C., and on the trial plaintiff was asked to state what portion of the stock formerly owned by C. he had seen in deceased's store on a certain occasion. *Held*, that it was error to exclude an answer as being contrary to the provision of Code 1873, § 3639, prohibiting a party to such a suit from testifying as to personal transactions or communications between himself and deceased.—Martin v. Shannon, 92 Iowa, 374, 60 N. W. 645.

[k] (Mass. 1857) In replevin of goods, to which defendant pleads title as assignee in insolvency of one now deceased, plaintiff is not a competent witness, under St. 1857, c. 305, to prove that the goods were fraudulently obtained from him by the deceased.—Fischer v. Morse, 75 Mass. (9 Gray) 440.

[l] (Mass. 1861) In an action against an executor to recover the price of goods sold and delivered to the wife of the testator in his lifetime, she cannot be allowed to testify to a private conversation with her husband in which he ratified her purchases; but she is a competent witness as to other facts.—Dexter v. Booth, 84 Mass. (2 Allen) 559.

[m] (Mass. 1866) In an action by a wife against the administrator of her husband's estate for the conversion of property, she may testify in her own behalf that the contract to purchase the goods converted was made by her before marriage, and that after marriage she gave her husband her own money with which to pay for the same.—Baxter v. Knowles, 94 Mass. (12 Allen) 114.

[n] (Mich. 1887) In a suit for rent upon a verbal lease, defendant introduced himself as a witness, and his counsel asked this question: "What conversation took place between you and James P. Pendill in the rear of his store, some time in the latter part of February, 1885, relative to renting a store from him?" *Held* that, on an objection that it was incompetent, because James P. Pendill was dead, it was properly excluded.—Pendill v. Neuberger, 64 Mich. 220, 31 N. W. 177; Id., 67 Mich. 562, 35 N. W. 249.

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[o] (N. J. 1884) In a dispute between a father as tenant by curtesy and his daughter as heir of her mother, over the surplus money on the foreclosure of a mortgage given by the mother on her own lands, the father could not testify as to what his wife told him as to his claim for an allowance by virtue of his paying out of his own funds the amount of a prior mortgage and the cost of improvements.—Rusling's Adm'r v. Bray, 38 N. J. Eq. (11 Stew.) 398.

[p] (N. Y. 1877) In an action by executors to recover securities which defendant claimed as a gift causa mortis, plaintiff and a residuary legatee were incompetent to testify to conversations had between themselves and the deceased tending to disprove the gift, by virtue of Code, § 399, forbidding a party interested from testifying in his own behalf as to transactions with decedent.—Cornell v. Cornell, 12 Hun, 312.

[q] (N. Y. 1884) Personal "transactions" and "communications" had with one since deceased, concerning which testimony is inadmissible, include every method by which one person can derive any impression or information from the conduct, condition, or language of another.—Holcomb v. Holcomb, 95 N. Y. 316, reversing (1883) 17 Wkly. Dig. 226.

[r] (N. Y. 1887) In an action by an administrator against a partnership as the makers of a note owned by the intestate, testimony by one of the defendants that at the time of making a certain assignment in connection with which the note was given and subsequently the intestate was a creditor of the partnership is incompetent, under Code, § 829, forbidding the person or party interested from testifying in his own behalf in an action against the administrator of a deceased person.—Wheeler v. Kuntz, 9 N. Y. St. Rep. 496.

[s] (N. Y. 1888) Evidence of defendant that he contributed more than his share in the expenses of managing a farm with his deceased partner, and also what deceased said at the time a declaration of trust was made in favor of the third partner, is inadmissible.—McKenna v. Bolger, 49 Hun, 259, 1 N. Y. Supp. 651.

[t] (N. Y. 1890) On foreclosure of a land contract because of the nonpayment of a balance alleged to be due thereon, brought by the vendor's administrators against the vendee's heir and administrator, the latter, who is also one of the heirs, is incompetent to testify that the vendor, in his lifetime, never presented a claim against the vendee's estate for the balance due on the contract.—Parks v. Andrews, 56 Hun, 391, 10 N. Y. Supp. 344.

[u] (N. Y. 1891) Plaintiff in an action against the administrator for the conversion of plaintiff's goods by decedent is not incompetent to testify as to the value of the goods.—Gregory v. Fichtner (Com. Pl.) 27 Abb. N. C. 86, 14 N. Y. Supp. 891; Same v. Fichtler, 21 Civ. Proc. R. 1.

[v] (N. Y. 1892) Plaintiff, in an action on notes alleged to have been made by a decedent, is not prohibited from testifying, for the purpose of proving a delivery of the notes, that the notes had been in her possession before the maker's death.—Mortimer v. Chambers, 63 Hun, 335, 17 N. Y. Supp. 874.

[w] (N. Y. 1892) In an action to recover $30,000, to be paid to plaintiff out of the proceeds of sale of a certain ship, plaintiff alleged that defendants' testator promised to notify plaintiff of the sale, and pay the $30,000 within 10 days after the notification. *Held*, that testimony by plaintiff that he had never heard of the sale of the vessel from any source until 1887 was equivalent to permitting him to testify that he had never received any such notification from defendants' testator during his lifetime, and therefore within Code Civ. Proc. § 829.—Hall v. Roberts, 63 Hun, 473, 18 N. Y. Supp. 480.

[x] (N. Y. 1893) In an action against a husband for the conversion of bonds alleged to be the property of his deceased wife, an offer by defendant to prove that he did not know that his deceased wife owned any property except a monthly payment was properly rejected, as it involved a conversation or transaction between the witness and deceased, prohibited by Code, § 829.—Martin v. Hillen, 66 Hun, 631, 21 N. Y. Supp. 309.

[y] (N. Y. 1895) On the trial of a claim against a decedent's estate for preparing plans for a building, claimant testified that he drew the plans; that they were reasonably worth a certain sum; and that he would not have drawn them without being requested by some one. *Held*, that it was error to permit him to further testify that he had conversations with decedent "about these plans," as it might be inferred from such testimony that decedent requested claimant to draw the plans, thereby in effect permitting him to testify as to conversations with decedent, in violation of Code Civ. Proc. § 829.—Ellis v. Filon, 85 Hun, 485, 33 N. Y. Supp. 138.

[yy] (N. C. 1871) Although plaintiff cannot be admitted, under the Code, as a witness to prove a special contract with the defendant's intestate for the hire of slaves, prior to emancipation, he is yet competent to prove that such intestate had the slaves in his possession and enjoyed their services.—Gray v. Cooper, 65 N. C. 183.

[z] (Tex. 1895) In an action by a surviving wife for the conversion of horses belonging to the community estate of herself and her deceased husband, plaintiff testified that her husband permitted one of defendants to take the horses to his place to care for them; that it was through the solicitation of defendants that he went to town with them; and that certain bills of sale were not written at the house of deceased and plaintiff. *Held*, that such evidence did not relate to a transaction between plaintiff and deceased, or pertain to any statement made by him, so as to make the witness incompetent, under Rev. St. 1895, art. 2302 (Rev. St. 1879, art. 2248).—Shilling v. Shilling (Civ. App.) 35 S. W. 420.

[zz] (W. Va. 1884) In an action by distributees against an administrator for an amount shown due from him on settlement, he is a competent witness to show that a credit to which he was entitled had been inadvertently omitted on settlement; such testimony having no reference to any personal transaction or communication with decedent.—Kyle v. Kyle, 25 W. Va. 376.

§ 668. Fact of transaction or communication.

Rebuttal of evidence on behalf of adverse party, see post, § 718.

[a] (D. C. 1889) Rev. St. § 858, provides that, in an action by or against an executor, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, etc. *Held*, that the statute does not prevent a party from testifying that an alleged transaction never took place between him and the testator.—Andrews v. Hunt, 7 Mackey, 311.

[b] (Fla. 1880) Defendant was asked if he knew of his own knowledge certain matters in issue in the suit otherwise than by personal communication or conversation with the deceased person whose administratrix is the plaintiff. *Held*, that the question was proper under Laws 1874, c. 1983, the inquiry not necessarily relating to a "transaction" or "communication" with the deceased.—Raulerson v. Rockner's Adm'x, 17 Fla. 809.

[c] (N. Y. 1866) In an action against an executor, plaintiff cannot testify that certain con-

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versations did not pass between him and deceased.—Clarke v. Smith, 46 Barb. 30.

[d] (N. Y. 1872) Testimony merely that a conversation was had with a deceased person, without proof of the conversation itself, is not objectionable as being a transaction or communication with a decedent within the meaning of Code, § 399.—Hier v. Grant, 47 N. Y. 278.

[e] (N. Y. 1877) Testimony of a party that no transaction took place between him and a deceased party is equally inadmissible with testimony to what took place in an alleged transaction.—Haughey v. Wright, 12 Hun, 179.

[f] (N. Y. 1882) Where the mere fact that one offered as a witness had a conversation with one deceased, to whom a party to the suit stands in the relation specified in Code, § 829, is the material question, the testimony of such a one as to the fact of such conversation is incompetent.—Maverick v. Marvel, 90 N. Y. 656.

[g] (N. Y. 1885) The prohibition of Code Civ. Proc. § 829, against testimony concerning a personal transaction or communication between the witness and one deceased, does not necessarily exclude evidence tending to negative or affirm the existence of such a transaction or communication.—Lewis v. Merritt, 98 N. Y. 206.

[h] (N. Y. 1890) Under Code Civ. Proc. § 829, it is not reversible error to permit the claimant in a statutory claim case against the estate of a decedent to prove that he had a conversation with decedent, unless the mere fact that there was a conversation is a material fact to be proved.—Heyne v. Dorflier, 57 Hun, 591, 10 N. Y. Supp. 908.

[i] (S. C. 1889) Code, § 400, which prohibits testimony by a party in interest of any conversation or transaction with a party deceased at the time of the trial, does not render incompetent testimony by a son's administrator that he had had frequent conversations with the father, since deceased, in relation to the settlement of the son's estate, and that the father, though knowing that he was administrator, never made any demand upon him for a note made by the son but paid by the father, where he does not undertake to testify to what the conversations were.—Richards v. Munro, 30 S. C. 284, 9 S. E. 108.

[j] (S. C. 1891) A wife was competent to testify that she had no conversations with a deceased mortgagee who held a mortgage upon the separate property of the wife, in an action by her to enjoin the sale of the premises upon the ground that the husband received the benefits of the mortgage, in regard to the transaction.—Griffin v. Earle, 34 S. C. 246, 13 S. E. 473.

[k] (S. C. 1892) A decree in an action by an executor against the estate of his coexecutor in relation to their testator's estate will not be set aside, under Code Civ. Proc. § 400—disqualifying a party to an action against an administrator from testifying on his own behalf as to any personal transactions had with deceased—because of testimony that plaintiff had had repeated conversations with deceased, where the details of the conversations were not given.—Williams v. Mower, 35 S. C. 206, 14 S. E. 483.

[l] (S. C. 1894) Plaintiff may state the fact and date of a conversation with defendant's testator.—Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291.

§ 669. What constitutes transaction in general.

[a] (Ala. 1876) In an action against an administrator for his intestate's trespass in taking plaintiff's tools, plaintiff could testify that he found the tools in a shop belonging to intestate during the latter's life, the testimony not being in relation to a transaction with decedent within Rev. Code, § 2704.—Miller v. Clay, 57 Ala. 162.

[b] (Ala. 1895) In ejectment, defendant, who relies on a transfer to N., his grantor, purporting to have been executed by R., deceased, through whom plaintiff claims by inheritance, indorsed on the deed of the property to R., cannot testify, in his own behalf, that N. told him how the transfer came to be put on the deed, as it involves proof of a transaction with deceased, R., besides being hearsay.—Wisdom v. Reeves, 110 Ala. 418, 18 South. 13.

[c] (Iowa, 1882) Where, in an action upon a note by the administrator of the payee, defendant, examined as a witness in behalf of himself, stated that he signed the note in his own house, the allowance of his answer as to who was in his house at that time is not objectionable as being testimony in respect to a personal transaction between the witness and plaintiff's intestate.—Conger v. Bean, 58 Iowa, 321, 12 N. W. 284.

[d] (N. Y. 1864) Code, § 399, provides that a party to an action shall not be examined as a witness in his own behalf in respect to any transaction or communication had personally by him with a deceased person, against the representatives of the deceased. *Held*, in an action to recover money belonging to plaintiff, but deposited in the name of defendant's intestate, with his consent, that the testimony of plaintiff as to the ownership of such money was admissible, where it did not appear that such ownership arose out of any transaction between the parties.—Franklin v. Pinkney, 25 N. Y. Super. Ct. (2 Rob.) 429, 18 Abb. Prac. 186.

[e] (N. Y. 1877) A party cannot be asked whether he transferred certain property to defendant's intestate with intent to defraud creditors.—Tooley v. Bacon, 70 N. Y. 34.

[f] (N. Y. 1886) Where the complaint alleged that defendant's testator received from plaintiff on a certain day certain sum at par value in United States bonds for safe-keeping, and the suit was for the value of the bonds, testimony by plaintiff as to the exact number of bonds which he possessed on that day was not incompetent under Code Civ. Proc. § 829, forbidding the person or party interested from testifying in their own behalf in an action against an executor as to transactions had with a decedent.—Price v. Brown, 5 N. Y. St. Rep. 7.

[g] (N. Y. 1887) An administrator sued defendant for money claimed to have belonged to the intestate and to have been converted by defendant. Plaintiff, in his own behalf, testified that he was present when A. paid money to the intestate, and was asked what defendant did with the money. *Held*, that the question was proper and not an attempt to elicit testimony as to a transaction between defendant and the deceased.—Crawford v. Haines, 44 Hun, 597.

[h] (N. Y. 1888) In an action by a widow against her husband's administrator on a contract for support, a question of plaintiff as to who furnished the family support during the existence of the marriage is not objectionable under Code Civ. Proc. § 829, disqualifying a party from testifying as to a transaction with a decedent, as it does not necessarily call for such a transaction.—Denise v. Denise, 110 N. Y. 562, 18 N. E. 368, affirming (1886) 41 Hun, 9.

[i] (N. Y. 1889) The testimony of defendant as to whether, at a certain time after the alleged surrender of certain notes by decedent to him, he owned any interest in the property alleged to have been transferred in consideration of the surrender of such notes, was properly excluded as being an attempt to establish, indirectly, a personal transaction between himself and decedent.—Clift v. Moses, 112 N. Y. 426, 20 N. E. 392.

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[j] (N. Y. 1889) Code Civ. Proc. § 829, prohibits "a party or person interested in the event" from testifying in his own behalf or interest against an executor concerning a transaction with testator. *Held* that, in an action on a note by the payee's executor against the maker's administrator, plaintiff is incompetent to testify, for the purpose of taking the note out of the statute of limitations, as to the length of the time he had held it, and that the credits indorsed were made by him during the maker's lifetime.—Mills v. Davis, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394, reversing (1886) 41 Hun, 415.

[k] (N. Y. 1889) Plaintiff's wife, who was the payee's daughter, and entitled to one-third of her estate, was also incompetent.—Mills v. Davis, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394, reversing (1886) 41 Hun, 415.

[l] (N. C. 1888) Under Code, § 590, relating to testimony as to transactions with decedent, a surety on a guardian's bond is competent to prove the insolvency of the sureties, notwithstanding the death of the guardian.—Topping v. Windley, 99 N. C. 4, 5 S. E. 14.

[m] (N. C. 1888) When the question is whether plaintiffs' ancestor owned certain land which he sold in order to buy the land in dispute, testimony of his widow that she saw the deed to the land in dispute to her husband, in her husband's possession; that he had land in Union county, sold it, and brought back the money; that she saw him start off with the money, and bring back the deed,—is not inadmissible under Code, § 590, forbidding testimony of transactions with decedents.—McCall v. Wilson, 101 N. C. 598, 8 S. E. 225.

[n] (N. C. 1890) Where defendant claims through mesne conveyances from plaintiff, testimony by plaintiff that at the time of his conveyance to defendant's grantor, since deceased, a line was surveyed and corner marked by him in the presence of deceased, is not incompetent under Code, § 590, providing that one party in interest to a transaction shall not testify in his own behalf after the decease of the other.—Marsh v. Richardson, 106 N. C. 539, 11 S. E. 522.

[o] (N. C. 1890) In an action to recover land bought by the plaintiff at an execution sale, under a judgment obtained by himself, he is not a competent witness, under Code, § 590, to prove the date of the debt on which such judgment was rendered, when the judgment debtor is since deceased, and defendant claims under him, as his testimony relates to a personal transaction had with decedent.—Buie v. Scott, 107 N. C. 181, 12 S. E. 198, approving Sumner v. Candler (1882) 86 N. C. 71.

[p] (N. C. 1890) Testimony by defendant, in an action to set aside a deed for fraud by the grantee, that a deceased witness had testified at a former trial that he had taken an account between plaintiff's decedent and defendant, which decedent acknowledged to be correct, was not within the inhibition of Code, § 590, against evidence as to transactions with decedents.—Costen v. McDowell, 107 N. C. 546, 12 S. E. 432.

[q] (N. C. 1891) In an action by a father against his son's widow and her minor children to compel the conveyance to plaintiff of an undivided half of land which the father and son both purchased, but the title to which was taken in the son's name, where it appears that the son mortgaged the land, the mortgagee may testify as to the date of the cancellation of the mortgage, as that is not a transaction with a deceased person, evidence of which by a party interested is prohibited by Code, § 590, in actions by or against the representatives of decedent.—Carey v. Carey, 108 N. C. 267, 12 S. E. 1038.

[r] (N. C. 1893) In an action to recover money alleged to have been deposited with a deceased person, evidence by plaintiff that the deceased handed her a book containing memoranda of the sums deposited by her is evidence as to a transaction with the deceased, and is inadmissible, under Code, § 590.—Lane v. Rogers, 113 N. C. 171, 18 S. E. 117.

[s] (S. C. 1884) In a proceeding instituted by an administrator to revive an execution, Code, § 415, rendering defendant incompetent to testify as to any transaction with decedent, renders defendant incompetent to testify that he placed notes for collection in the intestate's hands.—Monts v. Koon, 21 S. C. 110.

[t] (S. C. 1892) Where suit is brought upon the notes of a married woman, alleged to have been given with reference to certain property received from a deceased relative upon condition that she pay a certain debt of the husband, it is not incompetent under Code, § 400, as a transaction with a decedent, for plaintiff, speaking of a change in the possession of the property, to say that the decedent "had fixed the property so they could pay the debt."—Brice v. Miller, 35 S. C. 537, 15 S. E. 272.

[u] (Tex. 1886) In an action on an account sold to plaintiff by her testator in which defendant claimed there was an overcharge in the account, testimony by defendant that a few days after the discovery of the overcharge he had called the testator's attention to it related to "a transaction" with decedent within the meaning of Rev. St. art. 2248, and defendant was not a competent witness thereto.—Eastham v. Randolph, 3 Willson, Civ. Cas. Ct. App. § 115.

[v] (Tex. 1887) In an action by a creditor to subject land inherited by the debtor from his deceased father, evidence of the debtor that he knew of his own knowledge that his father had purchased the land with his wife's means is not incompetent, as relating to a transaction with deceased, under Rev. St. § 2248.—Harris v. Seinsheimer, 67 Tex. 356, 3 S. W. 307.

[w] (Tex. 1887) Rev. St. art. 2248, provides that in actions by or against executors, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator. In an action by an executor for the recovery of land, defendant was allowed to testify that the land in suit was his homestead, and to show the steps taken to make it his homestead. *Held*, that this was not testimony to a transaction between defendant and testator such as is contemplated by the statute.—Moores v. Wills, 69 Tex. 109, 5 S. W. 675.

[x] (Tex. 1889) Rev. St. art. 2246, provides that no person shall be incompetent to testify because he is a party to a suit. Article 2248 provides that, in actions by or against heirs or legal representatives of a decedent, neither party shall be allowed to testify against the others as to any transaction with such decedent. *Held*, that this did not preclude defendants in an action by the widow of a decedent, in behalf of herself and children, for damages for his alleged wrongful killing, from testifying as to conduct and statements of decedent at the time of his killing, in a personal difficulty with defendants.—Wallace v. Stevens, 74 Tex. 559, 12 S. W. 283.

[y] (Va. 1878) An action of debt was brought by A., for the use of B., against the executor of C., upon two bonds purporting to be executed by C. and D., and assigned to B., the executor pleaded non est factum and payment. The only proof of the execution of the bonds by C. was an acknowledgment by C. to an agent of B., made after the assignment to him, and the proof as to the payments was of payments made by D. to B., in the lifetime of C. *Held*, that B. was not a competent witness, under the statute, to testify in his own behalf, since the subject-matter of the testimony was a transaction between B. or his agent and C. in the lifetime of the latter.—Morris' Ex'r v. Grubb, 30 Grat. 286.

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[z] (Wis. 1887) In an action against an administrator, to recover for board and lodging furnished the decedent, the court permitted plaintiff to testify that deceased boarded with him, and to describe the kind of board furnished, and, in order to show how long he had boarded with plaintiff, to testify that deceased had been absent from plaintiff's house a certain length of time, and that plaintiff had in his possession before decedent's death a note of plaintiff's, payable to the decedent, and had shown it to third parties. *Held* evidence of independent facts, and in no sense transactions with the deceased within the meaning of Rev. St. § 4069.—Pritchard v. Pritchard, 69 Wis. 373, 34 N. W. 506.

§ 670. Admissions, declarations, or other statements by person subsequently deceased.

[a] (U. S. 1896) Declarations by the deceased president of defendant company, if relevant, may be admitted; neither the person testifying to them nor the president's executor or administrator being interested in the suit.—Jacksonville, M., P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct 379, 40 L. Ed. 515.

[b] (U. S. 1881) In ejectment subsequent to the death of a vendee who had entered into possession under a contract of purchase, verbal admissions of such vendee to an agent of the vendor, that he had so entered into possession, and that he had paid nothing on such contract, were not inadmissible under Rev. St. Wis. §§ 4069, 4070, providing that "no party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person."—Heermans v. Schmaltz (C. C.) 7 Fed. 568, 10 Biss. 323.

[c] (U. S. 1894) A party cannot testify to declarations of a decedent, which would put a liability on his estate, represented in the suit by executors, decedent not having testified or made a deposition before dying.—McMullen v. Ritchie (C. C.) 64 Fed. 253.

[d] (Ala. 1875) A party in interest is not a competent witness to prove admissions or declarations made by a decedent when the purpose of the evidence is to diminish the rights of a decedent or those claiming in succession to him.—Key v. Jones, 52 Ala. 238.

[e] (Ala. 1875) Under Act March 2, 1875, prohibiting either party to a civil suit from testifying against the other as to any statement by, or transaction with, a deceased person whose estate is interested in the result of the suit, plaintiff in an action against the surviving member of a partnership is not a competent witness to testify to admissions or declarations by the deceased partner.—Hussey v. Peebles, 53 Ala. 432.

[f] (Ala. 1887) Under Code 1886, § 2765, providing that, "neither party shall be allowed to testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit," the testimony of complainant in a bill to enforce a vendor's lien as to admissions of the deceased vendee is inadmissible.—Alexander v. Hooks, 84 Ala. 605, 4 South. 417.

[g] (Ala. 1889) In an action by a surviving partner on an account due the firm, where defendant seeks to set off money deposited with the deceased partner, evidence of his declaration at the time of a settlement with plaintiff that he had lost the receipt for the sum now claimed as a set-off is not admissible, it being equivalent to a declaration of the execution of the receipt, to which fact defendant is incompetent to testify himself, under Code, § 2765, forbidding either party to a suit to testify against the other as to transactions had with a decedent whose estate is interested in the result of the suit.—Edwards v. Parker, 88 Ala. 356, 6 South. 684.

[h] (Ala. 1895) Code 1886, § 2765, prohibiting any party from testifying against another as to any transaction with or statements by any deceased person whose estate is interested in the result of the suit, prevents plaintiff in a suit against an administrator to recover money loaned his decedent from testifying as to admissions by decedent of indebtedness in letters to plaintiff, which have been destroyed.—Scarborough v. Blackman, 108 Ala. 656, 18 South. 735.

[i] (Fla. 1883) An administrator under the statute is a competent witness to declarations and admissions of his intestate concerning claims against him.—Sanderson v. Sanderson's Adm'rs, 20 Fla. 292.

[j] (Ill. 1879) In an action on a penal bond against the sureties of a deceased principal, the obligee is not, under Rev. St. p. 486, § 4, a competent witness as to any admissions by the deceased, unless one or more of the sureties were present at the time they were made.—Henry v. Tiffany, 5 Ill. App. (5 Bradw.) 548.

[k] (Ill. 1888) Under Rev. St. c. 51, § 4, declaring that no adverse party or person having an interest adverse to a surviving partner is competent to testify to an admission or conversation with a deceased partner not occurring in the presence of the surviving partner, plaintiff in replevin to recover a chattel from a firm, of which a surviving partner in a firm which had owned the chattel is a member, is incompetent to testify as to admissions by the deceased member of the former firm as to an alleged sale to plaintiff, for the reason that the suit was substantially one against a surviving partner, and also because defendant, as purchaser of the decedent's interest in the property, had the right to invoke the aid of the statute.—Foster v. Hart, 29 Ill. App. 260.

[l] (Ind. 1873) The widow of a testator is not a competent witness as to statements made to herself by her deceased husband.—Griffin v. Smith, 45 Ind. 366.

[m] (Mich. 1893) A contestant is not a competent witness as to declarations of the deceased beneficiary of the will, as against the devisee and executors of such beneficiary.—In re Lambie's Estate, 97 Mich. 49, 56 N. W. 223; Thomas v. McMillan, Id.

[n] (Mich. 1893) A contestant of a will may testify to declarations of the testatrix tending to show that she made a later will, by which she devised her property to him.—In re Lambie's Estate, 97 Mich. 49, 56 N. W. 223; Thomas v. McMillan, Id.

[o] (Minn. 1879) Under Gen. St. c. 73, § 8, providing that "it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane person or party, relative to any matter at issue between the parties," a party to the action or person interested in the result may testify as to any acts of a decedent, though they may have the effect of admissions. The statute applies only to spoken words.—Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55.

[p] (Minn. 1891) In an action on a certificate of membership in a mutual benefit association, by the beneficiary named therein, it was claimed that deceased had changed the beneficiary, and it appeared that he wrote to the company indicating such a change as he desired to make, and that the company wrote to him inclosing a formal revocation and reappointment, to be signed by him and returned, which he failed to do. *Held*, that it was com-

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petent for plaintiff to testify that he got the company's letter from the post office, read it to deceased, and gave it to him, since the statute prohibiting a surviving party from testifying as to any conversation with, or admission of, a deceased person applies to spoken words, and not to acts from which admissions may be implied.—Hall v. Northwestern Endowment & Legacy Ass'n, 47 Minn. 85, 49 N. W. 524, following Chadwick v. Cornish (1879) 26 Minn. 28, 1 N. W. 55.

[q] (Miss. 1877) One of the plaintiffs in ejectment is not a competent witness to establish his own claim to property left by a deceased person by virtue of admissions by him in his lifetime of a permissive possession of the land and a holding thereof for plaintiffs.—Rothschild v. Hatch, 54 Miss. 554.

[r] (Mo. 1889) The rule which disallows the testimony of one party to a contract after the death of the other party does not exclude the testimony of a third person, who is otherwise competent, as to admissions made by the deceased party against his interest.—Klopfer v. Levi, 33 Mo. App. 322.

[s] (N. Y. 1886) A witness interested in the result of a suit wherein an executor is plaintiff cannot repeat the representations of the deceased made to the witness when acting as defendant's agent.—Hill v. Woolsey, 42 Hun, 481.

[t] (N. Y. 1892) The testimony of two of the defendants in an action, in respect to each overhearing declarations made to the other by plaintiff's intestate, is properly excluded, where it appears that the declarations of decedent not only concerned the joint rights of such defendants, but were made to them when together.—Hard v. Ashley, 63 Hun, 634, 18 N. Y. Supp. 413.

[u] (N. C. 1883) In an action against the estate of a deceased surety, the principal debtor can testify as to what deceased swore on a former trial.—Kesler v. Mauney, 89 N. C. 369.

[v] (Pa. 1878) In ejectment by executors in whom title vested extra the will, defendant is incompetent as a witness in his own behalf, under the act of 1869, to make title to himself through the declarations of a deceased grantor of plaintiff.—Chase v. Irvin, 87 Pa. 286.

[w] (R. I. 1889) In a suit by the executor against the daughter of a decedent to recover a note which she claims as a gift, she is not a competent witness to testify to declarations made by the testator in regard to the note.—Hopkins v. Manchester, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387.

[x] (Tenn. 1875) Heirs at law of a decedent are competent to prove his declarations made at the time of placing them in possession of the property with which they are sought to be charged as advancements.—O'Neal v. Breecheen, 64 Tenn. (5 Baxt.) 604.

[y] (Va. 1889) In a suit to establish a trust in land of which plaintiffs' mother was legal owner after the mother's death, plaintiffs are not competent to testify to declarations of the mother tending to show a recognition of the trust.—McDevitt v. Frantz, 85 Va. 740, 8 S. E. 642.

[z] (W. Va. 1878) The wife, having no interest in the subject-matter after the death of the husband, is competent to prove facts coming to her knowledge from other sources, and not by means of her situation as wife, though they relate to transactions of her husband; but she is incompetent to prove any declaration of his made to her, or in her presence, which might affect his character, even if such declarations might be proven by her, if they did not affect his character.—White v. Perry, 14 W. Va. 66.

§ 671. Occupancy of land, payment of taxes, and collection of rents.

[a] (Ala. 1882) Testimony of a witness to the effect that he lived, during a certain period, on the plantation of one who at the time of giving such testimony was deceased, was not rendered incompetent by Code, § 3058, excluding testimony of any "transaction with * * * a deceased person."—Wood v. Brewer, 73 Ala. 259.

[b] (Ala. 1884) Testimony by an administrator applying for the sale of lands to pay debts, as to occupancy by decedent, is not prohibited by Code, § 3058, as relating to a transaction by a deceased person, whose estate is interested in the result of the suit.—Meadows v. Meadows, 78 Ala. 240.

[c] (Ga. 1872) A person against whom, as a tenant holding over, a proceeding has been instituted under Rev. Code, §§ 4005-4013, is incompetent as a witness on an issue against the administrator of the deceased landlord, as to whether defendant held as tenant or owner.—Veal v. Veal, 45 Ga. 511.

[d] (N. Y. 1888) The testimony of a claimant under a deed from a deceased grantor, that he had occupied the land, had rented it, and collected the rents, is not objectionable as relating to transactions with deceased persons, within Code Civ. Proc. § 829.—Strough v. Wilder, 49 Hun, 405, 3 N. Y. Supp. 567.

[e] (S. C. 1887) Merely allowing one to occupy land, there being no agreement to that effect between the parties, is not a "transaction" within the meaning of Code, § 400, which excludes the testimony of an interested witness to any "transaction" with a party since deceased, as against a party claiming under such deceased person.—Brown v. Moore, 26 S. C. 160, 2 S. E. 9.

[f] (Tex. 1895) In an action by an heir to try title to land although testimony by a defendant as to the contents of a lost deed from the deceased to him was not admissible, under Rev. St. art. 2248, as relating to transactions with a decedent, it was error to exclude that part of his testimony which related to the length of his occupancy and the payment of taxes by him.—Britton v. Tischmacher (Civ. App.) 31 S. W. 241.

§ 672. Delivery of property.

[a] (Ark. 1889) Under Const. art. 7, § 22, providing that in actions by or against executors or administrators neither party shall be allowed to testify against the other as to any transaction with or statement of the deceased, it is not competent, in an action against an administrator for conversion, for plaintiff to testify to the fact of the delivery of the property converted to the intestate.—Nunnally v. Becker, 52 Ark. 550, 13 S. W. 79.

[b] (N. Y. 1890) The delivery to plaintiff by her agent of a box in which he kept plaintiff's securities, of which she then made a list, from which she was able to state their amount (the question at issue), and the return of the box by her to decedent, is a "personal transaction" with the agent, within Code Civ. Proc. § 829, and is inadmissible in an action against the agent's administrator.—Doolittle v. Stone, 55 Hun, 604, 8 N. Y. Supp. 605.

[c] (N. Y. 1891) In an action to recover for conversion of goods, plaintiff testified that she delivered certain articles of jewelry in a box to a third person to be delivered to defendant's testator, and such third person testified that she delivered the box to decedent, but did not know what was in it. *Held* that, by reason of such third person's ignorance of the contents of the box, the only testimony as to the delivery of the contents of the box was that given by plaintiff, which was inadmissible, and

should have been stricken out.—Gregory v. Fichtner (Com. Pl.) 27 Abb. N. C. 86, 14 N. Y. Supp. 891, 21 Civ. Proc. R. 1, reversing (City Ct. N. Y. 1891) 13 N. Y. Supp. 593.

§ 673. Demand and notice.

[a] (N. Y. 1876) In an action to recover personal property against a surviving partner, testimony by a witness, under whom plaintiff claimed, that he had made a demand of the property of the deceased partner, was not permissible under Code, § 399, prohibiting the examination of any person from, through, or under whom plaintiff derives any interest or title in regard to any personal transaction or communication between such witness and a deceased person against the survivor of such deceased person.—Conway v. Moulton, 6 Hun, 650.

[b] (N. Y. 1888) A prior mortgagee may prove notice by the mortgagor to a person who takes a second mortgage of the property without violating Code Civ. Proc. § 829, providing that a party or person interested shall not be examined as a witness in his own behalf or in behalf of the party succeeding to his title against the executor, administrator, or survivor of a deceased person concerning a personal transaction or communication between witness and a deceased person.—Clark v. McNeal, 14 N. Y. St. Rep. 507, affirmed (1889) 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638.

[c] (N. Y. 1891) On the trial of a claim against the estate of a deceased vendor for breach of warranty of title the vendee cannot testify that he prepared notices that he had been sued for the land, and that he had carried the notices to the house of the vendor, who had since died, and had come away from the house without the notices, as such testimony involves a transaction with a decedent within the inhibition of Code Civ. Proc. § 829.—Finton v. Egleston, 61 Hun, 246, 16 N. Y. Supp. 721.

[d] (Wis. 1896) Where defendant, in an action by an administrator for the price of lumber sold by his intestate, claimed damages for the poor quality thereof, a refusal to allow defendant to answer whether he notified the deceased of the defect was proper, on the ground that it was a personal transaction, where it did not appear that the notice was written.—Hazer v. Streich, 92 Wis. 505, 66 N. W. 720.

§ 674. Gift.

[a] (Ala. 1880) On a bill for specific performance by D. against the heirs and personal representative of F., his vendor, alleging that the notes for the purchase money had been given by F. to a son and daughter who had not received equal advancements with his other children, and were paid to them by D. after F.'s death, *held*, that an heir could not testify to F.'s statements disproving the alleged gift, and thus increasing the assets.—Fort's Adm'r v. Davis, 67 Ala. 481.

[b] (Ga. 1884) In trover by an administrator to recover a bond, defendant is incompetent to testify that plaintiff's intestate, during her life, gave the bond to the witness.—Elsinger v. Beytagh, 74 Ga. 399.

[c] (Iowa, 1888) Evidence of a son and his wife of an oral promise by his father, now deceased, that the son should have the land in controversy, to establish a gift, is incompetent under Code 1873, § 3639, as to evidence of transactions with decedents.—Wertz v. Merritt, 74 Iowa, 683, 39 N. W. 103.

[d] (Me. 1870) In an action to compel an administrator of the estate of plaintiff's husband to indorse a note alleged to have been given to her by decedent, plaintiff's deposition is inadmissible to prove the gift.—Trowbridge v. Holden, 58 Me. 117.

[e] (Mass. 1866) On trial of an action by a widow against the administrator of the estate of her deceased husband for the conversion of certain articles of furniture, it was *held* that she was a competent witness to prove title thereto in herself before and during coverture, but not to prove that they were a gift from her husband.—Baxter v. Knowles, 94 Mass. (12 Allen) 114.

[f] (N. Y. 1889) Defendant, who is sued for the possession of securities which he claims as a donatio causa mortis from plaintiff's intestate, is incompetent to prove whether she kept the pocketbook and securities for the deceased or not.—Bick v. Reese, 51 Hun, 639, 3 N. Y. Supp. 757.

[g] (Tex. 1895) In an action on a note payable to deceased, the payee's daughter, who was made a defendant as being in possession of the note, alleged that deceased had given her the money loaned to the other defendant, and had, immediately upon the execution of the note, delivered it to her, and, being called as a witness in her own behalf, was asked to whom the money so loaned belonged. *Held* inadmissible, as involving a transaction with deceased.—Turner v. Murchison (Civ. App.) 31 S. W. 428.

§ 675. Contracts in general.

[a] (Colo. 1895) A partner seeking to set off an individual claim against a partnership indebtedness in a suit by an administrator against the firm is incompetent, under Gen. St. § 3641, to testify as to an agreement with the firm and deceased whereby the debt to deceased was to be applied on deceased's indebtedness to him.—Rogers v. McMillen, 6 Colo. App. 14, 39 Pac. 891.

[b] (Ga. 1872) A creditor of an estate is not competent as a witness, even to show the dignity of his contract with deceased, as affecting only the priority of his claim.—Latimer v. Sayre, 45 Ga. 468.

[c] (Ill. 1888) Under Rev. St. c. 51, § 2, prohibiting a party to a civil action from testifying in his own behalf, when any adverse party sues or defends as the heir, legatee, etc., of any decedent, a defendant's testimony as to a contract with a deceased person, by which he claims notes and money formerly belonging to deceased, is incompetent, in an action by the heirs to have them declared the property of deceased's estate.—Way v. Harriman, 126 Ill. 132, 18 N. E. 206, affirming Harriman v. Sampson (1887) 23 Ill. App. 159.

[d] (Ind. 1881) Where one is prohibited by statute from testifying as to a contract made with one since deceased, an attempt, indirectly, to draw from him that which he could not directly state, is not allowable.—Cottrell v. Cottrell, 81 Ind. 87.

[e] (Ind. 1885) In an action by a widow concerning the title to land claimed by her as widow, brought against the widow of her grantee, plaintiff is not competent to testify as to agreements between herself and her grantee as to the consideration and time of delivery of the deed.—Cuthrell v. Cuthrell, 101 Ind. 375.

[f] (Minn. 1874) In the provision of Gen. St. 1866, c. 73, § 8, that, when all the original parties to one side of a contract are dead or insane, the other party or parties shall not be admitted to testify as to such contract in his or their own favor unless the transactions on behalf of the deceased or insane parties were had or performed by an agent, whose testimony is received, the words "as to such contract" are equivalent to the words "as to what took place between the parties to such contract at the time of making the same."—Johnson v. Coles, 21 Minn. 108.

[g] (Mo. 1886) Where the interest claimed by an interpleader depends on a contract made by

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communications with deceased.—Taylor v. Welsh, 92 Hun, 272, 36 N. Y. Supp. 952.

[t] (N. Y. 1896) Testimony of a claimant against an estate, as to the value of his services to decedent, is inadmissible, so far as it relates to services performed in the presence of decedent.—Yates v. Root, 4 App. Div. 139, 38 N. Y. Supp. 663.

[tt] (N. Y. 1896) Under Code Civ. Proc. § 829, which renders a party an incompetent witness in his own behalf concerning a personal transaction had with a decedent, even if a claimant against a decedent's estate may testify that he did certain work for decedent, it does not warrant the inference that decedent either knew of or authorized the work, since as to these facts he is an incompetent witness.—In re Havemeyer's Estate, 6 App. Div. 535, 39 N. Y. Supp. 550; In re Humfreville, Id.

[u] (N. C. 1876) In an action against the administrator of plaintiff's mother to recover for services rendered the mother, plaintiff is not a competent witness to prove the value of such services.—Kirk v. Barnhart, 74 N. C. 653.

[uu] (S. C. 1888) In an action against an administrator for services to his decedent, plaintiff cannot testify that the account sued on was correct, under Code Civ. Proc. § 400, providing that no party interested shall be examined as to any transaction with a deceased person.—Boyd v. Cauthen, 28 S. C. 72, 5 S. E. 170.

[v] (S. C. 1890) In an action for services rendered on a building for deceased, plaintiff's testimony as to work done by him on deceased's premises when the latter was at home, and could not have been ignorant of such work, is not within Code, § 400, forbidding plaintiff to testify as to a "transaction" with deceased.—Foggette v. Gaffney, 33 S. C. 303, 12 S. E. 260.

[vv] (S. C. 1893) A physician who claims compensation for medical attendance on decedent may testify as to decedent's physical condition, and the amount of time required to look after his health, as such testimony does not relate to a "transaction" with decedent within Code, § 400.—Sullivan v. Latimer, 38 S. C. 158, 17 S. E. 701.

[w] (S. C. 1894) Error cannot be assigned because plaintiff was allowed to testify that defendant's testator knew that plaintiff had done the work in question, and its price. The defense should have asked him if he knew it from conversation with testator, and, if so, moved to strike out.—Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291.

[ww] (S. C. 1894) Plaintiff could testify that while he was doing the work in question for deceased he was daily at deceased's office, or deceased at his.—Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291.

[x] (S. C. 1894) Also that deceased brought such work to him, and gave him instructions about it, which plaintiff carried out.—Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291.

[xx] (Tex. 1876) One who sues an administrator for services rendered to the deceased is not a competent witness to prove such labor or the value thereof.—Barnhill v. Kirk, 44 Tex. 589.

[y] (Tex. 1894) Where one sues another for services, and pending the trial defendant is adjudged insane, plaintiff cannot testify as to any conversations or transactions between him and defendant, but may state what he did for defendant, and may give any facts showing that his services were rendered with the knowledge of, and were accepted by, defendant.—Hamilton v. Starr (Civ. App.) 27 S. W. 587.

[yy] (Wash. 1896) In an action against an administrator for a balance due for services rendered by plaintiff for deceased, testimony of plaintiff that he worked at deceased's house, and as to the character of the work performed by him, is not testimony in relation to a "transaction had by him with, or any statement made to him by," deceased, within 2 Hill's Code, § 1646.—Ah How v. Furth, 13 Wash. 550, 43 Pac. 639.

[z] (W. Va. 1878) Under Code, c. 130, § 22, a plaintiff, in suit against an administrator, is incompetent to testify as to services rendered the decedent, such services, and the promise to pay therefor implied from their performance, constituting a "transaction" with decedent within the meaning of such section.—Owens v. Owens' Adm'r, 14 W. Va. 88.

[zz] (Wis. 1886) A claimant for the value of services rendered one since deceased in testifying as to how long he worked, and what his services were worth, does not testify concerning a "personal transaction," within the inhibition of Rev. St. § 4069.—Belden v. Scott, 65 Wis. 425, 27 N. W. 856.

§ 677. Supplies and value thereof.

[a] (Fla. 1883) Where the survivor sues the estate for medicine furnished decedent, he may state of what ingredients the medicine was composed.—Belote v. O'Brian's Adm'r, 20 Fla. 126.

[b] (N. C. 1895) Testimony that a witness carried supplies to a decedent is not evidence of a conversation or transaction which makes the witness incompetent, under Code, § 590.—Cowan v. Layburn, 116 N. C. 526, 21 S. E. 175.

[c] (Tex. 1876) One who sues an administrator for supplies furnished to the deceased is not a competent witness to prove such supplies, or their value.—Barnhill v. Kirk, 44 Tex. 589.

§ 678. Usury.

[a] (Ill. 1867) Where the creditor is dead, the debtor is an incompetent witness to prove usury.—Buck v. Beekly, 45 Ill. 100.

[aa] (Mass. 1851) In an action on a note, payable to an executor, defendant is not a competent witness, under Rev. St. c. 35, § 4, to prove that the consideration of the note was usurious interest taken and reserved of him by the payee's testator, although the payee was cognizant, of his own knowledge, of the nature of the usurious transaction, at the time it took place.—Bacon v. Robinson, 61 Mass. (7 Cush.) 579.

[b] (Minn. 1892) Under Gen. St. 1878, c. 73, § 8, which provides that it shall not be competent for any party to an action to give evidence "of or concerning any conversation with, or admission of, deceased relative to any matter at issue," a survivor of two contracting parties is competent to testify to the fact that a note given deceased for money loaned embraced a sum in excess of the amount loaned.—Parker v. Maxwell, 51 Minn. 523, 53 N. W. 754.

[c] (N. Y. 1865) On December 24, 1855, defendants made their note for $300, payable to Jacob Coller, senior, one year after date, for money lent and advanced. On the 1st of April, 1859, the payee sold and transferred the note to John Coller. The latter died in June, 1863, leaving a will by which he appointed Jacob Coller, second, his executor, who, as such executor, after the death of the payee, brought an action against the makers on the note. Defendants set up the defense of usury. *Held*, that under Code, § 399, as amended in 1857, one of the defendants was properly admitted as a witness in behalf of himself and his codefendant, to establish the defense by proving conversations and transactions between himself and the payee of the note at the time it was given.—Coller v. Wenner, 45 Barb. 397.

[d] (N. Y. 1867) In an action by an administrator on a bond due his intestate, the defense was usury, and it was shown that the bond was substituted for a note for $896, and R. testified that he only gave defendant $800 of the intestate's money for the note. Defendant was then permitted to testify, against objection, that he received nothing from the intestate for the note except the money received from R. *Held*, that it was error to admit the testimony, as it was in respect to a transaction between the deceased and defendant.—Stanley v. Whitney, 47 Barb. 586.

[e] (N. Y. 1871) In an action on a note by the administrator of the indorser of the note, the maker could not testify that the indorser had discounted the note, and that it was usurious, such testimony being expressly within Code, § 399, permitting a party to an action to be examined in his own behalf except as against the representatives of a deceased person in respect to any transaction had personally between the deceased person and the witness.—Fox v. Clark, 61 Barb. 216, note.

[f] (N. Y. 1878) In an action on a note against the maker, he alleged that it was made for the accommodation of A., who indorsed it to B. to be discounted at a usurious rate, and B. transferred it to plaintiff. Defendant called A. to prove an oral agreement with B. showing usury. *Held*, that A. was an incompetent witness under Code, § 899, providing that the assignor of a thing in action shall not be examined in behalf of a party in respect to any transaction had with a deceased person against parties who are the assignees of the deceased.—Richardson v. Warner, 13 Hun, 13.

[g] (N. Y. 1882) On an issue in proceedings to foreclose a mortgage by assignees thereof as to whether it was rendered usurious by the fact that a transfer of the mortgaged property to the mortgagee from his copartner was simulated, the mortgage having no inception until its delivery to an assignee for $500 less than its face, the mortgagee is incompetent, under Code Civ. Proc. § 829, to testify to a conversation between him and the assignee, since deceased, tending to sustain the defense of usury.—Smith v. Cross, 90 N. Y. 549.

§ 679. Agency.

[a] (Ga. 1875) Where the maker of a note is dead, the payee or holder thereof is not a competent witness to testify that he put the credit on it which kept it alive, by the authority and as agent of the maker.—Wright v. Bessman, 55 Ga. 187.

[b] (Ill. 1889) In an action against the sureties of a deceased guardian to recover an alleged balance due the ward, the latter will not be prevented, by Rev. St. c. 57, §§ 2, 4, from answering an inquiry as to whether the deceased guardian was ever constituted an agent to handle the same.—People v. Borders, 31 Ill. App. 426.

[c] (Nev. 1878) Under Code, § 379, testimony of plaintiff that he has been an agent of defendant's intestate, and authorized by him to draw certain bank checks, is inadmissible.—Higgs v. Hanson, 13 Nev. 356.

[d] (N. Y. 1888) Where plaintiff's husband bought a carriage, paying partly in cash and partly in his own notes, she is incompetent to testify that her husband, now dead, was the agent in the purchase, under Code, § 829, as it concerns a personal transaction with decedent.—Richmond v. Brewster (City Ct. N. Y.) 2 N. Y. Supp. 400.

§ 680. Partnership transactions.

[a] (Ala. 1875) One sought to be held liable as a partner on a note executed by his alleged copartner in the names of himself and defendant is not incompetent, under Rev. Code, § 2704, to testify that he was not a partner of the maker of the note when it was executed as against the administrator of the payee suing thereon.—Huckabee v. Nelson, 54 Ala. 12.

[b] (Ind. 1879) In an action on a note, executed by two partners, against one partner and the administrator of the other, after evidence had been given tending to show that a partnership existed at the time the note was executed, and that the deceased partner, in so executing, acted within the scope of his authority, the payee was competent to testify as to what the deceased said at the time he borrowed the money for which the note was given, to the effect that the money was for the use of the firm.—Dodds v. Rogers, 68 Ind. 110.

[c] (Ind. 1894) A sister who, after her brother's death, has bought from her coheirs their rights in his interest in a firm and become a partner, is not incompetent to testify, against the present partners, to a conversation between herself and one who was then, and still is, a partner, and the decedent, as to borrowing plaintiff's money for the firm, and that said money for which the note in suit was given was charged by said partner in the firm books as a firm liability, where she also swears that when she, and afterwards the other defendants, entered the firm, the note was assumed by each as a firm debt.—Case v. Ellis, 9 Ind. App. 274, 36 N. E. 666.

[d] (N. Y. 1889) Evidence by plaintiff, claiming to have been the partner of one deceased, as to the receipts and payment of moneys in the business, for the purpose of establishing the partnership, is incompetent, under Code Civ. Proc. § 829, relating to transactions with decedents.—Adams v. Morrison, 113 N. Y. 152, 20 N. E. 829, affirming Same v. Sullivan (1886) 42 Hun, 278.

[e] (N. Y. 1889) So also, under the same section, is evidence by the plaintiff that the deceased, at about the time the partnership was alleged to have been formed, made an entry in one of the books of the office in the name of the alleged firm.—Adams v. Morrison, 113 N. Y. 152, 20 N. E. 829.

[f] (N. C. 1886) On the issue of the existence of a partnership, one of the alleged partners being dead, the survivor is not a competent witness in his own behalf to prove facts establishing the partnership, unless it clearly appears that his knowledge of such facts is not the result of a personal communication or transaction between himself and the decedent.—Sikes v. Parker, 95 N. C. 232.

[g] (N. C. 1889) In an action by the executors of a deceased partner against all the surviving partners for a settlement, it appeared that the partnership was the successor of another firm, of which the decedent and G., one of the survivors, were members. *Held*, that it was error, under Code, § 590, forbidding a party to an action to give testimony in his own behalf, against the executor of a deceased person, as to any communication or transaction with the decedent, except where the executor is examined on his own behalf, or the testimony of the decedent is given concerning the same transaction, to permit G. to testify that the decedent and all the other members of the new firm had entered into an agreement as to the basis of merging the business of the old firm into the new, and that, in pursuance of such agreement, G. had aided the decedent in estimating the value of the property of the old firm.—Armfield v. Colvert, 103 N. C. 147, 9 S. E. 461.

[h] (N. C. 1896) In an action against the surviving partner and the administratrix of a deceased partner on a note purporting to have been given by the firm, the testimony of the surviving partner is inadmissible to prove the

partnership, or that the deceased consented to the borrowing of the money and the giving of the note therefor, under Code, § 590, providing that, in an action against an administrator, a party in interest shall not testify as to transactions with the deceased.—Lyon v. Pender, 118 N. C. 147, 24 S. E. 744.

§ 681. Payment or transmission of money.

[a] (Ill. 1880) M. and his wife made a deed of trust to H. to secure a note payable to Z. M. and Z. died. H. sued M.'s wife to recover possession of the land covered by the deed. *Held*, that defendant was a competent witness to show that so much of the debt as could be collected was paid.—Mester v. Hauser, 94 Ill. 433.

[b] (Ill. 1889) In an action against the sureties of a deceased guardian to recover an alleged balance due the ward, the latter will not be prevented by Rev. St. c. 57, §§ 2, 4, from answering an inquiry as to whether the deceased guardian ever paid over the moneys due from him.—People v. Borders, 31 Ill. App. 426.

[c] (Ill. 1893) Defendant in a suit by an administrator on a note is not a competent witness to show payments made by him to deceased.—Jockisch v. Hardtke, 50 Ill. App. 202.

[d] (Iowa, 1883) Plaintiff, in an action to recover for services rendered a deceased person, cannot, by his own testimony, show that payment for such services was never made, as this is a personal transaction with the deceased.—Van Sandt v. Cramer, 60 Iowa, 424, 15 N. W. 259.

[e] (Iowa, 1894) In an action against an administrator for personal services rendered decedent, plaintiff cannot testify as to payments to him by decedent, payment being a personal transaction.—In re Brown's Estate, 92 Iowa, 379, 60 N. W. 659; Cole v. Marsh, Id.

[f] (Iowa, 1895) Under Code 1873, § 3639, which provides that, where one of the parties to an action is deceased's personal representative, a transaction between deceased and the other party cannot be shown by the testimony of that other, a question asked plaintiff, in an action by a daughter to recover of her father's estate for services rendered him, whether he had ever paid her for her services before his death, was properly excluded.—Ridler v. Ridler, 93 Iowa, 347, 61 N. W. 994.

[g] (N. Y. 1872) In an action to have a conveyance by plaintiff to defendant's devisor declared a mortgage, plaintiff's testimony that he did not pay rent to the devisor was properly excluded, under Code, § 399.—Barrett v. Carter, 3 Lans. 68.

[h] (N. Y. 1874) The testimony of the manager of a testator's estate is inadmissible, under Code, § 399, to show payments made by him to testator in reduction of a claim of such estate against such manager.—Elmore v. Jaques, 4 Thomp. & C. 679.

[i] (N. Y. 1875) Where, in an action by the payee of a note made by defendant's testator, payment was pleaded as a defense, a question to plaintiff as to whether the note had ever been paid was properly excluded, under Code, § 399, providing that a party shall not be examined in his own behalf in respect to any transaction or communication had personally by him with a deceased person.—Howell v. Van Siden, 6 Hun, 115.

[j] (N. Y. 1884) In an action against an executor, a demand for services rendered plaintiff by the defendant's testator was set up as a counterclaim, and plaintiff testified to a conversation between himself and the executor in which he had stated that the account had been paid. *Held*, that under Code, § 829, providing that a party or person interested shall not be examined in his own behalf against an executor, except where the executor is examined in his own behalf, it was competent for the witness to speak of the details of the conversation, but that the question as to whether it was true that it had all been paid was objectionable, as calling for a transaction or conversation with the deceased.—Williams v. Davis, 7 Civ. Proc. R. 282.

[k] (N. Y. 1885) Testimony by a party to an action that he addressed a package of money to one deceased relates to a transaction had with the deceased, and is inadmissible under the rule.—Stuart v. Patterson, 37 Hun, 113.

[l] (N. Y. 1886) In an action against an executor on a note given by the testator, which was barred unless interest was paid as indorsed thereon, plaintiff was incompetent to testify to the indorsement, since, if it represented a real payment, it was a personal transaction with the deceased, and if not it was a mere declaration in his own favor.—Redfield v. Stett, 4 N. Y. St. Rep. 864.

[m] (N. Y. 1887) In an action to recover compensation, for services rendered to defendant's testator, the testimony of plaintiff that the work has not been paid for is incompetent as involving a personal transaction with the deceased; but, where no evidence of payment is offered or given on behalf of defendant, the admission of plaintiff's negative testimony is immaterial error, payment being an affirmative defense, the burden of proving which is upon defendant.—Lerche v. Brasher, 104 N. Y. 157, 10 N. E. 58.

[n] (N. Y. 1887) A payment of money by an executor to his testator is a personal transaction with the deceased, which the executor is incompetent to prove, under Code, § 829.—In re Kellogg, 104 N. Y. 648, 10 N. E. 152.

[o] (N. Y. 1887) Though Code Civ. Proc. § 829, forbidding testimony of transactions with a decedent, rendered a witness incompetent to testify as to whether or not certain payments had been made by decedent, he was not incompetent to give collateral testimony relative to the financial condition of the decedent at the time the payments were alleged to have been made.—Guibert v. Saunders, 10 N. Y. St. Rep. 43.

[p] (N. Y. 1889) Plaintiff sued for board furnished defendant's intestate, and the defense was that in payment for the board intestate had furnished the household supplies. Plaintiff was permitted to testify that she paid for all the supplies, and that no one else did. It did not appear whether she meant that she personally purchased and paid for the supplies, or whether she did so through intestate as her agent. *Held*, that she would be presumed to have meant the former, in which view she was not disqualified by Code Civ. Proc. § 829.—Sager v. Dorr, 51 Hun, 642, 4 N. Y. Supp. 568.

[q] (N. Y. 1891) In an action by the payee on a note executed by a deceased person, plaintiff cannot testify that the note was never paid by the maker.—Meyers v. Hunt, 60 Hun, 579, 14 N. Y. Supp. 471.

[r] (N. Y. 1892) A mortgagee is incompetent to testify that payment of the mortgage was never made to him by the deceased mortgagor.—McMurray v. McMurray, 63 Hun, 183, 17 N. Y. Supp. 657.

[s] (N. Y. 1892) In an action by the owner of a trust fund against the trustees' executors, evidence of plaintiff as to money sent by him to deceased is inadmissible.—Williams v. Clements, 64 Hun, 636, 19 N. Y. Supp. 613.

[t] (N. Y. 1894) Testimony of a claimant against the estate of a decedent that the claim

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had not been paid calls for a personal transaction between witness and decedent (Code Civ. Proc. § 829), and is therefore incompetent.—Brayman v. Stephens, 79 Hun, 28, 29 N. Y. Supp. 526.

[u] (N. Y. 1895) On the hearing of a claim against the estate of a decedent for money expended by claimant for the benefit of decedent when claimant was acting as decedent's agent, testimony of claimant that he paid certain debts of decedent with his own money does not refer to personal transactions with decedent, within the meaning of Code Civ. Proc. § 829.—In re Zinke, 90 Hun, 127, 35 N. Y. Supp. 645.

[v] (N. C. 1889) Decedent's widow, who is also a defendant, is not incompetent to testify for plaintiff that the latter paid part of the price of the land, where it does not appear that decedent was present at such payment, or knew anything of it.—Carey v. Carey, 104 N. C. 171, 10 S. E. 156.

[w] (N. C. 1890) In an action to recover land by virtue of a mortgage, where the mortgagor is dead, one of the plaintiffs, who was one of the mortgagees, is not competent to testify as to how much has been paid on the mortgage debt, as this involves a transaction with a decedent within the inhibition of Code, §§ 580, 590.—Simpson v. Simpson, 107 N. C. 552, 12 S. E. 447.

[ww] (Pa. 1890) The maker of a note is an incompetent witness to prove its payment in an action between himself and the administrator of the payee.—Mell v. Barner, 135 Pa. 151, 19 Atl. 940.

[x] (S. C. 1895) In an action by a widow to recover land claimed by defendant under a parol contract of purchase from plaintiff's deceased husband, it appeared that the other two heirs of decedent conveyed their interest in the land to plaintiff. *Held*, that defendant was not competent to prove that he had paid decedent in full for the land.—Vann v. Howle, 44 S. C. 546, 22 S. E. 735.

[xx] (Tex. 1882) Testifying, in an action against an executor, to having intrusted money to the deceased to be loaned by him, is testifying to a transaction with deceased within the statutory prohibition.—Altgelt v. Brister, 57 Tex. 432.

[y] (Tex. 1894) Defendant, during decedent's life, paid taxes on decedent's land which were refunded to defendant while acting as administrator. *Held*, in an action by the heirs to recover the money so refunded, that defendant's testimony that the payment was made at decedent's request was inadmissible.—Herbert v. Harbert (Civ. App.) 28 S. W. 250.

[yy] (W. Va. 1877) One sued by an administrator on a debt formerly owed by him to plaintiff's intestate is incompetent under Code 1868, c. 130, § 23, to testify that he paid the debt to deceased with an order drawn against the latter by a third person, and that deceased at the time delivered up the note or bond securing the debt, but that such security has since been lost or destroyed.—Calwell v. Prindle's Adm'r, 11 W. Va. 307.

[z] (Wis. 1875) In an action by an administrator defendant cannot testify as to payments made by him to plaintiff's intestate.—Kœnig v. Katz, 37 Wis. 153.

[zz] (Wis. 1891) Under Rev. St. § 4069, prohibiting any party or person through whom a party derives his title to be examined as a witness in respect to any transaction by him personally with a deceased person, in any action where the opposite party derives his title through such deceased person, a mortgagor, in ejectment against him by persons claiming through a sale under the mortgage and mesne conveyances, cannot testify that he paid the mortgage debt to the since deceased mortgagee before he assigned the mortgage.—Nau v. Brunette, 79 Wis. 664, 48 N. W. 649.

§ 682. Physical condition and mental capacity.

[a] (Ala. 1880) Application having been made by an administrator to sell land for the payment of debts, and the same having been opposed by the heirs, the issue was as to the validity of a note signed by the intestate, and payable to the administrator, which the heirs contested on the ground that, at the time of its execution, the intestate was not of sound mind. *Held* that, though the administrator, having been the family physician of the intestate for a long series of years, might testify, as a witness for himself, as to his general sanity, and might state the facts upon which his opinion was founded, yet, under Code, § 3058, not being allowed to testify as to "any transaction with or statement by the deceased," he could not state "what was the condition of his mind at the time the note was given."—Davis v. Tarver, 65 Ala. 98.

[b] (Ill. 1888) In a suit by an heir against a devisee to contest the will, the heir is not a competent witness as to the sanity of testator.—Brace v. Black, 125 Ill. 33, 17 N. E. 66.

[c] (Ind. 1886) In a suit to set aside a will, the heirs may testify as to the mental capacity of the testator, although his executor is a party to the action, and are not precluded by Code, § 498, which renders persons incompetent as witnesses concerning transactions with decedents.—Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171.

[d] (Iowa, 1880) On the contest of a will, testimony by a party, not an expert, that he saw no difference in the mental condition of the testator in sickness and in health, is not within the provision of Code 1873, § 3639, that no party to any action or proceeding shall be examined as a witness in regard to any "personal transaction or communication" between him and a person since deceased, against the heir, next of kin, etc., of such deceased person.—Severin v. Zack, 55 Iowa, 28, 7 N. W. 404.

[e] (Iowa, 1894) Contestant, having alleged that testator's mind was so impaired by long illness that he was incompetent, or at least very susceptible to undue influence, may testify as to testator's health for several years before his death, and especially about the time he made the will.—Sim v. Russell, 90 Iowa, 656, 57 N. W. 601.

[f] (Iowa, 1894) A legatee is competent to testify whether testator seemed to recognize him.—Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

[g] (Iowa, 1894) The wife of a legatee testified that she had seen testator for many years, and described his behavior and appearance, and was then asked, after excluding any personal transactions or conversations between herself and him, to give her opinion of his mental condition. *Held* not incompetent, as relating to her "personal transactions" with testator.—Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

[h] (Iowa, 1895) The contestant of a will cannot give his opinion of the mental capacity of the testatrix, based upon conversations which are inadmissible, under Code 1873, § 3639.—In re Goldthorp's Estate, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 400; Goldthorp v. Goldthorp, 62 N. W. 845.

[i] (Ky. 1890) Civ. Code, § 606, relating to testimony of transactions with decedents, does not prevent the contestants of a will from testifying as to the conduct, conversation, and character of the testator.—Williams' Ex'r v. Williams, 90 Ky. 28, 13 S. W. 250.

[j] (N. Y. 1883) One who, on account of interest, would have been precluded from testify-

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ing as to personal transactions or communications with the testatrix, in a suit brought to contest her will, was asked to state the testatrix's actions, conduct, and sayings on certain days. *Held*, that this question did not necessarily call for a personal conversation between the witness and the deceased, and was competent.—Steele v. Ward, 30 Hun, 555.

[k] (N. Y. 1886) Testimony to the effect that one since deceased appeared to be drunk at the time of the transaction in controversy is inadmissible to the same extent as would have been his statements made at the time.—Smith v. Meaghan, 40 Hun, 401.

[l] (N. Y. 1887) Where, in an action by a son questioning the validity of his father's will, it appeared that the father and son had been partners, engaged in business during the last year of the testator's life, the son was incompetent to testify to his father's physical condition during such year by virtue of Code Civ. Proc. § 829, forbidding a party or person interested in the event to testify in his own behalf against an executor "concerning a personal transaction or communication between the witness and the deceased person."—Scott v. Scott, 13 N. Y. St. Rep. 202.

[m] (N. Y. 1889) Code Civ. Proc. § 2544, providing that a person is not disqualified from testifying "respecting the execution of a will" by a provision therein, whether beneficial to him or not, does not conflict with section 829, forbidding testimony relating to transactions with decedents, and applies only to the evidence of the attesting witnesses proving execution of the will, and does not allow a legatee to testify to personal transactions with the testator tending to establish his testamentary capacity.—In re Eysaman's Will, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599.

[n] (N. Y. 1889) The testimony of the subscribing witnesses as to testator's mental condition being in conflict, and the whole evidence being so evenly balanced that in the absence of the evidence of such legatee, a finding either for or against the validity of the will would not be set aside as against the evidence, it is prejudicial error to admit the testimony of such a legatee on the matters referred to, for which a finding by the surrogate in favor of the proponent should be set aside.—In re Eysaman's Will, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599.

[o] (N. Y. 1891) Testimony as to the appearance of a testator, as indicating his incompetency to make a will, observed by an interested witness, is inadmissible.—In re McArthur's Will, 59 Hun, 619, 12 N. Y. Supp. 822.

[p] (N. Y. 1892) Evidence as to a testator's physical condition when witness reached his home, and as to whether he left his bedroom after her arrival, is not objectionable as relating to personal transactions or communications with a decedent.—In re McCarthy, 65 Hun, 624, 20 N. Y. Supp. 581.

[q] (N. C. 1893) In an action on a note given by decedent, the testimony of a daughter who lived with deceased, that his mind was bright both before and after the execution of the notes, was not objectionable under Code, § 590, as the testimony of an interested person in relation to transactions with a decedent.—Ducker v. Whitson, 112 N. C. 44, 16 S. E. 854.

[r] (W. Va. 1877) A trustee and beneficiary in a trust deed sought to be set aside by the deceased grantor's widow, as next friend of her infant children and only heirs of the grantor, on the ground of his insanity when he executed the trust deed, are incompetent, under Code, c. 130, § 2, to testify in their own behalf that in their opinion, based upon the grantor's conduct and conversations at and before the execution of the deed, he was of sound mind.—Anderson v. Cranmer, 11 W. Va. 562.

11. COMMUNICATIONS OR INSTRUMENTS IN WRITING.

IN GENERAL, § 683.
LOST INSTRUMENTS, § 684.
PROOF OF HANDWRITING, § 685.
LETTERS AND CONTENTS THEREOF, § 686.
STATEMENTS AND BOOKS OF ACCOUNT, § 687.
BONDS AND ASSIGNMENT THEREOF, § 688.
BILLS AND NOTES, § 689.
—— TESTIMONY AS TO HAVING SEEN NOTE, § 690.
—— CONSIDERATION, § 691.
—— INDORSEMENT, § 692.
DEEDS, § 693.
MORTGAGES AND ASSIGNMENT THEREOF, § 694.
EXECUTION AND CONTENTS OF WILL, § 695.

§ 683. In general.

[a] (Ind. 1881) In suit against heirs to foreclose a mortgage given by their ancestor, it appeared that the note had been lost, but that payments had been indorsed on the mortgage by the mortgagor, and also that a receipt for a certain amount, signed by the mortgagee, was in the handwriting of the mortgagor. *Held*, that under 2 Rev. St. 1876, p. 133, § 2, the mortgagee was incompetent to testify that the sum named in the receipt was really made up of two payments made shortly before the date of such receipt, and indorsed on the mortgage by the deceased.—Abshire v. Williams, 76 Ind. 97.

[b] (Ind. 1895) Rev. St. 1894, § 507 (Rev. St. 1881, § 499), controlling the admissibility of testimony as to matters occurring between witness and one since deceased, prohibits a widow from testifying, in the contest of her husband's will, in regard to circumstances under which a copy thereof came into her possession, this event having occurred during the life of the testator.—McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336.

[c] (Iowa, 1885) Where persons claim that certain property was transferred to them by a deceased person in consideration of their agreement to support him, they are not competent to prove the delivery of such agreement.—Samson v. Samson, 67 Iowa, 253, 25 N. W. 233.

[d] (Ky. 1895) In an action on a duebill after the death of the payee the testimony of the payor is inadmissible to show that the instrument was a sham, or that a receipt therefor was given.—Burns v. Ross, 30 S. W. 641.

[e] (Mich. 1870) In action on an account by an administrator, he having shown that decedent obtained an inventory of the goods sold from defendant and made a copy thereof, which copy was produced, evidence by defendant tending to show that the copy was not correct was not within the meaning of Act No. 125 of 1861, forbidding evidence of transactions with a decedent in an action by or against his representatives, as the correctness of the copy was an independent fact.—Moulton v. Mason, 21 Mich. 364.

[f] (Mo. 1876) In a suit by an executor on a note given to the testator, defendant is not a competent witness under Wag. St. p. 1373, § 1, as to the execution of a paper by the testator discharging defendant from his obligation.—Weiland v. Weyland, 64 Mo. 168.

[g] (N. Y. 1864) Code, § 399, was intended to provide for the case of personal intercourse, conversation, or communications had personally with the deceased, and is not applicable to testimony resting in papers and documents of

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any description.—Williston v. Williston, 41 Barb. 635.

[h] (N. Y. 1885) One who sues an administrator for services rendered decedent cannot, when confronted on the trial with what purports to be a receipt in full, state that the instrument, when delivered, was not a receipt in full, and that words were added after the intestate took it.—Boughton v. Bogardus, 35 Hun, 198.

[i] (N. Y. 1888) Where, in a trial to establish a claim against an estate, a witness is asked whether her husband ever had a written acknowledgment of the debt from deceased, an objection that the question was incompetent as involving a transaction with a decedent was properly overruled.—Bloss v. Morrison, 47 Hun, 218.

[j] (N. C. 1891) In a will contest, evidence by testator's widow that she found the will, after his death, among his valuable papers, does not relate to any personal transaction or communication with deceased, within the meaning of Code, § 590, which prohibits that class of evidence.—Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78.

[k] (Tenn. 1892) The fact that an exchange or novation of notes was accomplished by written correspondence between the parties does not render the testimony competent, since the statute makes no distinction between written and verbal transactions or statements.—Montague v. Thomason, 91 Tenn. (7 Pickle) 168, 18 S. W. 264.

§ 684. Lost instruments.

[a] (Ala. 1887) In an action by a surviving partner on an account due the firm, defendant is not competent to prove the execution and contents of a lost receipt given him by the deceased partner, as Code 1886, § 2765, prohibits either party to a suit from testifying against the other as to any transaction with a deceased person whose estate is interested in the result of the suit.—Parker v. Edwards, 85 Ala. 246, 4 South. 612.

[b] (Ill. 1886) Where two parties joined in instructing a scrivener to draw certain contracts which were afterwards lost, and one of the parties afterwards died, the instructions to the scrivener might be proved by the testimony of the surviving party, but he could not testify as to the transaction with the deceased.—Spencer v. Boardman, 118 Ill. 553, 9 N. E. 330.

[c] (Ind. 1877) The provision of 2 Rev. St. 1876, p. 133, § 2, that "neither party shall be allowed to testify as a witness unless required by the opposite party or by the court trying the cause," has not narrowed the common-law rule. Plaintiff in an action against the estate of a deceased maker of a lost note may testify as to the loss.—Milam v. Milam, 60 Ind. 58.

[d] (Iowa, 1872) Rev. Code, § 3982, providing that a party is incompetent to testify where the adverse party is an executor, does not render such party incompetent to establish the loss of a written instrument in order to admit evidence of its contents.—Keech v. Cowles, 34 Iowa, 259.

[e] (Iowa, 1893) In a proceeding to establish a claim against a decedent's estate for work rendered decedent, it is proper to allow claimant to testify in regard to the possession of a written contract between him and deceased, which has been lost, but he should not be allowed to testify as to the contents of such contract.—Stevens v. Witter, 88 Iowa, 636, 55 N. W. 535.

[f] (Miss. 1884) The statute prohibiting a party in interest from testifying to establish his claim against a decedent's estate does not preclude him from testifying to the loss of an instrument in order to admit secondary evidence.—Harper v. Lacey, 62 Miss. 5.

[g] (N. H. 1883) Under Gen. Laws, c. 228, § 16, providing that the living party to a transaction known only to him and the deceased party cannot testify as to that transaction in an action against his estate, a plaintiff in such an action is precluded from testifying as to the contents of a letter sent by him to deceased previous to his death, which he is presumed to have received, although it was not found among his papers.—Sabre v. Smith, 62 N. H. 663.

[h] (N. Y. 1864) In an action against heirs of a deceased party, plaintiff may prove the contents of a lost letter.—Williston v. Williston, 41 Barb. 635.

[i] (N. Y. 1882) In a foreclosure suit by the mortgagee's executrix, defendant set up that the mortgage was given to secure performance of an agreement to convey, and that he had offered to perform by tendering a sufficient deed; and he adduced evidence that a paper signed by the testatrix and himself was lost. *Held*, that under Code, § 829, he should not be allowed to show that the paper had been read to him, and to state its contents.—Hadsall v. Scott, 26 Hun, 617.

[j] (S. C. 1879) In a suit by the assignee of a sealed note, defendant may testify to having lost a receipt given by the assignor deceased, but cannot testify to its contents.—Standridge v. Powell, 11 S. C. 549.

[k] (S. C. 1887) Plaintiff claimed land as heir at law of B., who, as defendants claimed, had agreed to convey the land to T., their devisor, as evidence of which agreement they sought to introduce the testimony of M. as to the contents of a letter written by B. to M., the letter itself being lost. *Held*, that such testimony was properly excluded as being a communication made by a deceased person under whom plaintiff claims.—Boozer v. Teague, 27 S. C. 348, 3 S. E. 551.

[l] (Tenn. 1874) In an action to recover the amount of an obligation to a deceased obligee, defendant is not a competent witness for himself to show the loss of an alleged receipt.—Mason v. Spurlock, 63 Tenn. (4 Baxt.) 554.

[m] (Tex. 1891) Rev. St. art. 2248, providing that in suits against executors or administrators no party shall testify "to any transaction with or statement by the testator or intestate, unless called to testify thereto by the opposite party," does not prevent a party suing executors from testifying that he had lost a note owned by him, and purporting to be executed by the deceased.—Choate v. Huff (App.) 18 S. W. 87.

[n] (Tex. 1894) Evidence of the contents of a lost deed, executed by an intestate, is not evidence relating "to any transaction with or statement by" the intestate, within the meaning of Rev. St. art. 2248, prohibiting the giving of such evidence by a party to an action by or against the legal representative of a decedent.—Howard v. Galbraith (Civ. App.) 30 S. W. 689.

[o] (W. Va. 1886) After the death of the parties to an agreement for the sale of land, an heir of one of them is incompetent, under Amended Code, c. 130, § 23, to prove that said agreement has been lost, and that, when it was entered into, it was read in his presence, and he thus obtained a knowledge of its contents, and that by it B. agreed to convey the lot to A., and that B. frequently admitted to him that he (B.) held this lot in trust for A.—Robinson v. James, 29 W. Va. 224, 11 S. E. 920.

§ 685. Proof of handwriting.

[a] (Ala. 1868) The distributees of an estate cannot testify as to the genuineness of the signature of the intestate to a note payable to his personal representative, and claimed by

the latter as a credit on a final settlement of his administration, in which proceeding the distributees are opposing parties, when not called by the administrator.—Kirksey v. Kirksey, 41 Ala. 626.

[b] (Fla. 1886) Under the statute providing that no party to an action or person interested in the event thereof shall be examined as a witness in regard to "any transaction" between him and a person then deceased, plaintiff in replevin to recover property which he claims under a bill of sale from the deceased cannot testify as to whether the signature to the bill of sale is in the handwriting of deceased.—Holliday v. McKinne, 22 Fla. 153.

[c] (Ga. 1878) Where the question at issue was whether a deceased person had died seised of certain land or had passed the title to complainant, and letters, which purported to be in the handwriting of complainant, to the deceased, containing admissions derogatory to complainant's title, were offered in evidence, *held*, that complainant was not a competent witness to prove that the letters were not genuine.—Ford v. Holmes, 61 Ga. 419.

[d] (Ga. 1895) In an action by the vendee of the grantee to establish a lost deed executed by several makers, wherein the surviving maker and the heirs of the deceased makers were made defendants, and denied the execution of the deed, the grantee could not testify to the genuineness of the signatures of the deceased makers.—Neely v. Carter, 96 Ga. 197, 23 S. E. 813.

[e] (Ind. 1893) Under Rev. St. § 498, providing that in suits in which an administrator is a party, involving matters which occurred during decedent's lifetime, a party to the issue, whose interest is adverse to the estate, cannot testify as to such matters against such estate, where a judgment may be rendered for or against the estate, a defendant in an action on a note by an administrator, who sets up payment as a defense, and introduces a receipt purporting to be signed by decedent, is not competent to prove that the signature was genuine, and therefore cannot testify that the handwriting in a letter shown him was the genuine handwriting of decedent.—Merritt v. Straw, 6 Ind. App. 360, 33 N. E. 657.

[f] (Iowa, 1891) In an action against an executrix, evidence of a person familiar with the handwriting of deceased that, in his opinion, a certain letter and contract were signed by the deceased, though he did not see him sign them, is not incompetent, under Code 1873, § 3639, as being testimony as to a transaction with a deceased person.—Sankey v. Cook, 82 Iowa, 125, 47 N. W. 1077.

[g] (Mass. 1861) In an action by the indorsee against the executors of the maker of a note, the payee, who is interested as indorsee in the result of the suit, and his wife, are both competent witnesses to prove the genuineness of the maker's signature.—Bigelow v. Heyer, 85 Mass. (3 Allen) 243.

[h] (N. Y. 1890) In an action against a devisee to recover plaintiff's share of the profits, according to an agreement between plaintiff and the testator, of certain lands purchased in testator's name, and by him devised to defendant, it is not in violation of Code Civ. Proc. § 829, for plaintiff to testify that a certain letter was in testator's handwriting; that he found it on his desk; that it was in an envelope directed to him in testator's handwriting.—Wing v. Bliss, 55 Hun, 603, 8 N. Y. Supp. 500.

[i] (N. Y. 1892) In an action to declare a deed made by plaintiff's ancestor a mortgage, it appeared that defendant introduced in evidence various letters written by himself to deceased, touching the matters in issue. Defendant was administrator of deceased, and testified that he found the letters among deceased's papers, and that they were genuine. *Held*, that defendant was incompetent as a witness to such facts, under Code Civ. Proc. § 829.—Van Vechten v. Van Vechten, 65 Hun, 215, 20 N. Y. Supp. 140.

[j] (N. C. 1870) Under Code Civ. Proc. § 343, forbidding a party to be examined in his own behalf as to a transaction or communication between himself and a person deceased, plaintiff in a suit against an administrator was incompetent to prove that defendant's decedent actually signed a certain paper, though he was competent to prove the handwriting.—People v. Maxwell, 64 N. C. 313.

[k] (N. C. 1884) One interested in the event of a suit is not an incompetent witness to prove the handwriting of one deceased, such testimony not concerning a "personal transaction" with the deceased.—Rush v. Steed, 91 N. C. 226.

[l] (N. C. 1893) In an action by a husband, after the death of the wife, to set aside a conveyance made by her, he is a competent witness to prove that the signature to a letter, in which she promised to marry him, was in her handwriting, since it was not a "transaction" with a deceased person, within Code, § 590.—Ferebee v. Pritchard, 112 N. C. 83, 16 S. E. 903.

[m] (N. C. 1893) Code, § 590, declares that on the trial of an action a party interested shall not be examined as a witness in his own behalf against the administrator of a deceased person, concerning a personal transaction with deceased. *Held*, that plaintiff in an action against an administrator may testify that a contract on which plaintiff relies, and the signature of deceased thereto, are in deceased's handwriting, but not that he saw deceased sign the contract.—Sawyer v. Grandy, 113 N. C. 42, 18 S. E. 79.

[n] (Pa. 1873) An interested witness is incompetent to prove the handwriting of a deceased party.—In re Truitt's Estate, 10 Phila. 16.

[o] (Tex. 1894) Under Rev. St. art. 2248, excluding testimony of either party as to any "transaction with or statement by" the testator in an action against the executors, etc., the proponents of a holographic will are not rendered incompetent witnesses as to whether the will is in the testator's handwriting.—Martin v. McAdams, 87 Tex. 225, 27 S. W. 255.

[p] (Wis. 1870) Evidence by a party that a letter received by him from plaintiff's testator before his death was genuine, such evidence being founded on knowledge and familiarity with testator's handwriting, derived from long correspondence and familiarity, is admissible; it not being a transaction or communication had personally with deceased, testimony of which is forbidden under Laws 1868, c. 176.—Daniels v. Foster, 26 Wis. 686.

§ 686. Letters and contents thereof.

[a] (Colo. 1894) Under Gen. St. 1883, § 3641, which provides that no party shall testify, of his own motion, where the adverse party defends as heir, a woman who sues the children of her deceased husband to establish a trust in her favor is not competent to testify that certain letters written by the decedent were received by her in due course of mail, where such letters contain admissions confirmatory of her claim.—Carpenter v. Ware, 4 Colo. App. 458, 36 Pac. 298.

[b] (Md. 1891) Under Rev. Code 1878, art. 70, § 2, which provides that "when an original party to a contract or cause of action is dead, * * * or when an executor or administrator is a party to the suit, action, or other proceedings, either party may be called as a witness by his opponent, but shall not be admitted to

testify on his own offer, or upon the call of his coplaintiff or codefendant, otherwise than now by law allowed, unless a nominal party merely," a plaintiff cannot testify on his own call as to the contents of a letter written by himself to the deceased, although notice had been given to the administrator to produce the original on the trial.—Webster v. Le Compte, 74 Md. 249, 22 Atl. 232.

[c] (Neb. 1896) An interested party is prevented from testifying, over the objections of the representative of decedent, to the receipt by him of a letter, written by such decedent, making a gift of his property, and to the contents thereof, since such letter constitutes a "transaction," within Code Civ. Proc. § 329.—Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

[d] (N. Y. 1870) In an action against the writer of letters which contain statements of the amounts of funds therewith or previously sent to the person addressed, brought by the administrators of such person, defendant is an incompetent witness, under Code Proc. § 399, to prove that the letters were written, or that they were received and retained without objection or reply. Such testimony relates both to a "transaction" and a "communication" between the person testifying and a deceased person, whose claims against such party were the subject of the litigation.—Resseguie v. Mason, 58 Barb. 89.

[e] (N. Y. 1889) Testimony of the widow of a testator as to the contents of letters written by her to a contestant of the will at the instance of the testator is admissible.—In re Budlong, 54 Hun, 131, 7 N. Y. Supp. 289, 18 Civ. Proc. R. 18.

[f] (Wis. 1870) Evidence of the receipt of a letter, containing declarations by plaintiff's testator, importing a satisfaction of a mortgage in issue, is admissible, since such evidence could not have been directly contradicted by testator had he been alive, and is not within the terms of Laws 1868, c. 176, forbidding the examination of a party in his own behalf in regard to a transaction had personally with deceased as against the executor or administrator of deceased.—Daniels v. Foster, 26 Wis. 686.

§ 687. Statements and books of account.

[a] (Ala. 1873) In an action to recover for medical services of a deceased physician, after the correctness of the entries in his books have been denied on oath, under Rev. Code, § 2700, and excluded, defendant has no right to testify in his own behalf which entries are and which are not correct, because Rev. Code, § 2704, makes him incompetent to testify as to transactions with the deceased unless called to testify thereto by the plaintiff.—Weaver v. Morgan's Ex'rs, 49 Ala. 142.

[b] (Ala. 1880) Under Code, § 3058, in assumpsit by the administrator of the deceased seller to recover of the buyer the price of goods, the buyer cannot read in evidence original entries made in his own books in the course of trade, showing payment to the seller.—Dismukes v. Tolson, 67 Ala. 386.

[c] (Ark. 1877) Plaintiff cannot prove by his own testimony the correctness of his account founded on or embodying transactions between him and a deceased person.—Miller v. Jones, 32 Ark. 337.

[d] (Fla. 1892) In suits against the estates of deceased persons, a party in interest is not prohibited by the provisions of Acts 1874, c. 1983 (Rev. St. § 1095), which excludes testimony against the estates of deceased persons from accompanying the offer of books of original entry in evidence with a suppletory oath that the books so offered are the books of original entry of the contemporaneous transactions therein set down of the party in whose behalf they are offered.—Lewis v. Meginniss, 30 Fla. 419, 12 South. 19.

[e] (Ga. 1874) A party to an action against an administrator is a competent witness to identify a book of accounts, sought to be introduced by him as his book of original entries.—Strickland v. Wynn, 51 Ga. 600.

[f] (Iowa, 1872) A book of accounts was offered in evidence containing on the debit side of the account the entries, "By cash," and "To cash." *Held*, that the party offering the book could not explain that the word "by" was used by him in the sense of "to," the opposite party being an executor.—Cummins v. Hull's Adm'r, 35 Iowa, 253.

[g] (Iowa, 1894) Code 1873, § 3639, providing that no party can be examined as to any personal transaction between him and a person at the time of such examination deceased, does not prevent an examination of such party as to facts required to be shown preliminary to his introduction of a book of account to establish a claim against a decedent's estate.—Dysart v. Furrow, 90 Iowa, 59, 57 N. W. 644.

[h] (Me. 1881) In suit for labor and services against the estate of a deceased person, unless the entries in plaintiff's books of account are intelligible in themselves as setting forth in substance the facts constituting a right of action in his favor against deceased, the explanation of such entries must come from witnesses other than himself. He cannot testify that charges which apparently represent services rendered for third persons, or which do not indicate that they were rendered to deceased, were in fact so rendered.—Silver v. Worcester, 72 Me. 322.

[i] (Mo. 1889) Under Rev. St. § 4010, relating to transactions with decedents, in an action on account against a decedent's estate, plaintiff is a competent witness in his own favor so far as to prove in whose handwriting his charges are, and when made.—Jesse v. Davis, 34 Mo. App. 351.

[j] (N. H. 1880) The statutes permitting parties to testify did not repeal the common-law rule that in equity the surviving party can testify to matters of account in the discretion of the master, subject to revision by the chancellor.—Peirce v. Burroughs, 59 N. H. 512.

[k] (N. H. 1884) The statute excluding the testimony of a party when the other party is an administrator applies as well when the matter in controversy is an account as in other cases; and it applies in the case of a claim against a partnership prosecuted against the estate of a deceased partner, and concerning which the surviving partner has testified.—English v. Porter, 63 N. H. 206.

[l] (N. Y. 1891) In an action against an executrix for the price of goods furnished her testator, plaintiff introduced in evidence a memorandum book, purporting to contain a statement of the goods furnished. *Held*, that testimony of plaintiff that testator, in plaintiff's presence, directed one F. to make the entries, and that F. then made the entries, and read them aloud to testator, shows a transaction between plaintiff and decedent, within Code Civ. Proc. § 829.—Herrington v. Winn, 60 Hun, 235, 14 N. Y. Supp. 612, 20 Civ. Proc. R. 326.

[m] (N. C. 1874) The restrictions contained in Code Proc. § 393, in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, do not prevent his being permitted to testify under the book-debt law.—Leggett v. Glover, 71 N. C. 211.

[n] (Pa. 1891) A witness, though a party and interested, is nevertheless competent to prove

book entries made by a decedent, in a suit by his administrator against the administrator of another decedent.—Keener v. Zartman, 144 Pa. 179, 22 Atl. 889.

[o] (R. I. 1893) In an action for goods sold, plaintiff may testify as to the identity of his books of account, though the other party to the cause of action is dead; such case not being within Pub. St. c. 214, § 33, relating to transactions with decedents.—Cargill v. Atwood, 18 R. I. 303, 27 Atl. 214.

[p] (S. C. 1894) Plaintiff could testify that he made out the account sued on, and sent it to deceased.—Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291.

[q] (Tex. 1890) Rev. St. 1879, art. 2266, provides that, in an action on an account supported by affidavit, the account shall be taken as prima facie evidence of its correctness, unless defendant files a denial under oath. *Held* that, in a suit against an administrator on an account against his intestate, such account is not evidence, though sworn to by plaintiff, for Rev. St. 1879, art. 2248, provides that, in an action by or against an administrator, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the intestate.—Leverett v. Wherry (Sup.) 15 S. W. 121.

[r] (Vt. 1865) Under the statutes, a party has the same right to testify in his own favor, the opposite party being dead or insane, in actions of book account, and where the matter at issue and on trial is proper matter of book account, as in other actions, and in addition the right to testify to the handwriting of his charges, and when made, notwithstanding the proviso that in actions of the character of book account "the party living may be a witness in his own favor as far as to prove in whose handwriting his charges are, and when made, and no further."—Thrall v. Seward, 37 Vt. 573.

[s] (Vt. 1868) In an action of book account, brought after the death of plaintiff's wife, who was defendant's daughter, defendant's account contained three items of clothing, bought for her by him before her marriage with the understanding that she was to pay for them, the issue being upon an alleged parol promise of plaintiff, made to defendant after the marriage, to pay him therefor. *Held*, that defendant was a competent witness; his daughter's agreement, however material, was not in issue.—Cole v. Shurtleff, 41 Vt. 311, 98 Am. Dec. 587.

[t] (Vt. 1868) Under Gen. St. c. 36, § 24, providing that a surviving party may testify "so far as to prove in whose handwriting his charges are, and when made, and no further," such a party, in an action of book account, is not a competent witness to testify generally in relation to the items of his account. When he may testify further than to prove the handwriting and date, it is because the subject-matter of his action comes within the cases excepted in the first proviso, "acts since the probate," etc. The statute means the same as if these cases were also inserted in the second proviso.—Hunter v. Kittredge's Estate, 41 Vt. 359.

[u] (Vt. 1869) Money delivered in payment of part of a debt is not a proper subject of book charge, and does not create a right of action in any form, but only a set-off or defense. Hence the delivery cannot (under the laws regulating the testimony of parties) be proved by the testimony of the debtor, after the death of the creditor.—Jewett v. Winship, 42 Vt. 204.

[v] (Vt. 1893) R. L. § 1002, forbidding the surviving party to a contract to testify thereof in his own favor, is not abridged by section 1004, permitting, in actions of book account, the party living to testify for himself as to the handwriting and date of the charges, so far as to admit a nephew's statement of account against his deceased uncle, of dealings extending over the 15 years they had lived together, up to the uncle's death, in connection with the nephew's testimony that no books of account had been kept between them, and that the statement was drawn by his attorney, under his direction and from his memory, after letters granted on his uncle's estate.—Wyman v. Wilcox's Estate, 66 Vt. 26, 28 Atl. 321.

[w] (Wash. 1896) In an action against an administrator for a balance due for services rendered by plaintiff for deceased, the account book of plaintiff is not inadmissible on the ground that it is in effect permitting plaintiff to testify to a transaction with deceased.—Ah How v. Furth, 13 Wash. 550, 43 Pac. 639.

§ 688. Bonds and assignment thereof.

[a] (N. Y. 1880) In an action by H. to recover possession of two town bonds from one who claimed to own them as the assignee of F., with whom H. claimed that he (H.) had deposited them for safe-keeping, but that F. had thereafter inserted his name in a blank therein, *held*, that H. might properly be asked whether F.'s name was on the bonds when H. left them in the safe; the physical condition of the bonds was wholly independent of any personal transaction between the witness and the deceased person, within Code, § 829.—Hill v. Heermans, 22 Hun, 455.

[b] (N. Y. 1881) In an action of replevin to recover possession of two town bonds, plaintiff testified that the bonds had been taken from among his private papers by defendant, who claimed them as the assignee of a third party, who had died prior to the trial. The bonds were introduced in evidence, bearing the indorsement of the third party named. *Held*, that it was competent for plaintiff to testify in his own behalf whether the name of such indorser appeared anywhere in the bonds at the time they were placed by plaintiff among his private papers; and that such testimony did not necessarily involve a transaction between defendant and the deceased indorser.—Wadsworth v. Heermans, 85 N. Y. 639.

[c] (N. Y. 1883) A. sued B.'s executor upon a bond given by B. to A. The defense was that the bond had been altered after execution. A. proposed to testify that he did not see the bond signed, but that he saw it in the hands of his attorney shortly before its execution, and that it then contained the clause contended by defendant to have been inserted after execution. *Held*, that this testimony was incompetent under Code, § 829, as relating to a personal transaction with the deceased.—Pease v. Barnett, 30 Hun, 525.

[d] (N. C. 1870) Code Civ. Proc. § 343, providing that a party cannot testify as to a transaction between him and a person deceased, does not exclude his testimony that a bond given to the decedent was in blank as to the amount, or as to the name of the obligee, and was filled up afterwards without his authority.—Isenhour v. Isenhour, 64 N. C. 640; Brower v. Hughes, Id. 642.

[e] (N. C. 1876) A. executed a bond to B., who assigned it to C., by making his mark. C. indorsed the bond to D. The assignment by B. was attested by E. Upon the death of B., E. was appointed his administrator. In an action brought against E. to recover on said bond, *held*, that E. was not a competent witness to prove the assignment by B. to C., and that C. was not a competent witness to prove that E. signed his name as attesting witness to the assignment, since the testimony related to transactions with deceased.—Ballard v. Ballard, 75 N. C. 190.

§ 689. Bills and notes.

[a] (Ala. 1877) In an action against the payee's administrator, on a note executed by deceased

to plaintiff, and to recover the balance due on an account between plaintiff and deceased, it became a material inquiry how much were the several interests of the plaintiff and deceased in a note payable to them by third persons, which defendant, by way of set-off, claimed plaintiff had collected, and to what extent each had made collections. *Held* that, under Code, § 3058, which prohibited plaintiff from giving evidence involving "any transactions with, or statements by," deceased, he was a competent witness to prove the consideration of the latter note, who owned the property which constituted the consideration, and its value, but not as to any understanding between them by which the note was made payable to both, or by which deceased was to take certain property turned over by the makers of the note.—Tisdale v. Maxwell, 58 Ala. 40.

[b] (Ark. 1875) Plaintiff in an action on a note brought against the administrator of the maker, who denies the execution on the ground of a material alteration, should not be allowed to testify that the maker executed it just as it appears on the trial, for this relates to a transaction with the decedent.—Gist v. Gans, 30 Ark. 285.

[c] (Colo. 1893) In an action by an executor on a note, the maker is incompetent to testify as to the transactions out of which the note was given, under Gen. St. § 3641, relating to evidence as to transactions with decedents.—Jones v. Henshall, 3 Colo. App. 448, 34 Pac. 254.

[d] (Ind. 1867) In a suit on a note, defendant offered to testify to transactions between himself and the ancestor of plaintiff, for the purpose of showing that the note in suit was given to plaintiff, as one of the heirs of said ancestor, for plaintiff's interest in said ancestor's real estate, which defendant had purchased, and for which he executed the note in suit; and that he ought not to have given the note, because the ancestor was indebted to defendant by reason of transactions occurring between defendant and said ancestor during the lifetime of the latter. *Held*, that the evidence was not competent under the second proviso of the act of March 11, 1867 (3 Supp. Rev. St. p. 561).—Skillen v. Skillen, 41 Ind. 260.

[e] (Iowa, 1885) In an action by an administrator on a note given to his intestate, testimony by defendant regarding the date of the note is not a transaction with decedent, and, as such, inadmissible, under Code 1873, § 3639; for it merely refers to the date on which the transaction occurred.—Barlow v. Buckingham, 68 Iowa, 169, 26 N. W. 58.

[f] (Iowa, 1887) Code 1873, § 3639, provides that "no party to an action, * * * nor any husband or wife of any said party, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person * * * deceased," against the administrator of such deceased person, etc. *Held*, that the execution of a note is a "personal transaction" between the persons executing it and the payee, and that the wife of a joint maker is incompetent to testify, in an action on the note by the administrator of the payee, that her husband signed it only as surety.—Auchampauch v. Schmidt, 72 Iowa, 656, 34 N. W. 460.

[g] (Iowa, 1891) In a suit by an administrator, defendant pleaded payment, and offered in evidence certain checks drawn by him on a bank, and payable to plaintiff's intestate or bearer. *Held*, that it was competent for defendant to testify that he did not deliver any of the checks to any person other than plaintiff's intestate.—McElhenney v. Hendricks, 82 Iowa, 657, 48 N. W. 1056.

[h] (Iowa, 1893) Code 1873, § 3639, provides that no person interested in the event of an action "shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, * * * against the next of kin, of such deceased person." *Held*, that in an action by a bank on a note to which defendant's name was signed by his wife, who also signed it, but who died before the action was commenced, the owner of such bank was not competent to testify to transactions and communications between him and deceased relating to the note.—Campbell Banking Co. v. Cole, 89 Iowa, 211, 56 N. W. 441.

[i] (Iowa, 1894) Plaintiff's testimony that she has been the owner of a note since it was signed, to rebut the effect of its being payable to another, is not objectionable as involving a transaction with a decedent, because given by a widow in renewal of one given by her deceased husband.—French v. French, 91 Iowa, 140, 59 N. W. 21.

[j] (Iowa, 1894) Under Code 1873, § 3639, prohibiting a party to a proceeding against an administrator from testifying as to personal transactions between himself and deceased, unless the testimony of such deceased person shall be given in evidence, plaintiff, in an action for services rendered a deceased person, cannot testify for what purpose a check was given him by deceased, where the check is indorsed by him, and recites the purpose for which it was given.—In re Brown's Estate, 92 Iowa, 379, 60 N. W. 659; Cole v. Marsh, Id.

[k] (Iowa, 1894) In an action against an administrator for services rendered deceased, plaintiff cannot testify that words written on a check given by deceased, and indorsed by him, were not there at the time the check was delivered to him, it being in regard to a personal transaction with a deceased person, and prohibited by Code 1873, § 3639.—In re Brown's Estate, 92 Iowa, 379, 60 N. W. 659; Cole v. Marsh, Id.

[l] (Kan. 1888) Where the original payee of a note brings an action thereon against the administratrix of the maker, he is incompetent to testify that he saw the maker sign it, when the execution of the same was a part of a trade between the maker and himself; but when the execution of the note is established fully by other and competent evidence, the error in permitting plaintiff to testify is not reversible.—Bryant v. Stainbrook, 40 Kan. 356, 19 Pac. 917.

[m] (Ky. 1896) In an action on a note given by defendant to decedent, defendant cannot testify as to transactions between him and decedent, except as to such as other witnesses have testified to.—Allensworth v. Lowdermilk, 35 S. W. 1030.

[n] (N. Y. 1869) Plaintiff, in an action against an executrix, cannot be allowed to testify as to notes, made by the deceased, to the order of and indorsed by plaintiff, and which were transactions had personally between them.—Strong v. Dean, 55 Barb. 337.

[o] (N. Y. 1885) In an action on a note, purporting to be made by defendant to A.'s order, and by A. indorsed to plaintiff, defendant set up forgery of his signature. *Held*, that defendant might answer the question, "Is the signature to the note your signature?" notwithstanding A.'s decease.—Saratoga County Bank v. Leach, 37 Hun, 336.

[p] (N. Y. 1892) It appearing in an action against G., as indorser of a note, that it was made payable to him by P., and that it was one of several given by P., G., and others, in payment for certain rights purchased of H., who was dead, G. was incompetent, under Code Civ. Proc. § 829, prohibiting the examination of a party as to transactions with decedents, to explain why it was that the note was made pay-

able to himself.—Sallade v. Gerlach, 132 N. Y. 548, 30 N. E. 372, affirming (1889) 54 Hun, 635, 7 N. Y. Supp. 181, 17 Civ. Proc. R. 420.

[q] (Pa. 1885) Where the note in suit is in the same condition at the trial as at the death of the assignor, the assignee cannot testify that it is now partly in pencil.—Foster v. Collner, 107 Pa. 305.

[r] (Tenn. 1892) In an action against the makers of a note found among the papers of the deceased payee, one of the makers is incompetent to testify that he received a letter, which he had lost, from the payee, in the latter's lifetime, authorizing a renewal of the note sued on, and promising to return such note as satisfied, on receipt of the renewal note; that the renewal note was executed and delivered to the payee; and that he failed to return the note in suit, as promised—since such testimony includes both a "transaction with" and a "statement by" the deceased, within Mill. & V. Code, § 4565, which prohibits a party sued by the personal representative of a decedent from testifying as to any "transaction with or statement by deceased."—Montague v. Thomason, 91 Tenn. (7 Pickle) 168, 18 S. W. 264.

[s] (Wis. 1877) In an action by executors upon a note alleged to have been executed and delivered by defendants to plaintiff's testator, and in which he is named as payee, but which defendants allege to have been altered after execution, one of the defendants, as a witness for the defense, might properly be asked when and with what ink he signed the note; whether he struck out words in the printed form which appeared to have been stricken out; and other questions which did not call for any transaction or communication had by defendants with such testator personally.—Page v. Danaher, 43 Wis. 221.

[t] (Wis. 1878) In an action by administrators for the conversion of notes belonging to their decedent and payable to bearer, a witness for the defense may be asked to state the facts and circumstances under which he obtained possession of the notes, this not being within the statutory proviso as to testimony relating to any conversation or transaction with a party deceased.—Adams v. Allen, 44 Wis. 93.

§ 690. —— Testimony as to having seen note.

[a] (N. Y. 1874) In an action by an executor upon a note given by defendant to testator, the defense was that the note had been given by the testator before death to defendant's wife, and a new note had, at testator's request, been given therefor by defendant to his wife. At the trial defendant testified that he had seen the note in his wife's possession. *Held* not a personal transaction between defendant and testator, and not inadmissible under Code, § 399.—Smith v. Sergent, 67 Barb. 243, 4 Thomp. & C. 684.

[b] (N. Y. 1887) In an action on a note against the executor of the maker, testimony of the payee that he had seen the note is not within Code Civ. Proc. § 829, prohibiting testimony by parties as to a personal transaction or communication with one since deceased.—Redfield v. Stitt, 10 N. Y. St. Rep. 866.

[c] (N. Y. 1889) In an action on notes by plaintiff as surviving partner of one P., the notes were not produced, but it was shown that P. had taken them from the custody of the firm, and that they were in defendant's possession after P.'s death. The wife of defendant testified that, in consideration of the transfer by defendant to P. of certain property, the latter had delivered up the notes in suit, and that defendant had given them into her possession. *Held*, that the testimony of defendant that he had seen such notes in the possession of his wife prior to the death of P. was evidence concerning a personal transaction between the witness and P., and inadmissible as against plaintiff, under Code Civ. Proc. § 829.—Clift v. Moses, 112 N. Y. 426, 20 N. E. 392.

§ 691. —— Consideration.

[a] (Ky. 1889) Plaintiff, in a suit on a note against administrators of the maker, cannot testify as to the consideration.—Andrews v. Hayden's Adm'rs, 88 Ky. 455, 11 S. W. 428.

[b] (Ky. 1892) Under Civ. Code, § 606, subsec. 2, which provides that no person shall testify for himself concerning any verbal statement of, transaction with, or act done or omitted to be done by, one who is dead when the testimony is offered, the maker of a note, when sued by an indorsee, cannot, in support of his plea of no consideration, testify as to what took place between himself and the deceased payee concerning the execution and consideration of the note, though the indorsee has lost all recourse against the payee's estate, and it will not be affected by the determination of the action; the intention of the legislature being to prevent a party in all cases from testifying as to what was said or done by a decedent, whose version cannot be ascertained, concerning the issue to be tried.—Hurry v. Kline, 93 Ky. 358, 20 S. W. 277.

[c] (Mich. 1885) The maker of a note is not a competent witness in an action thereon by the executor of the payee to prove want of consideration.—Stewart v. Shaw, 55 Mich. 613, 22 N. W. 63.

[d] (Miss. 1894) Under Code 1892, § 1740, relating to transactions with decedents, the maker of a note sued by the administrators of a deceased assignee of the note cannot testify that it was without consideration and procured by fraud.—Wetherbee v. Roots, 72 Miss. 355, 16 South. 902.

[e] (Wis. 1896) Under Rev. St. § 4069 (providing that no person shall testify as to transactions with a decedent in an action in which the adverse party claims under the deceased, unless the adverse party first testifies to the same), it was error, in an action against an executor on a duebill, to allow plaintiff, in the first instance, to testify that a note of the deceased husband of the testatrix was delivered as a consideration for the duebill.—Campion v. Schinnick, 93 Wis. 111, 67 N. W. 11.

§ 692. —— Indorsement.

[a] (N. Y. 1884) In an action by the second indorser against the administrator of the maker of the note and the first indorser, testimony of the first indorser that he was an accommodation indorser is testimony relating to a personal transaction with one deceased.—Kelly v. Burroughs, 33 Hun, 349.

[b] (N. Y. 1892) In an action to declare a deed made by plaintiff's ancestor a mortgage, defendant introduced in evidence an indorsement on a note which was in defendant's handwriting, and made prior to the death of deceased. *Held*, that such indorsement was inadmissible, since it was a declaration by defendant in his own favor, and a transaction between him and deceased.—Van Vechten v. Van Vechten, 65 Hun, 215, 20 N. Y. Supp. 140.

[c] (W. Va. 1892) Where a note made to L. bears the indorsement of L.'s name first and then Q.'s name, thus importing that L. is first liable thereon, L., after Q.'s death, cannot, as against his estate, testify as to a personal transaction with Q., to show that in fact the latter became bound as joint guarantor for, or promisor with, the maker, as he is an incompetent witness, under Code, c. 130, § 23, relating to evidence of transactions with decedents.—Quarrier's Adm'r v. Quarrier's Heirs, 36 W. Va. 310, 15 S. E. 154.

[d] (Wis. 1896) In an action on a note, which was made by G. and indorsed by K., who has since died, the testimony of the maker and of the payee that K.'s indorsement was on the note when delivered to the payee, is not within Rev. St. § 4069, as in respect to a transaction had "personally" with a deceased person.—Sawyer v. Choate, 92 Wis. 533, 66 N. W. 689.

[e] (Wis. 1896) A letter, written by K. to the maker, instructing him "to raise the money, and he would be here the first of the week to indorse paper," etc., is not a transaction had personally with K.—Sawyer v. Choate, 92 Wis. 533, 66 N. W. 689.

[f] (Wis. 1896) The testimony of the payee, that he furnished the money on the credit of the maker and K., does not show a previous arrangement with K., or that the arrangement, if any, was with K. personally.—Sawyer v. Choate, 92 Wis. 533, 66 N. W. 689.

§ 693. Deeds.

[a] (Iowa, 1883) In an action to set aside a deed, the grantor's widow cannot testify that her husband told her it only included a certain number of acres, the statement of the husband being a "personal communication" under Code 1873, § 3639.—Palmer v. Palmer, 62 Iowa, 204, 17 N. W. 463.

[b] (Mo. 1880) Heirs of a grantee in a deed, who have become plaintiffs in a suit against the legal representatives of the grantor, are not rendered incompetent to testify to the fact of the execution of the deed, by reason of the grantor's death.—Martin v. Jones, 72 Mo. 23.

[c] (N. Y. 1880) M., being in his last sickness, executed and delivered to A. a deed of his farm, which was substantially his property, upon A.'s verbal agreement to hold the farm as a home for the family, consisting of 12 children besides A., who alone was of age, and to divide the farm or its proceeds among them when the youngest should come of age. After M.'s death, which occurred 10 days afterwards, the family continued to occupy the farm, paying the taxes, and the interest on a mortgage thereon, and making permanent improvements. A. never agreed to pay any consideration, never paid any, was never in possession of any of the farm, and never received any of the rent or profits thereof. *Held*, in an action by one of the children against A. to compel him to convey to them their respective shares of the farm, that under Code, § 829, A.'s testimony as to what took place in the sickroom upon the delivery of the deed was inadmissible.—Moyer v. Moyer, 21 Hun, 67.

[d] (N. Y. 1881) A wife, joining in a deed with her husband, since deceased, relying on his representations that it was a trust deed, is a competent witness to testify as to these representations.—Wittha's v. Schack, 24 Hun, 328.

[e] (N. Y. 1887) In a suit to set aside a deed as obtained through fraud and undue influence by a brother from his sister, now deceased, a question as to how long the deed had been in defendant's possession is not inadmissible, as calling for evidence in relation to transactions with decedent, and in violation of Code Civ. Proc. § 829.—Spicer v. Spicer, 54 N. Y. Super. Ct. (22 Jones & S.) 280.

[f] (N. Y. 1888) Plaintiff purchased property intending that the deed should create a life estate in his wife with remainder to him in fee, but by a mistake the title was conveyed to the wife absolutely, and on her death plaintiff brought an action to reform the deed which had been delivered to him and had never been in possession of the wife. *Held*, that testimony by him as to what he did with the deed was concerning acts independent of his wife, and was competent.—Nichols v. Bennett, 15 N. Y. St. Rep. 306.

[g] (N. Y. 1888) Where, in an action to establish a deed given by defendant to her husband, since deceased, witnesses for plaintiff having testified that they had seen an alleged deed from defendant to her husband in a certain desk, testimony by defendant as to whether there ever was a deed in that desk from her to her husband was not testimony to a transaction with decedent, and therefore was not within the prohibition of Code, § 829.—Blaesi v. Blaesi, 14 Civ. Proc. R. 216, 15 N. Y. St. Rep. 672.

[h] (N. Y. 1888) Where the delivery of a deed is in issue, evidence by the grantee that he had been in possession of the deed since the year of its date, is not objectionable as referring to a transaction with decedent.—Strough v. Wilder, 49 Hun, 405, 3 N. Y. Supp. 567.

[i] (N. Y. 1890) The father of plaintiff and defendant made a deed to the latter, which, as plaintiff claims, included by mistake 15 acres owned and occupied by plaintiff. *Held*, that a question put to defendant, as to whether he had stated that, if the deed included the 15 acres, he would correct the mistake by the grantor, who had since died, called for a transaction with a decedent, within Code Civ. Proc. § 829.—Mills v. Mills, 55 Hun, 610, 8 N. Y. Supp. 811.

[j] (Pa. 1892) Where co-tenants allow their land to be sold under execution, and a third person, under agreement with them, purchases the land, and holds it in trust, and subsequently partitions off by deed a share to one of the co-tenants, the latter is incompetent, in ejectment against his tenant by persons claiming through the trustee after his death, to testify as to the amount of land intended to be conveyed by the partition deed to him.—Walton v. Hinnau, 146 Pa. 396, 23 Atl. 342.

[k] (Pa. 1893) Where the date of acknowledgment of a deed is within the lifetime of the grantee, the grantor and his wife are not competent, after the death of the grantee, to testify that the deed is a forgery.—Sutherland v. Ross (Com. Pl.) 3 Lack. Jur. 291.

[l] (Tex. 1889) The grantees in a deed, the common source of title, being dead, a party cannot testify that it was given in satisfaction of a partnership debt which, on a division of the firm assets, had been given to witness' father, who gave it to him, and that the deed was made by mistake to the firm, instead of to witness.—Glover v. Thomas, 75 Tex. 506, 12 S. W. 684.

[m] (Tex. 1890) Plaintiff, in an action against the heirs of his deceased grantor, under Rev. St. art. 4354, providing that "any person interested under any instrument in writing entitled to be proved for record" may sue to obtain a judgment proving such instrument, sought to prove for record an instrument purporting to have been executed by deceased, conveying certain lands to plaintiff. *Held*, that it was error to allow plaintiff to testify as to his reception of the instrument through the post office, with a certain post-mark, for the purpose of proving delivery thereof by the deceased grantor, since such delivery is a "transaction" with deceased, within the meaning of Rev. St. art. 2248, prohibiting a party to an action against the heirs of a deceased person from testifying as to any "transaction" with such decedent.—Howard v. Zimpelman (Sup.) 14 S. W. 59.

[n] (Wis. 1877) Although the grantees in a deed are not competent witnesses after the grantor's death to testify in their own behalf to any personal communication or transaction between them and the grantor under Tayl. St. p. 1600, § 174, and cannot testify to the delivery of the deed by deceased to them, nor state any conversation between them in relation thereto, yet they may testify to other facts

having a bearing upon the question of delivery, such as that the deed was in their possession or under their control from its date until it was placed on record by them.—Stewart v. Stewart, 41 Wis. 624.

§ 694. Mortgages and assignment thereof.

[a] (Ill. 1882) In a suit between a mortgagor's wife and the mortgagee's executor, the mortgagor and wife cannot testify as to the wife's acknowledgment of the mortgage.—Warrick v. Hull, 102 Ill. 280.

[b] (Iowa, 1890) Where the handwriting in a mortgage was illegible, the scrivener who wrote it was competent to explain the characters used, though the person for whom he wrote it was insane at the time of the trial.—Shoemake v. Smith, 80 Iowa, 655, 45 N. W. 744.

[c] (Minn. 1886) Gen. St. 1878, c. 73, § 8, excluding the testimony of parties to an action, and persons interested therein, as to conversations or admissions of a deceased party in regard to matters at issue, does not operate to exclude testimony by one not a party, nor interested, to show that the conditions of a mortgage given by plaintiff to deceased were different from those expressed in the instrument, and had been discharged, when such testimony is independent of any conversation had with deceased.—Harrington v. Samples, 36 Minn. 200, 30 N. W. 671.

[d] (N. Y. 1883) Where A., since deceased, has taken a mortgage from B., in a foreclosure suit B. cannot be asked, as a witness for himself, whether A. took any part in the signing of the mortgage; such a question relating to a personal transaction with one deceased.—Wilson v. Reynolds, 31 Hun, 46.

[e] (N. Y. 1886) In an action to set aside a judgment in a foreclosure obtained by the deceased, as assignee of the mortgagee, on the ground of fraud, the act of fraud complained of was the production in evidence of the assignment of the mortgage to plaintiff with an unauthorized alteration as to the date of the assignment and the date of the certificate of acknowledgment attached thereto. Plaintiff produced a writing in the form of an assignment of the mortgage, purporting to be executed by the deceased, and testified that he knew the signature. *Held*, that it was incompetent for him to testify as to whether he saw the instrument signed, as this involved a personal transaction between himself and the deceased.—Howell v. Manwaring, 3 N. Y. St. Rep. 454, affirmed (1890) 118 N. Y. 682, 23 N. E. 1147.

[f] (W. Va. 1898) One who makes a deed of trust to secure a creditor cannot testify that it was procured by false representation of the trustee, when both trustee and creditor are dead.—Paxton v. Paxton, 38 W. Va. 616, 18 S. E. 765.

§ 695. Execution and contents of will.

[a] (Ala. 1887) Under Code 1886, § 2765, providing that interest shall not render parties incompetent as witnesses in civil suits, "except that neither party shall testify against the other as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit or proceeding," etc., the proponent of a will, who is the sole devisee under it, is a competent witness as to the fact of its execution.—Snider v. Burks, 84 Ala. 53, 4 South. 225.

[b] (Fla. 1893) Laws 1874, c. 1983, § 1, forbidding certain interested persons to testify as to transactions with a party then deceased, does not prevent an executor and legatee from testifying in a will contest to the execution of the will.—Hays v. Ernest, 32 Fla. 18, 13 South. 451.

[c] (Iowa, 1886) The mere act of subscribing a will as witness by the husband of a devisee named in the will is not such a "personal transaction" or "communication" between the testator and the witness as to disqualify the witness, under Code 1873, § 3639, from testifying in proceedings to establish the will.—Bates v. Officer, 70 Iowa, 343, 30 N. W. 608.

[d] (N. Y. 1877) The acts of executing and publishing the will, and a request by the testator to a person present to subscribe as a witness, do not constitute a "communication or transaction" between the witness and the testator, under Code, § 399.—Reeve v. Crosby, 3 Redf. Sur. 74.

[e] (N. Y. 1884) In proceedings for the probate of a will, the executor, who was also a legatee, was permitted to testify to the contents of a former will, drawn by himself, and also that a memorandum produced was made by himself at the time of the interview with the testator which resulted in the making of such former will. *Held*, that this testimony was incompetent under Code Civ. Proc. § 829, as it concerned "a personal transaction or communication between the witness and the deceased."—In re Smith, 95 N. Y. 516.

[f] (N. Y. 1887) Where decedent gave directions as to her will to one of the principal beneficiaries thereunder, who repeated them to the scrivener, the beneficiary was not a competent witness to prove that after the will was drawn it was read over to the testatrix, as Code, § 829, expressly forbids testimony to transactions with a decedent, and the testimony is not permissible under section 2544, providing that a person is not disqualified or excused from testifying respecting the execution of a will by a provision therein, whether beneficial to him or not.—In re Hopkins, 6 N. Y. St. Rep. 390.

[g] (N. Y. 1889) Under Code Civ. Proc. § 829, a legatee is incompetent to testify as to circumstances preceding, attending, and following the execution of the will, such as the mental and physical condition of testator, his acts, conversations, and conduct, from which sanity or the due execution of the will may be inferred, in a contest grounded on the alleged want of due execution and testamentary capacity.—In re Eysaman's Will, 113 N. Y. 62, 20 N. E. 618, 3 L. R. A. 599.

12. TRANSACTIONS OR COMMUNICATIONS BETWEEN PERSON OTHER THAN WITNESS AND PERSON SUBSEQUENTLY DECEASED OR INCOMPETENT, AND BETWEEN WITNESS AND PERSON OTHER THAN DECEASED OR IN ANOTHER'S PRESENCE.

TRANSACTIONS OR COMMUNICATIONS BETWEEN PERSON OTHER THAN WITNESS AND PERSON SUBSEQUENTLY DECEASED OR INCOMPETENT, § 696.
—— INTEREST OF OR PARTICIPATION BY WITNESS OR HIS AGENT, § 697.
TRANSACTIONS OR COMMUNICATIONS BETWEEN WITNESS AND PERSON OTHER THAN DECEASED OR IN ANOTHER'S PRESENCE, § 698.
COMMUNICATIONS BETWEEN WITNESS AND THIRD PERSON SUBSEQUENTLY DECEASED, § 699.
TRANSACTIONS OR COMMUNICATIONS BETWEEN WITNESS AND OTHER PERSON IN PRESENCE OF PERSON SUBSEQUENTLY DECEASED, § 700.
TRANSACTIONS OR COMMUNICATIONS BETWEEN WITNESS AND AGENT OR TRUSTEE, § 701.

§ 696. Transactions or communications between person other than witness and person subsequently deceased or incompetent.

[a] The statutory provisions relating to testimony as to transactions or communications with a decedent do not apply where the transaction or communication was not between the witness and the deceased person, but was between the latter and a third party, and was not taken part in by the witness.
—(Kan. 1896) Fry v. Fry, 56 Kan. 291, 43 Pac. 235;
(Neb. 1896) Kroh v. Heins, 48 Neb. 691, 67 N. W. 771;
(N. Y. 1863) Simmons v. Sisson, 26 N. Y. 264; (1871) Sanford v. Sanford, 5 Lans. 486, 61 Barb. 293; (1877) Marsh v. Gilbert, 2 Redf. Sur. 465; (1889) Brown v. Klock, 52 Hun, 613, 5 N. Y. Supp. 245;
(S. C. 1878) Hughey v. Eichelberger, 11 S. C. 36.

[b] (Ala. 1877) Code 1876, § 3058, preventing testimony by a witness of agreements or conversations between himself and deceased, includes only parties to the transaction, and does not prohibit the testimony of a tenant's widow to prove, at the instance of the landlord, the contract between him and her husband, made in her presence.—Smith's Adm'r v. Bryant's Adm'r, 60 Ala. 235.

[c] (Ga. 1891) A witness not a party or interested in the issue can testify to a contract made in his hearing whereby defendant's mortgagee, since deceased, sold the mortgage to plaintiff.—Hooks v. Hays, 86 Ga. 797, 13 S. E. 134.

[d] (Ill. 1871) On the trial of a claim against an administrator, the husband of an heir at law of the deceased as well as the wife is a competent witness for the administrator to prove conversations and transactions between the claimant and the intestate which are relevant to the issue.—Freeman v. Freeman, 62 Ill. 189.

[e] (Ind. 1873) The widow of a testator is a competent witness to testify to conversations and statements made by her husband to others, in her presence, relating to transactions between her husband and such others.—Griffin v. Smith, 45 Ind. 366.

[f] (Ind. 1876) On the trial of an action against an administrator, for the enforcement of a claim against the estate represented by him, the widow of the decedent is a competent witness to testify to the making of a settlement of the matter in controversy by her husband and plaintiff, in her presence and hearing.—Denbo v. Wright, 53 Ind. 226.

[g] (Ind. 1878) In an action to enforce a claim against a decedent's estate, his widow is a competent witness, as to a material conversation had in her presence, between him and a third person.—Floyd v. Miller, 61 Ind. 224.

[h] (Iowa, 1875) In an action upon a note and mortgage by the assignee of decedent, the heir is not disqualified by Code 1873, § 3639, from testifying respecting a transaction between defendant and the deceased.—Sweezey v. Collins, 40 Iowa, 540.

[i] (Iowa, 1879) Under Code 1873, § 3639, providing that a wife of a party shall not be examined as a witness in regard to any personal transaction or communication between such witness and a deceased person, against the executor, etc., of such deceased person, a wife of a party is not incompetent to testify to what took place between her husband and the deceased.—Johnson v. Johnson, 52 Iowa, 586, 3 N. W. 661.

[j] (Iowa, 1880) In an action by an administratrix against the guardian of an insane person to recover for board furnished the lunatic, the administratrix, who was also the wife of her decedent, is not incompetent as a witness to prove the contract for board, entered into by the lunatic, when sane, and the decedent, under Code 1873, § 3639, providing that no party to an action, nor husband or wife of any such party, shall testify as to any personal transaction or communication between such witness and a person insane at the time of the examination, since the contract for board was not made with the witness, but with her deceased husband.—Lines v. Lines, 54 Iowa, 600, 7 N. W. 87.

[k] (Iowa, 1882) In an action to recover money alleged to belong to plaintiff's intestate, it appeared that T., one of the defendants, handed the money to decedent, who afterwards handed it to T.'s wife, the other defendant. *Held*, that what was then said by decedent and the wife of T. as to the money, and the consideration for which it was given to her, was not a personal transaction between T. and the decedent, within the statute, and that T. could testify thereto.—Mayes v. Turley, 60 Iowa, 407, 14 N. W. 731.

[l] (Iowa, 1885) A defendant in an action to contest the validity of a will may testify as to the acts and conduct of legatees named in the will towards the testator, as such evidence does not relate to a personal transaction between the witness and the deceased.—Parsons v. Parsons, 66 Iowa, 754, 21 N. W. 570, 24 N. W. 564.

[m] (Iowa, 1887) In an action to contest the probate of a will, evidence given by one defendant as to a conversation between a deceased testator and another defendant is not evidence of a transaction between witness and the deceased, and is not incompetent under Code 1873, § 3639, forbidding evidence of a transaction between the witness and a deceased person.—Smith v. James, 72 Iowa, 515, 34 N. W. 309.

[n] (Iowa, 1891) Code 1873, § 3639, provides that no person interested in the result of a proceeding shall be examined as a witness in regard to any transaction or communication between such witness and a person deceased at the commencement of such examination. *Held*, in a proceeding by a mother against the executors of her deceased son to recover a debt due from him to her deceased husband, that her daughter is a competent witness as to letters from the father to the son, concerning which she acquired a knowledge without any communication with her brother.—Gable v. Hainer, 83 Iowa, 457, 49 N. W. 1024.

[o] (Iowa, 1892) In a proceeding in the probate court by a firm of bankers to prove against an estate notes executed by the decedent to the bank, a member of the firm may testify that decedent owed a certain amount of money to the bank before the notes were executed, and as to transactions in relation to the notes, not between decedent and himself, but with third persons, since Code 1873, § 3639, makes a party in an action against the personal representative of a decedent incompetent to testify as a witness only in regard to a "personal" transaction or communication between such witness and the deceased person.—Farmers' & Traders' Bank v. Creveling, 84 Iowa, 677, 51 N. W. 178.

[p] (Iowa, 1896) Code 1873, § 3639, prohibiting the examination of any person interested in an action as to any communication or transaction had with a person then deceased, does not, in an action against a surviving husband (who has appropriated his wife's estate without administration) on a note of his wife, preclude plaintiff from testifying to a conversation in which plaintiff took no part, and in which defendant's wife stated that she wanted him to give plaintiff a home.—Leipird v. Stotler, 97 Iowa, 169, 66 N. W. 150.

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[q] (Iowa, 1896) Code 1873, § 3639, providing that no party to any action, and no husband or wife of any party, shall be examined as a witness in regard to any personal transaction between such witness and a person deceased, in an action against an administrator to recover back money paid in excess of the amount due on a note executed by the husband and wife, it was competent for the wife to testify that she was present when her husband paid money to the decedent, and that decedent directed her husband to indorse the payments on the notes, none of the money paid having belonged to her.—Erusha v. Tomash, 98 Iowa, 510, 67 N. W. 390.

[qq] (Mich. 1890) How. Ann. St. § 7545, providing that, in a suit to which a corporation is party, an opposite party cannot testify in his own behalf as to matters equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of its surviving officers or agents, does not prevent the opposite party from testifying as to an interview at which himself and others were present between two officers of the corporation, one of whom has since died.—Lyttle v. Chicago & W. M. Ry. Co., 84 Mich. 289, 47 N. W. 571.

[r] (Miss. 1860) The widow is a competent witness, on behalf of the estate of her deceased husband, to prove a conversation between her husband in his lifetime and the opposing party, in relation to the subject-matter of the suit.—Stuhlmuller v. Ewing, 39 Miss. 447.

[rr] (N. Y. 1867) In an action by heirs at law of an intestate's son, claiming specific performance of an oral agreement for the conveyance of land, against the devisees of the father, one of the defendants could testify in his own behalf as to a conversation between the father and son respecting the agreement by the father to give the son a deed of the property on performance of certain conditions; the conversation not being within the words of Code, § 399, forbidding a party to testify "to any transaction or communication had personally by such a party with the deceased."—Lobdell v. Lobdell, 36 N. Y. 327, 33 How. Prac. 347, reversing (1866) 32 How. Prac. 1.

[s] (N. Y. 1871) Code, § 399, does not prevent a party from testifying in an action in which the legal representatives of a deceased person are adverse parties, to a conversation between the deceased and a third person, also deceased, which was overheard by the witness.—Hildebrant v. Crawford, 6 Lans. 502.

[ss] (N. Y. 1880) Code, § 829, does not prohibit the next of kin of a decedent from testifying in an action by the administrator to set aside an assignment of a mortgage made by the intestate, as to sayings and doings of the latter which were without any inducement or participation on the part of the witness.—Holcomb v. Holcomb, 20 Hun, 156.

[t] (N. Y. 1882) In an action for dower against the sisters of deceased who denied plaintiff's marriage, after a witness for plaintiff testified that deceased stated to him that he was married, but it would not do to let defendants know it, and on cross-examination denied that in another conversation in the presence of one of defendants deceased stated he was not married, said defendant might testify as to what was then said; the subject of inquiry not being collateral to but bearing on the main issue, and such statement not being, within Code, § 829, a personal transaction between defendant and deceased.—Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263.

[tt] (N. Y. 1888) Defendant's intestate having been adjudged to be the father of a bastard, and required to contribute to its support, a conversation between him and plaintiff, constituting the agreement for its board and care, whereon the action is brought, in which neither the mother nor her legal adviser, though present, participated, is not a personal transaction between the mother and deceased, so as to render her incompetent to testify in regard to it, under Code Civ. Proc. § 829.—Connolly v. O'Connor, 49 Hun, 605, 1 N. Y. Supp. 489, judgment affirmed Connelly v. Same (1889) 117 N. Y. 91, 22 N. E. 753.

[u] (N. Y. 1889) Plaintiff in the contest of a will having testified, without objection, that she heard a conversation between the testator and one of the defendants, in which she took no part; that she could see them at the time, and hear what they said; and that they could have seen her if they had looked in the right direction—was permitted to testify that "they were talking about making a will. I heard [defendant] ask him how he was going to make it. I heard father say he wanted to give me my home there, and support, and [defendant] said, 'Give her some money.' I didn't hear any more." *Held*, that the testimony was not within the inhibition of Code Civ. Proc. § 829, relating to evidence of transactions with a decedent.—Petrie v. Petrie, 53 Hun, 638, 6 N. Y. Supp. 831, judgment affirmed (1891) 126 N. Y. 683, 27 N. E. 958.

[uu] (N. Y. 1891) An objection to testimony on the ground that conversations detailed by witnesses as occurring between a decedent and another, and in which such witnesses stated that they took no part, were really transactions between the decedent and the witnesses, and were prearranged so as to evade the statute, is not sufficient to justify the exclusion of such testimony, but goes to the credibility of the witnesses.—In re Brown, 59 Hun, 628, 14 N. Y. Supp. 122.

[v] (N. Y. 1895) The assignee of a claim against a decedent's estate may testify as to conversations between decedent and the assignor, in which the assignee took no part, concerning the claim, as Code Civ. Proc. § 829, prohibiting testimony as to communications with decedents in certain cases, applies only to communications between the witness and decedent.—In re Hartman's Estate (Sur.) 13 Misc. Rep. 486, 35 N. Y. Supp. 495.

[vv] (N. C. 1872) A ward who brings suit against his guardian's administrators, though not a competent witness to prove a transaction between himself and his deceased guardian, may testify as to transactions by his guardian with others involving a sale of the ward's property by the guardian.—Dobbins v. Osborne, 67 N. C. 259.

[w] (N. C. 1883) In an action against the estate of a deceased surety, the principal debtor can testify for defendant administrator as to what occurred in a transaction between plaintiff and deceased.—Kesler v. Mauney, 89 N. C. 369.

[ww] (N. C. 1888) The question being whether plaintiff's father had owned certain land, which he sold in order to buy the land in dispute, evidence of one of plaintiffs, that he saw a third person pay his father a sum of money for the land, was not objectionable under Code, § 590, forbidding testimony of transactions with decedents, as such evidence related to no personal transaction or communication, but only to what the witness saw.—McCall v. Wilson, 101 N. C. 598, 8 S. E. 225.

[x] (S. C. 1875) The declarations of a deceased person in reference to a transaction between him and a party to the action cannot be proved by the party himself, although such declarations were made, not to the witness, but to some one else, in his presence.—Boykin v. Watts, 6 S. C. (6 Rich.) 76.

[xx] (S. C.) The statute excluding the testimony of a person as to transactions between himself and a person not living at the time of the trial, in certain cases, does not render in-

admissible the testimony of a witness as to a transaction between a third person—as, for example, his wife—and a person afterwards deceased.—(1882) McLaurin v. Wilson, 16 S. C. 402; (1882) Shaw v. Cunningham, Id. 631; (1893) Sullivan v. Latimer, 38 S. C. 158, 17 S. E. 701.

[y] (S. C. 1886) Under Code, § 400, rendering incompetent testimony "in regard to any transactions or communications between such witness and a person at the time of such examination deceased," in an action against the administrator of a deceased judgment debtor by the assignee of the judgment creditor, plaintiff may testify to conversations between his assignor, who then owned the judgment, and the judgment debtor, now deceased.—Colvin v. Phillips, 25 S. C. 228.

[yy] (S. C. 1887) In an action to recover an interest in land, a party defendant is competent to testify as to declarations and transactions between the deceased owner and the father of plaintiffs, also deceased, under whom plaintiffs claim.—Kennemore v. Kennemore, 26 S. C. 251, 1 S. E. 881.

[z] (S. C. 1892) Where suit is brought upon the notes of a married woman, alleged to have been given with reference to certain property received from a deceased relative, the examination of plaintiff as to whether he knew how defendant came into possession of the property was not improper, under Code, § 400, as the transaction referred to was not between the witness and a deceased person, but between defendant and a deceased person.—Brice v. Miller, 35 S. C. 537, 15 S. E. 272.

[zz] (S. C. 1895) The son of a grantor in a deed may testify as to remarks made by the grantor at the time of executing the deed, which was to another son of the grantor, and as to directions by the grantor to the person drawing the deed, without infringing Code, § 400, forbidding one to testify as to a transaction or communication between himself and a decedent.—Brock v. O'Dell, 44 S. C. 22, 21 S. E. 976.

§ 697. —— Interest of or participation by witness or his agent.

[a] (Kan. 1882) A. and B. were plaintiffs in a suit against the administrator of C. Under the statute, neither A. nor B. were competent to testify as to the substance of a conversation had with C. *Held* that, the interests of A. and B. in the suit being identical, neither could testify as to what C. told the other at a conversation at which the three were present.—Wills v. Wood, 28 Kan. 400.

[b] (N. J. 1891) A party to a suit is not a competent witness, under Act 1880 (Supp. Revision, p. 289), to testify, adversely to another party suing in a representative capacity, as to a transaction of the deceased with a person other than the witness, in which the witness and such person are interested, although such interests are divisible.—Matthews v. Hoagland, 48 N. J. Eq. (3 Dick.) 455, 21 Atl. 1054.

[c] (N. Y. 1876) Code, § 399, provides that a party shall not be examined in his own behalf in respect to any communication had personally by him or his assignor with a deceased person against the executor. *Held* that, in an action against an executor, plaintiff cannot testify to a conversation between the deceased and a third party, at which plaintiff was present, when it appears to be connected with something that passed between him and the deceased.—Brague v. Lord, 41 N. Y. Super. Ct. (9 Jones & S.) 193.

[d] (N. Y. 1877) The rule that a party to an action may testify as to a conversation between the deceased and a third person, which he overheard, provided such testimony is limited to what was neither a personal transaction nor communication between the witness and the deceased (Code Proc. § 399), does not apply when the third person is an agent for, and acts in the interest of, the witness.—Head v. Teeter, 10 Hun, 548.

[e] (N. Y. 1877) Allowing a plaintiff in an action against executors to testify in his own behalf as to a conversation at an interview had, during the lifetime of the deceased, between him and plaintiff and a third person, relating to the course of action, upon the theory of permitting plaintiff to state what was said between the deceased and the third person, and excluding plaintiff's share in the conversation, is error.—Ross v. Harden, 42 N. Y. Super. Ct. (10 Jones & S.) 427.

[f] (N. Y. 1878) A party is not competent to testify as to a conversation between a deceased party and a third person, wherein he participated, relating to a transaction between himself and the deceased.—Kraushaar v. Meyer, 72 N. Y. 602.

[g] (N. Y. 1882) Under Code, § 829, in an action by A. on an alleged contract of B., deceased, A. cannot testify as to a conversation between B. and C., if A. took any part therein.—Smith v. Ulman, 26 Hun, 386.

[h] (N. Y. 1884) Plaintiff sued to recover the proceeds of bonds alleged to have been left with defendant's testator for safe-keeping, and sought to testify that, bonds having been stolen from her trunk, defendant's testator admitted to a detective in plaintiff's presence that those not stolen were in his pocket, and that he was going to put them in a bank for plaintiff. *Held*, that the evidence was inadmissible.—Price v. Price, 33 Hun, 69.

[i] (N. Y. 1889) In an action by executors for money loaned by their testatrix, defendant is not prohibited from testifying that he heard testatrix tell a third person that the sum sued for was a gift, though the remark was part of a general conversation in which defendant participated.—Stern v. Eisner, 51 Hun, 224, 4 N. Y. Supp. 406.

[j] (N. Y. 1889) In an action to enforce specific performance of an oral agreement with a decedent to convey land against decedent's grantee, it appeared that decedent was plaintiff's father, and that, in the presence of his wife, and plaintiff and his wife, the latter two being seated together, he had turned to them and said: "My son, I give you the farm. I want you to go on it and live. You may have all you make of it. Fix it up, and when I die it shall be yours; but I will keep the title while I live, that you may neither burden or lose it during my lifetime;" that plaintiff assented thereto; and that his wife said nothing, because the father disliked her, and she feared that he would change the arrangement if she spoke. *Held*, that plaintiff's wife was a party to the transaction, though not named in the agreement, as the arrangement was a family affair, and the farm was intended to be a home for plaintiff and his family.—Erwin v. Erwin, 54 Hun, 166, 7 N. Y. Supp. 365, 18 Civ. Proc. R. 11.

[k] (N. Y. 1894) One who is interested in the contest of a will cannot testify as to conversations between testator and another in which the witness took no part.—In re Palmateer's Will, 78 Hun, 43, 28 N. Y. Supp. 1062.

[l] (Tex. 1882) A party to a suit against heirs, claiming the property in controversy through their deceased ancestor, is precluded from testifying, not only as to statements made by the deceased to him, and to transactions had between the deceased and himself, but also as to such statements and transactions between deceased and third persons, although occurring at a time when the witness had no interest in

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such statements or transactions.—Parks v. Caudle, 58 Tex. 216.

§ 698. Transactions or communications between witness and person other than deceased or in another's presence.

[a] (U. S. 1894) In an action against executors for advances made to testator on goods consigned to plaintiff, plaintiff testified as to his efforts to sell the goods, the prices he obtained, and the correctness of the charges made. *Held*, that this was not within Rev. St. § 858, excluding testimony as to statements by and transactions with a deceased person.—Steiner v. Eppinger, 61 Fed. 253, 9 C. C. A. 483.

[aa] (U. S. 1896) The husband of a deceased party, defending an action as her executor, is not precluded by Rev. St. § 858, from testifying to incidents, occurring with third parties for the benefit of the deceased, as to which she, if living, could not have given testimony to contradict his, although in such transactions he acted at the time as her agent, since it does not relate to transactions with decedent.—Hinchman v. Parlin & Orendorff Co., 74 Fed. 698, 21 C. C. A. 273.

[b] (Ala. 1878) A party may testify as to transactions had with a partnership, one of the members of which has since died, although the personal representative and heirs of such deceased partner are parties to the suit; it not appearing that the transaction was with the deceased partner.—Alabama Gold Life Ins. Co. v. Sledge, 62 Ala. 566.

[bb] (Ala. 1880) On a bill for specific performance by D. against the heirs and personal representative of F., his vendor, alleging that the notes for the purchase money had been given by F. to a son and daughter, who had not received equal advancements with his other children, and were paid to them by D. after F.'s death. *Held*, that such payments were not, within Code, § 3058, transactions with the decedent whose estate was interested in the result, and might be proved by the distributees, though parties.—Fort's Adm'r v. Davis, 67 Ala. 481.

[c] (Colo. 1892) Under Gen. St. § 3643, which provides that in any action against a surviving partner no party adversely interested shall be a competent witness to testify to any admission or conversation by any deceased partner, unless some one of the surviving partners was also present at the time of such admission or conversation, where one defends an action as surviving partner and also as trustee for the administratrix and the heirs at law of his deceased partner, plaintiff may testify to conversations had with the deceased partner when the surviving partner was also present; and the fact that defendant was sued as trustee of the representatives of his deceased partner as well as for the firm does not bring him within the meaning of section 3641, which provides that no person directly interested in an action shall testify in his own behalf when any adverse party defends as the executor or administrator, heir, legatee, or devisee of any deceased person, unless called as a witness by such adverse party.—Savard v. Herbert, 1 Colo. App. 445, 29 Pac. 461.

[cc] (Ga. 1891) In an action by a son against his brother, as administrator of his father, to recover for services rendered the father in his lifetime, plaintiff may testify, in answer to the testimony of the administrator, as to occurrences between him and plaintiff before their father's death, not in the presence of the father, and not participated in by him.—Hudson v. Hudson, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270.

[d] (Ga. 1892) Plaintiff's agent is a competent witness as to transactions occurring between himself and the surviving member of a defendant partnership.—Payne v. Miller, 89 Ga. 73, 14 S. E. 926.

[dd] (Ga. 1893) One who, by himself or another, has bid off property at sheriff's sale, is generally competent, under the evidence act of 1889, to testify in his own favor, against the administrator of the defendant in the execution under which the sale was made, as to any fact involved in the controversy, except "as to transactions or communications with such deceased person"; and, if the sheriff is still alive, transactions and communications with him may be proved as if the defendant in execution were alive also.—Puryear v. Foster, 91 Ga. 444, 18 S. E. 316.

[e] (Ill. 1874) One suing an administrator for the price of a monument erected by him over the grave of defendant's intestate under a contract with the latter's widow is a competent witness to testify to the transactions involved in the suit.—Foley v. Bushway, 71 Ill. 386.

[ee] (Iowa, 1891) In a suit to set aside a distribution by a father among his children, the wife of defendant, though present at the conference when the division was made, and assisting in making computations on which it was based, is an interested party, and disqualified, under Code 1873, § 3639, from testifying, though the communications were general between deceased and all present.—Muir v. Miller, 82 Iowa, 700, 47 N. W. 1011, 48 N. W. 1032.

[f] (Md. 1874) On a bill by a widow against the grantee in a voluntary deed from her husband of nearly the whole of his property to have such deed declared fraudulent and void as against her rights, she is competent under Acts 1864, c. 109, and Acts 1868, c. 116, to testify as to what passed in an interview between herself and defendant, and as to certain letters from him to her husband, found in his desk after his death.—Sanborn v. Lang, 41 Md. 107.

[ff] (Mich. 1880) Where one of the parties to an agreement is dead, the disability imposed upon the survivor by Comp. Laws, § 5968, as amended by Pub. Acts 1875, p. 184, as to testifying as to the transaction, is not removed by the fact that third persons were present, but who knew nothing of the vital facts of the transaction.—Downey v. Andrus, 43 Mich. 65, 4 N. W. 628.

[g] (Mich. 1895) Plaintiff in replevin for wheat claimed the property under an agreement between defendant and his landlord, who was succeeded by plaintiff, that crops on the ground at the expiration of the term should belong to the landlord, and testified that, in a conversation with defendant after the landlord's death, the contract was adopted by plaintiff and defendant. Defendant denied both adoption and agreement, and testified that he sowed the wheat in suit on plaintiff's representation that he might go on the land after the expiration of the term to harvest the same. *Held*, that it was not error to permit defendant to testify what he said to plaintiff, in the conversation, as to his arrangements with the deceased landlord.—Ladd v. Brown, 108 Mich. 105, 65 N. W. 520.

[gg] (Mo. 1875) Wag. St. p. 1372, § 1, excluding one party as a witness when the other is dead or insane, does not apply to transactions with third persons to which the deceased or insane person was no party.—Martin v. Jones, 59 Mo. 181.

[h] (N. J. 1894) Revision, p. 378, §§ 3, 4 (Supp. Revision, p. 287, § 1), providing that where a representative party to a suit does not testify to a transaction or conversation with his testator or intestate, testimony by the other party concerning transactions and conversations with decedent is inadmissible, applies only to transactions at which decedent was present,

and in which he participated.—Woolverton v. Van Syckel, 57 N. J. Law (28 Vroom) 393, 31 Atl. 603.

[i] (N. Y. 1872) Where, on the trial of special issues as to the due execution of a will and deed and as to the competency of the testatrix, evidence was permitted to be given by plaintiff, a daughter of the testatrix, of declarations pertinent to the issue, made to her by the testatrix in the presence of defendant, defendant being a legatee and executrix named in the will, and such evidence tending to maintain the issues in favor of plaintiff and against defendant, *held*, that this was a clear violation of Code, § 399, notwithstanding defendant was living at the time of the trial and might have contradicted the evidence of plaintiff. There is nothing in that section which makes the admissibility of such evidence depend on the fact that at the time when it is offered there is some person living who can contradict it. On the contrary, its admissibility depends on the nature of the transaction to which it relates.—Hatch v. Peugnet, 64 Barb. 189.

[j] (N. Y. 1876) Code, § 399, provides that a party shall not be examined in his own behalf in respect to any communication had personally by him or his assignor with a deceased person against the executor. *Held*, that testimony by a party in an action against an executor that at an interview at which he and the deceased and a third party were present he advised them to revoke a certain instrument was not competent.—Brague v. Lord, 41 N. Y. Super. Ct. (9 Jones & S.) 193.

[k] (N. Y. 1877) "Personal transaction," as used in Code, § 399, relating to testimony as to transactions with deceased persons, does not mean a private transaction; and the fact that the party against whom the testimony is offered was present at the interview, and is living, and might be examined at the trial, does not authorize a party to the action, or one who is interested in the event thereof, to testify as to what was said to him by the testator at such interview.—Howell v. Taylor, 11 Hun, 214.

[l] (N. Y. 1879) Plaintiff in an action against a surviving partner on a firm contract may testify to a conversation with the deceased partner, at which defendant was present.—Kale v. Elliott, 18 Hun, 198.

[m] (N. Y. 1887) Where a brother induced his two sisters to deed his wife's father their undivided two-fifths of certain real estate, which they held as tenants in common, and his wife afterwards began an action to partition the real estate, having succeeded as heir to the interest of her father, and the sisters intervened in opposition thereto on the ground that they were induced to sign the deed by an abuse of confidence and fraudulent representations and concealments, the death of the plaintiff's father was not a bar to the admission in evidence of the conduct and conversations of her husband during the negotiation to prove the imposition; none of the transactions or communications alleged by the interveners having been with him.—Jones v. Jones, 6 N. Y. St. Rep. 736.

[n] (N. Y. 1889) In an action to charge defendant as surety for the payment of rent of a hotel leased by plaintiff's decedent, defendant alleged that he had been induced to sign as surety by false and fraudulent representations made by decedent. It appeared that, before signing, the tenant and one D., at defendant's request, had a conversation with decedent with regard to the business done at the hotel. *Held*, that evidence of what the tenant said to defendant on his return from such interview was admissible to show that defendant had knowledge of representations made by decedent in such conversation; what the representations were having already been testified to by D.—Hill v. Woolsey, 113 N. Y. 391, 21 N. E. 127.

[o] (N. Y. 1891) The presence of third persons at conversations between plaintiff and decedent does not render plaintiff's testimony in regard thereto competent.—Heyne v. Doerfler, 124 N. Y. 505, 26 N. E. 1044, reversing Same v. Dorflier (1890) 57 Hun, 591, 10 N. Y. Supp. 908.

[p] (N. Y. 1893) In an action for fraud of defendant's intestate in a sale to plaintiff, whose cause of action was transferred to his wife after commencement of the action, it appearing that she talked with her husband and with decedent on the occasion of a conversation between them during the negotiations, and that she objected to her husband making the purchase, and that decedent, referring to such interference, said that he did not consult his wife on business matters, the wife cannot testify to the conversation, it being so far a personal communication with decedent as to make her incompetent under Code Civ. Proc. § 829.—Eighmie v. Taylor, 68 Hun, 573, 23 N. Y. Supp. 248.

[q] (N. Y. 1895) In an action against the beneficiary named in a certificate in a mutual benefit association, by the children of the insured, to recover the proceeds of the certificate, a plaintiff may testify that she told defendant that insured told her before his death that defendant was to pay the proceeds of the certificate to plaintiffs, and that defendant said, "That is right," this not being an effort to show a transaction or conversation with deceased, within the prohibition of Code, § 829, but merely showing an admission of liability by defendant.—Hirsh v. Auer, 146 N. Y. 13, 40 N. E. 307, affirming (1894) 79 Hun, 493, 29 N. Y. Supp. 917.

[r] (N. C. 1882) A witness offered to prove a fact which occurred out of the presence of, and which was in no sense a transaction with, a deceased person, is not incompetent, under Code, § 343. It is only when the transaction is between deceased and the living party that the statute prohibits the latter from testifying.—Lockhart v. Bell, 86 N. C. 443.

[s] (N. C. 1884) Evidence of communications between a witness and another witness are not excluded under the rule excluding evidence of communications between the witness and one deceased.—Waddell v. Swann, 91 N. C. 105.

[t] (N. C. 1891) Code, § 590, provides that no one interested in an action adversely to a deceased person shall be examined as a witness in his own behalf "concerning a personal transaction or communication between the witness and the deceased person." *Held*, in an action to set aside an assignment to decedent's brothers of a life insurance policy, that defendants, although incompetent under said section to prove the contract of assignment, or the consideration agreed upon therefor with decedent, could testify to their transactions with third persons in that regard, and show what money they had paid in settlement of decedent's debts, and also what sums they had been compelled to pay on account of decedent's default as co-executor of their father's estate.—Watts v. Warren, 108 N. C. 514, 13 S. E. 232.

[u] (N. C. 1895) Code, § 590, excluding the testimony, in his own behalf, of a party interested in a suit, concerning a personal transaction between the witness and a deceased person, as against the personal representative then defending or prosecuting the suit, does not exclude the testimony of defendant as to a conversation with a decedent and two other persons who were associated with decedent in the transaction which is the subject of a suit, in which the personal representative of the decedent and such other persons are coplaintiffs.—

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Johnson v. Townsend, 117 N. C. 338, 23 S. E. 271.

[v] (N. C. 1896) Code, § 590, prohibiting parties in interest from testifying to "communications and transactions" with deceased persons as against their personal representatives, does not preclude plaintiff, in an action against an administrator for fees incurred as witness for his intestate, from testifying that he attended court as a witness for the intestate, and the number of days he so attended (it appearing that his witness tickets, issued to him and filed with the clerk, had been lost by burning of the courthouse), since they were facts of which others equally with the intestate had knowledge.—Johnson v. Rich, 118 N. C. 268, 23 S. E. 1007.

[w] (N. D. 1893) Under Comp. Laws, § 5260, providing that in actions by or against executors, etc., neither party shall testify against the other as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, a party is prohibited from testifying to a conversation with plaintiff's intestate, notwithstanding the fact that an agent of decedent was present at the time the conversation took place.—Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729.

[x] (Pa. 1895) Act June 11, 1891, authorizing the testimony of a surviving party as to any relevant matter occurring before the death of the opposite party, if, and only if, such relevant matter "occurred" between himself and another who is competent to testify, or if it "occurred" in the presence of such other living competent witness, qualifies such party to testify only as to conversations or events transpiring in his hearing and presence, and not as to the existence of mere physical facts, such as the manner in which a room was furnished, etc.—Thomas v. Miller, 165 Pa. 216, 30 Atl. 928.

[y] (Vt. 1865) In proceedings on a claim of book account by a firm against the estate of a deceased person, one of the partners is a competent witness relative to a contract or understanding between the partners as to whether the items sued on are a partnership claim or belong to another partner.—Thrall v. Seward, 37 Vt. 573.

[z] (Vt. 1869) The statute disqualifying a party to a suit as a witness, where the other party is an executor or administrator, but excepting the case where the "contract in issue" was made with a person "living and competent to testify," is *held* to embrace within the provisions of the exception contracts which relate to the substantial issues made by the evidence, as well as those relating to the mere formal issues made by the pleadings.—Hollister v. Young, 42 Vt. 403.

[zz] (Wis. 1875) In a suit brought by an administrator, defendant may testify to conversations held by him with plaintiff's witnesses touching matters sworn to by them.—Kœnig v. Katz, 37 Wis. 153.

§ 699. Communications between witness and third person subsequently deceased.

[a] (N. Y. 1889) The contestant of a will, who is the next of kin of testator, is not incompetent to testify, in his own behalf, to a conversation had since testator's death with the residuary legatee, who was the proponent of the will, but who has died pending the contest, which is still carried on between the contestant and the personal representatives of said legatee.—In re De Baum, 1 Con. Sur. 203, 4 N. Y. Supp. 342.

[b] (N. Y. 1895) In an action to recover bonds which defendant claimed were given to her by plaintiff's intestate, defendant is not forbidden to testify as to statements made by a third person, since deceased, that plaintiff's intestate gave the bonds to her, to be by her delivered to defendant.—Bump v. Pratt, 84 Hun, 201, 32 N. Y. Supp. 538.

§ 700. Transactions or communications between witness and other person in presence of person subsequently deceased.

[a] (Cal. 1889) An attorney at law who drew a declaration of homestead, acting at the time for both husband and wife, is competent to testify, in a contest between the deceased husband's legatee, who claims the property as his testator's separate property, and testator's widow, who claims it as community property, as to whether a recital in the declaration of homestead was explained to the wife, and as to what the explanation was.—In re Bauer's Estate, 79 Cal. 304, 21 Pac. 759.

[b] (Ind. 1890) Testimony offered by a wife, on the hearing of her claim against the husband's estate, as to a conversation between herself and one of the heirs, is not rendered incompetent by the mere fact that it occurred in testator's presence, as it is not a matter occurring with the testator during his lifetime, within the prohibition of Rev. St. § 498.—Denny v. Denny, 123 Ind. 240, 23 N. E. 519.

[c] (Iowa, 1875) In an action by an administrator on a note, the wife of defendant may testify that she saw the note in her husband's possession, in the presence and with the knowledge of the deceased.—Dougherty v. Deeney, 41 Iowa, 19.

[d] (N. Y. 1876) In the course of a conversation with a person in the presence and hearing of another, since deceased, who was also affected by the transaction conversed about, the speaker's turning his head toward the latter and addressing a remark evidently intended for both is a personal communication, within Code Civ. Proc. § 399, rendering parties incompetent to testify to a personal transaction or communication with a decedent.—Brague v. Lord, 67 N. Y. 495.

[e] (N. C. 1884) A party to an action by an administrator cannot, under Code, § 590, excluding evidence of transactions between a party and decedent, testify to a conversation had with the attorney of deceased in the presence of the latter in relation to a contract between himself and deceased.—McRae v. Malloy, 90 N. C. 521.

[f] (Pa. 1886) Where the parties to an action had, prior to its commencement, conversations at which a third person, who had before stood in the same position as defendant, although never actually the defendant, was present, it is competent for either plaintiff or defendant to testify to these conversations, notwithstanding the fact that the third person has died in the meantime.—Jackson v. Payne, 114 Pa. 67, 6 Atl. 340.

§ 701. Transactions or communications between witness and agent or trustee.

[a] (D. C. 1889) Rev. St. § 858, provides that, in an action by or against an executor, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, etc. *Held*, that the statute does not prevent a party from testifying as to transactions with agents of the deceased.—Andrews v. Hunt, 7 Mackey, 311.

[b] (Ga. 1875) Where administrators are sued on a cause of action arising during the life of their intestate, plaintiff is an incompetent witness as to such matter, even though he negotiated and contracted with one of the administrators, who was acting as the agent of the intestate, then living.—Whitaker v. Groover, 54 Ga. 174.

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[c] (Ga. 1879) In an action on a draft accepted by the drawee's agent, the drawee is competent to testify to the want of authority in his agent to make such acceptance, though the drawer be dead; the agent and payee being alive.—Lemon v. Hornsby, 63 Ga. 271.

[d] (Ga. 1880) In an action on a contract between A. and B., A. cannot testify to statements thereon of B., deceased, repeated to A. by B.'s agent; and this, though B.'s agent became B.'s executor and a party to the suit.—Freeman v. Bigham, 65 Ga. 580.

[e] (Mich. 1892) On a claim against an estate for logs loaned, the testimony of the lender that he told the person who came to borrow the logs for decedent that they must be returned to him on demand, and that such person, for decedent, assented to such arrangement, and in reliance thereon the logs were loaned, was competent.—Smith v. Smith's Estate, 91 Mich. 7, 51 N. W. 694.

[f] (Mo. 1890) Decedent, being indebted, conveyed land to a trustee by deed of trust to pay the debts, and authorized him to borrow money, and to give his notes secured by mortgage on the land. *Held*, in a suit to foreclose a mortgage given by the trustee, that plaintiff is competent to testify as to transactions between him and the trustee in regard to the execution of the note and mortgage, though the grantor in the deed of trust is dead. The statute regulating the admissibility of the testimony of interested persons, where the adverse party is dead, does not apply.—Orr v. Rode, 101 Mo. 387, 18 S. W. 1066.

[g] (Mo. 1894) Under Rev. St. 1889, § 8918, providing that, where an administrator is a party to an action, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living, and competent to testify, plaintiff in an action to cancel a trust deed may testify as to transactions, regarding said deed, had with the agent of defendant's intestate.—Miller v. Wilson, 126 Mo. 48, 28 S. W. 640.

[h] (Mo. 1895) Where a contract with a decedent was made with decedent's agent who is alive, Rev. St. § 8918, does not render the other party thereto an incompetent witness in his own behalf.—Reed v. Crissey, 1 Mo. App. Rep'r, 742, 63 Mo. App. 184.

[i] (Mo. 1895) Rev. St. § 8918, does not prohibit a person who furnished necessaries for a wife as the agent of her husband from testifying in an action against the husband's estate to recover for such necessaries, where the wife is still living.—Reed v. Crissey, 1 Mo. App. Rep'r, 742, 63 Mo. App. 184.

[j] (Mo. 1895) Where a contract is made on behalf of one party by an agent, the subsequent death of the principal will not disqualify the other contracting party from testifying as to the subject-matter of the contract.—Roeder v. Shryock, 1 Mo. App. Rep'r, 680, 61 Mo. App. 485.

[k] (Nev. 1878) Under Code, § 379, in an action by an administrator, defendant cannot testify in his own behalf as to a contract made with plaintiff as agent for his intestate.—Vesey v. Benton, 13 Nev. 284.

[l] (N. Y. 1871) Code, § 399, does not prohibit a party from testifying to a transaction between himself and the agent of deceased previous to his death.—Hildebrant v. Crawford, 6 Lans. 502.

[m] (N. Y. 1880) The prohibition in Code, § 829, of testimony to personal transactions with a deceased person, does not extend to those with his agents.—Pratt v. Elkins, 80 N. Y. 198.

[n] (N. Y. 1886) In an action by an administrator on a note, testimony by defendant as to transactions with the agent of the deceased payee was not incompetent, under Code Civ. Proc. § 829, as concerning a personal transaction between witness and the deceased party.—Waterhouse v. Gilman, 6 N. Y. St. Rep. 283.

[o] (N. C. 1884) The mere entry of a credit on a bond due the intestate's estate is not sufficient to raise a presumption of fact that the intestate was present at the time the credit was entered, where it appeared that the intestate's business had been conducted by an agent, so as to make the other party to the transaction incompetent as a witness.—Lockhart v. Bell, 90 N. C. 499.

[p] (Pa. 1891) Act May 23, 1887, § 5, cl. "e," provides that where any party to a thing or contract in action is dead, and his rights therein have passed to a party on the record, neither the surviving or remaining party to such contract, nor any other person whose interests are adverse to the rights of the deceased party, shall be a competent witness to any matter occurring before his death. *Held* that, in ejectment for land claimed by defendant under a deed from a grantor who is deceased, plaintiff cannot testify that a deed of the land, purporting to have been made by him to defendant's grantor before the latter's death, was a forgery, and as to matters occurring at its alleged execution, though defendant's grantor was not present at its alleged execution, and was represented there by an agent, who is alive.—Sutherland v. Ross, 140 Pa. 379, 21 Atl. 354, 28 Wkly. Notes Cas. 17.

[q] (Pa. 1894) In an action to recover money paid on the purchase of land to defendant, as agent of the landowner, on the ground that defendant had made fraudulent representations as to his authority to sell, this being denied by defendant, he is a competent witness, though the landowner is dead, the thing in controversy being a transaction between the parties.—Davis v. Hawkins, 163 Pa. 228, 29 Atl. 746.

[r] (S. C. 1894) In an action for the price of work, which defendant contends was ordered by his testator as agent, the principals being alive, plaintiff may testify that he did not do the work for them.—Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291.

[s] (Tenn. 1872) Defendant may testify as to the terms of a contract made with a son of plaintiff's intestate, acting as his father's agent.—Cottrell v. Woodson, 58 Tenn. (11 Heisk.) 681.

[t] (Va. 1887) A magistrate before whom a deed was acknowledged, and who afterwards got the grantor to reacknowledge it, to cure a certain defect, after considerable objection on the grantor's part, is not the agent of the grantee so as to render the testimony of the grantor admissible in a suit arising out of the transaction to which the conveyance related, after the death of the grantee, under the statute excepting from the rule of exclusion applying to transactions with persons deceased cases where the person since deceased was represented in the transaction by an agent still living.—Booth v. McJilton, 82 Va. 827, 1 S. E. 137.

[u] (Va. 1889) Under Code 1887, § 3346, which makes an adverse party incompetent to testify as to a transaction with a decedent unless, inter alia, it was personally had with his agent, who is alive and capable of testifying, the examination must be restricted to such portion of the transaction as was had personally with the agent.—Reherd's Adm'r v. Clem, 86 Va. 374, 10 S. E. 504.

[v] (W. Va. 1889) Code, c. 130, § 23, provides that a party shall not be examined as a witness in his own behalf in regard to any personal transaction or communication between such witness and a deceased person, or against the personal representative, heir at law, next

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of kin, assignee, legatee, devisee, or survivor of such deceased person. *Held*, that a party is a competent witness to testify in his own behalf, in respect to a transaction or communication had personally between him and the agent of a deceased person, against the personal representative, heir, or assignee of such deceased person, notwithstanding such agent is dead.—Voss v. King, 33 W. Va. 236, 10 S. E. 402.

13. MATTERS EQUALLY WITHIN KNOWLEDGE OF WITNESS AND PERSON SUBSEQUENTLY DECEASED, AND MATTERS OCCURRING BEFORE OR AFTER DEATH OR INCOMPETENCY OF PARTY TO CONTRACT OR OTHER TRANSACTION OR CAUSE OF ACTION.

MATTERS EQUALLY WITHIN KNOWLEDGE OF WITNESS AND PERSON SUBSEQUENTLY DECEASED, § 702.
MATTERS OCCURRING BEFORE DEATH OR INCOMPETENCY OF PARTY TO CONTRACT OR OTHER TRANSACTION OR CAUSE OF ACTION, § 703.
MATTERS OCCURRING AFTER DEATH OR INCOMPETENCY OF PARTY TO CONTRACT OR OTHER TRANSACTION OR CAUSE OF ACTION, § 704.
MATTERS OCCURRING AFTER PROBATE OF WILL OR APPOINTMENT OF ADMINISTRATOR, § 705.

§ 702. Matters equally within knowledge of witness and person subsequently deceased.

[a] (Mich. 1867) Under Laws 1861, p. 169, in a suit by or against representatives of a deceased person, an opposite party in interest cannot testify as to matters "which, if true, must have been equally within the knowledge of such deceased person." The admissibility of his testimony thereon does not depend on the degree of knowledge. It will be strictly confined to facts not within the knowledge of the deceased.—Kimball v. Kimball, 16 Mich. 211.

[b] (Mich. 1868) In an action of ejectment plaintiff testified to his having gone into possession of the premises in 1841, and that defendants, W. and his wife, afterwards went into possession, and had remained in possession ever since, and that the wife died after the commencement of the suit. The evidence was objected to on the ground that the facts must, if true, have been equally within the knowledge of the deceased wife, and that defendant W. was defending not only in his own right but as administrator of his deceased wife. *Held*, that it was admissible, since it was also within the knowledge of a surviving party.—Wright v. Wilson, 17 Mich. 192.

[c] (Mich. 1870) Whether the statute declaring that in cases prosecuted or defended by the representatives of a deceased person the opposite party shall not be admitted to testify in relation to matters which, if true, must have been equally within the knowledge of such deceased person, has any application to written documents, is questionable; but, when the representatives of the deceased have the means of proving the document by independent evidence, the case is not within the statute.—Moulton v. Mason, 21 Mich. 364.

[d] (Mich. 1874) Evidence as to what occurred at a time when the deceased was absent, such as the forwarding of property from Michigan, destined for his use, when he was in Texas, and as to the value of the property and transportation, and as to matters which it is not made to appear were specially or at all known to the deceased, is not excluded by the statute (Comp. Laws 1871, § 5968), relating to evidence of matters equally within the knowledge of the deceased.—Wheeler v. Arnold, 30 Mich. 304.

[e] (Mich. 1876) In a suit between an administrator and a son of the deceased, involving the title to personal property claimed by the administrator to belong to the estate, the son is precluded by the statute (Comp. Laws 1871, § 5968) from testifying as a witness to conversations between himself and his father, in the lifetime of the latter, as being matter equally within the knowledge of the deceased.—Chambers v. Hill, 34 Mich. 523.

[f] (Mich. 1877) Parol evidence from the party as to the contents of letters which passed between him and the decedent, and which have been lost or destroyed, is within the provision of the statute excluding evidence of a party in certain cases as to matters equally within the knowledge of a deceased party.—Schratz v. Schratz, 35 Mich. 485.

[g] (Mich. 1877) In a suit by an administrator, questions relating to a payment made since suit brought or at its commencement, or to a payment made to agents of the deceased, are not within the statutory provision excluding evidence of matters equally within the knowledge of deceased.—Jones v. Beeson, 36 Mich. 214.

[h] (Mich. 1877) The mortgagor cannot testify, in foreclosure after death of the mortgagee in a purchase-money mortgage, to admissions made by the mortgagee of defects in the title he conveyed and warranted to the mortgagor, nor to a consent by the mortgagee that a payment made by the mortgagor to extinguish an adverse claim should be deemed to reduce the mortgage; such evidence being inadmissible under Comp. Laws, § 5968, as relating to matters which in his lifetime must have been equally within the knowledge of the mortgagee.—Hart v. Carpenter, 36 Mich. 402.

[i] (Mich. 1877) Under How. Ann. St. § 7545, a party cannot testify to facts equally within the knowledge of his deceased opponent.—Harmon v. Dart, 37 Mich. 53.

[j] (Mich. 1877) The rule excluding testimony of facts equally within the knowledge of a deceased opponent does not apply where the transaction was between the surviving party on one side and a surviving agent of decedent on the other, and in the presence of other persons, but not of the decedent.—Ward v. Ward, 37 Mich. 253.

[k] (Mich. 1882) In an action involving a contract alleged to have been made with a deceased person, facts relating to its delivery to a third person before decedent received it may be shown by the testimony of the other party, if decedent had not known them.—Seligman v. Ten Eyck's Estate, 49 Mich. 104, 13 N. W. 377.

[l] (Mich. 1885) How. Ann. St. § 7545, in excluding the testimony of a party as to facts, the knowledge of which is shared only by a deceased person in adverse interest, applies to the testimony of such party as to admissions or statements made by one who had been, while living, an officer of a company which is the adverse party in interest, or who was a member of a firm which had assigned to the company.—Rayburn v. Mason Lumber Co., 57 Mich. 273, 23 N. W. 811.

[m] (Mich. 1887) Under the express provisions of How. Ann. St. § 7545, relative to the competency of witnesses, where a suit is prosecuted or defended by the heirs of a deceased person, the opposite party is not allowed to testify as to facts which lie equally within the knowledge of the deceased.—Pendill v. Neuberger, 64 Mich. 220, 31 N. W. 177.

[n] (Mich. 1887) Under How. Ann. St. § 7545, excluding the testimony of the opposite party as to matters which must have been equally in the knowledge of the deceased, a claimant is incompetent to testify that she paid out various sums for decedent at the request of her husband, his brother, where it appears that the deceased was present when the payments were made.—Stackable v. Stackable's Estate, 65 Mich. 515, 32 N. W. 808.

[o] (Mich. 1888) Under How. Ann. St. § 7545, providing that, in a suit with the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify to matters which, if true, must have been equally within the knowledge of such deceased person, the fact that conversations between plaintiff and defendant's intestate took place in the presence of third persons does not enable plaintiff to testify as to such conversations.—Taylor v. Bunker, 68 Mich. 258, 36 N. W. 66.

[p] (Mich. 1888) In an action to recover commissions for estimates, furnished to defendants by plaintiffs' testator, as to the amount of timber on lands purchased by defendants, where a witness for plaintiffs testifies that defendants made a contract with plaintiffs' testator, in his presence, to pay such commissions, the exclusion of a question, asked of one of the defendants, whether he "ever made any contract" with reference to the land, in the presence of said witness, is error, since the question will not necessarily elicit facts equally within the knowledge of deceased.—Webster v. Bearinger, 72 Mich. 630, 40 N. W. 772.

[q] (Mich. 1890) In an action on a claim assigned to plaintiff by her husband before his death, her testimony as to the transfer is admissible under How. Ann. St. § 7545, providing that in actions by or against heirs, administrators, etc., the opposite party, if called as a witness in his own behalf, cannot testify as to matters which if true must have been equally in the knowledge of the deceased party, since this is not a matter which must have been equally within the knowledge of both.—Jackson v. Cole, 81 Mich. 440, 45 N. W. 826.

[r] (Mich. 1892) In an action to recover land that plaintiff inherited from his father, testimony of defendant himself is competent to show payments made to the father on a mortgage given him by defendant, in payment of which mortgage plaintiff claims defendant gave up the land to him, since the facts were equally within the knowledge of the deceased.—Knight v. Hartman, 93 Mich. 69, 52 N. W. 1044.

[s] (Mich. 1895) It cannot be shown by statements made by deceased to his children, and by facts and circumstances that came within his knowledge, as well as their own, what disposition deceased made of certain property.—O'Neil v. Greenwood, 106 Mich. 572, 64 N. W. 511; Warner v. Same, Id.

[t] (Mich. 1896) In an action by an administrator on a note, plaintiff having introduced testimony that it was signed by defendant, in the presence of intestate, at a certain time and place, defendant, in support of his plea that he did not execute it, may testify that he never signed it, and that at the time mentioned he was at another place; this not being within the rule prohibiting a party from testifying to transactions with decedents, the facts testified to not being equally within the knowledge of deceased.—Pillard v. Dunn, 108 Mich. 301, 66 N. W. 45.

[u] (Mich. 1896) So, too, plaintiff having introduced a letter written by defendant to deceased, and the envelope in which it was inclosed, and testimony that the note was inclosed therein, defendant was competent to testify that the letter had no reference to the note.—Pillard v. Dunn, 108 Mich. 301, 66 N. W. 45.

[v] (N. H. 1867) In an action for money paid by the administrator of P. against D., it appeared that P. and D. gave their joint notes, and that after the death of P. the notes were found among his papers. *Held*, that under Act July 30, 1865, giving the court discretion to allow a party to testify, though his adversary is an executor or administrator, he will not ordinarily be admitted to testify to a fact which was within the knowledge of the deceased, and to which he might have testified if he were living, and hence defendant should not have been admitted to testify to the payment of the notes.—Chandler v. Davis, 47 N. H. 462.

[w] (N. H. 1880) Without the consent of an executor, who is a defendant, plaintiff cannot testify to matters to which the testatrix, if living, could testify.—Burns v. Madigan, 60 N. H. 197.

[x] (N. H. 1881) Where the adverse party in an action is an executor or administrator, the general rule is that the surviving party will not be allowed to testify to matters to which the deceased could testify, if alive.—Cochran v. Langmald, 60 N. H. 571.

[y] (N. H. 1882) In an action against an administrator to recover for services performed for his intestate, testimony of plaintiff as to a bargain with deceased was properly excluded; it being a matter exclusively within the knowledge of plaintiff and deceased, and it not appearing that injustice would be done without the testimony.—Berry v. McArdle, 62 N. H. 354.

[z] (N. H. 1890) One who makes a claim against the estate of a decedent for personal injuries, sustained while riding with decedent at her invitation, cannot testify to her ignorance of certain peculiarities of the horse, which caused the accident, nor describe the character of her injuries, and the nature and extent of her sufferings, since some of these matters must have been within the knowledge of deceased.—Simpson v. Gafney, 66 N. H. 261, 20 Atl. 931.

§ 703. Matters occurring before death or incompetency of party to contract or other transaction or cause of action.

[a] (Cal. 1886) Code Civ. Proc. § 1880, providing that "parties to an action * * * against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person," cannot be witnesses, does not prevent a plaintiff from testifying, in such an action, to prove his account books as preliminary to their introduction in evidence; and, it not appearing that he was not within the jurisdiction of the court, books proven by the testimony of his wife are inadmissible.—Roche v. Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539.

[b] (Cal. 1888) Under Code Civ. Proc. § 1880, providing that parties to an action against an executor or administrator upon a claim against the estate of a decedent cannot be witnesses as to any matter occurring before the latter's death, an attorney at law who sues for professional services rendered the decedent is not incompetent to testify as to the nature and extent of his law practice.—Knight v. Russ, 77 Cal. 410, 19 Pac. 698.

[c] (Cal. 1894) Under Code Civ. Proc. § 1880, subd. 3, forbidding a party to an action on a claim against a decedent's estate to testify to facts occurring before decedent's death, plaintiff cannot testify that a paper showing a debt from decedent to him was unpaid at decedent's death.—Robinson v. Dugan, 35 Pac. 902.

[d] (Ga. 1879) Where the question at issue was the validity of a note held by an adminis-

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trator against his intestate, and which, if valid, had been paid, *held*, that the administrator might testify in respect to transactions subsequent to his intestate's death, but could not as to anything which transpired prior thereto, between him and his intestate, as to the validity of the note, or as to its payment.—Stanford v. Murphy, 63 Ga. 410.

[e] (Ill. 1879) A bill was brought against the trustee of a legatee under a will and the legatee and others to establish a partnership between complainant and the testator with two of the other defendants, and for an account, praying that the trustee pay over to the several partners the sums that might be found due to each on a final accounting. *Held*, that the defendant co-partners were not competent witnesses, under the statute permitting persons interested to testify in their own behalf, except where the adverse party sues or defends as an executor or legatee of a decedent, to testify to facts occurring before the death of the deceased partner.—Bragg v. Geddes, 93 Ill. 39.

[f] (Ill. 1880) In an action by the administrator of one deceased against his murderers for damages, defendants are incompetent to testify as to matters prior to the death of the deceased.—Forbes v. Snyder, 94 Ill. 374.

[g] (Ind. 1876) The grantee of land, though the son of his grantor, cannot object to the competency of a party to an action against him, which is founded on a contract with his father affecting said land, to testify as to a matter which occurred prior to the death of his father. Rev. St. p. 560, §§ 2, 3, does not apply in such a case.—Hodgson v. Jeffries, 52 Ind. 334.

[h] (Ind. 1878) Under 2 Rev. St. p. 133, § 2, allowing neither party to a suit by or against heirs, etc., to testify as to any matter occurring prior to the ancestor's death, unless required, etc., neither party can testify, in a partition suit, as to the ancestor's intention in making a voluntary conveyance to one of the parties.—Dille v. Webb, 61 Ind. 85.

[i] (Ind. 1878) In an action by a widow to have a deed executed by her and her husband declared to be a mortgage, etc., she is incompetent to testify as to matters occurring prior to her husband's death, relating to the alleged agreement to reconvey.—Cravens v. Kitts, 64 Ind. 581.

[j] (Ind. 1879) A defendant to an action for the partition of lands, who claims an interest therein from a common ancestor with plaintiff, is incompetent to testify as to matters against the ancestor before his decease, and which tended directly to charge the estate.—Baker v. Baker, 69 Ind. 399.

[k] (Ind. 1880) In an action for the partition of lands of her deceased husband against the other heirs or devisees, the wife is not, under 2 Rev. St. 1876, p. 132, a competent witness as to matters which occurred before his decease.—Wiseman v. Wiseman, 73 Ind. 112, 38 Am. Rep. 115.

[l] (Ind. 1886) In an action by an administrator to collect a claim due the estate of the decedent, parties to the record are not, under Rev. St. § 499, competent witnesses as to matters that occurred prior to the death of decedent.—McConnell v. Huntington, 108 Ind. 405, 8 N. E. 620.

[m] (Ind. 1890) Rev. St. 1881, § 499, which provides that in suits by or against heirs or devisees neither party shall be a competent witness as to matters occurring before the ancestor's death, does not render heirs incompetent to testify, in a suit to set aside their ancestor's will for want of testamentary capacity, as to the conduct and conversation of such ancestor in his family as bearing upon the question of testamentary unsoundness.—Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118.

[n] (Iowa, 1864) Revision 1860, § 3982, which provides that no party to a suit shall be allowed to testify when the adverse party is the executor of a deceased person, when the facts to be proved transpired before the death of such deceased person, does not change the common-law rule that a party to a suit may testify to the loss of a note sued on, where such evidence is received from necessity and the nature of the subject.—Nash v. Gibson, 16 Iowa, 305.

[o] (Iowa, 1864) Revision, § 3982, providing that a party to a suit, when the adverse party is the executor of a deceased person, shall not be allowed to testify as to facts which transpired before the death of the deceased person, does not apply when the deceased was only a trustee in regard to the matter in controversy, and the cestui que trust is still living.—Watson v. Russell, 18 Iowa, 79.

[p] (Iowa, 1869) Where plaintiff in a case is the administrator of a deceased person, defendant is not a competent witness in relation to matters transpiring before the death of such deceased person, and the fact that the matters sought to be proved by defendant were connected with transactions of a firm of which the deceased was a member and that the surviving member of the firm was a witness cannot have the effect of changing the rule.—Hosmer v. Burke, 26 Iowa, 353.

[q] (Me. 1885) In a suit to specifically enforce a bond for the conveyance of land against the heirs and personal representative of the vendor, testimony of plaintiff and his wife relating to any matters which happened before the vendor's death is incompetent, unless the administrator testifies or puts the vendor's books in evidence.—Hubbard v. Johnson, 77 Me. 139.

[r] (Mont. 1888) Code Civ. Proc. § 648, providing that no person shall be allowed to testify where the adverse party, or the party for whose benefit the action is prosecuted or defended, is the representative of a deceased person, when the facts to be proven transpired before the death of such person, does not disqualify the wife of a deceased maker of a note from testifying, in an action on the note against the administrator, that a sum indorsed on the note as paid was paid before the death of deceased.—Stewart v. Budd, 7 Mont. 573, 19 Pac. 221.

[s] (Ohio, 1860) In an action under Code, § 313, providing that no party shall be allowed to testify when the adverse party is the executor or administrator of a deceased person, and when the facts to be proved transpired before the death of such deceased person, evidence by defendant of the age of a boiler and its kind and quality is not admissible, in an action for the killing of plaintiff's decedent by the explosion of the boiler, since such facts transpired before decedent's death.—Hall v. Crain, 3 West. Law Month. 137, 2 Ohio Dec. 453.

[t] (Ohio, 1876) In an action by a guardian of an imbecile to set aside a deed executed by his ward before his appointment, the heirs of the grantee, if defendants, are not competent witnesses to prove facts which occurred before the appointment.—McNicol v. Johnson, 29 Ohio St. 85.

[u] (Ohio, 1886) Code, § 5241, provides that a person who assigns his claim or interest shall not testify concerning any matter in respect to which he would not, if a party, be permitted to testify. Code, § 5242, prohibits a party from testifying where the adverse party is an executor or administrator of a deceased person, except, among other things, to facts which occurred subsequent to the time the decedent died. Section 5243 provides that a party may compel the adverse party to testify as any other witness may be compelled. *Held* that, in an action by the assignee of a note against the ex-

ecutor of the maker, the assignor was prohibited from testifying concerning any facts occurring before the death of the testator, not within the other exceptions specified, and such disqualification did not depend on his being called by the assignee.—Roberts v. Briscoe, 1 O. C. D. 323.

[v] (Ohio, 1893) Where plaintiff in an action on a joint and several note is the guardian of an insane person, a maker of the note, who is in default for answer, is not a competent witness for his codefendant as to facts in reference to a usurious agreement between the makers and payee of the note, which occurred prior to the appointment of such guardian.—Baker v. Jerome, 50 Ohio St. 662, 35 N. E. 1113, distinguishing Bell v. Wilson (1867) 17 Ohio St. 640, and Baker v. Kellogg (1876) 29 Ohio St. 663.

[w] (Pa. 1882) On a petition by a widow for a refund of purchase money paid by her for lands of her husband (the decedent), to which she discovered she was entitled by survivorship, *held*, she was not a competent witness in her own behalf as to facts occurring in her husband's life.—In re Walker's Estate, 1 Del. Co. R. 384.

[x] (Pa. 1887) Under Act 1878, defendant, one of two joint makers of a note, is competent, after the death of his co-obligor, to testify as to matters occurring between himself and strangers, although pertaining to the questions at issue between the payee and makers of the note, and occurring prior to the death of the co-obligor.—Hill v. Truby, 117 Pa. 320, 11 Atl. 89, 800.

[y] (Pa. 1890) A life insurance policy payable to a wife was assigned by the insured and his wife to a person from whom he obtained a loan, and this assignee a month later assigned the policy to a third person. The insured and the first assignee having died, the second assignee sued the wife for the insurance money. *Held*, under Act 1887, which renders parties to an action incompetent as witnesses as to matters occurring in the lifetime of a deceased person whose interest in a contract has passed to one of the parties to the action, that she could not testify that the original assignee was only the agent of the second assignee in procuring the assignment, and that she executed such assignment under duress.—De Coursey v. Johnson, 134 Pa. 328, 19 Atl. 1074, 26 Wkly. Notes Cas. 86.

[yy] (Pa. 1890) In an action by the assignee of a lease against a subsequent lessee of part of the same premises, where one of the lessors of plaintiff's assignor is dead, neither plaintiff nor his assignor is a competent witness as to transactions occurring before such lessor's death.—Duffield v. Hue, 136 Pa. 602, 20 Atl. 526, 26 Wkly. Notes Cas. 387.

[z] (Pa. 1892) Where a claim against a decedent's estate is contested on the ground that a letter evidencing the claim is a forgery, the heirs of decedent and distributees of his estate are competent to testify as to the signature of decedent, such evidence not being within the meaning of Act May 23, 1887, § 5, which disqualifies a person, interested adversely to decedent, to testify as to matters occurring before the latter's death.—In re Toomey's Estate, 150 Pa. 535, 24 Atl. 697.

[zz] (Pa. 1892) On scire facias by a mortgagee to foreclose the mortgage after the death of the mortgagor, one who defends and claims title to the land under a deed executed by the mortgagor before the execution of the mortgage, but recorded afterwards, is incompetent to testify to a parol sale to her by the mortgagor in pursuance of which the deed was executed, and that she took and maintained possession under such sale.—Griggs v. Vermilya, 151 Pa. 429, 25 Atl. 61, 31 Wkly. Notes Cas. 75.

§ 704. Matters occurring after death or incompetency of party to contract or other transaction or cause of action.

[a] (Ga. 1875) The rule that a party to a contract is an incompetent witness in reference thereto, where the other party is dead, excludes an entry made by the survivor on an obligation of his to the deceased, after the death of the latter, by which the former was released from a portion of such liability.—Gray v. Obear, 54 Ga. 231.

[b] (Ga. 1875) In a claim case, though one of the plaintiffs in fi. fa., who are assignees of the judgment, is dead, and his administrators are made parties, the claimant is a competent witness in relation to facts disconnected with deceased and transpiring since his death.—Sterling v. Arnold, 54 Ga. 690.

[c] (Ill. 1875) The intention of Act July 1, 1872, relative to competency of witnesses, is that no person directly interested shall be allowed to testify, where the adverse party sues or defends as the executor, administrator, heir, legatee, or devisee of any deceased person, except as to facts occurring subsequent to the death of the deceased, as to which he may testify; but, if the adverse party sues or defends as guardian or trustee for such heir, legatee, or devisee, then the additional restriction is imposed that such facts shall have occurred, not only subsequent to the death of the deceased, but also after such heir, legatee, or devisee shall have attained his or her majority.—Stone v. Cook, 79 Ill. 424.

[d] (Ill. 1879) Under Rev. St. 1874, c. 51, § 2, first exception, an interested person may testify in his own behalf, in a suit brought by heirs or legatees of a deceased person, concerning facts which happened after such person's death.—Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136.

[e] (Ill. 1886) The rule rendering parties incompetent witnesses for themselves, as against parties claiming under a deceased person (1 Starr & C. Ann. St. c. 51, par. 2), does not apply to occurrences after the death of such person.—Vigus v. O'Bannon, 118 Ill. 334, 8 N. E. 778.

[f] (Ill. 1888) Starr & C. Ann. St. c. 51, par. 1, § 2, provides that no party to any civil action, or person directly interested in the event, shall testify of his own motion, or in his own behalf, when any adverse party sues or defends as executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, except, in any such action, a party or interested person may testify as to facts occurring after the death of the deceased person. *Held*, that in a suit to set aside a deed, brought against the widow and minor heirs of the grantee, testimony of the widow that she found the deed among his papers is competent, as "a fact occurring after the death of such deceased person."—Griffin v. Griffin, 125 Ill. 430, 17 N. E. 782.

[g] (Ill. 1895) In a suit between the widow and heirs of a decedent, the widow is competent to testify that she is unable to find a certain deed from the decedent to her, since she is competent, by express statutory provision, to testify as to matters occurring after his death.—Gillespie v. Gillespie, 159 Ill. 84, 42 N. E. 305.

[h] (Ind. 1883) In an action against an administrator and others pertaining to assets of the estate, where the controversy is concerning matters which arose after the intestate's death, plaintiff is a competent witness.—Sedgwick v. Tucker, 90 Ind. 271.

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[i] (Ind. 1886) In an action against a railroad company for negligently causing the death of plaintiff's intestate, the widow of the intestate is a competent witness as to matters which occurred subsequent to her husband's death.—Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

[j] (Iowa, 1862) In proceedings to establish a claim in the probate court against the estate of a deceased person, his executor is competent to testify as to facts occurring after the death of the deceased.—Terhune v. Henry, 13 Iowa, 99.

[k] (Ky. 1876) An administrator is not a competent witness against the infant children of his intestate, in an action by them, by guardian or next friend, against him, to recover rents which he had collected for lands leased by him, which had descended to them, on the ground that the facts transpired since the death of the father.—Wilson v. Unselt's Adm'r, 75 Ky. (12 Bush) 215.

[l] (Ky. 1879) In an action by A. and B. against C. and D., administrator and surety, whose wives were distributees of the estate and alleged owners of lands sought by amended petition to be subjected to the judgment, C. and D. were competent witnesses to testify on behalf of their wives as to matters which occurred after death of the intestate.—Allen v. Russell, 78 Ky. 105.

[m] (Me. 1887) Although one party to a suit be the representative of a deceased person, the other party may, under Rev. St. c. 82, § 98, par. 2, be a witness in his own behalf, as to matters happening after the death of such decedent, whether the representative party testifies or not.—Swasey v. Ames, 79 Me. 483, 10 Atl. 461.

[n] (Md. 1892) Under Code, art. 35, § 2, providing that when an original party to a contract or cause of action is dead, or an executor or administrator is a party, either party may be called as a witness by his opponent, but shall not testify on his own offer, in an action for the breach of a lease by the lessee against the administrator of the lessor, plaintiff is disqualified to testify, though the breach occurred after the lessor's decease.—Biggs v. McCurley, 76 Md. 409, 25 Atl. 466.

[o] (Mass. 1858) After the insolvency and death of plaintiff in a civil action, and the admission of his assignee in insolvency to prosecute it, defendant is not a competent witness, under St. 1857, c. 305, § 1, even to matters which have occurred since the death of the original plaintiff and the appointment of the assignee, and to which the latter has already testified in his own favor.—Bacon v. Williams, 77 Mass. (11 Gray) 222.

[p] (Mo. 1873) Wag. St. p. 1372, § 1, providing that, where "one of the original parties" to the cause of action is dead, "the other party shall not be admitted to testify in his own favor," in a suit based on a series of contracts, does not disqualify a party making some of the contracts with one since dead from testifying to other transactions occurring subsequent to the decease.—Poe v. Domic, 54 Mo. 119.

[q] (Mo. 1875) Wag. St. p. 1372, § 1, excluding one party when the other is deceased or insane, does not apply to transactions occurring since the death or insanity.—Martin v. Jones, 59 Mo. 181.

[r] (Mo. 1891) Rev. St. 1889, § 8918, provides that when an administrator is a party the other party shall not be admitted to testify in his own favor, except as to such acts and contracts as have been done or made since the appointment of the administrator. *Held* that, in an action against an administrator, plaintiff is incompetent to testify in rebuttal as to admissions and statements made by her after intestate's death, and before the appointment of the administrator.—Callahan v. Riggins, 43 Mo. App. 130.

[s] (N. H. 1868) Under Laws 1865, c. 4074, prescribing when a party may testify, where the adverse party is an executor, etc., the living party may testify to transactions and admissions arising since the decease of the testator or intestate.—Brown v. Brown, 48 N. H. 90.

[t] (N. C. 1870) An administrator may testify as to transactions by himself, after the death of his intestate, which relieve him from the charge of having assets in hand.—Whitesides v. Green, 64 N. C. 307.

[u] (Pa.) That the testimony as to a fact occurring or existing after the death of the decedent may tend to prove the existence of the same fact prior to his death does not make such testimony inadmissible.—(1879) Rothrock v. Gallaher, 91 Pa. 108; (1881) Stephens v. Cotterell, 99 Pa. 188.

[v] (Pa. 1884) An administrator sued A. for the proceeds of a note received by A., but claimed by the administrator to belong to the estate. *Held*, that A. was a competent witness to testify in his own behalf that B. and C., who, with himself, were the only children and heirs of the intestate, agreed that he might collect the note, notwithstanding that B. since the agreement had died, under Act April 9, 1870, as amended by Act May 11, 1881, providing that no party or person shall be excluded from testifying to matters occurring since the death of a person whose testator, through a legal representative, is a party to the record.—Weaver v. Roth, 105 Pa. 408.

[vv] (Pa. 1887) A party's relationship to a deceased person is not a matter "occurring since the death of the person," so as to render the party's testimony on the point admissible, in a suit to which the decedent's estate is a party, under Act April 9, 1870.—Adams v. Edwards, 115 Pa. 211, 8 Atl. 425, reversing Edwards v. Adams (1886) 2 Pa. Co. Ct. R. 90.

[w] (Pa. 1888) In scire facias on a judgment rendered on a bond executed by defendant's testator, evidence by defendant and another, daughter of testator, that after testator's death, and in plaintiff's presence, the bond was found in testator's papers, is not incompetent under Act May 23, 1887, providing that a person interested adversely to decedent shall not testify as to a matter occurring before the latter's death, as such testimony is not as to a fact occurring before the death, although it might inferentially establish the fact that testator had the bond in his lifetime.—Porter v. Nelson, 121 Pa. 628, 15 Atl. 852.

[x] (Pa. 1888) In an action by the executor of the payee of a bond, which it is alleged came into possession of defendant improperly, the latter is incompetent to testify whether or not he obtained possession of it since the testator's death.—Schultz v. Boehme, 16 Atl. 89.

[y] (Pa. 1893) In ejectment it appeared that certain land was conveyed to K., plaintiff's ancestor, the grantor reserving to himself therefrom a lot, one of whose boundaries was the east end of a bridge, and defendant thereafter acquired such lot by mesne conveyances. If, as claimed by plaintiffs, the east end of the bridge had been moved since the conveyance to K., the land in dispute belonged to them; otherwise to defendant. *Held*, that it was error not to permit defendant to testify that since the death of K. the location of the old abutment of the bridge had been uncovered by a flood, and to prove its location as defendant then saw it; such evidence not being objectionable on the ground of defendant's incompetency to prove the existence of a fact in the lifetime of K.,

now deceased, or his predecessors in title.—Krepps v. Carlisle, 157 Pa. 358, 27 Atl. 741, 33 Wkly. Notes Cas. 192.

[z] (Pa. 1894) Under Act 1891 (P. L. 287), one of the parties may testify to things occurring after the death of the person under whom the other parties claim, and in the presence of other living and competent persons.—Irvin v. Patchen, 164 Pa. 51, 30 Atl. 486, 35 Wkly. Notes Cas. 341.

[zz] (Vt. 1889) Under R. L. § 1004, prohibiting a witness in an action on a book account against the estate of a decedent from testifying except to prove the handwriting and time of making the entries of the items charged, unless to rebut the testimony of living witnesses as to post mortem events, a witness may explain a letter written by him to the executrix touching events which transpired since the death of the testator.—Gifford v. Thomas' Estate, 62 Vt. 34, 19 Atl. 1088.

§ 705. Matters occurring after probate of will or appointment of administrator.

[a] (Ind. 1875) A party holding a claim against an estate, based on a contract made with the administrator, is a competent witness in his own behalf.—Voiles v. Voiles, 51 Ind. 385.

[b] (Mass. 1858) Under the provision of St. 1857, c. 305, § 1, that, "where an executor or administrator is a party to the suit, the other party shall not be admitted to testify in his own favor, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator," defendant in an action brought by an administrator de bonis non may testify as to acts done or contracts made before plaintiff's appointment, though after the appointment of the original administrator.—Palmer v. Kellogg, 77 Mass. (11 Gray) 27.

[c] (Mass. 1858) Under St. 1857, c. 305, § 1, an administrator, who is a party to a civil action, is a competent witness to acts done or contracts made before his appointment, although the other party can only testify to matters since such appointment.—Howe v. Merrick, 77 Mass. (11 Gray) 129.

[d] (Mass. 1858) Under St. 1857, c. 305, § 1, defendant in an action brought by an administrator is a competent witness to disprove admissions alleged to have been made by him since the administrator's appointment.—Lincoln v. Lincoln, 78 Mass. (12 Gray) 45.

[e] (Mass. 1868) The question to plaintiff as to "when he first discovered what he claimed to be errors in the accounts" of the defendant's intestate *held* to be competent, under Gen. St. c. 131, § 14, as applying to admissions made by plaintiff since defendant's appointment as administratrix, where it would be impossible to frame a technically unobjectionable question directing the witness to the fact.—Cronan v. Cotting, 99 Mass. 334.

[f] (Miss. 1873) The restriction of the statutes (Code 1857, p. 510, art. 190; Code 1871, § 758) against a party testifying in his own behalf against the estate of a deceased person in a case involving over $50, is limited to cases arising before the death of deceased, and does not apply to controversies arising with administrators.—Witherspoon v. Blewett, 47 Miss. 570.

[g] (Miss. 1877) In an action by the personal representatives of a testator's deceased creditors to subject lands to the payment of their debts, a purchaser of the lands from the executrix of such testator is a competent witness to establish her claim to the land, based on such purchase since testator's death.—Buckingham v. Wesson, 54 Miss. 526.

[h] (Miss. 1877) A widow is competent to prove her transactions as executrix, though not to prove her dealings with her deceased husband, out of which she has a claim against the estate.—Buckingham v. Wesson, 54 Miss. 526.

[i] (Miss. 1891) Under Code, § 1602, permitting persons to give evidence in support of their claims against the estate of a decedent which originated after the death of the decedent, in the course of administering the estate, an administrator is a competent witness to testify as to the exceptions to his account, that he had not charged himself with all the moneys which came into his hands as administrator, and that certain credits claimed by him were incorrect.—McDonald v. McDonald, 68 Miss. 689, 9 South. 896.

[j] (Mo. 1875) The grantee in a trust deed is a competent witness as to transactions with the administrator of the grantor's estate, relating thereto, subsequent to the grantor's decease.—McGlothlin v. Hemry, 59 Mo. 213.

[k] (R. I. 1870) Rev. St. c. 187, § 34, enabling parties to testify, provides that where an original party to a contract or cause of action is dead, or when the executor or administrator is a party to the suit, the other party may be called as a witness by his opponent, but shall not be permitted to testify on his own offer, or on a call of his coplaintiff or codefendant, otherwise than now by law allowed, unless a nominal party merely, includes transactions after the death of the decedent between the executor or administrator and the other party to the suit.—Brown v. Lewis, 9 R. I. 497.

[l] (Vt. 1865) Under Gen. St. 1863, p. 327, § 24, providing that, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator, defendant in a suit by an administrator was not competent to testify in his own favor as to any facts occurring before the administrator's appointment.—Hulett v. Hulett, 37 Vt. 581.

[m] (Vt. 1868) Under Gen. St. p. 327, § 24, defendant, in an action brought by an executor, is not a competent witness to testify as to conversations had with the executor before the probate of the will.—Ford's Ex'rs v. Cheney, 40 Vt. 153.

[n] (Vt. 1869) Under Gen. St. c. 36, § 24, allowing a party to testify "as to such acts and contracts as have been done or made since the probate," defendant, in an action of debt on a judgment of the probate court in favor of the estate of a deceased person, was a competent witness to prove that one of the executors, since deceased, had accepted his note, payable to both executors, in full satisfaction of the claim, though the surviving coexecutor had no knowledge of the agreement.—Dawson v. Wait, 41 Vt. 626.

14. NATURE AND EFFECT OF TESTIMONY.

FOR OR ON BEHALF OF WITNESS, § 706.
AGAINST INTEREST OF WITNESS, § 707.
FOR OR ON BEHALF OF CO-PARTY, § 708.
FOR OR AGAINST ADVERSE PARTY, § 709.
WITNESS REQUIRED TO TESTIFY BY COURT, § 710.

Testimony taken before death of party, see ante, § 564.

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§ 706. For or on behalf of witness.

[a] (Ill. 1877) Where a junior mortgage was sought to be foreclosed by the administrator of the mortgagee, and a cross-bill was filed by the administrator of the prior mortgagee to foreclose his mortgage, *held*, that a prior administrator of the first mortgagee, who had given the second mortgage, and had entered satisfaction of the first mortgage, and who was made a defendant in both bills, was a competent witness in favor of the administrator of the first mortgagee, and against the administrator of the second mortgagee, to prove notice of the prior mortgage and the facts attending the satisfaction of the same, since the witness did not testify on his own motion nor in his own behalf.—Remann v. Buckmaster, 85 Ill. 403.

[b] (Ky. 1887) Under Civ. Code, § 606, subsec. 2, providing that no person shall testify for himself concerning any transaction with a deceased person, the individual liability assumed by one partner in permitting judgment by default to go against him, on appeal, does not render him a competent witness, at the next trial of the action, to testify for the other partners, with reference to the same transaction, as to what transpired between the witness and the dead man as to the payment of the partnership debt sued on.—Worthington v. Miller's Adm'r, 85 Ky. 320, 3 S. W. 532.

[c] (Ky. 1888) The president and cashier borrowed money of their bank, and loaned the same to a failing debtor of the bank and of the president. The debtor gave a mortgage; the property being delivered to the mortgagees, with authority to sell, etc. The president controlled the property, and the proceeds were applied, first, to the payment of the loan to him and the cashier. *Held*, that Civ. Code, § 606, subsec. 2, providing that no person shall testify for himself concerning any verbal statement, etc., of a decedent, did not prohibit the cashier, in an action between the bank and the president's executor, from testifying to an agreement by the president to pay the balance due by the debtor to the bank, where no action has been brought on the cashier's bond for any misconduct in the matter, and he was not shown to be liable to the bank.—Apperson's Ex'x v. Exchange Bank, 10 S. W. 801.

[d] (Ky. 1889) A partnership purchased land, each partner taking an undivided interest, paid for out of his own funds. The property was used for the partnership business, and after it ceased each used his undivided interest for his own benefit, and mortgaged it to secure individual liabilities. In an action by the administrator of the deceased partner to enforce an alleged lien for the balance due a deceased partner, against a mortgagee of the survivor's interest for the latter's individual debt, the survivor is a competent witness in reference to the status of the real estate, as it is not properly testimony in his own behalf, his personal liability for the balance being neither increased nor diminished thereby; the contest as to the status of the property being between plaintiff and the survivor's mortgagee.—Wilhite's Adm'r v. Boulware, 88 Ky. 169, 10 S. W. 629.

[e] (N. Y. 1881) A. received from B., during her last sickness, a sum of money, with directions as to its use. After B.'s death, A., having applied a portion of the money as directed, was made a defendant in a suit brought by one claiming it; B.'s administrator also claiming it, and being made a party to the suit. *Held* that, under Code, § 829, A.'s testimony as to his transaction with B. was inadmissible, as it was on his own behalf, as well as that of plaintiff, and against the administrators of deceased.—Wilkins v. Baker, 24 Hun, 32.

[f] (N. Y. 1882) In one's action against his father's executors to compel the cancellation of a mortgage, a residuary legatee, not a party to the mortgage, could testify as to declarations of the deceased, since she was not testifying in her "own behalf or interest," within Code, § 829.—Carpenter v. Soule, 88 N. Y. 251, 42 Am. Rep. 248.

[g] (N. Y. 1889) A legatee, having affirmed the will in her answer to the petition to revoke the probate, was not incompetent as a witness under the pleadings, by virtue of the statute as her testimony would not be in her own behalf.—In re Stewart, 1 Con. Sur. 412, 5 N. Y. Supp. 32.

[h] (N. Y. 1891) A party is a competent witness when she is not examined in her own behalf, and is not interested in the subject on which she testifies.—Kelsey v. Cooley, 58 Hun, 601, 11 N. Y. Supp. 745.

[i] (S. C. 1890) Testimony by an heir, a party to the proceeding, of a communication had between his ancestor and the ancestor, since deceased, of a codefendant adverse in interest, is competent, under Code Civ. Proc. § 400, providing that no party to an action shall testify in his own behalf as to any transaction between himself and a person at the time of the examination deceased, in an action by or against the administrator, etc.—Moore v. Trimmier, 32 S. C. 511, 11 S. E. 548, 552.

[j] (Va. 1890) Code, § 3346, disqualifies a party to the transaction under investigation to testify "in his own favor" when the other party thereto is dead. In a suit to enforce a vendor's lien, the testimony of the vendee as to the sale was "in his own favor," even though the claim against him was barred by limitation, and his interest in the suit was only as to the costs.—Tunstall's Adm'r v. Withers, 86 Va. 892, 11 S. E. 565.

[k] (W. Va. 1881) In a contest of a will of a deceased husband, to exclude the widow's evidence of conversations with her husband, her evidence must not only be against the devisees, but must be in her own behalf.—McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

[l] (W. Va. 1881) A witness is not disqualified on account of interest, unless he is to be examined in his own behalf.—Beall v. Shaull, 18 W. Va. 258.

§ 707. Against interest of witness.

[a] (Ill. 1891) In a proceeding by an administrator to sell the land of his intestate to pay debts, a defendant is competent to testify that the land belonged to his codefendant, instead of to the estate, since such testimony is against the witness' interest.—McKay v. Riley, 135 Ill. 586, 26 N. E. 525.

[b] (Mo. 1891) A guardian is a competent witness to prove his own default in an action on his official bond, brought by his ward against a surety thereon.—State, to Use of Hermann, v. Miller, 44 Mo. App. 118.

[c] (N. Y. 1876) Under Code Proc. § 399, one who is next of kin to defendant's intestate and interested in the event of the action, although not a party thereto, cannot testify to conversations with defendant's intestate, whether such testimony would be favorable to or against his interest.—Le Clare v. Stewart, 8 Hun, 127.

[d] (N. Y. 1883) Code, § 829, is not to be construed as rendering incompetent the testimony of one having a personal knowledge of an agreement between plaintiff and one deceased, where the testimony of the witness is adverse to her own interest.—Brown v. Brown, 29 Hun, 498.

[e] (N. Y. 1896) A person interested in the event of an action is not excluded by Code Civ. Proc. § 829, from testifying against his own interest.—Savercool v. Wilsey, 5 App. Div. 562, 39 N. Y. Supp. 413.

[f] (Pa. 1880) In a sheriff's interpleader, defendants in the execution are competent to testify that the goods levied on belonged to their decedent's estate; for such testimony is against their interest.—Bruner v. Wallace, 14 Phila. 178.

[g] (S. C. 1884) Code, § 400, which excludes parties from testifying as to transactions with a deceased person, "where such examination or any judgment in the action can affect in any manner the interest of such witness," does not apply where the evidence of the witness is against his own interest.—Robinson v. Robinson, 20 S. C. 567.

[h] (S. C. 1884) In an action against the administrator of the maker of a note, the sureties are competent witnesses to prove its execution, even though they are the distributees of the estate.—Robinson v. Robinson, 20 S. C. 567.

[i] (S. C. 1890) Code Civ. Proc. § 400, providing that no person who has an interest which may be affected by the event of an action, nor any person who has had such an interest, shall be examined as a witness in regard to transactions between himself and a person since deceased, against a party then prosecuting or defending the action as executor, administrator, heir at law, etc., of such deceased person, when such examination can in any way affect the interest of the witness, or the interest previously owned by him, does not prevent the son and grantee of a deceased debtor, who is a party defendant, from testifying for complainant in a suit by a judgment creditor of his father to set the deed aside as fraudulent, when such testimony is against his own interest, even though it does affect the rights of others.—Shell v. Boyd, 32 S. C. 359, 11 S. E. 205.

[j] (Va. 1878) Where a party to a suit is examined as a witness, and testifies about transactions the other party to which is dead, if he does not testify "in his own favor, or in favor of any other party having an interest adverse" to the party who is dead or those claiming under him, but against his own interest and the interest of those having an interest adverse to the dead party, he is not incompetent.—Burkholder v. Ludlam, 30 Grat. 255, 32 Am. Rep. 668.

[k] (W. Va. 1895) Code, c. 130, § 23, providing that one shall not testify as to a transaction with a decedent, does not apply to one whose testimony is against his interest, he being competent at common law.—Crothers' Adm'r v. Crothers, 40 W. Va. 169, 20 S. E. 927.

[l] (W. Va. 1895) Children of a decedent, who are his distributees, are competent to prove a transfer by their father of personalty to another.—Crothers' Adm'r v. Crothers, 40 W. Va. 169, 20 S. E. 927.

[m] (Wis. 1885) The testimony of a party as to transactions by him with a deceased person, from whom the opposite party derives title, may properly be received so far as it is merely an admission against his interest of payments made by such deceased person.—Crowe v. Colbeth, 63 Wis. 643, 24 N. W. 478.

§ 708. For or on behalf of co-party.

[a] (Ala. 1889) In a suit against D. and the administrator of a decedent on a joint demand, D. is not a competent witness for the administrator as to conversations between decedent, plaintiff, and himself.—Sublett v. Hodges, 88 Ala. 491, 7 South. 296.

[b] (Ill. 1873) In a suit at law by minor heirs against an administrator of an estate to recover moneys received by the intestate, which belonged to the plaintiff's father's estate, it was by stipulation agreed that the plaintiff's mother and her present husband should be made parties, and the cause should be heard by the court, and determined according to equity. *Held*, that the mother of the minor plaintiffs was not a competent witness to testify generally for the purpose of establishing her own claim, but that she was competent to prove any fact to establish the claim on behalf of the minor plaintiffs.—Stewart v. Kirk, 69 Ill. 509.

[c] (Ill. 1883) One who is a necessary party to an executor's bill to foreclose is incompetent to testify to payments made by the mortgagor, his codefendant, to the testator.—Richardson v. Hadsall, 106 Ill. 476.

[d] (Ill. 1893) Rev. St. 1891, c. 51, §§ 1, 2, which abolish all disqualifications of witnesses by reason of interest as a party or otherwise, except when the adverse party represents a decedent, and in certain other cases therein stated, do not abolish the rule of chancery courts making a defendant competent to testify on behalf of a codefendant on any question in the decision of which he has no interest; and such a defendant is therefore competent to testify in such case, even though the adverse party sue as representative of a decedent.—White v. Ross, 147 Ill. 427, 35 N. E. 541.

[e] (Iowa, 1876) In proceedings for the probate of a will, one of the proponents of the will cannot be permitted to testify respecting conversations with the testator, even though the testimony is offered, not in his own behalf, but for other proponents.—Sisters of Visitation v. Gloss, 45 Iowa, 54.

[f] (Ky. 1892) The statute providing that no person shall testify for "himself" as to any verbal statement of a deceased person will not, in a suit by two beneficiaries against the executor of their deceased trustee to establish the trust, prevent each from testifying in favor of the other as to conversations of the deceased trustee respecting the trust.—Beach v. Cummins' Ex'x, 18 S. W. 360; Beach's Adm'r v. Same, Id.

[g] (Mass. 1862) If the original plaintiff in an action against several defendants is dead, and the suit is prosecuted by his administrator, one of the defendants cannot be allowed to testify in behalf of the others to facts which affect them alone.—Pettingill v. Porter, 85 Mass. (3 Allen) 349.

[h] (N. Y. 1877) The fact that the maker and indorser of a note, sued together by the executor of the deceased holder, have put in separate answers, does not entitle one to call the other as a witness to any transaction had with decedent.—Alexander v. Dutcher, 70 N. Y. 385, affirming (1876) 7 Hun, 439.

[i] (N. Y. 1879) In an action by the administrator of the payee of a note against the surety, testimony by the principal maker, in behalf of the surety, as to personal transactions between himself and the deceased, is not excluded by Code, § 829, since it is not in his own behalf or interest, or on behalf of a party succeeding to his title or interest.—Church v. Howard, 17 Hun, 5.

[j] (N. Y. 1879) In an action by the payee's testator against the two makers of a joint and several note, one defendant might testify, solely for the benefit of the other, and without contravening Code, § 829, as to a usurious agreement made with the deceased.—Ely v. Clute, 19 Hun, 35.

[k] (N. Y. 1881) In an action by the payee's administrator against H. and A., the makers, H. claimed to be liable only as surety, and A. interposed no defense. *Held* that, under Code, §§ 828, 829, A. could not be allowed to testify for H. as to personal transactions and communications had by A. with the deceased payee.—Hill v. Hotchkin, 23 Hun, 414.

[l] (N. Y. 1896) In an action against a husband individually and as administrator of his wife's estate and their children to foreclose a

mortgage, accompanied by bond, of the wife's separate estate, both of which instruments were signed by the husband for himself and wife, where the husband made no defense in either capacity, he was not, under Code Civ. Proc. § 829, prohibiting any person "interested in the result" of an action from testifying "in his own behalf," etc., disqualified by interest from testifying for the defendant children that he signed the instruments without authority or knowledge of his wife.—Albany County Sav. Bank v. McCarty, 149 N. Y. 71, 43 N. E. 427.

[m] (N. C. 1896) Code, § 590, disqualifying a witness from testifying as to a personal transaction between himself and a decedent "in behalf of himself or a person succeeding to his title or interest," does not render a principal, who has admitted his liability on a note made to decedent in his lifetime, an incompetent witness to an extension of time to himself which might result in releasing a surety, his codefendant.—Sutton v. Walters, 118 N. C. 495, 24 S. E. 357.

[n] (Ohio, 1884) In a suit by C., a judgment creditor of L., against L. and the administrator of J., praying a sale of land incumbered by a mortgage to J., the administrator filed an answer and cross-petition on the mortgage, to which L. and C., by separate answers, charged that J. had received usurious interest on the mortgage debt. These answers were denied by separate replies. *Held* that, upon the issue of usury so raised between J.'s administrator and C., L. was a competent witness.—Johnson v. Connable, 41 Ohio St. 178.

[o] (Tex. 1891) Under Rev. St. art. 2248, which provides that in actions by or against representatives of a decedent, a party cannot testify as to transactions with the decedent, unless called to testify thereto by the opposite party, a plaintiff cannot testify in such case on behalf of his coplaintiffs.—James v. James, 81 Tex. 373, 16 S. W. 1087.

[p] (Tex. 1893) In an action by the guardian of the minor children of a deceased heir against the other heirs for partition, one of the defendants, though called by his codefendants, cannot testify as to declarations made to him by the deceased heir, under Rev. St. art. 2248.—Ellis v. Stewart (Civ. App.) 24 S. W. 585.

§ 709. For or against adverse party.

[a] (U. S. 1871) Where a bill is filed to set up a parol trust in land against the heirs and administrators of a deceased person, and an execution creditor of the complainant, who had levied on the property, is made a defendant and has filed a cross-bill, such execution creditor cannot be considered as "the opposite party," referred to in Act March 3, 1865 (13 Stat. 533), which provides that in actions against executors or administrators neither party shall be allowed to testify against the other as to any transaction with or statement by the testator or intestate, "unless called to testify thereto by the opposite party," etc.—Eslava v. Mazange's Adm'r, Fed. Cas. No. 4,527 [1 Woods, 623].

[b] (U. S. 1892) Evidence elicited by cross-examination of complainant testifying on his own behalf in a suit against the representatives of a decedent, as to matters independent of the matters inquired about in direct examination, are competent as against respondent, and will not be affected by an objection to the competency of the witness.—Treadwell v. Lennig (C. C.) 50 Fed. 872.

[c] (Ala. 1868) Where, in an action by an administrator, defendant is introduced and examined as a witness in his own behalf, it is competent for the administrator to ask defendant on cross-examination a question in relation to a transaction between witness and plaintiff's intestate, as such witness is then "called to testify thereto by the opposite party," within the meaning of Code, § 2704.—Thomas' Adm'x v. Thomas, 42 Ala. 120.

[d] (Ala. 1882) In an action by an administrator on a debt due the intestate, defendant, though incompetent to testify in his own behalf, may be compelled to testify in favor of plaintiff.—Dudley v. Steele, 71 Ala. 423.

[e] (Ala. 1889) In a proceeding by the administratrix and widow of an intestate to declare his estate insolvent, where the heirs appear and deny the insolvency, the testimony of a creditor who joins in the issue with the heirs, but whose claim is resisted by the heirs, to establish his claim, as to transactions with the decedent, is not made competent by his being called by the administratrix, where it appears that it is to her interest, as widow, to have the claim established. In such case, not being actually opposed to the witness in interest, she is not the "opposite party" within the meaning of the statute.—Dolan v. Dolan, 89 Ala. 256, 7 South. 425.

[f] (Cal. 1877) Code Civ. Proc. § 1880, which prohibits parties to an action in which a claim is made against an estate from testifying, is not to be construed as prohibiting an executor or administrator from calling a party to the action to testify in behalf of the estate.—Chase v. Evoy, 51 Cal. 618.

[g] (Ga. 1892) Act Oct. 29, 1889, declares that, in a suit instituted or defended by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against said decedent as to communications or transactions with him, and, further, that where a person not a party, but interested in the result of the suit, is offered as a witness, he shall not be competent if, as a party, he would, for any cause, be incompetent. *Held* that, construing the act according to the letter, as therein required, a defendant sued jointly with an administrator is not incompetent to testify in behalf of plaintiff as to a transaction between plaintiff and deceased, though the witness was also a party to the transaction, and may have an interest in charging the administrator, as such, with liability in the pending suit.—New Ebenezer Ass'n v. Gress Lumber Co., 89 Ga. 125, 14 S. E. 892.

[h] (Ill. 1879) A trustee under a will and the legatee were made defendants in a suit to establish a partnership between complainant, the testator, and two other defendants. Complainant prayed that the trustees should pay over to the partners what might be found due on an accounting. *Held*, that the defendant copartners could not testify in behalf of complainant as to transactions with the deceased partner.—Bragg v. Geddes, 93 Ill. 39.

[i] (Ill. 1883) Where parties complainant were incompetent, under Rev. St. 1874, c. 51, § 2, forbidding any party or person directly interested from testifying in his own behalf against an administrator, they could not avoid the effect of the statute by amending the original bill by striking out the name of one of the complainants and making him one of the defendants, and by his filing a cross-bill.—Wagenseller v. Prettyman, 12 Ill. App. (12 Bradw.) 341.

[j] (Ill. 1888) Under Rev. St. c. 51, § 2, providing that no party to an action, directly interested in the event, shall be allowed to testify of his own motion or in his own behalf, when any adverse party sues or defends as executor, administrator, heir, legatee, or devisee of any deceased person, unless when called as a witness by such adverse party, a legatee, who is the widow of a son of the testator, who died during the testator's life, may testify as to his testamentary incapacity, in an action against her by an heir of the testator to set aside the will, on being called by complainant,

as she does not testify of her own motion, or in her own behalf, her interest being as legatee merely, and not by descent.—Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740.

[k] (Ill. 1891) A party who was incompetent as a witness under Rev. St. c. 51, § 2, because the adverse party defended as heir of a decedent, testified at a hearing before the master, and was cross-examined by the adverse party. *Held*, where all the evidence of such witness is excluded on motion, the cross-examination cannot be read in evidence, although said statute makes a party a competent witness in such case, when called as a witness by the adverse party.—Achilles v. Achilles, 137 Ill. 589, 28 N. E. 45.

[l] (Ill. 1894) Where an administratrix of the payee of a note signed by a firm brings suit on it, one member of the firm may, by bill in chancery against plaintiff and the other member, render his partner, so made defendant, a competent witness for him to show that he told plaintiff's intestate, when he signed the note, that the money so borrowed was for his individual use, or that he had no authority to sign the firm name.—Thompson v. Wilson, 56 Ill. App. 159.

[m] (Ill. 1895) Under Rev. St. 1893, c. 51, par. 2, § 2, which provides that no party to any civil action may testify when any adverse party sues or defends as representative of a decedent, unless called as a witness by such adverse party, a defendant in a chancery suit whose interest is the same as that of the complainants, and whose codefendants defend as executors of a decedent, cannot testify for the complainants. —Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999.

[mm] (Ind. 1865) In a suit by A. against the administrator of B. on a lost note, made by B. and alleged to have been assigned by C. to A. in writing, after the loss, and after the death of B., C., who was joined as a defendant to answer as to the assignment, made default. The administrator answered: (1) General denial; (2) payment by the deceased; (3) that C., and not A., was the real party in interest. On the trial, C. was called by A. as a witness to prove the execution and assignment of the note. *Held* that, as C. had admitted the assignment by his default, he was not an adversary party to A., but their interests were identical, and adverse to the administrator, and hence the witness, not being called to testify by the "opposite party," was not competent under Act 1861, § 3.—Martin v. Asher's Adm'r, 25 Ind. 237.

[n] (Ind. 1873) When the assignee sues on an assigned account, and makes the assignor a party to answer as to his interest therein, the assignor and assignee are not adverse parties, and the assignor is not a competent witness for plaintiff, where the cause of action is filed as a claim against an estate.—Ketcham v. Hill, 42 Ind. 64.

[o] (Ind. 1880) Suit was brought by an heir against the coheirs of the common ancestor, who had died intestate, such suit being based upon an alleged contract with such ancestor, and having for its object the obtaining of title to certain land which belonged to him. *Held* that, under the last proviso of 2 Rev. St. 1876, p. 135, § 2, "defining who shall be competent witnesses," an adverse party, who had, before the suit was brought, assigned a part of the cause of action to plaintiff, might be required by plaintiff to testify as to the material facts set out in the complaint.—Howard v. Howard, 69 Ind. 592.

[p] (Ind. 1882) A defendant, although incompetent to testify in favor of his codefendants in the original action, may, by reason of his having filed a cross-complaint as to matters in which his interests are adverse to those of such codefendants, testify in regard to such matters. —Nye v. Lowry, 82 Ind. 316.

[q] (Iowa, 1882) Code 1873, § 3639, that provides that "no party to an action or proceeding, nor any person interested in the event thereof, * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, against the executor * * * of such deceased person," applies only where the witness is examined against the executor, for he may testify in behalf of the executor.—Leasman v. Nicholson, 59 Iowa, 259, 12 N. W. 270, 13 N. W. 289.

[r] (Md. 1892) In an action to vacate a deed, although the trustee named therein, who was also a beneficiary, is dead, the grantor is a competent witness when produced by the new trustees, who are the real defendants; Code, art. 35, § 2, providing that, where a party to a contract or cause of action is deceased, the living party may be examined by the opposite party to the cause.—Whitridge v. Whitridge, 76 Md. 54, 24 Atl. 645.

[s] (N. J. 1881) In a suit by an administrator, defendant may be compelled to testify in regard to the transaction had with decedent.—Personette v. Pryme, 34 N. J. Eq. (7 Stew.) 26.

[t] (N. J. 1887) Under Act 1880, which prevents a claimant against the estate of a decedent from testifying as to anything the deceased may have said or done tending to show that the claim is valid, complainant has a right to call a defendant, who is in fact an adverse party to him, as his witness.—McCartin v. Traphagen's Adm'r, 43 N. J. Eq. (16 Stew.) 323, 11 Atl. 156.

[u] (N. J. 1887) In a suit in equity against the legal representative of a decedent, a defendant, whose rights and interests are the same as those of the complainant, and who is a complainant in fact, though not in form, is not competent as a witness to give testimony as to transactions with the decedent, or statements made by him, under Act 1880.—McCartin v. Traphagen's Adm'r, 43 N. J. Eq. (16 Stew.) 323, 11 Atl. 156.

[uu] (N. Y. 1878) The inhibition in Code, § 399, against testimony of an interested witness as to transactions with the deceased, applies, although such interest is adverse to that of the person calling the witness. So *held* as to the testimony of a legatee against the executor.—Gifford v. Sackett, 15 Hun, 79.

[v] (N. Y. 1887) Testimony given in a special proceeding in behalf of the administrators, who were parties to a conversation had with the intestate, was not incompetent, under Code Civ. Proc. § 829, forbidding the person or party interested to testify in his own behalf against the executor, administrator, or survivors of a deceased person.—In re Babcock, 12 N. Y. St. Rep. 841.

[vv] (N. Y. 1888) An executor is not prevented from testifying to a conversation with his testator on behalf of the latter's wife, claiming a debt against the estate.—Wiltsie v. Wiltsie's Estate, 49 Hun, 606, 1 N. Y. Supp. 559.

[w] (N. C. 1876) Though a defendant, called by a plaintiff, may be competent to testify as to transactions and conversations had with a person at the time he deceased against his own interest, he cannot be thereof examined against the interests of other defendants.—Weinstein v Patrick, 75 N. C. 344.

[ww] (N. C. 1876) One nominally a defendant, but really identified in interest with the plaintiff, is incompetent to testify to conversations with a person since deceased.—Weinstein v. Patrick, 75 N. C. 344.

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[x] (Ohio, 1859) Code, § 313, forbidding a party to testify where the adverse party is an executor or administrator, when the facts to be proved transpired before the death of such deceased person, was designed for the protection of estates, and does not excuse a party from testifying when called by the executor or administrator.—Neil v. Cherry, 2 Ohio Dec. 417.

[xx] (Ohio, 1887) In an action by the indorsee of a note against the maker, the executor of the maker may, under Rev. St. §§ 5241–5243, relative to the testimony of parties to transactions with decedents, compel the payee and assignor of the note to testify to facts that occurred prior to the death of the testator.—Roberts v. Briscoe, 44 Ohio St. 596, 10 N. E. 61.

[y] (Pa. 1881) Act March 27, 1865, enabling a party in any civil proceeding to compel the opposite party to testify on his behalf, is not affected by Act April 15, 1869. Where, therefore, plaintiff in an action on a contract made with several defendants, some of whom have since died, calls on others of them to testify on his behalf, they are competent.—Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818.

[yy] (R. I. 1892) As defendant in an accounting is required to present an account under oath, in doing so he will be regarded as testifying on the call of his opponent, and as not within the prohibition contained in the proviso to Pub. St. c. 214, § 33, which provides that, in cases where the original party to the contract or cause of action is dead or insane, a "party may be called as a witness by his opponent, but shall not be admitted to testify upon his own offer."—Bowen v. Bowen, 17 R. I. 738, 24 Atl. 714.

[z] (Tenn. 1873) The phrase "opposite party," in Code, § 3813d, providing that in actions by or against executors, etc., neither party shall be allowed to testify against the other as to transactions with decedent, etc., unless called by the opposite party, means opposite in interest, so that a defendant is an incompetent witness for complainants as to transactions with a deceased codefendant, when the interests of such witness and complainants are not antagonistic. —Trabue v. Turner, 57 Tenn. (10 Heisk.) 447.

[zz] (Tex. 1890) Under Rev. St. art. 2248, which allows a party to testify when called by the opposite party, a defendant who has, pending the suit, conveyed his interest in the property in controversy to plaintiff without warranty, is a competent witness for plaintiff.—Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030.

§ 710. Witness required to testify by court.

[a] (U. S. 1868) Under Act March 8, 1865 (13 Stat. 533) which provides that, in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify by the court, the federal court will not grant an application by one party to be required by the court to testify, in any case where the effect of granting it would be to adopt a rule of decision different from that which the legislature of the state has prescribed for the government of the state courts in all similar cases.—Robinson v. Mandell, Fed. Cas. No. 11,959 [3 Cliff. 169].

[b] (U. S. 1871) An ex parte order obtained by complainant before process issued, for his own examination as a witness, does not qualify him as such, on the ground that he is required by the court to testify, under Act March 3, 1865 (13 Stat. 533), which provides that, in actions against executors, administrators, or guardians, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court.—Eslava v. Mazange's Adm'r, Fed. Cas. No. 4,527 [1 Woods, 623].

[c] (Ind. 1883) Under Act March 15, 1879, providing that, when an executor is a party to a suit, neither party shall be allowed to testify, "unless required by the opposite party or by the court," the overruling of an objection to the competency of a witness is not equivalent to a requirement on the part of the court that he should testify.—Cupp v. Ayers, 89 Ind. 60, overruling Smith v. Smith (1881) 76 Ind. 236.

[d] (Pa. 1870) An administrator is not a competent witness under P. L. 1869, p. 30, allowing parties to testify, or under P. L. 1832, p. 208, authorizing auditors to examine accountants, unless upon the mandate of the auditor.—In re Breneman's Estate, 65 Pa. (15 P. F. Smith) 298.

15. EFFECT OF ADMISSION OF TESTIMONY OF PERSON SUBSEQUENTLY DECEASED OR OF TESTIMONY OF ADVERSE PARTY, AND EFFECT OF CALLING OR EXAMINATION AS WITNESS BY ADVERSE PARTY.

EFFECT OF ADMISSION OF TESTIMONY OF PERSON SUBSEQUENTLY DECEASED IN GENERAL, § 711.
EFFECT OF FILING OR ADMISSION OF DEPOSITION OF PERSON SUBSEQUENTLY DECEASED, § 712.
EFFECT OF TESTIMONY TAKEN AT FORMER TRIAL, § 713.
EFFECT OF ADMISSION OF TESTIMONY OF ADVERSE PARTY IN GENERAL, § 714.
— INTEREST OF WITNESS, § 715.
— TRANSACTIONS OR COMMUNICATIONS WITH DECEASED, § 716.
— SCOPE OF TESTIMONY IN GENERAL, § 717.
— REBUTTAL OF EVIDENCE ON BEHALF OF ADVERSE PARTY, § 718.
TESTIMONY OF ASSIGNOR OF OR SURVIVING PARTY TO CONTRACT OR THING IN ACTION OR PERSON SUCCEEDING TO RIGHTS OF DECEASED, § 719.
TESTIMONY OF PERSON IN WHOSE PRESENCE TRANSACTION OCCURRED, § 720.
TESTIMONY OF AGENT, § 721.
EFFECT OF CALLING OR EXAMINATION AS WITNESS BY ADVERSE PARTY, § 722.
— HUSBAND AND WIFE, § 723.
— EFFECT OF EXAMINATION OF CO-PARTY, § 724.
— TESTIMONY GIVEN AT INSTANCE OF PARTY DESIRING TO TESTIFY, § 725.

§ 711. Effect of admission of testimony of person subsequently deceased in general.

[a] (N. J. 1891) A complainant having died after he had been examined as a witness on his own behalf, defendant is not a competent witness to a transaction with the complainant as to which the latter had not been examined, under Revision, p. 378, § 3, making parties competent witnesses, with a proviso that the act "shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in the action."—Beckhaus v. Ladner, 48 N. J. Eq. (3 Dick.) 152, 21 Atl. 724.

[b] (N. Y. 1876) Where a stipulation is entered into as to what a certain person's testimony will be, with leave to either party to

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read such stipulation on the trial, and the person dies, *held* that, after reading such agreed evidence on the trial, the party producing it cannot testify to personal transactions with the deceased.—Miller v. Adkins, 9 Hun, 9.

[c] (N. Y. 1878) Under Code Civ. Proc. § 399, prohibiting the admission in evidence of transactions between a witness and a decedent in certain cases, but providing that the prohibition shall not extend to any transaction as to which an executor shall be examined in his own behalf, or when the testimony of such deceased person shall be given in evidence, on a final accounting of an executor, the testator's books, wherein certain sums are directed to be taken from a child's portion as bequeathed to him by the will, are not "the testimony of the deceased," so as to permit the admission of testimony of a legatee of the income of the property for life as to personal transactions with the testator.—Benjamin v. Dimmick, 4 Redf. Sur. 7.

[d] (N. Y. 1879) Where, against a child's claim for a share of his father's estate, the executors adduce, in proof of an advancement, an entry made by the testator in his books of account, the child may, under Code, § 829, testify in explanation or denial of the entry; such entry being as "testimony of the deceased person."—Marsh v. Brown, 18 Hun, 319.

[e] (N. Y. 1894) In an action to compel defendant to deliver to plaintiff a deed, placed in defendant's custody by the deceased grantor, evidence of third persons as to declarations made to them by deceased, on an occasion other than the transaction between deceased and defendant, that deceased had executed deeds of his land to his sons, of whom plaintiff was one, is not testimony of deceased, within the meaning of Code Civ. Proc. § 829, rendering incompetent evidence as to transactions with a deceased person, "except when testimony of the deceased person is given in evidence concerning the same transaction;" and does not render competent defendant's evidence as to such transaction.—Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189.

[f] (N. Y. 1895) A note executed by decedent, and offered in evidence by the next of kin on the hearing of a claim against decedent's estate for the purpose of showing that all prior obligations to claimant had been settled, and that the note represented the sum total of what was due the claimant, is not the testimony of decedent, within Code Civ. Proc. § 829, so as to permit claimant to testify as to the consideration of the note.—In re Callister, 88 Hun, 87, 34 N. Y. Supp. 628, 2 N. Y. Ann. Cas. 146.

[g] (S. C. 1886) A ward, in an action against the executor of his deceased guardian for an accounting, is incompetent to testify as to personal communications between himself and the decedent relative to an alleged compromise and settlement, although the return of the guardian has been admitted in evidence.—Owens v. Watts, 24 S. C. 76.

§ 712. Effect of filing or admission of deposition of person subsequently deceased.

[a] (U. S. 1873) Notwithstanding Act 1865 (13 Stat. 533), which provides that, in actions against an administrator, plaintiff shall not be allowed to testify as to any transaction with the testator, defendant may testify in his own behalf as to matters embraced in the deposition of plaintiff's intestate, offered in evidence on continuance of the suit by his administrator.—Mumm v. Owens, Fed. Cas. No. 9,919 [2 Dill. 475].

[b] (Colo. 1888) Gen. St. 1883, § 3641, provides that no party to a suit shall be competent to testify in his own behalf, where the adverse party sues or defends as executor or administrator, except that, where the deposition of the deceased shall be read in evidence, the adverse party may testify as to the matters contained in such deposition. *Held* that, to make a party competent, it is not sufficient merely to show that the deposition of the deceased has been taken, but such deposition must be introduced in evidence by the representative of the party.—Levy v. Dwight, 12 Colo. 101, 20 Pac. 12.

[c] (Ga. 1874) The introduction of the deposition of a deceased party renders the opposite party a competent witness.—Monroe v. Napier, 52 Ga. 385.

[d] (Ga. 1875) Where one of the parties to the contract or cause of action in issue or on trial is dead, the other party is not a competent witness in his own favor, even though the deposition of the deceased may be in court; but, where such deposition is read, the contrary rule will apply.—Hollis v. Calhoun, 54 Ga. 115.

[e] (Ind. 1881) In a suit by the executor of a decedent whose deposition is admitted, the other party can testify on all points contained in the deposition.—Hatton v. Jones, 78 Ind. 466.

[f] (Ind. 1894) Rev. St. 1894, § 506 (Rev. St. 1881, § 498), provides that in suits in which an administrator is a party, and where a judgment may be rendered against the intestate's estate, any necessary party whose interest is adverse to the estate shall not be a competent witness as to matters which occurred during the lifetime of decedent, provided that, in case the deposition of decedent has been taken and "can be used" as evidence for the administrator, the adverse party shall be a competent witness for himself as to matters in the deposition. *Held*, that such adverse party is a competent witness where decedent's deposition is on file, though the administrator does not offer it in evidence, the adverse party himself having the right in such case to offer it to show his competency.—Coble v. McClintock, 10 Ind. App. 562, 38 N. E. 74.

[g] (Mo. 1888) Under Rev. St. § 4010, relating to evidence of transactions with decedents when the deposition of one party is taken on his own behalf, and he afterwards dies before the trial, the other party is a competent witness as to such matters only as were testified to in the deposition, and this whether the deposition be or be not previously offered in evidence by either party.—Leahy v. Rayburn, 33 Mo. App. 55.

[h] (Mo. 1890) Where, in an action to recover money paid in accordance with a proposition for reimbursement made by defendant to plaintiffs' testator, plaintiffs introduce the deposition of their testator, defendant may testify in his own behalf as to matters covered by the deposition, but no further.—Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869.

[i] (N. Y. 1879) Plaintiff in an action against an executrix was permitted to testify in his own behalf concerning personal transactions with her testatrix. Defendant afterwards gave in evidence a deposition of deceased concerning the same transactions. *Held*, that the error of admitting plaintiff's testimony was cured by the admission of the deposition.—Trow v. Shannon, 8 Daly, 239.

[j] (N. C. 1890) Under Code, § 590, which provides that a person interested in the event of an action shall not be examined as a witness in his own behalf against a person deriving his title or interest from a deceased person, concerning a personal transaction between the witness and the deceased, except where the person so deriving title or interest is examined in his own behalf, or the testimony of the deceased is given in evidence concerning the same transaction or communication, a vendee may testify, in an action against him to recover the land on the ground that the conveyance was in fraud

of creditors, that the conveyance was for a full and fair consideration, when the same statement in the deceased vendor's deposition has been read to the jury without objection.—Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154.

[k] (Pa. 1882) A. sued B., the principal, and C., the surety, on a bond. Both defendants appeared. B. died, and, upon A.'s motion, B.'s name was stricken from the record. *Held*, that plaintiff could not testify as to matters regarding which his testimony would have been incompetent had the suit been continued against B.'s personal representative, and that the fact that C. introduced in evidence a deposition given in the suit by B. did not affect the question of A.'s competency as a witness.—Lacock v. Commonwealth, 99 Pa. 207.

[l] (Tenn. 1878) If, after issue joined, complainant has filed his own deposition and died, defendant may afterwards give his own deposition. Acts 1869, c. 78, § 2, provided simply against the competency of the living party against the dead. If the dead has testified, the living may.—Bingham v. Lavender, 70 Tenn. (2 Lea) 48.

[m] (Tex. 1879) Where the deceased plaintiff's deposition has been admitted on the executor's trial of the cause, it is error to exclude defendant's testimony as to the acts and declarations about which the testator had deposed.—Runnels v. Belden, 51 Tex. 48.

[n] (Tex. 1894) Where, in an action against an executrix, decedent's deposition as to the disputed transactions with him is admitted in evidence, it is not error to allow another party to the transaction to testify as to the same.—Shuford v. Chinski (Civ. App.) 26 S. W. 141.

[o] (Wis. 1883) Defendant's testimony that he had settled the matter in controversy with plaintiff's agent, since deceased, is inadmissible, and the fact that a deposition of such deceased agent, which had been taken by plaintiff, had been put in evidence by defendant, does not render the latter competent to testify as to his transactions with such agent referred to in the deposition.—McIndoe v. Clarke, 57 Wis. 165, 15 N. W. 17.

§ 713. Effect of testimony taken at former trial.

[a] (Ga. 1878) An attorney present at a conversation between his client and a third party was competent to testify after the death of the latter, whose testimony at a former trial was in court and could be used.—Allen v. Morgan, 61 Ga. 107.

[b] (Me. 1871) Under Rev. St. 1871, c. 82, § 87, providing that in an action by an executor, administrator, or other legal representative of the decedent, in which the latter's account books or other memoranda are used in evidence on either side, the other party may testify in relation thereto, defendant, in an action continued after plaintiff's death by his administrator, cannot introduce the testimony of plaintiff as given at a previous trial of the action, and then put himself on the stand as a witness to contradict it.—Folsom v. Chapman, 59 Me. 194.

[c] (Mich. 1888) The fact that, at a former trial between plaintiff and defendant's intestate, the former testified as to certain conversations, and the latter cross-examined plaintiff, and testified in his own behalf, does not enable plaintiff, at a subsequent trial, after the death of defendant's intestate to testify concerning those matters again, under How. Ann. St. § 7545.—Taylor v. Bunker, 68 Mich. 258, 36 N. W. 66.

[d] (Miss. 1877) On the first two trials of an action by H. against S., both parties testified. H. dying, the action was revived by her administrator, and on the third trial her testimony was admitted as given in the previous trials. *Held*, that thereupon S. should have been allowed to testify as to the matters embraced in H.'s testimony.—Strickland v. Hudson, 55 Miss. 235.

[e] (Mo. 1893) The statutory provision that where one of the original parties to a cause of action is dead, and his personal representative is a party to the suit, the other party shall not be admitted to testify in his own favor, does not apply where the testimony of the decedent, taken at a former trial, has been preserved by bill of exceptions, even though such testimony is not first introduced by the personal representative.—Stone v. Hunt, 114 Mo. 66, 21 S. W. 454.

[f] (Mo. 1893) In such case the living witness cannot testify as to matters not covered by the testimony of the decedent, but he may correct any errors in the testimony given by himself upon the former trial.—Stone v. Hunt, 114 Mo. 66, 21 S. W. 454.

[g] (Neb. 1893) When one of the defenses was that the matters in controversy had been determined adversely to plaintiff in an action by him against the decedent, of whom defendants were the heirs and personal representatives, and where the deposition of decedent, taken in the previous case, was introduced merely to show the identity of the subject-matter of the two suits, plaintiff testifying that they were not identical, its admission did not justify the admission of plaintiff's testimony as to personal transactions and conversations between him and decedent as to material matters.—Furbush v. Barker, 38 Neb. 1, 56 N. W. 996.

[h] (N. Y. 1876) Code, § 399, allowing a party to testify as to communications concerning which the testimony of the deceased (on a former trial) has been read in evidence, applies only to cases where such testimony is given by the adverse party, and not by the one who offers himself as a witness.—Miller v. Adkins, 9 Hun, 9.

[i] (N. Y. 1880) The saving clause of Code, § 829, does not cover a case where the testimony at a former trial, given by a party since deceased, is read upon the trial of a subsequent action by a party thereto.—Potts v. Mayer, 46 N. Y. Super. Ct. (14 Jones & S.) 182, reversed (1881) 86 N. Y. 302; Id., 10 Abb. N. C. 63; Id., 62 How. Prac. 126.

[j] (N. Y. 1881) Where the deceased party has spoken, and his statement is put in evidence, Code, § 829, does not preclude the surviving party from contradicting or correcting it. So *held*, where, after testimony of a deceased party on a former trial had been read in one's favor, the cross-examination was read, including testimony to a distinct and material fact not responsive thereto, and therefore the survivor may testify to such fact, though it be a personal transaction or communication with deceased.—Potts v. Mayer, 86 N. Y. 302, 10 Abb. N. C. 63, 62 How. Prac. 126, reversing (1880) 46 N. Y. Super. Ct. (14 Jones & S.) 182.

[k] (N. Y. 1881) Where the testimony of a deceased plaintiff, given on a former trial, is read on a retrial, the case is within the exception of Code Civ. Proc. § 829, forbidding a person or party interested to testify in his own behalf against an executor, "except where the testimony of the deceased person is given in evidence concerning the same transaction or communication." Therefore defendant might contradict, correct, and supplement such evidence as to all that took place at an interview as to which the deceased had testified.—Robbins v. Pultzs, 48 N. Y. Super. Ct. (16 Jones & S.) 510.

[l] (Pa. 1877) Where one of the parties to the original action is dead, in a subsequent action, brought by his administratrix for the same subject-matter, the surviving party cannot testify

to matters which occurred during the lifetime of the original plaintiff, although the testimony of the latter, taken in the original suit, has been admitted in evidence.—Evans' Adm'x v. Reed, 84 Pa. 254.

[m] (Pa. 1877) Where, on the first trial of a case, plaintiff was fully examined and cross-examined, and before retrial he died, and his administratrix was substituted, and on the retrial his testimony was admitted, defendant was competent to testify in his own behalf, notwithstanding Act April 15, 1869, forbidding testimony of a party in actions against an executor, administrator, or guardian.—Evans v. Reed, 8 Lanc. Bar, 141.

[n] (Tex. 1884) Where, in A.'s action against B., A. testifies in B.'s absence and recovers judgment, and B. (having been served only by publication) obtains, under Dig. art. 1373, after A.'s death, a new trial, A.'s testimony on the first trial is admissible; and its admission renders B. a competent witness.—O'Neill v. Brown, 61 Tex. 34.

§ 714. Effect of admission of testimony of adverse party in general.

[a] (Ala. 1875) In a suit on a deceased administrator's bond against his surety to recover the amount of a decree rendered against the deceased in his lifetime, the administrator of the deceased testified to conversations had with plaintiff tending to show that deceased had settled the decree. *Held*, that plaintiff was a competent witness to prove that the settlement to which such conversation referred did not relate to the decree.—Cousins v. Jackson, 52 Ala. 262.

[b] (Fla. 1880) In an action of assumpsit by A.'s administrator against B., after the books of B. have been placed in evidence, and a witness has sworn that some of the entries of charges against A. in said books are in B.'s handwriting, B. is not rendered incompetent by Laws, c. 1983, to testify as to the regularity and correctness of the entries in his handwriting.—Robinson v. Dibble's Adm'r, 17 Fla. 457.

[c] (Ky. 1876) On the trial of an action on a note, against the principal and one surety and the executor of another surety in the note, by agreement of the parties, an affidavit was read as the deposition of the principal, proving, in effect, that after the maturity of the note he had paid to plaintiff, in semiannual installments, a greater rate of interest than that stipulated in the note, and that in consideration thereof plaintiff had extended the time of the payment of the note two years. *Held*, that by this evidence of the principal plaintiff was made a competent witness in his own behalf.—Eaves' Ex'r v. Harbin, 75 Ky. (12 Bush) 445.

[d] (Me. 1871) The provisions of Rev. St. 1871, c. 82, § 87, specifying what will authorize "the other party to testify in relation to" matter "used in evidence," does not apply to a bill of items annexed to a writ and placed in a witness' hands to refresh his memory.—Folsom v. Chapman, 59 Me. 194.

[e] (Me. 1871) Rev. St. 1871, c. 82, § 87, permitting the adverse party to testify when an administrator testifies, is in derogation of the common law, and must be construed strictly, namely, to import that the adverse party cannot testify unless the administrator offers to testify.—Kelton v. Hill, 59 Me. 259.

[f] (Me. 1871) Under Rev. St. c. 82, § 87, cl. 4, permitting the opposite party to testify in an administrator's action wherein account books of the deceased "or other memoranda are used as evidence on either side," the phrase "other memoranda" means memoranda made by the deceased only, and does not include receipts given by the adverse party.—Cary v. Herrin, 59 Me. 361.

[g] (Mich. 1884) Though 2 How. Ann. St. § 7545, prohibits a party adverse to a decedent from testifying as to matters equally within the knowledge of decedent, yet, where the representatives of decedent introduce admissions of the survivor, they waive the inhibition, and the survivor may testify as to the facts concerning which they were made, though equally within the knowledge of decedent.—Appeal of Smith, 52 Mich. 415, 18 N. W. 195.

[h] (Mich. 1889) In an action by an administrator against a person to whom the intestate had disposed of his property before his death, where plaintiff produces in evidence certain answers of defendant, in an examination in the probate court, as to his disposition of the property in dispute, defendant may introduce so much of his testimony given upon such examination as he may deem material, notwithstanding it would otherwise be inadmissible under How. Ann. St. § 7545, prohibiting the opposite party in an action by or against an administrator from testifying in his own behalf as to matters which must have been equally within the knowledge of the decedent.—Beardslee v. Reeves, 76 Mich. 661, 43 N. W. 677.

[i] (Minn. 1887) Proof by plaintiff, an executor, of an admission by defendant of a liability in favor of the estate, does not waive the protection of the statute, so as to enable defendant to testify as to conversations with, or admissions of, the deceased party.—Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86.

[j] (Mo. 1882) In a suit by an administrator, plaintiff and another testified as to various acts and statements of defendant relating to the matters in controversy occurring after the grant of letters of administration. *Held*, that defendant should be allowed to give his testimony in relation thereto.—Wade v. Hardy, 75 Mo. 394.

[k] (N. H. 1889) Under Gen. St. c. 209, § 16, providing that when an executor, being a party to a suit, elects to testify, the adverse party may testify, an executor's election to testify for any purpose or to any extent enables the adverse party to testify generally, and without restriction.—Dow v. Merrill, 65 N. H. 107, 18 Atl. 317.

[l] (N. H. 1889) Under Laws 1857, permitting parties to actions to testify except where the adverse party is an administrator or guardian not electing to testify, the identification of deceased's books by plaintiff executor is not an election to testify, nor a waiver of a right to object to defendant's testifying generally.—Sheehan v. Hennessey, 65 N. H. 101, 18 Atl. 652.

[m] (N. J. 1864) Under the statutes a complainant in forcible entry and detainer against a husband and his wife, being an incompetent witness, is not made competent by the subsequent admission of the defendants as witnesses for themselves.—Yetman v. Dey, 33 N. J. Law (4 Vroom) 32.

[n] (N. J. 1866) In an action by an administratrix in her representative right, defendant will not be permitted to be sworn, except where plaintiff has first sworn and testified.—Shepherd's Ex'x v. McClain, 18 N. J. Eq. (3 C. E. Green) 128.

[o] (N. J. 1889) The supplementary act of February 25, 1880 (Supp. Revision, p. 287), provides that in all civil actions "any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action." *Held*, that either party may be admitted to testify on his own behalf within the range prescribed by the act, whether the other is a witness or not.

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McCartin v. Traphagen's Adm'r, 45 N. J. Eq. (18 Stew.) 265, 17 Atl. 809.

[p] (N. Y. 1881) In Code, § 829, providing that a party shall not be examined as a witness in his own behalf against an administrator concerning a personal transaction between witness and decedent, "except where the administrator is examined in his own behalf, or the testimony of the deceased person is given in evidence, concerning the same transaction or communication," the words "concerning the same," etc., refer not only to the last clause, "or the testimony," etc., but also to the preceding clause, "except where," etc.—Ward v. Plato, 23 Hun, 402.

[q] (N. Y. 1888) Under Code Civ. Proc. § 829, evidence by plaintiff that certain clothing and money furnished him by defendant's intestate were on account of wages due by deceased, and that deceased so stated, is incompetent, even on redirect examination, after plaintiff has been asked, on cross-examination, if he had not received such clothing and money, and after checks given plaintiff by deceased, and indorsed by plaintiff, have been introduced in evidence by defendants.—Vanderveer v. Vanderveer, 49 Hun, 608, 1 N. Y. Supp. 897, 898.

[r] (N. Y. 1888) In an action for services to deceased while sick, plaintiff cannot give in evidence a conversation with deceased as to the debt, where defendant has testified that plaintiff went to the bedside of deceased, but gave no evidence concerning the conversation.—Bowers v. Smith, 50 Hun, 604, 3 N. Y. Supp. 105, judgment affirmed (1891) 124 N. Y. 645, 27 N. E. 412.

[s] (N. Y. 1889) In an action on a joint note against the surviving maker and the executors of deceased maker, where the executor testifies in his own behalf in regard to matters about which plaintiff is prohibited from testifying by Code Civ. Proc. § 829, the prohibition is thereby removed; the section excepting the case "where the executor is examined in his own behalf."—Wilcox v. Corwin, 117 N. Y. 500, 23 N. E. 165, affirming (1888) 50 Hun, 425, 3 N. Y. Supp. 317.

[t] (Or. 1894) In an action by decedent's wife against his executor for money loaned to decedent, the will of deceased, which contained no statement concerning the receipt of the money, or denial of his obligation to pay it, or facts tending to contradict plaintiff's testimony, is not admissible, under Hill's Code, § 711, as amended by Sess. Laws 1893, p. 134, providing that, when a party to an action against an executor testifies in his own behalf, statements of the deceased concerning the same subject, in his own favor, may be shown.—Grubbe v. Grubbe, 26 Or. 363, 38 Pac. 182.

[u] (Pa. 1875) A claimant against the estate of a decedent is incompetent as a witness on his own behalf, further than in support of his book entries; and the error of the auditor in admitting declarations of the decedent in the absence of the claimant does not thereby enable the latter to testify otherwise than in support of his book entries.—In re White's Estate, 32 Leg. Int. 430.

[v] (S. C. 1894) When defendant's witness has testified that he gave plaintiff a certain note, plaintiff can testify that such witness gave the note to defendant's intestate, who indorsed it to plaintiff.—Trimmier v. Thomson, 41 S. C. 125, 19 S. E. 291.

[w] (Tex. 1888) Where plaintiffs, relying upon the possession of a deceased person to complete their title by adverse possession, introduce the testimony of his administrator as to such possession, it is error to exclude evidence for defendant as to such deceased person's acts in relation to the land on the ground that he was dead, and that plaintiffs claimed by purchase from his administrator; for such exclusion would defeat the purpose of the law, which is to place the parties on an equal footing.—Hurley v. Lockett, 72 Tex. 262, 12 S. W. 212.

§ 715. —— Interest of witness.

[a] (Ill. 1873) On a bill filed by the heirs of a deceased grantor, to have his deed declared a mortgage, and to redeem from the same, where witnesses, not parties to the record, or parties in interest, or agents of the deceased, testify as to admissions made by the grantee in the presence of the deceased grantor, and not in his absence, the grantee is not a competent witness to testify as to the same admissions or conversations.—Ruckman v. Alwood, 71 Ill. 155.

[b] (Minn. 1890) Where it appears from the testimony of a disinterested witness that defendants made to plaintiff (deceased since the commencement of the action) the fraudulent representations for which a recovery is sought, defendants are not permitted (under the statute relating to evidence of transactions with decedent) to testify that, in the conversation with the deceased, referred to by such witness, they made no such representations.—Redding v. Godwin, 44 Minn. 355, 46 N. W. 563.

[c] (N. Y. 1888) A witness for plaintiff, an administrator, testified that he was present when a certain contract was made; that defendant then agreed to pay deceased a certain sum for his one-third interest in a farm owned by them. Defendant, as a witness, was asked if he promised deceased, in presence of this witness, at that time, to pay the sum stated for deceased's one-third interest. *Held*, that the answer was properly excluded.—McKenna v. Bolger, 49 Hun, 259, 1 N. Y. Supp. 651, judgment affirmed (1889) 117 N. Y. 651, 22 N. E. 1132.

[d] (N. Y. 1892) Where a disinterested person has given his version of a transaction between a deceased person and a party to the action, the bar raised by Code, § 829, is not removed so as to permit the party interested in the action to give his version of the same transaction.—Hard v. Ashley, 63 Hun, 634, 18 N. Y. Supp. 413, judgment affirmed (1892) 136 N. Y. 645, 32 N. E. 1015.

[e] (Ohio, 1888) Rev. St. § 5242, provides that in an action against an administrator the plaintiff cannot testify regarding transactions and conversations with the intestate, unless some person directly interested in the action has testified to such transactions or conversations. *Held*, that the widow of intestate had a direct interest in an action brought against his administrator to recover money paid the intestate by mistake, since she was entitled to share in his estate; and hence, after she had testified regarding transactions with intestate, plaintiff could testify regarding the same transactions.—Williams v. Longley, 2 O. C. D. 292.

[f] (S. C. 1879) The incompetency of a party in interest to testify to transactions or communications had by himself with a person deceased is not removed by the introduction of testimony as to the same matter by witnesses other than the representatives of the deceased.—Brice v. Hamilton, 12 S. C. 32.

[g] (Va. 1888) In an action on a note, by the executor of the payee, defendants called one of the devisees of the payee as a witness to prove a payment made by them to him as her agent. On cross-examination, he testified that such payment and all other credits to which defendants were entitled were allowed them on a settlement at that time had, and two new notes were given—the one in suit by all the defendants, and another by one defendant. *Held*, that such witness was not, within Acts 1876-77, p. 265, shown to be a party "having an interest adverse to the defendants, who has

testified to some fact occurring before the disability accrued," so as to remove the disability of a defendant to testify to the application of certain payments made by him to the payee personally.—Well's Adm'r v. Ayers, 84 Va. 341, 5 S. E. 21.

§ 716. —— Transactions or communications with deceased.

[a] (Ill. 1875) A claimant who is prosecuting a claim against the estate of a deceased person is a competent witness in his own behalf, in relation to what was done and said at a settlement between him and the executor of the estate, about which a witness produced by the executor has testified.—Straubher v. Mohler, 80 Ill. 21.

[b] (Ill. 1878) Under Rev. St. 1874, p. 480, defendant in a suit by an administrator is a competent witness to testify as to an admission by him in a conversation, given in evidence by the administrator as having taken place between himself and defendant before the death of the intestate.—Penn v. Oglesby, 89 Ill. 110.

[c] (Iowa, 1875) In an action by one against the heirs of his wife to set aside a conveyance made to her, on the ground that it was a trust for himself, he is not a competent witness to the agreement under which the conveyance was made; but in such case plaintiff may testify respecting any particular transaction to which either of the defendants has testified.—Wood v. Brolliar, 40 Iowa, 591.

[d] (Iowa, 1879) In an action by an administrator to recover rents alleged to be due his intestate for use and occupation of premises during his lifetime, where plaintiff testifies to facts from which an implied promise to pay said rents may, in the absence of evidence to the contrary, be inferred, defendant may testify as to the arrangement with deceased by which he occupied the premises, since Code 1873, § 3639, provides that in such an action the prohibition against such testimony shall not extend to any transaction with decedent as to which the administrator is examined on his own behalf.—Bailay v. Keyes, 52 Iowa, 90, 2 N. W. 1025.

[e] (Iowa, 1882) Where one party to a transaction is dead, and his administrator gives merely negative testimony as to such transaction, as that it did not occur to his knowledge, the other party is not thereby authorized to testify as to the fact of such transaction and its character, under Code 1873, § 3639, allowing such party to testify where the "administrator shall be examined on his own behalf."—In re Edwards' Estate, 58 Iowa, 431, 10 N. W. 793.

[f] (Iowa, 1894) In an action against an administrator for personal services rendered decedent, testimony by defendant that a check given by decedent, and indorsed by plaintiff, was in the handwriting of decedent, does not entitle plaintiff to testify for what the check was given, as such testimony by defendant is not in regard to a personal transaction with decedent.—In re Brown's Estate, 92 Iowa, 379, 60 N. W. 659; Cole v. Marsh, Id.

[g] (Ky. 1887) A party may testify for himself, concerning a transaction with a decedent, where another, who is adversely interested, has testified relative to the same transaction, notwithstanding Civ. Code, § 606, subsec. 2, prohibiting a party from testifying for himself concerning any transaction with a decedent, except for the purpose of affecting one who is living, and who was present when such transaction took place.—Waters v. Davis, 2 S. W. 695.

[h] (Ky. 1895) Where heirs, in an action on a contract executed by their intestate, introduce evidence as to transactions with her, the opposing party may testify as to the same matter.—Dowis' Heirs v. Elliott, 29 S. W. 142.

[i] (Mich. 1884) A person suing an estate for a loan made to deceased may not testify to a conversation had with deceased in regard thereto, even though the widow of deceased has testified as to such conversation.—Chadwick v. Chadwick, 52 Mich. 545, 18 N. W. 350.

[j] (Mo. 1892) In an action by heirs of decedent to set aside for fraud and undue influence a deed which the latter made to his wife shortly before his death, the wife is a competent witness as to conversations between herself and persons who had testified for the adverse party touching such conversations.—Brown v. Foster, 112 Mo. 297, 20 S. W. 611.

[k] (Neb. 1892) A note signed by a father and son was filed as a claim against the father's estate. On the trial the son testified as a witness that his father was merely a surety on the note, and that he was the principal, and that the note had been extended from time to time, without the knowledge or assent of his father. He was then asked if it was not a part of the agreement between himself and his father and the bank that the note was not to be paid when due, but was to be extended from time to time for about one year. *Held*, proper cross-examination, under Code, § 329, relating to testimony of an interested party as to transactions with decedents, since, the estate having shown a part of the transaction, plaintiff was entitled to show the whole.—American Sav. Bank v. Harrington's Estate, 34 Neb. 597, 52 N. W. 376.

[l] (Neb. 1893) A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by Code, § 329, from testifying to a transaction between himself and such deceased person, where the administrator first introduced a witness who testified to the same transaction.—Parrish v. McNeal, 36 Neb. 727, 55 N. W. 222.

[m] (N. J. 1889) Under Act March 27, 1874 (Revision, p. 878, §§ 3, 4), where a representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, the other party may be a witness in his own behalf as to all transactions with or statements by such testator or intestate, which are pertinent to his case. But if the representative offers himself on his own behalf, and does not testify to any such transaction with or statement by his testator or intestate, the other party is excluded from testifying with regard to any such transaction or statement.—McCartin v. Traphagen's Adm'r, 45 N. J. Eq. (18 Stew.) 265, 17 Atl. 809.

[n] (N. J.) Under Act Feb. 25, 1880 (P. L. p. 52), where an heir at law who is sued with the administrator is sworn for the defense, and testifies to transactions with and statements by decedent, plaintiff is also a competent witness.—(1889) McCartin v. McCartin, 45 N. J. Eq. (18 Stew.) 265, 17 Atl. 809; (1894) Greenwood v. Henry, 52 N. J. Eq. (7 Dick.) 447, 28 Atl. 1053.

[o] (N. J. 1891) If the executor testifies, in his own behalf, to any transactions of the deceased with the witness or another, which are relevant to the relief in the action, the other party, under Act 1874, may be a witness in his own behalf to all transactions or statements of the deceased which are pertinent to his case.—Matthews v. Hoagland, 48 N. J. Eq. (3 Dick.) 455, 21 Atl. 1054.

[p] (N. Y. 1887) On the question of whether the petitioner in a proceeding for revocation of letters of administration was or was not the intestate's wife, *held* that, as the respondents had put in evidence the intestate's declarations denying the relationship, they could not be

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heard to object to her testifying to personal communications with him tending to support her contention.—In re Scheuer, 5 Dem. Sur. 369.

[q] (N. Y. 1888) Where one of the plaintiffs in an action to establish a deed given by defendant to her husband, then deceased, testified to a transaction between defendant, himself, and the deceased, it was not error to admit the evidence of the defendant as to such transaction, as Code, § 829, forbidding a party to testify against an executor or survivor expressly excepts cases in which the executor or survivor testifies in his own behalf.—Blaesi v. Blaesi, 14 Civ. Proc. R. 216, 15 N. Y. St. Rep. 672.

[r] (N. Y. 1889) Evidence as to whether, at a time after the surrender of the notes in suit by plaintiff's deceased partner, P., to defendant, he owned any interest in the property alleged to have been transferred in consideration of the surrender, was not admissible under the exception in the statute, because of testimony by plaintiff that after the death of P. defendant had access to the safe and papers of the decedent; such testimony of plaintiff not relating to any personal transaction with P.—Clift v. Moses, 112 N. Y. 426, 20 N. E. 392.

[s] (N. Y. 1889) In an action on a note by the administrator of the payee against the surviving maker and the executor of the deceased maker, the executor having testified to a personal communication between the deceased and plaintiff, plaintiff may give his version of the conversation.—Wilcox v. Corwin, 50 Hun, 425, 3 N. Y. Supp. 317, judgment reversed (1889) 117 N. Y. 500, 23 N. E. 165.

[ss] (N. Y. 1889) In an action by the grantor's widow to have an absolute deed declared a mortgage, defendant's evidence as to a conversation between herself and the grantor with reference to the transaction, which conversation was testified to by plaintiff, is admissible.—Sidway v. Sidway, 54 Hun, 634, 7 N. Y. Supp. 421.

[t] (N. Y. 1890) In an action by a surviving partner to foreclose a mortgage, plaintiff testified, with reference to an alleged payment of money in satisfaction of the mortgage, that the money was paid by defendant to the deceased partner, to be handed to him (plaintiff) for the purpose of buying goods for defendant; that the decedent gave him the money, and that he used it for the purpose indicated. *Held*, that such testimony related indirectly to a transaction between decedent and defendant, and that the testimony of defendant concerning such transaction was therefore not prohibited by Code Civ. Proc. § 829.—Mitchell v. Cochran, 57 Hun, 589, 10 N. Y. Supp. 545.

[tt] (N. Y. 1891) In an action against an administrator for rent due by his intestate, where defendant has testified to an agreement between the parties that intestate was not to pay rent for a given period, it is error to exclude questions put to one chosen by the parties as receiver of the rents whether the lessor or the intestate ever informed him of such an agreement.—Littman v. Coulter (City Ct. N. Y.) 16 N. Y. Supp. 87.

[u] (N. Y. 1894) After defendant executor has testified to a transaction with deceased in which plaintiff participated, plaintiff may testify concerning the same transaction, and explain or deny the executor's testimony.—McLaughlin v. Webster, 141 N. Y. 76, 35 N. E. 1081.

[uu] (N. C. 1874) Under Code Proc. § 343, regulating testimony as to transactions with a deceased testator, admission of evidence thereon of one who, though nominally a defendant, is really a plaintiff in interest, renders competent that of his codefendant touching the same transaction.—Redman v. Redman, 70 N. C. 257.

[v] (N. C. 1881) Where a witness testifies to the want of mental capacity in a grantor to make a deed, and that his opinion was formed from conversations and communications between the witness and grantor, it is competent to prove the facts on which such opinion was founded; and Code, § 343, prohibiting an interested party from testifying to any transaction or communication with a deceased or insane person, does not apply.—McLeary v. Norment, 84 N. C. 235.

[vv] (N. C. 1881) In an action against the sureties on a deceased administrator's bond to recover a balance due to the estate, where defendants offered plaintiff's admissions to show that the indebtedness had been discharged by his acceptance of the personal obligation of one of the administrator's heirs, who had also since died, it is competent for plaintiff, under Code, § 343, to testify as to all the particulars of the transaction with said deceased heir.—Hawkins v. Carpenter, 85 N. C. 482.

[w] (N. C. 1885) Under Code, § 590, if an executor is examined in his own behalf concerning a transaction with his testator, the adverse party may testify concerning the same transaction.—Burnett v. Savage, 92 N. C. 10.

[ww] (N. C. 1885) Under Code, § 590, a party to an action against an administrator can testify as to transactions with decedent only in case the administrator has previously testified thereto.—Sumner v. Candler, 92 N. C. 634.

[x] (Ohio, 1882) Where an administrator in his own behalf testifies to a conversation between his intestate and the other party to the suit, such other party, under the third exception to Rev. St. § 5242, may testify as to the same conversation.—Rankin v. Hannan, 38 Ohio St. 438.

[xx] (S. C. 1888) Oral declarations and entries in the memorandum book of an intestate, unless part of conversations or transactions introduced by the adverse party, and in explanation or rebuttal thereof, are inadmissible on behalf of his administrator.—Williams v. Mower, 29 S. C. 332, 7 S. E. 505.

[y] (Vt. 1895) In an action on a note given by defendant to one since deceased, by the transferee thereof, defendant claimed to have made payments thereon, and to refute that claim plaintiff introduced another note given by defendant to decedent, and testified as to conversations had with defendant regarding the same during decedent's lifetime, and while the note was in decedent's possession. *Held*, that it was error to exclude defendant from testifying as to such conversations, as being within R. L. § 1002, disabling as a witness a surviving party to a contract "in issue and on trial."—Farrington v. Jennison, 67 Vt. 569, 32 Atl. 641.

[yy] (W. Va. 1876) If an administrator calls an heir at law of the decedent to testify to a transaction between the decedent and defendant, alleged to render defendant liable, defendant is a competent witness in his own behalf as to that transaction, though he will not be as to others.—Metz's Adm'r v. Snodgrass, 9 W. Va. 190.

[z] (W. Va. 1886) Where the deposition of a widow as to personal transactions with her deceased husband was incompetent, it could not be made the foundation for the executor's testimony, or for that of his wife concerning personal transactions had between the executor and the deceased.—Kimmel v. Shroyer, 28 W. Va. 505.

[zz] (Wis. 1867) Under Rev. St. c. 137, § 51, providing that, in suits by or against executors or administrators, the opposite party shall not testify, it was the capacity in which the party sued or defended, and not the nature of the testimony, which determined the question of

the competency of the other party to be examined as a witness in his own behalf; and in a suit by an administratrix defendant could not testify, though plaintiff may have testified to conversations and transactions between himself and defendant, as well as to others between defendant and the deceased in his presence.—Wright v. Hardy, 22 Wis. 348.

§ 717. —— Scope of testimony in general.

[a] (Ala. 1894) In an action against the maker of a note, the defense being that the note had been paid by turning over to plaintiff chattels belonging to the estate of a deceased surety thereon, a witness for defendant testified to a conversation with deceased at which plaintiff was present. *Held*, that a general question to plaintiff as to what occurred in that conversation was properly excluded under Code, § 2765, providing that neither party shall testify against the other as to a transaction with a decedent whose estate is interested in the suit, as plaintiff could only testify as to whether the conversation took place, and whether the former witness had told the truth in regard thereto.—Frank v. Thompson, 105 Ala. 211, 16 South. 634.

[b] (Ill. 1872) On bill by the widow and heirs of a deceased mortgagor against the mortgagee for an account and redemption, the court, having admitted conversations between the mortgagor and defendant and conversations between the complainants and defendant after the mortgagor's death, permitted defendant to testify generally. *Held* to be error. His testimony, under the witness act of 1867, should have been limited to the conversations.—Donlevy v. Montgomery, 66 Ill. 227.

[c] (Ill. 1888) In an action against a private corporation for damages for causing death by negligence, a stockholder of the corporation cannot testify generally to facts, material to the defense, occurring before the death, but only to a conversation or admission by deceased before his death, testified to by a witness for plaintiff, as provided by Starr & C. Ann. St. c. 51, par. 2, subd. 4.—Consolidated Ice Mach. Co. v. Kiefer, 26 Ill. App. 466, affirmed (1890) 134 Ill. 481, 25 N. E. 790, 23 Am. St. Rep. 688, 10 L. R. A. 696.

[d] (Ind. 1889) Rev. St. § 500, provides that whenever any witness shall testify on behalf of heirs or executors to any conversation or admission of a party to the suit, as having been had or made in the absence of deceased, then the party against whom it is offered shall be competent to testify to the same matter. In an action by a son against the devisees of his father to enforce a trust in lands, which he alleged his father held in trust for him, a witness testified on behalf of defendants to a statement made by plaintiff as to why he moved off the land. *Held*, that the statute did not give plaintiff the right to testify generally as to his reasons for moving from the land, but only as to the same matter testified to by the witness provided the conversation was in the absence of the deceased.—Martin v. Martin, 118 Ind. 227, 20 N. E. 763.

[e] (Ind. 1889) A witness testified on behalf of defendants that he had a conversation with plaintiff about some logs; that plaintiff said he had bought them from his father, and that they came off the "upper place," the land in controversy. *Held*, that plaintiff was competent to testify as to the conversation, but that an offer to also show by him that the logs did not come off the "upper place," but off other land, was too broad.—Martin v. Martin, 118 Ind. 227, 20 N. E. 763.

[f] (Ind. 1890) Rev. St. 1881, § 500, which provides that, when any witness shall testify on behalf of an administrator concerning any conversation of a party to the suit in the absence of decedent, the party against whom such testimony is given may testify concerning the same matter, does not allow such party to state all the facts in relation to the subject-matter of the conversation, but confines his testimony to his version of the conversation.—Copeland v. Koontz, 125 Ind. 126, 25 N. E. 174.

[g] (Iowa, 1883) Where, in a suit against an executor, he testifies in his own behalf, plaintiff is not a competent witness on that account to testify as to personal transactions between himself and the decedent, as to which the executor did not testify.—Luehrsmann v. Hoings, 60 Iowa, 708, 15 N. W. 571.

[h] (Iowa, 1888) In an action by an executor to restrain trespass, testimony by defendant and his wife as to a purchase of the land from deceased, and payment to him of the price, is inadmissible, though the executor testified to searching among the papers of deceased for a conveyance; Code 1873, § 3689, providing that no party to an action, and no husband or wife of such party, shall be examined as a witness in regard to any personal transaction between such witness and a deceased person except a transaction as to which any executor, etc., of such deceased person shall be examined on his own behalf.—Cochrane v. Breckenridge, 75 Iowa, 213, 39 N. W. 274.

[i] (Iowa, 1894) Though plaintiff testified to transactions between defendant and deceased with respect to the delivery of a deed, defendant could not testify to any other transactions with deceased.—Clarity v. Sheridan, 91 Iowa, 304, 59 N. W. 52.

[j] (Ky. 1880) Under Code, § 606, subsec. 2, the fact that the representative of the decedent has testified confers no right on the adverse party to testify, save as to those things to which said testimony related.—Hardin's Adm'r v. Taylor, 78 Ky. 593.

[k] (Me. 1885) Under Rev. St. c. 82, § 98, authorizing the representative to testify to any facts, legally admissible upon the general rules of evidence, happening before the death of his decedent, and permitting the adverse party to testify "in reference to such facts," *held* that, to facts happening before the death, the adverse party was confined in his testimony to the facts testified to by the representative.—Hall v. Otis, 77 Me. 122.

[l] (Md. 1870) An executor, who is a party to a suit, may, on his own offer or on the call of his coplaintiff or codefendant, give in evidence, adversely to his opponent, any conversation he may have had with the latter in reference to the cause of action or controversy; and if he does so, then the other party likewise, on his own offer or on the call of his coplaintiff or codefendant, may testify in respect to such conversations or admissions, by giving such evidence as will fairly tend to contradict, explain, or modify them; but beyond this the latter cannot go.—Johnson v. Heald, 33 Md. 352.

[m] (Md. 1870) Upon a bill filed by an executor to set aside certain gifts, alleged to have been made by his testator, the executor was examined on his own offer, and testified as to conversations between himself and the donee, who was the testator's daughter. The donee offered herself as a witness and testified at large to the whole cause; but she was not cross-examined, either as to her conversations with the executor or as to the general testimony. *Held*, that she was incompetent to testify.—Johnson v. Heald, 33 Md. 352.

[n] (N. H. 1873) Where an executor, being party to a suit, has elected to testify in the cause, the court has no discretionary power to reject the proffered testimony of the adverse

party, even though it relate to conversations between himself and the testator, of which the executor had no knowledge, and which he could have no means of contradicting or explaining.—Ballou v. Tilton, 52 N. H. 605.

[o] (N. Y. 1874) In an action by a surviving partner on a contract made by the partnership, the fact that plaintiff testified to a conversation with the deceased partner did not render it permissible for defendant to testify to a conversation between himself and the deceased partner on that subject.—Goodwin v. Hirsch, 37 N. Y. Super. Ct. (5 Jones & S.) 503.

[p] (N. Y. 1877) In an action for the specific performance of a contract for the sale of land, entered into with decedent, defendant introduced admissions of plaintiff as to the purchase price. *Held*, that Code, § 399, prohibiting plaintiff from testifying as to a transaction with decedent, rendered him incompetent to testify as to whether he had agreed to pay the price proved by his admissions.—Chadwick v. Fonner, 69 N. Y. 404.

[q] (N. Y. 1878) In an action against a physician for negligence in causing the death of plaintiff's testator by giving him an overdose of morphia, plaintiff gave evidence of the incidents of defendant's visit to deceased at which the morphia was claimed to have been left, and himself testified to an interview which then occurred in the sickroom between himself and defendant. *Held*, that defendant, being entitled, under Code Civ. Proc. § 829, to give evidence "concerning the same transaction or communication," was competent to testify to what took place at said interview.—Markell v. Benson, 55 How. Prac. 360.

[r] (N. Y. 1889) In an action against an executor on notes alleged to have been made by testator, the signatures to the notes were disputed, and plaintiff offered evidence of their genuineness. The executor then testified that he was familiar with testator's handwriting, and that the signatures were not genuine. After defendant had rested, plaintiff was recalled, and swore that he received the notes personally from testator. *Held*, that the testimony was inadmissible, under Code Civ. Proc. § 829, as it related to a transaction with decedent concerning which the executor had not testified.—De Verry v. Schuyler, 54 Hun, 639, 8 N. Y. Supp. 221.

[s] (N. Y. 1894) Where, in an action by an executor against deceased's husband, plaintiff testifies to a personal transaction with deceased, defendant is not competent, under Code, § 329, to testify to different and independent transactions between him and deceased, though such transactions tend to contradict the transaction testified to by plaintiff, or show that it could not have occurred.—Martin v. Hillen, 142 N. Y. 140, 36 N. E. 803, affirming (1893) 66 Hun, 631, 21 N. Y. Supp. 309.

[t] (N. Y. 1895) Under Code Civ. Proc. § 829, prohibiting a party to an action from testifying in his own behalf against the executor or administrator of a deceased person, as to a personal transaction with decedent, except where the executor or administrator has testified in his own behalf in reference thereto, the adverse party may testify only to such transactions as have been directly testified to by the executor, and not to other and independent transactions with the decedent, for the purpose of explaining, impairing, or contradicting the testimony of the executor.—Rogers v. McGuire, 90 Hun, 455, 37 N. Y. Supp. 76, affirmed Same v. Rogers (1897) 153 N. Y. 343, 47 N. E. 452.

[u] (N. C. 1893) Under Code Civ. Proc. § 590, which provides that "no party shall be examined in his own behalf against the administrator of a deceased person except where the administrator is examined in his own behalf concerning the same transaction," the administrator of the payee of a bond is competent to prove its execution by defendant, and testifying to such execution renders defendant a competent witness "concerning the same transaction" only.—Williams v. Cooper, 113 N. C. 286, 18 S. E. 213.

[v] (N. C. 1896) The administrator having testified, in an action for goods sold by his intestate, that defendant "purchased" the goods from the intestate, that he witnessed their delivery, and that certain bills offered in evidence "were the originals of the bills of goods delivered to defendant by his intestate and himself," it was competent for defendant to testify that the intestate, who was in failing circumstances, and who desired to put said goods beyond the reach of his creditors, delivered the same to defendant, pursuant to an anterior agreement whereby defendant was to hold the same for said intestate.—Cheatham v. Bobbitt, 118 N. C. 343, 24 S. E. 13.

[w] (Va. 1895) Under Code 1887, § 3346, after parties in interest have testified concerning declarations of a deceased person, the opposite party may testify not only concerning the matters referred to by the previous witnesses, but also concerning all questions pertinent to the issue.—Brock's Adm'r v. Brock, 92 Va. 173, 23 S. E. 224.

[x] (W. Va. 1881) When the deposition of the grantee of the deceased person, being defendant in the suit, is used, and it relates to a transaction or conversation with the deceased, the deposition of plaintiff may be read, so far as it relates to the same transaction or conversation, but not as to other matters.—Zane v. Fink, 18 W. Va. 693.

§ 718. —— Rebuttal of evidence on behalf of adverse party.

[a] (Ala. 1887) Under Code 1886, § 2765, providing that neither party shall testify against the other as to any transaction with or statement of a deceased person whose estate is interested in the suit, where an administrator proves a conversation between his intestate and E., from whom defendant derives title, E. is not competent to deny the conversation.—Miller v. Cannon, 84 Ala. 59, 4 South. 204.

[b] (Ga. 1877) Where heirs at law, who are the real defendants in interest in an action against an administrator, have testified as to interviews between the intestate and plaintiff, plaintiff may testify in rebuttal of their testimony.—Parkerson v. Burke, 59 Ga. 100.

[c] (Ga. 1886) Under Code, § 3854, providing that, "where an executor or administrator is a party in any suit on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor," plaintiff, in an action on a note made by defendant's intestate, is an incompetent witness to prove that the note was not paid, as testified by a witness for defendant.—Skelton v. Richardson, 77 Ga. 546.

[d] (Ga. 1891) Where a plaintiff usee testifies that no payment was made to her deceased cousee in her presence, defendant is not a competent witness to prove a payment to such deceased, unless he testifies that it was made in the presence of the witness whose testimony is sought to be thus answered.—Rudolph v. Underwood, 88 Ga. 664, 16 S. E. 55.

[e] (Ill. 1872) In a suit to enforce a vendor's lien against the deceased purchaser's representatives, the vendor is a competent witness to disprove a conversation alleged to have been had between himself and witness who testified on the hearing.—Stonecipher v. Hall, 64 Ill. 121.

[f] (Ill. 1873) In a suit against the administrator of an estate upon a claim, the administrator proved certain declarations or admissions

of plaintiff as to the state of the account after the intestate's death. Plaintiff then offered to testify and explain what he did say to the witnesses, which the court below refused to allow. *Held*, that the court erred, as plaintiff was a competent witness to explain or contradict the statement of the witnesses in regard to the particular conversation.—Stewart v. Kirk, 69 Ill. 509.

[g] (Ill. 1888) In a suit by the heirs to contest the validity of the ancestor's will on the ground of insanity, a witness testified that the testator had told him that one of the plaintiffs, a daughter of testator, had requested him (testator) to convey to her certain property, which he was then unwilling to do; this evidence being offered as tending to prove testator's knowledge of his own property, and the absence of any insane delusion in that respect. *Held*, that the daughter was incompetent to testify that she had not made such a request.—Brace v. Black, 125 Ill. 33, 17 N. E. 66.

[h] (Ind. 1882) Under a statute providing that, where an administrator is a party to a suit, neither party shall testify unless called by the opposite party or by the court, defendant cannot deny admissions which witnesses testify that he made after the intestate's death, unless he is so required to testify.—Froman v. Rous, 83 Ind. 94.

[i] (Ind. 1891) Under Rev. St. 1881, § 498, and Acts 1883, p. 102, which render plaintiff in an action against an estate incompetent to testify as to matters occurring during the decedent's life, unless called by the adverse party or by the court, such plaintiff cannot testify in rebuttal as to what took place at an interview between himself and the decedent, concerning which a witness has testified for the defense.—Allen v. Jones, 1 Ind. App. 68, 27 N. E. 116.

[j] (Ind. 1891) Under Rev. St. 1881, § 498, which provides that in suits against an administrator an adverse party cannot testify as to matters which occurred during the decedent's lifetime, such party cannot testify in rebuttal on his own motion as to admissions which other witnesses testify that he made during the decedent's lifetime.—Nelson v. Masterton, 2 Ind. App. 524, 28 N. E. 731.

[k] (Ind. 1895) Rev. St. 1894, § 506 (Rev. St. 1881, § 498), disqualifies a claimant against a decedent's estate from testifying as to matters which occurred during decedent's life. Rev. St. 1894, § 508 (Rev. St. 1881, § 500), provides that, if any witness on behalf of the executor, administrator, or heirs shall testify to any conversation as having been had "in the absence of the deceased," the party against whom such evidence is adduced may testify concerning the same matter. *Held*, that a claimant against a decedent's estate cannot testify, in rebuttal of testimony of a witness in behalf of the administrator, as to a conversation which such witness stated took place in the presence of the deceased.—Kibler v. Potter, 11 Ind. App. 604, 39 N. E. 525.

[l] (Iowa, 1875) Under Code 1873, § 3639, it is not competent for plaintiff, in an action against an administrator, to testify respecting personal transactions between himself and deceased, for the purpose of rebutting the testimony of decedent's widow.—Canaday v. Johnson, 40 Iowa, 587.

[m] (Md. 1891) In an action against an administrator to recover a debt owing by his decedent, where certain witnesses have testified for the defense as to conversations with plaintiffs, showing the terms on which the goods were furnished, plaintiffs are incompetent, under Rev. Code 1878, art. 70, § 2, to testify in rebuttal as to such conversations.—Webster v. Le Compte, 74 Md. 249, 22 Atl. 232.

[n] (Md. 1896) Under Code, art. 35, § 2, providing that, when an executor is a party to a suit on a contract with his testator, neither party shall be permitted to testify on his own offer, provided that either party may be examined as a witness when the executor testifies to any conversation had with the other party, the other party is not a competent witness to contradict admissions made by him to the testator, testified to by a third person.—Hopper v. Beck, 83 Md. 647, 34 Atl. 474.

[o] (Mo. 1877) Where, in a widow's suit on a life policy, a witness for defendant had given his version of a conversation with her, wherein she repeated what her husband had told her, she might testify as to the whole conversation, although not evidence as a statement of the deceased.—Hanley v. Life Ass'n of America, 4 Mo. App. 253.

[oo] (Mo. 1877) After the death of one of the original parties to a contract, the survivor is not a competent witness in an action on the contract, even to rebut testimony, given on behalf of the adverse party, showing admissions made by the survivor subsequent to the death of the deceased.—Ring v. Jamison, 66 Mo. 424.

[p] (Mo. 1892) Where a note, payable to the maker, and indorsed by several persons, is delivered to the cashier of a bank as collateral, and the bank, in an action against the indorsers, introduces its bookkeeper for the purpose of showing that the note was not indorsed by the maker until after its delivery to the bank, and until after its indorsement by defendants, and that the bank, therefore, was entitled to recover of defendants as makers, defendants are entitled, notwithstanding the death of the maker and the cashier, to testify in rebuttal that the note was not so indorsed.—First Nat. Bank v. Payne, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520.

[pp] (N. J. 1895) Plaintiff is not a competent witness to contradict evidence on the part of defendant of a conversation between plaintiff and defendant's decedent.—Fountain v. Linn, 57 N. J. Law (28 Vroom) 503, 31 Atl. 982.

[q] (N. Y. 1866) In proceedings by an administrator for the sale of the real estate of his intestate, where, in the trial of a disputed claim, he introduces testimony which establishes a transaction between the decedent and the claimant relative to the matter in dispute, such claimant cannot be examined as a witness to prove that no such transaction had occurred, under Code, § 399.—Dyer v. Dyer, 48 Barb. 190.

[r] (N. Y. 1879) Under Code, § 829, in an action for goods sold and delivered, where the defense was payment, plaintiff being the survivor of the firm, defendant cannot be allowed to testify, over plaintiff's objections, that he paid the bill in question to the deceased partner; and this, although plaintiff, after testifying in his own behalf to the sale and delivery of the goods, also testified without objection that no part of the bill had ever been paid.—Pettit v. Geesler, 58 How. Prac. 195.

[rr] (N. Y. 1881) Plaintiff, upon a trial, introduced evidence of a conversation between his testator and defendant. *Held*, that defendant could testify that no such conversation ever took place.—Gorham v. Price, 25 Hun, 11.

[s] (N. Y. 1882) If the personal representative of one deceased has testified concerning a transaction had between the deceased and a party to the suit, such party may contradict that testimony.—Sweet v. Low, 28 Hun, 432.

[ss] (N. Y. 1882) Code, § 829, does not inhibit A., a party, from testifying against an executor, etc., in his action, to extraneous facts showing that B. has testified falsely as to a transaction between A. and the deceased; for instance, that B. was never present at the time and place

when any conversation or transaction occurred between A. and the deceased, A. not testifying what was or was not said or done between himself and the deceased.—Pinney v. Orth, 88 N. Y. 447, 2 Civ. Proc. R. 1.

[sss] (N. Y. 1885) In an action by a son against his father's executor to recover for services performed on a farm occupied by the father, the defense was that such services were rendered as a member of the family and without expectation of reward. Plaintiff's sister testified to hearing the conversation between plaintiff and his father, in which the father asked plaintiff why he did not go home. *Held*, that it was error to permit plaintiff to deny that such a conversation was had, as the evidence related to a personal communication with deceased, and it was therefore incompetent, under Code, § 829.—Carney v. Wadhams, 9 Civ. Proc. R. 204.

[t] (N. Y. 1885) A party to an action may contradict a living witness, who has testified to a transaction between the party and one deceased.—McKenna v. Bolger, 37 Hun, 526.

[tt] (N. Y. 1886) In an action involving the validity of a will and the mental competency of the testator, the will produced contained a clause reciting that a certain daughter had already received a certain amount from her share of the property, and it was desired to show by her that she had not received such sum and knew nothing about it. *Held*, that she was incompetent to testify, under Code Civ. Proc. § 829, forbidding a party interested from testifying to transactions with a decedent; and, the plaintiff having given no evidence as to the fact of the gift, excepting the production of the will, her testimony was not admissible on the theory that it was contradicting evidence already given by the other side.—Doughty v. Doughty, 5 N. Y. St. Rep. 95.

[u] (N. Y. 1889) In an action for the conversion of notes owned by his testatrix, plaintiff testified that a few hours before her death, while in a stupor from which she never roused, he saw the notes in question in decedent's trunk; that a few hours after her death he looked again, and the notes were gone. Defendant admitted having the notes, and testified that at the time plaintiff said he saw the notes in decedent's trunk they were in his (defendant's) possession. *Held* that, defendant having rebutted the inference from plaintiff's testimony that it was impossible for defendant's possession of the notes to have been obtained with decedent's consent, by directly contradicting the fact on which that inference solely depended, he was not prejudiced by a refusal to allow him to testify that he took the notes with decedent's consent.—Lewis v. Merritt, 113 N. Y. 386, 21 N. E. 141.

[uu] (N. Y. 1889) The testimony of an administrator, in an action against him for a debt, that his intestate showed him an acquittance in the handwriting of, and signed by, plaintiff, will not render plaintiff competent to testify that he never gave the intestate such a paper.—Eagan v. Powers, 51 Hun, 642, 4 N. Y. Supp. 592.

[v] (N. Y. 1889) Though in such case plaintiff may testify that he never wrote such a paper, the error in excluding his testimony is harmless, when he is afterwards allowed to testify that there never was such a paper signed by him.—Eagan v. Powers, 51 Hun, 642, 4 N. Y. Supp. 592.

[vv] (N. Y. 1891) Plaintiff sold land to one B. by contract, under which possession was given. B. afterwards assigned the contract to defendant. In an action for the purchase price of the land, defendant testified to a conversation had by him with plaintiff, in which plaintiff admitted that B., who had since died, had paid plaintiff for the land in question by the assignment to him of a contract for the purchase of certain timber land which B. had procured. *Held*, that defendant did not testify as to a transaction with B., deceased, so as to entitle plaintiff to deny that he took from B. the transfer of the contract for the timber land in payment for the land sold to B.—Brown v. Burgett, 61 Hun, 623, 15 N. Y. Supp. 942.

[w] (N. Y. 1894) Error in admitting testimony of a party as to a transaction with a decedent is not cured where the other party testifies in rebuttal, but states that he was not present at the interview referred to, and could not testify in regard to it.—McMillan v. Stern (City Ct. N. Y.) 8 Misc. Rep. 82, 28 N. Y. Supp. 596.

[ww] (N. Y. 1894) Plaintiff cannot testify that he did not have with decedent a conversation to which defendant's witness testified.—Walsh v. McArdle, 78 Hun, 411, 29 N. Y. Supp. 169.

[x] (N. C. 1875) Where an executor, administrator, next of kin, etc., is examined as a witness in his own behalf concerning transactions with the deceased, the testimony of any person (as the plaintiff) not otherwise rendered incompetent is admissible to contradict or explain the evidence.—Murphy v. Ray, 73 N. C. 588.

[xx] (N. C. 1877) Defendant, having an interest in the event of an action, is not permitted, under Code Civ. Proc. § 343, to testify in his own behalf, for the purpose of contradicting a former witness whose evidence tended to show that defendant fraudulently procured an assignment from a person deceased.—Bushee v. Surles, 77 N. C. 62.

[y] (N. C. 1879) In order to show the testator's bias a witness for a caveator testified that the testator had said to him of the propounder: "He has married one of my nearest kin and won't speak to me." *Held*, that it was not competent for the propounder being a "party," within the meaning of Code, § 343, to testify that he never refused to speak to the testator.—Pepper v. Broughton, 80 N. C. 251.

[yy] (Pa. 1894) Where an administrator, in an action by him, testifies to declarations made by defendant in the presence of deceased, defendant is a competent witness in rebuttal to deny such statements. Act 1891 (P. L. 287).—Steele v. Nichols' Adm'r (Com. Pl.) 3 Pa. Dist. R. 517.

[z] (Tex. 1888) In an action against the maker of a note by the administratrix of the payee, her testimony that deceased had stated, but not in the presence of defendant, that defendant had admitted the note, and promised to pay it, is inadmissible, if objection is made, even to rebut improper evidence which has been admitted without objection.—Dolson v. De Ganahl, 70 Tex. 620, 8 S. W. 321.

[zz] (Vt. 1875) Plaintiff's cause of action was upon contract with the intestate, and that was the matter in issue. The administrator pleaded accord and satisfaction, and to support the plea introduced a writing from the intestate to the plaintiff. *Held*, that plaintiff was not a competent witness to explain the writing, and to show what was said and done when it was made and delivered to him.—Woodbury v. Woodbury's Estate, 48 Vt. 94.

§ 719. Testimony of assignor of or surviving party to contract or thing in action or person succeeding to rights of deceased.

[a] (Ga. 1876) In a controversy between the guardian of a lunatic and the heirs, relative to the estate, where the heirs are living and are witnesses, the guardian is a competent witness.—Tarpley v. McWhorter, 56 Ga. 410.

[b] (Ga. 1877) If one party to the record is dead at the time of the trial, and the surviving

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party be offered as a witness by the other side, and be examined only in respect to matters which did not transpire between the witness and the deceased, while the cross-examination should be full in respect to the matters so inquired about on the direct examination, it should not operate as a license to the party examined to testify to transactions which took place between him and deceased, such as delivery of property, and payment of money, to deceased in compliance with an award, the delivery and payment being vital issues in the case.—Perry v. Mulligan, 58 Ga. 479.

[c] (Ga. 1885) Although a bank cashier who made a contract in behalf of the bank may not be competent to testify concerning it, the other party being dead, yet, if the other party's representative puts in evidence the sayings or writings of the cashier, the latter may explain them and state all the circumstances, especially where he acted as agent for the other party as well as for the bank.—Planters' & Miners' Bank v. Neel, 74 Ga. 576.

[d] (Ga. 1888) Under Act 1866, providing that where one of the original parties to the contract or cause of action is dead, the other party cannot testify in his own favor, where plaintiffs in ejectment claim under a deed of gift from defendant to their father, defendant is not incompetent to rebut evidence of declarations by him that he had given the land to his son, plaintiffs' father.—Hardman v. Nowell, 81 Ga. 748, 8 S. E. 188.

[e] (N. Y. 1855) An indorser of a note is not an assignor within the meaning of Code, § 399, providing that when an assignor is examined as a witness the adverse party may testify.—Hicks v. Wirth, 10 How. Prac. 555, 4 E. D. Smith, 78.

[f] (N. Y. 1858) The members of a firm by agreement among themselves made an actual division between them of a part of the firm's assets, and allotted to each, as his own property, specified portions thereof. Afterwards one partner received from a third person payment of a debt owing to the firm which had been allotted to his copartner, who thereon brought action therefor against the partner receiving the payment. *Held*, that plaintiff having called one of his copartners as a witness, defendant was not entitled to testify by virtue of Code Civ. Proc. § 399, providing that, when the assignor of a contract or thing in action is examined as a witness on behalf of any person deriving title through him, the adverse party may offer himself as a witness to the same matter, as the cause of action was not founded on the contract made by the partners, but was a demand against defendant for improperly receiving the amount.—Crosby v. Nichols, 16 N. Y. Super. Ct. (3 Bosw.) 450.

[g] (Va. 1896) Under Code, § 3346, which provides that, where one party to a contract is dead, the other party may testify if any one succeeding to the interest of the deceased testifies adversely in his own interest, plaintiff in an action to enforce against an estate a claim arising under a contract with the deceased is rendered a competent witness by an heir becoming a witness in his own interest.—Copeland v. Copeland's Adm'r, 24 S. E. 218.

§ 720. Testimony of person in whose presence transaction occurred.

[a] (Ala. 1880) Where a witness has testified to a settlement between plaintiff's intestate and defendant, made in his presence, defendant himself cannot be allowed to testify, in corroboration of this evidence, that the intestate, said witness, and himself, were together at the time and place mentioned.—Killen v. Lide's Adm'x, 65 Ala. 505.

[b] (Pa. 1890) Act June 11, 1891 (P. L. 287), declaring that, though one party to the thing or contract in action be dead, the survivor may testify as to any matters occurring between them in the presence of a third person, who may be competent to testify, and who does so testify, must be construed as allowing the survivor to testify only after the said third person has been called to testify, and testimony given by the survivor is not rendered competent by the fact that such person is afterwards called.—Appeal of Ebert, 150 Pa. 261, 24 Atl. 685, 30 Wkly. Notes Cas. 407.

[c] (Pa. 1891) In an action by a married woman against the personal representative of her deceased husband to recover her separate estate, plaintiff is a competent witness to explain declarations made by herself in decedent's lifetime, but not in his presence, respecting such estate, under Act June 11, 1891, allowing a party in interest adverse to decedent to testify against his administrator, as to relevant matter occurring between himself and a third person before decedent's death, and as to which such person testifies at the trial.—Karch v. Karch's Adm'r (Com. Pl.) 10 Pa. Co. Ct. R. 669.

[d] (Pa. 1892) Act June 11, 1891, provides that any one interested adversely to the right of deceased may testify to any relevant matter that occurred before the decease, if it occurred between himself and a person living at the time of trial, who is competent to testify, and does so testify, against him. In an action by a surviving partner for the price of goods, defendant called plaintiff, who testified that he did not make the sale or warranty. *Held*, that defendant was competent to testify that he did.—Gathercole v. Wolf (Com. Pl.) 7 Kulp, 305.

[e] (Pa. 1894) Acts 1891, p. 287, provides that though a party to a contract in action be dead, and his right passed to a party in the record who represents his interest, any surviving party to such contract shall be a competent witness as to any relevant matter which occurred between himself and another person who is competent to testify, and does testify, on the trial, against such surviving party, or if such relevant matter occurred in the presence of such other living or competent person. *Held*, that such surviving party is not made competent by the fact that the party to whom the right of deceased has passed was interrogated by his counsel after being called and examined as of cross-examination by the surviving party's counsel.—Cake v. Cake, 162 Pa. 584, 29 Atl. 797.

[f] (Pa. 1896) Act June 11, 1891, allows a surviving party to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between himself and one who testified against him at the trial, "or if such relevant matter occurred in the presence of such other living person." *Held* that, where a witness called by defendant administrator testified to a conversation which occurred in his presence between plaintiff and decedent touching the contract in issue, plaintiff was properly allowed to state what this conversation was.—Kauss v. Rohner, 172 Pa. 481, 33 Atl. 1016, 51 Am. St. Rep. 762.

§ 721. Testimony of agent.

[a] (Ga. 1877) If the agent of a deceased party to an action has been examined as a witness in the case by interrogatories, the other party may testify in respect to transactions between himself and such agent, though the agent be dead at the time of the trial.—Perry v. Mulligan, 58 Ga. 479.

[b] (Ill. 1868) Under the act of 1867, in an action between the vendor and a representative of the purchaser, the purchaser having died, his agent who made the contract at issue being admitted to testify, the vendor is a competent witness.—Jacquin v. Davidson, 49 Ill. 82.

[c] (Ill. 1871) In an action on a note by an administrator, where the question of considera-

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tion was involved, one who acted as agent of the deceased in the transaction testified as to the consideration. *Held*, that a surety on the note who was one of the defendants and was present during such transaction was a competent witness.—Marshall v. Karl, 60 Ill. 208.

[d] (Ill. 1877) The scrivener drawing a deed of lands from a parent to a child claimed to be in full of his interest in the parent's estate as heir, being the grantor's agent only for the special purpose of drawing the deed, the fact that he testifies to a conversation between the parties at the time of drawing the deed does not render the child competent to testify in his own behalf concerning the same conversation in a suit between him and the other heirs, after the parent's death.—Galbraith v. McLain, 84 Ill. 379.

[e] (Ind. 1883) Rev. St. 1881, § 500, provides that when an agent of a decedent has testified concerning any transaction had by him as such agent with a party to the suit and in the absence of the decedent, the party against whom such evidence is offered may then also testify concerning it. *Held*, that a scrivener employed to draft a deed is not an agent of the grantor within the meaning of the statute.—Kenney v. Phillipy, 91 Ind. 511.

[f] (Minn. 1867) Where the claim was for care, board, clothing, etc., in the family of plaintiff's intestate, and the arrangement with respect to it was made by intestate's wife, she must be regarded as his agent; and if she testifies the testimony of the other party may also be received, under the statute.—McNab v. Stewart, 12 Minn. 407 (Gil. 291).

[g] (Minn. 1872) The words "is received," as used in Gen. St. 1866, c. 73, § 8, providing that, when all the parties on one side of a contract are dead or insane, the other party shall not be admitted to testify in his own favor, unless such transaction was had and performed on behalf of the party or parties dead or insane, by an agent whose testimony is received, extend to a case where such evidence is receivable under the rules of evidence, though it may not be offered.—Bigelow v. Ames, 18 Minn. 527 (Gil. 471).

[h] (Va. 1893) Where plaintiff, in an action on a note given to her in consideration of an antecedent indebtedness, is incompetent to testify, defendant's testimony is not rendered competent by the facts that the note was given at the instance and in the presence of plaintiff's brother and agent, and that he has testified in the case.—Hill v. Postley, 90 Va. 200, 17 S. E. 946.

§ 722. Effect of calling or examination as witness by adverse party.

[a] (Ala. 1878) A former partner seeking an account and settlement of the partnership dealings against the administrator of a deceased partner, in a case where the partnership affairs were unsettled on a dissolution, and the assets were, by written agreement, left with the deceased partner to dispose of, is not a competent witness in his own behalf to prove any transaction with, or statements by, deceased, unless first called to testify thereto by the opposite party; and the fact that he was interrogated by defendant as to other matters does not vary the rule.—Causler v. Wharton, 62 Ala. 358.

[b] (Colo. 1894) Under Mills' St. § 4816, providing that in a suit against the representatives of a deceased person the opposite party is not a competent witness unless when called by the adverse party, plaintiff, if examined by defendants on the question of his insanity, which he alleges as the cause of his delay in bringing suit, may be cross-examined on his own behalf as to the transaction with defendants' ancestor, which is the controlling question in the case.—Warren v. Adams, 19 Colo. 515, 36 Pac. 604.

[c] (Colo. 1895) Gen. St. 1883, § 3641, provides that no party shall testify of his own motion when the adverse party defends as executor, unless when called as a witness by such adverse party. *Held*, that plaintiff, after being called by defendant executor to prove the execution of a certain paper filed of record, was competent to testify in her own behalf for all purposes.—Jerome v. Bohm, 21 Colo. 322, 40 Pac. 570.

[d] (Ga. 1887) Plaintiff, having testified on cross-examination that he delayed bringing suit on a note till just before it was barred, was competent to explain the whole cause of that delay, including the fact that he was urging the surviving partner, then in life, but since dead, to settle the demand.—Shipp v. Davis, 78 Ga. 201, 2 S. E. 549.

[e] (Ga. 1887) In an action on a note made by a partnership, by the payee against the representatives of one of the partners, both partners being dead, plaintiff having testified in his own behalf to the loss of the note, and then, on cross-examination, having testified to the making of a similar note by plaintiff to the partnership, which was pleaded as a set-off, he was competent to explain (to the same extent as a disinterested witness) the circumstances under which the latter note was made; and as these circumstances connected it with the former, and both notes with a book account between the parties, his competency extended to a full explanation of the consideration of the notes, their relation to each other, and to the account, the object of interchanging them, and the entire transaction of which these matters were a part.—Shipp v. Davis, 78 Ga. 201, 2 S. E. 549.

[f] (Ga. 1887) Though plaintiff (not being cross-examined on this point) may have been an incompetent witness to show what consideration he paid the partnership for certain drafts drawn by it in his favor, yet the presumption of law being that he gave value for the drafts, and there being no ground to infer that they or their proceeds were paid to him on the note in suit, and no evidence, direct or indirect, of that fact, his testimony showing the application of a part of the drafts to his book account against the partnership, and that he advanced cash for the balance, was not hurtful to defendants, as the account unpaid, even if all the drafts had been applied to it, would still have been larger in amount than the note, thus leaving the whole of the note operative as continuing to represent a real debt.—Shipp v. Davis, 78 Ga. 201, 2 S. E. 549.

[g] (Ga. 1887) In trover against an executrix, all that plaintiff testified as to any act of the deceased was drawn out on cross-examination. *Held* no error, and that plaintiff could testify as to what occurred between her and the executrix after the death of deceased.—Moore v. Dutson, 79 Ga. 456, 4 S. E. 169.

[h] (Ind. 1894) The barrier to the competency as a witness, imposed by Rev. St. 1894, § 506 (Rev. St. 1881, § 498), on a plaintiff in an action against a decedent's estate, involving matters which occurred during decedent's lifetime, is removed by plaintiff being called and sworn, and testifying as a witness for defendant.—Bartlett v. Burden, 11 Ind. App. 419, 39 N. E. 175.

[i] (Kan. 1876) Under Civ. Code, § 322, prohibiting a party from testifying in his own behalf as to any personal transaction had with a deceased partner or joint contractor in the absence of the surviving contractor, when the latter is an adverse party, yet if he is called by an adverse party to testify as to a part of such transaction, he may, at his own instance,

testify as to the whole thereof.—Niccolls v. Esterly, 16 Kan. 32.

[j] (Mass. 1862) Plaintiff is not a competent general witness in a suit after defendant's death; nor is he made so by being asked in cross-examination, after testifying to his books of account, showing sales of articles charged to the deceased, who delivered those articles named in the account which were not delivered by himself.—Green v. Gould, 85 Mass. (3 Allen) 465.

[k] (Mass. 1868) Gen. St. c. 131, § 14, admits parties to testify except "where one of the original parties to the contract or cause of action in issue and on trial is dead," etc. *Held* that, where a party is admitted as a witness, there is no restriction or limitation as to the facts to which his testimony may or may not be directed.—Granger v. Bassett, 98 Mass. 462.

[l] (Mich. 1892) Where defendant administratrix has been interrogated by plaintiff heirs as to matters equally within the knowledge of the decedent, the inhibition of How. St. § 7545, providing that in a suit by the heirs the opposite party shall not be permitted to testify in his own behalf as to such matters, is waived, and witness may testify in explanation of the matters drawn out of such interrogation.—Dunlap v. Dunlap, 94 Mich. 11, 53 N. W. 788.

[m] (Minn. 1894) Where a witness who is a party to the suit is required on cross-examination to state a conversation with a person since deceased, the party so cross-examining thereby waives the statute excluding such evidence, and, on redirect examination, such witness may give the whole of such conversation, or qualify the same by other conversations with the deceased relating to the same transaction.—In re Hess' Estate, 57 Minn. 282, 59 N. W. 193.

[n] (Mo. 1891) The exclusion of testimony of a defendant, incompetent as a witness under the statute, is not error, although the objection to his competency has been waived by plaintiff by taking his deposition, which is afterwards read on the trial, where such a waiver was not suggested to the court when defendant was called to testify, and defendant did not offer to testify after the waiver became apparent by the reading of the deposition.—Tomlinson v. Ellison, 104 Mo. 105, 16 S. W. 201.

[o] (N. J. 1884) Where an executor is called by one of the parties interested in the account, he may be examined with respect to any transaction had with the testator, or be asked with reference to statements made by testator.—In re Tichenor's Will, 7 N. J. Law J. 208.

[oo] (N. Y. 1889) Plaintiffs sued for a loan made by their intestate to defendant, and to prove the loan showed that intestate drew his check, payable to defendant, and that the latter cashed it. They then introduced defendant himself, who testified that at the date of the check intestate owed him nothing. Thereupon plaintiffs rested, and defendant offered himself as a witness to prove the circumstances attending the giving of the check. *Held* that, although the transaction was one had personally with intestate, and defendant would ordinarily have been precluded from testifying about it, under Code Civ. Proc. § 829, the matter having been opened by plaintiffs in their examination of defendant, the latter was competent to explain the whole transaction.—Nay v. Curley, 113 N. Y. 575, 21 N. E. 698.

[p] (N. Y. 1889) A cross-examination of defendant concerning the meaning of statements contained in a letter written by him to one of the plaintiffs, who has since died, does not render defendant competent to testify to a conversation between him and the plaintiff preceding the writing of the letter, and which caused it to be written.—Weston v. Reich, 55 Hun, 605, 7 N. Y. Supp. 784, judgment affirmed (1891) 130 N. Y. 659, 29 N. E. 1034.

[pp] (N. Y. 1890) In an action for services rendered and for goods furnished to defendant's intestate, where a transaction between plaintiff and decedent was shown by defendant's examination of plaintiff, it is competent for plaintiff to testify in his own behalf in relation thereto.—Davis v. Gallagher, 55 Hun, 593, 9 N. Y. Supp. 11, judgment reversed (1891) 124 N. Y. 487, 26 N. E. 1045.

[q] (N. Y. 1891) On a reference of a claim against the estate of an intestate, disputed by the administrator, it is not an objection to answers of a witness, on redirect examination, that they relate to personal transactions with the deceased, and that the witness is interested in the event, where, on cross-examination, the witness was questioned on the same subject by the counsel for the administrator.—Blankman v. McQueen, 59 Hun, 625, 13 N. Y. Supp. 663.

[qq] (N. Y. 1893) A party, on cross-examination, by eliciting a partial disclosure of a transaction not open to proof by his adversary under Code Civ. Proc. § 829, admits that adversary, on the redirect examination, to a complete disclosure of the transaction.—Howe v. Schweinberg (Com. Pl.) 4 Misc. Rep. 73, 23 N. Y. Supp. 607, affirming judgment (1892) 1 Misc. Rep. 481, 21 N. Y. Supp. 469.

[r] (N. Y. 1894) Where plaintiffs in an action for money alleged to have been collected for their testator by defendant, who claimed that it was given to him by testator, ask defendant on cross-examination concerning conversations between testator and defendant relating to the money, they thereby waive the provision of Code Civ. Proc. § 829, forbidding parties to testify as to transactions with decedents in certain cases, and therefore defendant may, on redirect examination, testify as to the entire conversation with testator.—Hackstaff v. Hackstaff, 82 Hun, 16, 24 Civ. Proc. R. 208, 31 N. Y. Supp. 11.

[rr] (N. Y. 1895) In an action against an administrator to recover a debt alleged to be due from decedent, defendant called plaintiff as a witness, and proved by him that he was the maker of a note to decedent, pleaded by defendant as a counterclaim. *Held*, that plaintiff could testify, as a witness in his own behalf, as to the consideration of the note.—Hopkins v. Clark, 90 Hun, 4, 35 N. Y. Supp. 360.

[s] (N. C. 1871) When the administrator of an intestate, with a view to defeat a recovery on an implied contract, asks of plaintiff, who had offered himself as a witness, whether there was not a special contract between himself and the intestate, it is competent for plaintiff to prove, by himself or by another witness, all the particulars going to make up or qualify such fact, and put it in its proper light.—Gray v. Cooper, 65 N. C. 183.

[ss] (N. C. 1875) In an action against an administrator, the testimony of a witness is not rendered admissible to prove a transaction between the witness and defendant's intestate, whereby certain bonds, the subject of this action, were assigned to the witness, who assigned them to plaintiff, by the fact that, on the cross-examination, a question explanatory of a statement made in his examination in chief, relative to such transaction, was asked the witness, and he answered it.—Jackson v. Evans, 73 N. C. 128.

[t] (N. C. 1888) Under Code, § 590, providing that a party shall not be examined in his own behalf against a representative of a deceased person, except where testimony of the deceased person is given concerning the transaction, an administrator in an action against him by the heirs on the bond, when asked by plaintiffs about certain purchases made by him

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from deceased, can testify only as to matters tending to discharge the claim of deceased against him therefor, and not to matters showing a claim in his own favor.—Smith v. Smith, 101 N. C. 461, 8 S. E. 128, 131, 133.

[tt] (N. C. 1891) Where, in an action to recover land of a decedent by persons claiming to be his heirs at law, defendants, his alleged wife and children, are introduced for the sole purpose of showing to the jury that they are of negro blood, and hence that the union was meretricious, and the children illegitimate, this does not render the woman competent to testify as to her marriage to deceased, and other transactions with him, under Code, § 590, providing that, when one claiming under a decedent is examined as to a transaction with him, the opposite party is rendered competent to give evidence "concerning the same transaction."—Hopkins v. Bowers, 108 N. C. 298, 12 S. E. 984.

[uu] (Pa. 1876) Where defendant, in an action by an administrator, was inquired of, on cross-examination, as to conversations after the decedent's death, this was not ground for a general examination as to conversations with the decedent on the same subject.—Lahey v. Heenan, 81 Pa. (31 P. F. Smith) 185.

[uu] (Pa. 1887) Where a party calls an interested witness and examines him as to matters occurring before the death of a decedent, he is estopped from objecting to the testimony of the witness when offered by his adversary.—In re McBride's Estate, 4 Pa. Co. Ct. R. 564.

[v] (Pa. 1888) Where a widow is also the accountant of her deceased husband's estate, the calling of her for cross-examination by exceptants to her account has the effect, under Act May 23, 1887 (P. L. 518), of removing all objections to her competency on the ground of interest.—In re Taylor's Estate (Orph. Ct.) 17 Pa. Co. Ct. R. 166, 4 Pa. Dist. R. 691.

[vv] (Pa. 1889) Where a husband is called, as for cross-examination, and interrogated as to transactions between himself and his deceased wife, he is made a competent witness as to such transactions generally.—In re Eichhorn's Estate, 7 Pa. Co. Ct. R. 433.

[w] (Pa. 1892) Where a person claiming against an estate calls as a witness one of the heirs, who is also accountant in the settlement of the estate, the latter becomes competent to testify in his own behalf as to all other matters relevant to the issues.—In re Young's Estate, 148 Pa. 573, 575, 24 Atl. 124; Appeal of McHenry, Id.

[ww] (Pa. 1892) Under Act May 23, 1887, § 7 (P. L. 160), plaintiff's incompetency to testify as to transactions with a decedent was removed by his being cross-examined concerning such matters.—Boyd v. Conshohocken Worsted Mills, 149 Pa. 363, 24 Atl. 287, 30 Wkly. Notes Cas. 317.

[x] (Pa. 1892) In an action by an administratrix on a note, defendants, to overcome the prima facie incompetency of one of them to testify to an arrangement with intestate by which any payments made to him were to be credited on the note, offered to show that on a former trial of the case witness was called by plaintiff, and was asked questions and answered them. *Held*, that this was insufficient, it not being shown that the questions related to anything in the lifetime of deceased.—Bair v. Frischkorn, 151 Pa. 466, 25 Atl. 123, 31 Wkly. Notes Cas. 125.

[xx] (Pa. 1895) Pending ejectment by a husband and wife against their grantee, based on the wife's defective acknowledgment of the deed, the grantee conveyed the land to the terre-tenant, and subsequently died. His executors filed a bill against the husband and wife and the terre-tenant to have the acknowledgment reformed, which was dismissed, and judgment in the ejectment suit was given for plaintiffs therein, who obtained a rule on the terre-tenant to bring second ejectment. *Held* that, in the second ejectment the testimony of the husband in the suit to reform the acknowledgment was not made admissible by his having been called by plaintiffs for cross-examination.—New York & O. Land Co. v. Weidner, 169 Pa. 359, 32 Atl. 557.

[y] (Tenn. 1891) Under Code, § 4565, which provides that "in actions * * * against executors * * * neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, * * * unless called * * * by the opposite party," a deposition of plaintiff, taken by defendant executor, and filed in the suit, may be read in evidence by plaintiff when the executor refuses to read it, although the testimony chiefly relates to transactions and conversations with defendant's testator.—Thomas v. Irvin, 90 Tenn. (6 Pickle) 512, 16 S. W. 1045.

[yy] (Tex. 1855) Where defendant was interrogated as to whether he had not obtained possession of certain money belonging to plaintiff's intestate a few days before the death of the latter, he has a right in his answer, admitting such possession, to show that the intestate gave him the money—a certain part thereof for his children and the balance for himself.—Bradley's Adm'rs v. Bradley, 13 Tex. 263.

[z] (Tex. 1888) In an action by an administrator d. b. n. against the executor for the conversion of the assets of the estate, where defendant is called as a witness by plaintiff, and questioned as to the assets collected by him, and another witness testifies concerning services rendered, and advances made, by defendant during the decedent's lifetime, defendant may on his cross-examination testify to the same, and he is not precluded by Rev. St. art. 2248, which provides that an executor shall not testify to any statement by or transaction with his testator in a case where judgment may be rendered for or against him, unless called to testify thereto by the other party.—Grothaus v. Witte, 72 Tex. 124, 11 S. W. 1032.

[zz] (Tex. 1889) In an action by an administrator, plaintiff took, and introduced in evidence, the deposition of one of the defendants, in which the witness was asked to explain certain transactions had with the intestate, but the witness stated that he was unable to answer the question fully because his books showing the transactions were not accessible. *Held* that, plaintiff having elected to make the defendant a witness, the latter had the right to answer fully, and that it was error to refuse to permit that defendant to be introduced on the trial as a witness for the defendants, and to produce his books, and explain the transactions.—Jackson v. Munford's Ex'r, 74 Tex. 104, 11 S. W. 1061.

§ 723. —— Husband and wife.

[a] (Ind. 1894) An administrator defending a claim against the estate, who examines the claimant, as permitted by Burns' Rev. St. §§ 509, 510, only waives the claimant's own incompetency to testify in her own behalf, and not her husband's, under Rev. St. 1881, § 501, disqualifying as witness the spouse of a party so disqualified.—Gilbert v. Swain's Estate, 9 Ind. App. 88, 36 N. E. 374.

[b] (Pa. 1892) Under Act May 23, 1887, § 7, providing that one incompetent to testify as to transactions with deceased in his own behalf may be compelled by the adverse party to testify, and thereupon shall become competent to testify for himself, when a husband's disability is thus removed, his wife's goes with it.—In re White's Estate (Orph. Ct.) 2 Pa. Dist. R. 808.

§ 724. —— Effect of examination of co-party.

[a] (N. Y. 1862) As the law stood in 1860, a defendant, in a suit brought by the executor of one deceased, could not testify in his own behalf, although a codefendant, united with him in interest, had been allowed to testify on behalf of plaintiff.—Wood v. Hunt, 38 Barb. 302.

[b] (N. C. 1889) The fact that one of the other surviving members of the firm and defendants was examined on behalf of plaintiff, with regard to a declaration of the decedent not relating to a transaction with decedent, did not affect the competency of evidence as to such transaction.—Armfield v. Colvert, 103 N. C. 147, 9 S. E. 461.

§ 725. —— Testimony given at instance of party desiring to testify.

[a] (Ill. 1872) Act 1867, § 2, regulating testimony in actions by or against executors, provides that when any witness shall, in behalf of any party, testify to any conversation or admission of the adverse party, the latter may testify as to the same matter, has no application where such party's own witness called by him testifies to his statement or admission, although such testimony may prove to be unfavorable to him.—Richerson v. Sternburg, 65 Ill. 272.

[b] (N. H. 1867) In an action where an executor is a party, if he testifies upon compulsion by the adverse party, such adverse party will not be made thereby a competent witness.—Harvey v. Hilliard, 47 N. H. 551.

[c] (N. J. 1879) Although, under Revision, p. 378, a party cannot, in case the adverse party sues or is sued in a representative capacity, render his own testimony competent by calling such adverse party, yet the statute does not preclude him from calling such adverse party as his own witness.—Daw v. Vreeland, 30 N. J. Eq. (3 Stew.) 542.

[d] (N. J. 1893) Under Revision, p. 378, § 4, providing that a party to a suit in a representative capacity may be admitted as a witness therein, and if called as a witness in his own behalf, and admitted, the opposite party may in like manner be admitted as a witness, one of the defendants in an action against devisees, under Revision, p. 476, to recover a debt due from their devisor, may be called as a witness by plaintiff to testify to transactions with, and statements by, decedent, but plaintiff cannot acquire competency by calling such defendant.—Joss v. Mohn, 55 N. J. Law (26 Vroom) 407, 26 Atl. 987.

[e] (N. Y. 1882) A party cannot, by examining his adversary concerning transactions had with one deceased, thereby let in his own testimony concerning the transactions.—Corning v. Walker, 28 Hun, 435.

[f] (N. Y. 1885) Defendant, by drawing out a transaction with one since deceased, on cross-examination of plaintiff, does not open the door to the introduction of evidence involving a transaction of the deceased with defendant himself.—Corning v. Walker, 100 N. Y. 547, 3 N. E. 290, affirming (1882) 28 Hun, 435.

[g] (N. Y. 1891) In an action against an executrix for the price of goods furnished her testator, plaintiff called defendant as a witness, and examined her as to testator's condition at the time of the alleged transaction, whereupon she was cross-examined by her own counsel as to testator's condition. *Held*, that such cross-examination did not render plaintiff competent to testify as to the transaction with decedent.—Herrington v. Winn, 60 Hun, 235, 20 Civ. Proc. R. 326, 14 N. Y. Supp. 612.

[h] (N. C. 1893) Testimony of an administrator, on cross-examination by defendant, to a transaction concerning which he did not testify in chief, does not render defendant a competent witness concerning such transaction.—Williams v. Cooper, 113 N. C. 286, 18 S. E. 213.

[i] (Pa. 1887) A claimant against decedent's estate cannot be called as a witness of her own counsel to testify to credits against her interest and thereby become competent generally.—In re Voldemar's Estate, 4 Pa. Co. Ct. R. 577.

16. OBJECTIONS TO ADMISSIBILITY AND DETERMINATION THEREOF.

OBJECTIONS IN GENERAL, § 726.
TIME FOR OBJECTION AND WAIVER THEREOF, § 727.
—— EFFECT OF EXAMINATION OF WITNESS BY PARTY OBJECTING, § 728.
REQUISITES AND SUFFICIENCY OF OBJECTION, § 729.
EVIDENCE AS TO INCOMPETENCY, § 730.
DETERMINATION AS TO ADMISSIBILITY AND ADMISSION OF TESTIMONY NOTWITHSTANDING INCOMPETENCY, § 731.

§ 726. Objections in general.

[a] (Ala. 1893) When the estate of a deceased person is interested in the result of a proceeding, the adversary of the estate cannot object to the competency of witnesses called by the representative of the estate to prove transactions with decedent, on the ground of interest, the exception as to competency in such case (Sess. Acts 1890-91, p. 557) being for the protection of the estate.—Austin v. Bean, 101 Ala. 133, 16 South. 41.

[b] (Colo. 1893) When a person sued individually for the conversion of property undertakes to defend as administrator, he must establish by positive averment and proof his status as administrator, and that he is possessed of or entitled to such property, and chargeable therewith, in such capacity, by some appropriate preliminary trial, before the opposite party, or other interested parties, can properly be excluded as witnesses on the merits of the case.—Prewitt v. Lambert, 19 Colo. 7, 34 Pac. 684.

[c] (Colo. 1894) Since Gen. St. § 3641, provides that no party to an action shall be allowed to testify in his own behalf when any person sues or defends as the heir of a deceased person in a suit against the heir of a decedent to establish in plaintiff's favor a trust in land, the title to which is in decedent's name, plaintiff is disqualified to testify to his agreement with decedent, on which the trust is sought to be based, though the only person objecting to the evidence is a judgment creditor of decedent, who intervened.—Vandevier v. Fetta, 20 Colo. 368, 38 Pac. 466, affirming Fetta v. Vandevier (1893) 3 Colo. App. 419, 34 Pac. 168.

[d] (Ill. 1869) Under Act 1867, permitting "a party or interested person to testify to facts occurring after the death of" a deceased person, objection cannot be made to the swearing of such party, although it be probable, from the nature of the issue—as here, whether a testator was incapacitated—that the testimony will relate to matters occurring before the decease; objection must be made specially to the questions upon such prior occurrences.—Holloway v. Galloway, 51 Ill. 159.

[e] (Ind. 1876) In an action by or against heirs, founded on a contract with the ancestor, affecting the property of the ancestor, it must be made to appear in some legal way that the ancestor is dead, before an objection can be sustained to the competency of a party to testify as to a matter which occurred prior to the assumed death of the ancestor.—Hodgson v. Jeffries, 52 Ind. 334.

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[f] (Ind. 1883) Acts 1879, p. 245, provides that in all suits where an administrator is party, in a case where the judgment may be rendered either for or against an estate represented by him, neither party shall be allowed to testify as witnesses unless required by the opposite party or the court trying the cause. *Held*, that in an action on the bond of a deceased commissioner, appointed in partition to sell land, against his administrator and the sureties on the commissioner's bond, where the administrator consents to plaintiff testifying as a witness, the sureties cannot object.—Ferguson v. State, 90 Ind. 38.

[g] (Ind. 1892) A party to an action being competent to testify against herself, although such testimony relates to conversations with a person since deceased, the other parties cannot complain, where they fail to ask specific instructions that such testimony is not competent as against them.—Thistlewaite v. Thistlewaite, 132 Ind. 355, 31 N. E. 946.

[h] (Mo. 1896) Where an incompetent witness is asked a direct question on cross-examination, his answer is competent against the party eliciting it.—Banking House of Wilcoxson & Co. v. Rood, 132 Mo. 256, 33 S. W. 816.

[i] (N. H. 1881) A third person who is a party to a suit by an administrator cannot object that the adverse party is precluded by Gen. St. c. 228, § 16, from testifying; such objection can be made only by the administrator.—Marcy v. Amazeen, 61 N. H. 131, 60 Am. Rep. 320.

[j] (N. J. 1884) Where it appears that a witness, called on to testify to a particular fact, is wholly incompetent, the court ought, of its own motion, to reject such testimony, although the record discloses no objection made to it at the trial below.—Sherman v. Lanier, 39 N. J. Eq. (12 Stew.) 249.

§ 727. Time for objection and waiver thereof.

[a] An objection to the introduction of testimony, as concerning transactions with a decedent, not taken at the time it was offered, cannot be taken on appeal.

—(Ga. 1883) Clarke v. Alexander, 71 Ga. 500;
(Ill. 1869) Hipple v. De Puie, 51 Ill. 528;
(1889) Bruner v. Nisbett, 31 Ill. App. 517;
(N. Y. 1881) Sacia v. Decker, 1 Civ. Proc. R. 47, 10 Daly, 204;
(S. C. 1892) Wingo v. Caldwell, 35 S. C. 609, 14 S. E. 827.

[b] An objection to the competency of a witness, on the ground that the other party to the transaction testified to is dead, cannot first be raised in the appellate court.

—(Iowa, 1887) Moody v. Dryden, 72 Iowa, 461, 34 N. W. 210;
(Mo. 1888) Carney v. Carney, 95 Mo. 353, 8 S. W. 729;
(Va. 1880) Simmons v. Simmons' Adm'r, 33 Grat. 451.

[c] (Ala. 1887) The testimony of a party as to transactions with a deceased person, if not objected to in proper time, will be considered, and given such weight as his interest in the suit, and other circumstances, will allow.—Chapman v. Peebles, 84 Ala. 283, 4 South. 273.

[d] (Ill. 1886) Under section 2 of the act relating to evidence and depositions (1 Starr & C. Ann. St. c. 51), disqualifying a party from being a witness where opposing parties sue or defend as administrators or heirs, an objection on this account is not necessary in order to exclude their testimony, and a failure to object cannot be given effect as a waiver.—Kelsey v. Snyder, 118 Ill. 544, 9 N. E. 195.

[e] (Ill. 1891) The objection to the competency of plaintiff as a witness is not waived by the failure of the infant defendant's guardian ad litem to object to his testimony.—Johnston v. Johnston, 138 Ill. 385, 27 N. E. 930.

[f] (Ill. 1895) The objection that a witness is incompetent because he is a party, and the adverse party defends as heir of a decedent, is waived if not made at the hearing.—Doty v. Doty, 159 Ill. 46, 42 N. E. 174.

[g] (Ill. 1895) When the witness is competent for certain purposes, if questions put to him call for evidence which he is not competent to give, objections should be made and exceptions taken, otherwise the question of his incompetency cannot be raised on appeal.—Pease's Estate v. Hunt, 60 Ill. App. 585.

[h] (Ind. 1876) It is error to permit an administrator to testify as a witness in his own behalf, without his having been required to testify by the opposite party or by the court; but, if he is permitted to so testify, without objection by the adverse party, or motion made to strike out his evidence, the error will be deemed waived.—Denbo v. Wright, 53 Ind. 226.

[i] (Ind. 1894) Permitting plaintiff to testify in an action against a decedent's estate cannot be complained of, where no proper objection was made to her testifying, and exception saved.—Bartlett v. Burden, 11 Ind. App. 419, 39 N. E. 175.

[j] (Md. 1884) Where an administrator is a party to a suit, and testifies on his own offer, such portions of his testimony as are not excepted to will be treated as evidence.—Dilley v. Love, 61 Md. 603.

[k] (Mich. 1891) Material evidence by a claimant as to claims against an estate, which was equally within the knowledge of the decedent, should not be received, although the administrator does not object thereto.—McHugh v. Dowd's Estate, 86 Mich. 412, 49 N. W. 216.

[l] (Minn. 1863) Objection to the competency of a defendant to testify in an action brought by the assignees of a deceased insolvent debtor should be made before the testimony has been given, otherwise the right to object on that ground, under the statutes, will be held to have been waived.—Levering v. Langley, 8 Minn. 107 (Gil. 82).

[m] (Neb. 1884) A party to a suit may waive objection to the competency of a witness to testify on account of the death of a party to a contract or transaction whose interests are hostile to those of the witness, and thus render such witness competent.—Bartlett v. Bartlett, 15 Neb. 593, 19 N. W. 691.

[n] (Neb. 1893) When a person, who is precluded by Code, § 329, from testifying against the representative of a deceased person, is permitted to testify without objection, the benefit of the statute is waived.—Parrish v. McNeal, 36 Neb. 727, 55 N. W. 222.

[o] (N. H. 1889) The executor's election to testify waives a previous objection to the right of the adverse party to testify.—Dow v. Merrill, 65 N. H. 107, 18 Atl. 317.

[p] (N. J. 1868) An objection to a witness incompetent by reason of interest, whose interest may be released by the party offering him, need not be made at the very time of the examination, but it must be made in time for the party to remove the incompetency if practicable.—Graham v. Berryman, 19 N. J. Eq. (4 C. E. Green) 29.

[q] (N. J. 1868) Objections to the testimony of a party incompetent by reason of his interest, made when he had no right to take further evidence, when they are substantial, are not waived by a slight inadvertence which caused no injury to the opposite party.—Graham v. Berryman, 19 N. J. Eq. (4 C. E. Green) 29.

[r] (N. J. 1878) An objection to the competency of a witness must, in general, be made before his testimony is taken; otherwise it is waived.—Boone v. Ridgway's Ex'rs, 29 N. J. Eq. (2 Stew.) 543.

[rr] (N. J. 1884) Where a party with knowledge of the incompetency of a witness allows him to be sworn and examined without objection, he waives his objections to the competency.—Monfort's Adm'r v. Rowland, 38 N. J. Eq. (11 Stew.) 181.

[s] (N. J. 1884) In an accounting by a widow as executrix of her husband's estate, where the widow claimed certain personal property as a gift from her husband, her testimony as to the transaction, involving the gift, though not objected to, will be disregarded by the court, where it appears that an infant was interested and was not a party to the accounting.—Sherman v. Lanier, 39 N. J. Eq. (12 Stew.) 249.

[ss] (N. Y. 1876) In an action against an executor, plaintiff had testified to certain specific services performed, and also generally to services rendered, and there was also other evidence as to services rendered by him and his general employment as attorney to take charge of a certain business in respect to which the services were performed, and the question was asked him, "From your knowledge of the services rendered, taking in the specific items which you remember having done and your general recollection as to what you did do, what would be a fair compensation?" *Held*, that if an answer might be objectionable as contrary to Code Civ. Proc. § 399, forbidding a party suing an executor to testify to transactions had with the decedent, the objection should have been taken when plaintiff testified to his services.—Brague v. Lord, 41 N. Y. Super. Ct. (9 Jones & S.) 193.

[t] (N. Y. 1880) Where testimony of a brother of one deceased was objected to, and the objection overruled, an omission to renew the objection, as to like testimony of two other brothers, was no implied waiver of objection to the testimony of all three witnesses.—Schoonmaker v. Wolford, 20 Hun, 166.

[tt] (N. Y. 1882) Testimony in a probate court of an interested witness as to conversations with testator may be stricken out at the hearing, though not objected to when offered.—In re Burke, 5 Redf. Sur. 369.

[u] (N. Y. 1883) On an issue as to whether a certain transfer of personal property from a decedent to plaintiff was fraudulent as against defendant who claimed title by virtue of a sale under an execution against the decedent, testimony by plaintiff as to a personal transaction between himself and the deceased was incompetent, and the fact that such testimony was but a repetition of testimony previously given without objection, except that the testimony first given did not disclose the fact that the transaction was with decedent, did not obviate the objection.—Taylor v. Meldrum, 6 Civ. Proc. R. 235.

[uu] (N. Y. 1891) In an action by an administratrix to recover money paid to defendant after the death of plaintiff's intestate, who was the father of the parties, on checks drawn in defendant's favor by decedent, there was evidence that decedent owed defendant money. *Held*, that the question asked defendant as a witness, "Did your father ever promise to repay that money to you?" called for a conversation with a decedent, and the objection was not waived by having permitted defendant to testify that her father (decedent) owed her a certain sum of money.—McMurray v. Ennis (City Ct. Brook.) 14 N. Y. Supp. 635.

[v] (N. Y. 1895) A party does not waive his objection to the admission of evidence, incompetent because involving transactions with a decedent, by subsequently introducing evidence on the same subject-matter.—German-American Bank v. Slade (Super. Buff.) 15 Misc. Rep. 287, 36 N. Y. Supp. 983.

[vv] (N. C. 1870) Where a party was allowed to testify in chief to a conversation between himself and defendant's testator, an objection to his competency, made on cross-examination, was too late.—Meroney v. Avery, 64 N. C. 312.

[w] (N. C. 1890) A witness is not incompetent on account of interest; and, where a general objection to the witness' competency was overruled, and afterwards no objection was made to his testimony as to transactions with decedents, which testimony is incompetent under Code, § 590, the objection will be deemed waived.—Norris v. Stewart's Heirs, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917.

[ww] (Ohio, 1882) Testimony of a party was heard subject to a general objection to his incompetency because the adverse party was the executor of a decedent and it did not appear whether the events testified to occurred before or after the testator's death. The executor made no motion to strike out the testimony, but presented contradictory proof on the same subject without further insisting on the objection. *Held*, that by such conduct he admitted that if plaintiff was competent to testify at all he was competent to give the testimony which he did.—Meier v. Herancourt, 6 Ohio Dec. 1164.

[x] (Ohio, 1888) Under Code, § 5245, providing that parties shall not testify except in certain cases and as to certain matters, an objection interposed to a competent witness before he testifies is premature, and is properly overruled, as the party desiring to object should delay his objection until alleged objectionable matter is proposed to be proved by the witness.—Murdock v. McNeely, 1 O. C. D. 9.

[xx] (Pa. 1870) Though an administrator is not a competent witness under P. L. 1869, p. 30, allowing parties to testify, or under P. L. 1832, p. 208, authorizing auditors to examine accountants, if an administrator testifies before an auditor, an objection afterwards made will be disregarded, unless it is shown that the auditor was led into error by the evidence.—In re Breneman's Estate, 65 Pa. (15 P. F. Smith) 298.

[y] (Pa. 1881) In suit on a note under seal against two of three joint obligors, the third being dead, the note, upon being put in evidence, appeared to have an alteration, to explain which plaintiff, the obligee, testified that he had received it in its altered condition from one of the joint obligors, but he could not remember which. He had answered two questions on cross-examination when his competency was objected to. *Held* that, while he was incompetent to testify against the survivors, the objection came too late, and there being other evidence explanatory of the alteration, it is not error to admit his testimony.—Dean v. Warnock, 98 Pa. 565.

[yy] (S. C. 1882) Where objection is taken to the competency of a witness to testify in an action, and said objection is made too late, it is unnecessary to consider whether it could have been sustained if taken at the proper time.—Tompkins v. Tompkins, 18 S. C. 1.

[z] (Tex. 1895) Where the inadmissibility of certain evidence, in that it involves a transaction with a decedent, under whom plaintiff claims title, is for the first time made to appear on cross-examination of the witness, it is error to overrule an objection thereto.—Branch v. Makeig, 9 Tex. Civ. App. 399, 28 S. W. 1050.

[zz] (W. Va. 1872) Objection to the competency of a witness is not waived by uniting in taking his deposition nor by omitting to insist on

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the objection, on the hearing below.—Middleton's Ex'r v. White, 5 W. Va. 572.

§ 728. —— Effect of examination of witness by party objecting.

[a] (Ga. 1879) Where defendant draws out on cross-examination of plaintiff testimony in regard to a transaction with defendant's deceased wife, he cannot complain.—Harper v. Parks, 63 Ga. 705.

[b] (Ill. 1891) Where a party who is incompetent as a witness, under Rev. St. c. 51, § 2, because the adverse party defends as heir of a deceased person, testifies at a hearing before a master, the adverse party may cross-examine the witness, without thereby waiving his right to object to the evidence on the ground of the incompetency of the witness.—Achilles v. Achilles, 137 Ill. 589, 28 N. E. 45.

[c] (Iowa, 1886) In an action by an executor, where a witness was incompetent, by reason that his testimony involved transactions between himself and the deceased, and was objected to by plaintiff on that ground, the fact that plaintiff cross-examined the witness, did not make his testimony, or the part of it contained in the cross-examination, competent.—Donnell v. Braden, 70 Iowa, 551, 30 N. W. 777.

[d] (Ky. 1896) One who does not object to evidence, and, on cross-examination, goes into the whole matter covered by the witness' testimony, cannot complain of the incompetency of the witness.—Kimball v. Thurman, 98 Ky. 578, 33 S. W. 834.

[e] (Mich. 1894) Objection to testimony as being within the statute excluding testimony of a party as to facts equally within the knowledge of a deceased party is not available, where the party objecting first opened up with the witness the subject covered by the testimony.—Michigan Sav. Bank v. Butler's Estate, 98 Mich. 381, 57 N. W. 253.

[f] (Minn. 1895) Right to object to the testimony of a witness as to conversations with a decedent, on the ground of incompetency by reason of interest in the result of the action, is not waived by asking him preliminary questions for the purpose of ascertaining such interest.—Tretheway v. Carey, 60 Minn. 457, 62 N. W. 815, distinguishing In re Hess' Estate (1894) 57 Minn. 282, 59 N. W. 193.

[g] (N. Y. 1879) The fact that those objecting to an executor's account have examined his surety as to matters on which he was competent to testify is no waiver of their right to oppose the calling out of incompetent evidence on the cross-examination. If the same has been given without objection, through counsel's ignorance of the suretyship, the court may strike it out on motion.—Miller v. Montgomery, 78 N. Y. 282.

[h] (N. Y. 1895) In an action by administrators to recover money claimed by defendant as a gift from plaintiff's intestate, plaintiff, on cross-examination of a witness, asked him if intestate was present when defendant deposited the money in bank. *Held* that, by asking such question, plaintiff did not waive the benefit of Code Civ. Proc. § 829, relating to testimony as to transactions with decedents, but merely showed that evidence as to what occurred on such occasion was incompetent.—Davis v. Davis, 86 Hun, 400, 33 N. Y. Supp. 477.

[i] (Va. 1895) Where the incompetency of a witness to testify as to a transaction with a person deceased is known, objection cannot be made thereto after cross-examination.—Pillow v. Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

[j] (W. Va. 1877) Where a party offered as a witness in his own behalf is objected to as incompetent, but the objection is overruled, and an exception duly taken, and he is examined, the adverse party does not, by cross-examining him, waive the benefit of the objection and exception.—Calwell v. Prindle's Adm'r, 11 W. Va. 307.

§ 729. Requisites and sufficiency of objection.

[a] A general objection is not sufficient to present the question whether the evidence was objectionable as relating to transactions with decedent.

—(Ind. 1882) John v. Hatfield, 84 Ind. 75; (1885) Forbing v. Weber, 99 Ind. 588; (1891) Bingham v. Walk, 128 Ind. 164, 27 N. E. 483;

(N. Y. 1895) Cross v. Smith, 85 Hun, 49, 32 N. Y. Supp. 671.

[b] (Ind. 1889) Rev. St. 1881, § 496, makes all persons, whether parties to or interested in the suit, competent witnesses, except as otherwise provided by statute. Section 499 provides that in all suits by or against heirs or devisees, to affect the decedent's estate, neither party shall be a competent witness as to any matter which occurred prior to decedent's death. *Held*, that a beneficiary under a will was competent to testify concerning the testator's sanity, on a contest of the will on the ground of mental incapacity, and to do so could state the facts on which her opinion was based, including testator's conduct and declarations prior to his death; and that an objection to her testimony, except as to testator's mental capacity, and a motion for a new trial on the ground of admitting her testimony, setting it out in full, were too indefinite and general to be considered.—Staser v. Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

[c] (Mo. 1890) A party to a suit being competent on a second trial to testify as to points embraced in the testimony of his adversary on the first trial, since deceased, whose testimony is preserved in a bill of exceptions, an objection that a different version is given must be specifically taken, and is not saved by a general objection to his competency.—Hayden v. Grillo's Adm'r, 42 Mo. App. 1.

[d] (Mo. 1893) An objection to evidence "as incompetent" is not sufficient to raise the point on appeal that the witness, being a party, could not testify, because the adverse party was dead.—Stone v. Hunt, 114 Mo. 66, 21 S. W. 454.

[e] (N. Y. 1879) On exception and appeal, a general objection to a question will be considered as applying to the competency of the matter, and not to that of the witness. So *held* as to whether the exception presented the competency of an executrix under Code, § 399, to testify.—Stevens v. Brennan, 79 N. Y. 254.

[f] (N. Y. 1880) In an action against an administratrix, an objection to the plaintiff's testifying, on the ground that he was "interested, and incompetent under Code, § 829," *held* to be properly overruled as not sufficiently specific, although the testimony afterwards given by him was as to personal transactions with the deceased.—Hoar v. Hoar, 23 Hun, 33.

[g] (N. Y. 1884) An objection to the admission of testimony on the ground that it relates to personal transactions had with one deceased, is sufficiently specific.—Sanford v. Ellithorp, 95 N. Y. 48.

[h] (N. Y. 1889) Where a series of questions are all objected to on account of the witness' disqualification under Code Civ. Proc. § 829, to testify to transactions with a deceased person, and overruled, an objection to another question of the same character immediately following, not accompanied with the specific grounds of objection, is sufficiently definite to be considered; the trial court being evidently apprised of the ground on which it was made.

—In re Eysaman's Will, 113 N. Y. 62, 20 N. E. 613, 3 L. R. A. 599.

[i] (N. Y. 1889) Where evidence as to a personal transaction with a decedent is admitted in violation of the statute, under a general objection, the causes rendering such evidence improper not being called to the attention of the court, such objection will not be considered on appeal.—Shiel v. Muir, 51 Hun, 644, 4 N. Y. Supp. 272.

[j] (N. Y. 1890) On an issue as to whether a deed had been delivered, the grantee testified that he, the grantor, since deceased, the grantor's attorney, and a notary were present when the deed was executed and acknowledged, and that he got possession of it immediately afterwards, but he did not state from which of the persons present he received it. The only objection taken to such testimony was as to the names of the persons present when the grantee got the deed. *Held*, that it was not sufficient to raise a question as to whether the grantee had been allowed to testify as to a transaction with a decedent.—Greer v. Greer, 58 Hun, 251, 20 Civ. Proc. R. 71, 12 N. Y. Supp. 778.

[k] (N. Y. 1891) In an action on a note by the payee against the executor of the alleged maker, who was the father of plaintiff, the answer denied the execution and delivery of the note, and that there was any consideration therefor. The executor himself gave testimony to show that his testator did not execute the note; and another witness testified to interviews between plaintiff and his father, bearing on the same issue, and on the question of want of consideration. *Held*, that while plaintiff was not incompetent as a witness for all purposes, defendant having testified, and while, to exclude any testimony by plaintiff, the objection thereto must specifically appear, plaintiff's version of the interviews with his father, testified to by such other witness, was not admissible as against a general objection to a question which specifically called for the conversations that took place.—Rittenhouse v. Crevling, 59 Hun, 626, 14 N. Y. Supp. 85.

[l] (N. Y. 1891) Upon the issue of the legitimacy of a person through whom plaintiffs claim title to real estate, they were allowed to testify as to the declarations of the deceased putative father of such person, which evidence defendants objected to as "hearsay and incompetent," but not as inadmissible, under Code Civ. Proc. § 829, excluding testimony of one party to a transaction, when the other is dead. *Held*, that the objection was not sufficiently specific to apprise the court and plaintiffs that it was directed to the statutory incompetency of the witnesses, and was therefore not available.—Bell v. Bumstead, 60 Hun, 580, 14 N. Y. Supp. 697.

[m] (N. C. 1889) An exception to the admission of testimony on the ground that it is within the prohibition of Code, § 590, rendering parties to an action against those claiming through a deceased person incompetent to testify as to a personal transaction with the decedent, will not be considered unless so specific as to show that the evidence is objectionable on that ground.—Perkins v. Berry, 103 N. C. 131, 9 S. E. 621.

[n] (Ohio, 1882) If a witness is competent to testify on any subject, a general objection to his being sworn should be overruled.—Meier v. Herancourt, 6 Ohio Dec. 1164.

[o] (Wis. 1870) The erroneous admission of testimony concerning a transaction with a decedent cannot be taken advantage of under an objection that the testimony was irrelevant, immaterial, and improper.—Cornell v. Barnes, 26 Wis. 473.

[p] (Wis. 1887) An objection to testimony as incompetent, irrelevant, and immaterial is not sufficiently specific to raise the question of the competency of the witness, defendant's grantor, under Rev. St. § 4069, to testify to communications from plaintiff's grantor, since deceased, relative to the title in dispute.—McCormick v. Herndon, 67 Wis. 648, 31 N. W. 303.

§ 730. Evidence as to incompetency.

[a] (Ala. 1878) The burden of showing the incompetency of a witness rests on the party objecting to his testimony.—Alabama Gold Life Ins. Co. v. Hedge, 62 Ala. 566.

[b] (Mich. 1889) Where the assignor of a claim against the estate of a deceased person is offered as a witness to prove the claim, it is not error to ask him if the assignment was made for the purpose of enabling him to become a witness. It is competent to show by the assignor that the assignment was colorable, and that he has an interest in the claim which excludes his testimony against the deceased person.—Buck v. Patterson, 75 Mich. 397, 42 N. W. 949.

[c] (Minn. 1892) In an action against the grand lodge by the beneficiary on a certificate of membership in the Ancient Order of United Workmen, one who joined a subordinate lodge of the order after the death of deceased, where it does not clearly appear that he will be liable to assessment to pay the benefit sued on, or incur other liability thereon, is not incompetent to testify, in behalf of defendant, to conversations with or admissions by deceased, under Gen. St. 1878, c. 73, § 8, making it incompetent for any party interested in the event of an action to testify therein concerning any conversation with or admission of a deceased party; the burden being on the party objecting to a witness to show interest.—Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. 1022.

[d] (N. C. 1884) In order to incapacitate a witness from testifying, under Code, § 343, the transaction or communication must be shown to be between the deceased and the witness; and the court may determine the competency of the witness upon his testimony as to whether the transaction was between himself and the deceased.—Lockhart v. Bell, 90 N. C. 499.

§ 731. Determination as to admissibility and admission of testimony notwithstanding incompetency.

[a] (Ind. 1891) On the trial of a claim of a widow against the estate of her deceased husband upon a note made by him to her, the administrator introduced evidence of a contemporary parol agreement between deceased and claimant, whereby she was not to present the note in the event of his performing a certain agreement, and that he had performed the same. The court called claimant as a witness, and she denied the agreement. *Held*, that it was within the power of the court, in its discretion, to require claimant to testify, though under Code 1881, § 498, she was incompetent to testify as to transactions with decedent.—Willetts v. Schuyler, 3 Ind. App. 118, 29 N. E. 273.

[b] (Ind. 1894) In an action against a devisee, founded on a transaction with his testator, after plaintiff has made out a prima facie case, it is not an abuse of the discretion vested with the trial judge (Rev. St. 1894, § 510; Rev. St. 1881, § 502) to call plaintiff to testify thereto.—Talbott v. Barber, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491.

[c] (N. H. 1876) Under the statute which gives the court in certain cases a discretion to allow a party to testify for himself, though his adversary is an executor or administrator, in ordinary cases, the safe guide and decisive test is found in the inquiry whether the deceased, if alive, could testify to the same matters.—Hoit v. Russell, 56 N. H. 559.

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[d] (N. Y.) A witness was offered by the contestants of a will, who had theretofore herself been a contestant, and who would, in case of the intestacy of deceased, have taken absolutely one-fifth of his whole estate. By the will she was given for life the income of one-third of the residuary estate. No evidence was given to show which was of the most value. *Held*, that it would be assumed, in support of the surrogate's ruling that she was incompetent, under Code Civ. Proc. § 829, to testify to personal transactions and communications with deceased, that her pecuniary interests would be promoted by defeating probate.—(1890) In re Lassak's Will, 56 Hun, 647, 10 N. Y. Supp. 80; (1892) In re Lasak, 131 N. Y. 624, 30 N. E. 112; Appeal of Schermerhorn, Id.

[e] (Pa. 1894) A witness incompetent by interest to testify as to transactions with a deceased person swore that he had assigned his interest in good faith; that there was to be no recompense. The court permitted him to be sworn, leaving his credibility to the jury. *Held* a decision by the court that his assignment was in good faith, as required by Act May 23, 1887.—Turner v. Warren, 160 Pa. 336, 28 Atl. 781, 34 Wkly. Notes Cas. 245.

[f] (Vt. 1890) In an action on a contract, where one of the parties thereto is dead and the other claims that he is competent to testify as to the contract, because it was not made with the deceased, but with his agent, who is still living, the question of agency is for the court.—Cairns v. Mooney, 62 Vt. 172, 19 Atl. 225.

(D) CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS.

1. IN GENERAL, §§ 732, 733.
2. HUSBAND AND WIFE, §§ 734-742.
3. FIDUCIARY OR CONTRACT RELATIONS IN GENERAL, §§ 744-746.
4. COMMUNICATIONS TO OR ADVICE BY ATTORNEY OR COUNSEL, §§ 747-767.
5. COMMUNICATIONS TO OR INFORMATION ACQUIRED BY PHYSICIAN OR SURGEON, §§ 768-777.
6. CONFESSIONS OR OTHER COMMUNICATIONS TO CLERGYMAN OR MINISTER OF RELIGION, § 778.
7. COMMUNICATIONS TO OR INFORMATION ACQUIRED BY PUBLIC OFFICERS, § 779.
8. ASSERTION OF PRIVILEGE, OBJECTIONS, AND DETERMINATION AS TO ADMISSIBILITY, §§ 780-787.

1. IN GENERAL.

NATURE AND GROUND OF PRIVILEGE IN GENERAL, § 732.
WHAT LAW GOVERNS, § 733.

Privileges of witness, see post, §§ 1008–1071.
Relationship to party as affecting competency in general, see ante, § 119.
Production and inspection of writings before trial affected by relations of witness, see "Discovery," vol. 16, c. 2141, § 116.
Right to examine adverse party before trial affected by confidential relations and privileged communications, see "Discovery," vol. 16, cc. 2045, 2046, § 55.
State laws as rules of decision in federal courts, see "Courts," vol. 13, cc. 2768, 2769, § 984.

§ 732. Nature and ground of privilege in general.

[a] (Iowa, 1874) Code 1873, § 3638, making both parties compellable to give evidence, must not be construed to open the door to inquiry into privileged communications.—Barker v. Kuhn, 38 Iowa, 392.

[b] (Me. 1839) In the trial of an indictment for larceny, a witness, from whom the property is charged to have been stolen, is not bound to disclose the names of persons in his employment who gave the information which induced him to take measures for the detection of the persons indicted.—State v. Soper, 16 Me. (4 Shep.) 293, 33 Am. Dec. 665.

[c] (Md. 1848) A witness must disclose any information pertinent to the cause which has no necessary connection with his professional character, and which he did not acquire by reason of the confidence reposed in him on account of that character.—Chew v. Farmers' Bank of Maryland, 2 Md. Ch. 231.

[d] (N. Y. 1874) A witness before the grand jury on a complaint for libel published in a newspaper may be required to disclose the name of the writer, which he admitted he knew, over objection that it was an office regulation that the editors of the paper were not to give the name of the writers of articles published in it.—People v. Fancher, 4 Thomp. & C. 467.

§ 733. What law governs.

[a] (N. Y. 1889) An attorney cannot be compelled to testify, before commissioners appointed to take evidence in New York by the high court of justice in England, concerning professional communications from a client, or to produce letters written by him to and received from such client, relating to the subject of his employment, and it was immaterial whether or not such communications were privileged in England, where the evidence was to be used.—In re Whitlock, 51 Hun, 351, 3 N. Y. Supp. 855, reversing judgment (1888) 15 Civ. Proc. R. 204, 2 N. Y. Supp. 683.

2. HUSBAND AND WIFE.

IN GENERAL, § 734.
EXISTENCE OF RELATION, § 735.
SUBJECT-MATTER OF TESTIMONY IN GENERAL, § 736.
SUBJECT-MATTER OF COMMUNICATIONS, § 737.
MODE AND FORM OF COMMUNICATION, § 738.
CONFIDENTIAL OR PRIVATE CHARACTER OF COMMUNICATION, § 739.
COMMUNICATIONS IN PRESENCE OR HEARING OF OTHERS, § 740.
—— TESTIMONY OF THIRD PERSON, § 741.
COMMUNICATIONS BEFORE MARRIAGE, § 742.
EFFECT OF DIVORCE OR DEATH OF HUSBAND OR WIFE, § 743.

Competency in general, see ante, §§ 124–132.

§ 734. In general.

[a] (Cal. 1890) Under Code Civ. Proc. § 1881, which provides that a husband or wife cannot be examined for or against each other as to "any communication made by the one to the other during marriage," a defendant in a criminal case, who has offered himself as a witness in his own behalf, and who has not testified in chief to any communications between himself and his wife, cannot, without his consent, be examined by the state as to any such communications.—People v. Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

[b] (Colo. 1891) In an action between a married woman and a third person, involving title to real estate, she may, under the statute, testify to the delivery of a deed to her by her husband, although such delivery took place during the existence of the marital relation.—Hutchinson v. Hutchinson, 16 Colo. 349, 26 Pac. 814.

[c] (Ga. 1871) Under Code, § 3798, permitting the husband or wife to testify in certain

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cases, a husband, though a competent witness, in his action for divorce for desertion, cannot testify as to any facts derived by him from the confidential relation of husband and wife.—Castello v. Castello, 41 Ga. 613.

[d] (Ill. 1873) Acts 1867, p. 184, making husband and wife incompetent to testify for or against each other as to any transaction or conversation occurring during the marriage, applies only to cases wherein one is a party. Thus, on a bill for specific performance of a contract for the sale of land by the heirs of the purchaser, his widow is a competent witness for the heirs.—Deniston v. Hoagland, 67 Ill. 265.

[e] (Mass. 1860) Under St. 1857, c. 305, § 1, excluding private conversations between a husband and wife, a party to a libel for divorce cannot testify to private communications with his wife while they were living together as husband and wife.—French v. French, 80 Mass. (14 Gray) 186.

[f] (Mass. 1868) A witness will not be compelled to testify to private conversations between himself and wife, even though not required to testify that the person with whom they took place was his wife.—Baldwin v. Parker, 99 Mass. 79, 96 Am. Dec. 697.

[g] (Mass. 1874) The statutes have not changed the rule of the common law that the testimony of a wife as to conversations had by her with her husband when they were alone is inadmissible against him.—Raynes v. Bennett, 114 Mass. 424.

[h] (Mo. 1873) Wag. St. p. 1378, § 5, permitting no "married woman, while the relation exists or subsequently, to testify to any admissions or conversations of her husband," applies to all cases, whether the husband is a party or not.—Moore v. Wingate, 53 Mo. 398.

[i] (Mo. 1883) No private conversations or communications of whatsoever nature, between husband and wife, can be testified to by either of the parties as a witness.—Miller v. Miller, 14 Mo. App. 418.

[j] (N. H. 1871) Under Gen. St. c. 209, § 22, providing that a wife may testify in any case when it appears to the court that her examination would not lead to a violation of marital confidence, a wife on becoming a witness becomes so for all purposes, whether for or against her husband.—Corson v. Murinane, 51 N. H. 92, note.

[k] (N. Y. 1860) The provisions of the Code permitting parties to testify in their own behalf does not change the common-law rule that a husband or wife shall not testify as to confidential communications.—Marsh v. Potter, 30 Barb. 506.

[l] (N. Y. 1870) Under the act of 1867, to enable husband and wife, or either of them, to be a witness for or against each other, either may voluntarily disclose confidential communications.—Southwick v. Southwick, 2 Sweeny, 234, 9 Abb. Prac. (N. S.) 109, reversed (1872) 49 N. Y. 510.

[m] (Ohio, 1889) In an action for libel for circulating a publication reflecting on the character of a married woman, her husband cannot testify as to words spoken by her in his presence only, since Rev. St. § 5241, subd. 3, provides that a husband or wife shall not testify as to communications between them not in the presence of a third person, competent to be a witness.—Commercial Gazette Co. v. Grooms, 10 Ohio Dec. 489, 21 Wkly. Law Bul. 292.

[n] (R. I. 1893) Pub. Laws, April, 1886, c. 581, § 1, providing that either party to a divorce proceeding may testify in the case, does not repeal or modify Pub. St. c. 214, § 36, forbidding the husband or wife of a party to any civil cause to give evidence criminating the other, or to disclose any communication made during marriage, and hence a husband cannot testify in a divorce proceeding as to admissions of guilt by his wife.—Briggs v. Briggs, 26 Atl. 198.

[o] (S. C. 1868) The proviso of the act of 1866, that neither a husband or wife shall be required to disclose any communication made to each other during coverture, was intended to preserve the principles of common law on this subject. Testimony competent by those rules is competent under the act.—Moseley v. Eakin, 15 Rich. Law, 324.

[p] (Tex. 1874) The husband cannot be examined as to statements made by his wife for the purpose of impeaching her testimony. This rule obtains regardless of the time when the relation commenced.—Roach v. State, 41 Tex. 261.

§ 735. Existence of relation.

[a] (Ill. 1894) Where there is positive proof by other witnesses that a man's former wife was living when he contracted a second marriage, the second wife is competent to prove admissions made by him to her during their cohabitation to the effect that he had never been divorced from his first wife.—Cole v. Cole, 153 Ill. 585, 38 N. E. 703.

[b] (Mo. 1892) On a trial for bigamy, letters written by defendant to the woman whom the indictment charges to be defendant's lawful wife are inadmissible.—State v. Ulrich, 110 Mo. 350, 19 S. W. 656.

§ 736. Subject-matter of testimony in general.

[a] (D. C. 1882) Testimony by defendant's wife that she saw no indications of insanity exhibited by him during their association does not come within the rule protecting confidential communications between husband and wife.—United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247.

[b] (Ga. 1878) In a prosecution for assault and battery, a woman having testified that the accused put his arm around her neck against her will, her husband is incompetent to testify that she delayed to complain to him. The law guards the marital confidence of silence as well as that of communication.—Goodrum v. State, 60 Ga. 509.

[c] (Ind. 1858) A widow may testify, in a suit by her sons, as to the execution, loss, and contents of the bond sued on, given to her husband, neither he nor she being parties, and her knowledge on the subject not being considered, in this case, a privileged communication from her husband.—Carpenter v. Dame, 10 Ind. 125.

[d] (Ind. 1887) In an action by a wife against the obligor or guarantor on a bond for the good behavior of her husband, she may testify as to her husband having been intoxicated in her presence. Such testimony does not come within the inhibition of Rev. St. 1881, § 497, making husband and wife incompetent to testify as to communications made to each other.—Stanley v. Stanley, 112 Ind. 143, 13 N. E. 261.

[e] (Ind. 1891) In a prosecution of a man as accessory before the fact of the murder of his child by his wife, the admission of evidence that defendant and his wife were in a room by themselves after the arrest does not violate the rule protecting communications between husband and wife.—Sage v. State, 127 Ind. 15, 26 N. E. 667.

[f] (Ind. 1893) A wife is not debarred from testifying that her husband gave her a venereal disease.—Polson v. State, 137 Ind. 519, 35 N. E. 907.

[g] (Me. 1859) As to all facts a knowledge of which was acquired through the confidential re-

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lation of husband and wife, the one cannot be a witness against the other, without his or her consent.—Walker v. Sanborn, 46 Me. 470.

[h] (Me. 1859) But as to facts known to the widow of a deceased husband, which did not come to her knowledge by reason of her relation as wife, she may testify, in a suit brought by her husband's executor upon an agreement at the making of which she happened to be present.—Walker v. Sanborn, 46 Me. 470.

[i] (Mo. 1886) Rev. St. 1879, § 4014, providing that a married woman, while the relation exists, or subsequently, shall not testify to any admission or conversation of her husband, excludes what was said by another in conversation with the husband as well as what was done by such other person in connection with the conversation and which might be explained thereby.—Waddle v. McWilliams, 21 Mo. App. 298.

[j] (N. H. 1872) Conversations between the husband and third person, and which were heard by the wife, would not ordinarily come within the exception of the statute, permitting her to testify except in violation of marital confidence.—Clements v. Marston, 52 N. H. 31.

[k] (Ohio, 1884) The husband was a competent witness to show that the letters purporting to be written to him by his wife were in his wife's handwriting.—Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

[l] (Tenn. 1851) On an issue of devisavit vel non the widow of the testator is not a competent witness to prove the alleged insanity of the testator by testimony as to his conduct and conversation during the existence of the marriage relation, though she had no interest in the question at issue, as such conduct and conversation were of the nature of confidential communications during the marital relation.—Brewer v. Ferguson, 30 Tenn. (11 Humph.) 565.

[m] (Vt. 1890) It is competent for a wife to testify that a note in question, given by a decedent, was not mentioned at a certain interview between herself and husband.—Spaulding v. Albin, 63 Vt. 148, 21 Atl. 530.

[n] (Vt. 1892) In an action by a husband for alienation of his wife's affections, the fact that the husband had invited his wife on different occasions to go to the village with him, and that she declined, and afterwards went with defendant, did not involve a matter of marital confidence, and might properly be shown by plaintiff.—Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438.

[o] (Wis. 1890) A husband is a competent witness against a former wife as to facts coming to his knowledge during the marriage, by means equally accessible to other persons, and not disclosed to him in conversation with her.—Bigelow v. Sickles, 75 Wis. 427, 44 N. W. 761.

§ 737. Subject-matter of communications.

[a] (U. S. 1889) Under Rev. St. § 877, providing that, on the trial of any cause in the District of Columbia, the wife shall not be competent or compellable to give evidence for or against her husband in any criminal proceeding, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage, in an action by a wife against the heirs of her deceased husband to establish her claim as creditor of his estate on account of the alleged investment by him of her property in his own name, the wife is not compellable to testify as to directions given by her to her husband concerning the investment.—Stickney v. Stickney, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136.

[b] (Ark. 1884) Husband or wife may testify as to transactions had with one another in suits between third parties, where the testimony involves no breach of matrimonial confidence.—Nolen v. Harden, 43 Ark. 307, 51 Am. Rep. 563.

[c] (Cal. 1895) In an action against a wife to set aside a fraudulent conveyance from her deceased husband she cannot be compelled to testify as to what decedent told her at the time of the conveyance as to his purpose in making it; Code Civ. Proc. § 1881, providing that a husband cannot be examined against his wife without her consent, and that neither husband nor wife, during marriage or afterwards, can be, without the consent of the other, examined as to any communication made by one to the other during marriage.—Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

[d] (Conn. 1887) The admission of a wife's testimony as to promises and representations made by her husband to induce her, and which did induce her, to advance her separate funds as a loan, is not a disclosure of private and confidential communications.—Appeal of Spitz, 56 Conn. 184, 14 Atl. 776, 7 Am. St. Rep. 303.

[e] (Fla. 1889) On the trial of a plea in bar of dower, based on the adulterous conduct of the wife, it was not error to exclude interrogatories to the wife seeking to prove her confessions to the husband of unfaithfulness to him.—Henderson v. Chaires, 25 Fla. 26, 37, 6 South. 164.

[f] (Ill. 1868) Act 1867 (Gross' Comp. p. 286) § 5, declares that no husband or wife shall, by virtue of the act, be rendered competent to testify for and against each other as to any past transaction or conversation occurring during marriage, or after its dissolution, "except in cases where the wife would, if unmarried, be plaintiff or defendant, or the action grows out of a personal wrong to the wife or the neglect of the husband to furnish the wife with suitable support, and except in cases concerning the wife's separate property." *Held*, that in an action against the sureties of a note, the wife of one of the defendants is incompetent to testify as to what the plaintiff had told her at the time when he called for her husband to go and see the principal debtor to get him to execute a mortgage as further security.—Phares v. Barbour, 49 Ill. 370.

[g] (Ill. 1880) Under the statute relating to evidence and providing that nothing therein shall authorize or permit any husband or wife to testify to any conversations of the other, conversations between a husband and wife prior to the execution of a mortgage are inadmissible.—Munford v. Miller, 7 Ill. App. 62.

[h] (Ind. 1879) In a suit for the partition of lands, a husband claimed his deceased wife's share therein, as her heir, and it was alleged that under the statute he had forfeited all his interest therein by abandoning her. *Held*, that under 2 Rev. St. 1876, p. 133, providing that husband and wife as to communications made to each other during marriage shall not in any case be competent witnesses unless with the consent of the person making such confidential communications, he was incompetent to testify to a conversation between himself and his wife which tended to show that he had not abandoned her, but had left her temporarily, with her consent.—Dye v. Davis, 65 Ind. 474.

[i] (Ind. 1882) Communications between husband and wife relating to an agency conferred by the latter upon the former are not confidential communications, nor inadmissible in evidence.—Schmied v. Frank, 86 Ind. 250.

[ii] (Ind. 1883) In an action by a husband and wife to enjoin the sale of land claimed by them jointly, on an execution against the husband, the wife may testify to agreements and stipulations made with her husband from time to time concerning their several property in-

terests as set out by her in her separate reply; such agreements not being confidential communications within the meaning of Act March 11, 1867, concerning the competency of witnesses.—Sedgwick v. Tucker, 90 Ind. 271.

[jj] (Ind. 1885) In an action for enticing away plaintiff's wife, the question of whether she committed adultery with defendant cannot be established by communications between herself and husband after her return.—Higham v. Vanosdol, 101 Ind. 160.

[jj] (Ind. 1887) Under Rev. St. 1881, § 497, making a husband or wife an incompetent witness as to communications made to each other, a wife is not an incompetent witness as to negotiations between herself and husband, resulting in the conveyance of real estate to her, which shows a valid consideration therefor, in trial of a suit to set aside such conveyance as fraudulent.—Beitman v. Hopkins, 109 Ind. 177, 9 N. E. 720.

[k] (Ind. 1895) In a prosecution for arson against the wife, the husband, as the party injured (Rev. St. 1894, § 1865; Rev. St. 1881, § 1796), being a part owner of the property burned, may testify against his wife as to communications between them.—Jordan v. State, 142 Ind. 422, 41 N. E. 817.

[kk] (Iowa, 1882) Testimony of the widow as to a transfer of a claim to her by her husband before his death is not incompetent as a "communication" between husband and wife.—Hanks v. Van Garder, 59 Iowa, 179, 13 N. W. 103.

[l] (Iowa, 1889) In an action to foreclose a mortgage, which defendants (husband and wife) alleged had been satisfied by a conveyance of the land, the wife's testimony as to what occurred between herself and husband before they executed the deed is inadmissible, Code 1873, § 3642, providing that neither husband nor wife can be examined as to any communication made by one to the other while married.—Head v. Thompson, 77 Iowa, 263, 42 N. W. 188.

[m] (Kan. 1893) Under Civ. Code, § 323, providing that in no case can either the husband or wife testify concerning any communication made by one to the other during the marriage, a husband cannot so show his life interest in property standing in his wife's name.—Chicago, K. & N. Ry. Co. v. Ellis, 52 Kan. 48, 34 Pac. 352.

[mm] (Kan. 1896) Under Gen. St. 1889, § 4418, providing that neither the husband nor wife shall testify concerning any communication made by one to the other during the marriage, a husband cannot testify to a communication made by him to his wife concerning property claimed by her.—Van Zandt v. Schuyler, 2 Kan. App. 118, 43 Pac. 295.

[n] (Mass. 1887) The prohibition of Pub. St. c. 169, § 18, cl. 1, that neither husband nor wife shall be allowed to testify as to private conversations with each other, includes conversations between them relating to business done by one as agent of the other.—Commonwealth v. Hayes, 145 Mass. 289, 14 N. E. 151.

[o] (Mass. 1890) On a prosecution for keeping intoxicating liquors with intent unlawfully to sell the same, where defendant claims that his wife owned the liquor seized, his offer to prove by his wife that he showed her that he was opposed to her owning and having intoxicating liquor was properly refused, except so far as it related to acts; as private conversations between husband and wife are inadmissible in evidence under Pub. St. c. 169, § 18, cl. 1.—Commonwealth v. Cleary, 152 Mass. 491, 25 N. E. 834.

[oo] (Mass. 1894) Private confessions by a wife to her husband as to acts of adultery are not admissible in an action by the husband against her paramour therefor.—Sanborn v. Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864.

[p] (Mich. 1896) How. Ann. St. § 7546, providing that neither husband nor wife, during or after the termination of the marriage, "shall be examined as to any communication made by or to the other during marriage," does not preclude a husband, after the death of his wife, from testifying that she intrusted property to him with express instructions to turn it over to complainants on her death.—Hagerman v. Wigent, 108 Mich. 192, 65 N. W. 756.

[pp] (Minn. 1886) Gen. St. 1878, c. 73, § 10, providing that neither husband nor wife can, "during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage," includes all private conversations between husband and wife, though on subjects not confidential in their nature.—Leppla v. Minnesota Tribune Co., 35 Minn. 310, 29 N. W. 127.

[q] (Minn. 1895) Under Gen. St. 1894, § 5662, excluding, as privileged, communications between husband and wife, the widow of one killed at a railroad crossing, and plaintiff in an action for damages, cannot testify as to statements by deceased as to the dangerous character of the crossing.—Newstrom v. St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253.

[qq] (Mo. 1874) In a suit by a husband to devest the wife of her title to land, a letter from him to her, directing her to purchase certain land for him, is not within the rule forbidding the disclosure of confidential communications.—Darrier v. Darrier, 58 Mo. 222.

[r] (Mo. 1887) In an action for divorce plaintiff cannot testify as to communications with defendant not in the presence of third persons, though such communications consist of opprobrious epithets, which would justify a divorce.—Ayers v. Ayers, 28 Mo. App. 97.

[rr] (Mo. 1889) In an action to enjoin the enforcement of a deed of trust securing upon the wife's land certain notes given by the husband in a transaction induced by fraud, the husband and wife may testify as to conversations between themselves as to the transaction, as a part of the res gestæ, and also on the ground of fraud.—Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580.

[s] (Mo. 1896) Where a husband, in furtherance of the fraud of others, prevails upon his wife to sign a note and incumber her property, equity will, in the absence of other evidence, in order to expose the fraud in all its details, permit both husband and wife to testify as to the conversations had between them in regard to the transaction.—Moeckel v. Heim, 134 Mo. 576, 36 S. W. 226.

[ss] (N. H. 1872) In an action by a husband to recover for personal injuries, testimony by the wife as to his physical condition after the injury and as to his statements when alone with her as to his sufferings is not objectionable as involving violation of marital confidence.—Stack v. City of Portsmouth, 52 N. H. 221.

[t] (N. J. 1876) A communication made by a husband to his wife, respecting trust property which it is their joint duty to carefully preserve and surrender to the lawful owner, when lawfully entitled to it, is not confidential, within the meaning of the statute, relieving husband and wife from obligation to disclose any confidential communication made by one to the other during coverture.—Wood v. Chetwood, 27 N. J. Eq. (12 C. E. Green) 311.

[tt] (N. Y. 1862) In an action against a husband and wife in which it is sought to establish that a conveyance by the husband to the wife was fraudulent, and it appeared that some time before the conveyance the husband had

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received from the wife a sum of money belonging to her, her testimony as to what she said when she gave him the money was not inadmissible, as being a communication between herself and her husband.—Schaffner v. Reuter, 37 Barb. 44.

[u] (N. Y. 1879) In an action by a loan company to recover of A. and wife and B. and wife an amount obtained from plaintiff by defendant's agent upon pledge of forged bonds, testimony of P.'s wife, an accomplice in the forgery, as to statements made to her by P. as to sayings and doings of B. and wife, is incompetent.—New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503, 7 Abb. N. C. 334.

[uu] (N. Y. 1887) In an action by a husband against his wife, from whom he had been divorced, to secure from her the transfer of a policy of insurance, on the ground that it had been assigned to her as security for a loan which had been paid, conversations between plaintiff and defendant relating to such policy, after its transfer to defendant, were admissible, in view of the rights conferred by law on married women, over an objection that they were private and a secret of the marriage.—Simmons v. Henry, 12 Civ. Proc. R. 204.

[v] (N. Y. 1888) In an action for an accounting of property appropriated by defendant, testimony of defendant's wife to private conversations with defendant in relation to his obligation for the property and his promise to secure plaintiff therefor is not within Code Civ. Proc. § 831, prohibiting evidence of confidential communications between husband and wife, as they were ordinary conversations relating to matters of business.—Parkhurst v. Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384.

[vv] (N. Y. 1892) Code Civ. Proc. § 831, provides that "a husband and wife shall not be compelled, or, without the consent of the other, if living, allowed, to disclose a confidential communication made by one to the other during marriage." *Held*, that in an action for libel for the publication of an article imputing unchastity to plaintiff, and suggesting improper relations between plaintiff and one S., plaintiff's husband should not be allowed to testify concerning his disputes and conversations with plaintiff about S.—Warner v. Press Pub. Co., 132 N. Y. 181, 30 N. E. 393, affirming (1890) 15 Daly, 545, 8 N. Y. Supp. 341.

[w] (Pa. 1868) The husband is a competent witness to prove a verbal agreement between himself and the wife that land conveyed to him, but bought with her father's advancement to her, might be conveyed away on condition that he would secure for her the proceeds.—Peiffer v. Lytle, 58 Pa. (8 P. F. Smith) 386.

[ww] (Tenn. 1882) Testimony of a wife, in favor of her husband, that he gave her money to take up certain notes, *held* excluded by the rule as to communications between husband and wife.—Washington v. Bedford, 78 Tenn. (10 Lea) 243.

[x] (Tenn. 1895) In an action to set aside a deed from husband to wife as in fraud of creditors, the testimony of either husband or wife, as to transactions and conversations between them, not in the presence of third persons, as to how the land should be purchased, how it should be paid for, and how title should be taken, must be excluded, under Mill. & V. Code, § 4563, rendering the husband or wife incompetent to testify as to any matter that occurred between them by virtue of or in consequence of the marital relation.—Phœnix Fire & Marine Ins. Co. v. Shoemaker, 95 Tenn. (11 Pickle) 72, 31 S. W. 270; Memphis Nat. Bank v. Same, Id.

[y] (Tex. 1891) Under Rev. St. art. 2247, prohibiting as evidence confidential communications between husband and wife, letters written by the husband to his wife concerning the business carried on by them, and tending to show that it was unprofitable, are inadmissible in an action by his widow.—Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705.

[z] (Va. 1830) In a suit for freedom by slaves, the widow of a former owner of the slaves, who conveyed them to the defendant, is not competent to prove declarations of her deceased husband that the mother of the plaintiff was an Indian woman, such declaration having been made as a confidential communication to such widow by her deceased husband.—Robin v. King, 2 Leigh, 140.

§ 738. Mode and form of communication.

[a] (U. S. 1887) The wife's administrator found among her papers letters from her husband which made against him in a suit in which he was then interested. The administrator, in a spirit of hostility to the husband, delivered the letters to the other side, which sought to use them. *Held*, that the letters were privileged.—Bowman v. Patrick (C. C.) 32 Fed. 368.

[b] (U. S. 1892) Code Civ. Proc. Cal. § 1881, prohibiting the examination of a husband or wife, during or after marriage, as to communications between them during marriage, does not extend its protection to letters from one to the other found in the possession of the wife's administrator after both are dead.—Lloyd v. Pennie (D. C.) 50 Fed. 4.

[c] (Conn. 1880) Upon the trial of a criminal, the state introduced letters written by the defendant to his wife (how obtained it did not appear). *Held*, that they were not protected as confidential communications between husband and wife.—State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

[d] (Ga. 1893) Under Code, § 3797, which excludes as evidence communications between husband and wife, a letter written by the husband to the wife, and received by her, which indicates his feelings towards a third person and towards herself in relation to that person, is not admissible in behalf of the latter on his trial for the homicide of the husband, though the wife voluntarily gave it to the accused before the homicide, and the latter has had it ever since.—Wilkerson v. State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63.

[e] (Kan. 1878) A letter from the defendant in a criminal case to his wife, after being delivered by her to a prosecuting witness, *held* not to be privileged, but admissible against him.—State v. Buffington, 20 Kan. 599, 27 Am. Rep. 193.

[f] (Ky. 1893) In a homicide case, a letter written by defendant to his wife is not admissible against him, however the letter was obtained from her.—Scott v. Commonwealth, 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371.

[g] (Ky. 1893) The fact that defendant, on being compelled by the court to answer the questions asked him on cross-examination, admitted he wrote the letter, and identified it, did not legalize it as evidence.—Scott v. Commonwealth, 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371.

[h] (Mass. 1892) On a trial for polygamy, letters from defendant to the second wife are competent evidence against defendant, since it is only private conversations between husband and wife, and not written communications, which are excluded by Pub. St. c. 169, § 18, subd. 1.—Commonwealth v. Caponi, 155 Mass. 534, 30 N. E. 82.

[i] (Mo. 1893) Letters between the parties to divorce proceedings are not competent; the rule excluding communications between husband and wife applying.—Brown v. Brown, 53 Mo. App. 453.

[j] (Mo. 1893) A letter from the wife, sent to their daughter, to be delivered to the husband, will not be assumed to be intended for

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the daughter's perusal, and so is incompetent.—Brown v. Brown, 53 Mo. App. 453.

[k] (N. Y. 1894) Letters written by a wife to a husband, and given by him to his mistress, and produced by her on his trial for perjury, are not privileged.—People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830, affirming (1893) 70 Hun, 111, 24 N. Y. Supp. 194.

[l] (Wis. 1889) On a trial for perjury in making affidavit that defendant did not know and could not ascertain where his wife could be found, for the purpose of procuring publication of summons in an action for divorce, it was error to allow the wife's attorney in the divorce suit to produce letters written by the husband to the wife during marriage, though the contents were not shown, but only the address, date, etc., which tended to show that defendant did know where his wife was, as such letters were confidential communications between husband and wife.—Selden v. State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144.

[m] (Wis. 1890) In an action for criminal conversation, it appeared that plaintiff's wife wrote a note in his presence, addressed to defendant, and that plaintiff copied the note and gave it back to her. The note was not sent to the defendant, nor to any one, and there was no evidence that any one ever saw it before the trial except the wife and husband. *Held*, that it was inadmissible in evidence, under Rev. St. § 4072, which provides that "a husband or wife shall not be allowed to disclose a confidential communication made by one to the other, during their marriage, without the consent of the other.—Smith v. Merrill, 75 Wis. 461, 44 N. W. 759.

§ 739. Confidential or private character of communication.

[a] (Iowa, 1883) Exclamations of a wife upon the killing of her son by her husband are not privileged communications.—State v. Middleham, 62 Iowa, 150, 17 N. W. 446.

[b] (Mo. 1876) It is not competent in a divorce suit to allow either party to testify as to what was said by the other in private conversations.—Dwyer v. Dwyer, 2 Mo. App. 17.

[c] (Mo. 1886) A paper, in the wife's handwriting, found among her deceased husband's papers, addressed "To whom it may concern," and which speaks of her husband in the third person and explains the cause of their separation, is not a privileged communication.—Hoyt v. Davis, 21 Mo. App. 235.

[d] (Mo. 1890) In a wife's suit for divorce for cruelty, she cannot testify as to epithets spoken to her by the defendant, as such matter falls within the rules concerning confidential communications.—King v. King, 42 Mo. App. 454.

[e] (Mo. 1896) In an action for divorce, it is not error to exclude conversations between plaintiff and defendant which are not made in the presence of a third person; such communications being confidential.—Schierstein v. Schierstein, 68 Mo. App. 205.

[f] (N. Y. 1891) Plaintiff in a divorce suit could testify that defendant made a statement to her, in the form of a confession, that he had had improper relations with a woman in his office, and that he afterwards admitted that the confession was false, and made in the hope of inducing a similar confession from her in return; it not constituting a privileged communication.—Fowler v. Fowler, 58 Hun, 601, 19 Civ. Proc. R. 282, 11 N. Y. Supp. 419.

[g] (N. C. 1895) Where a wife, on threats of her husband to leave her, confesses to having committed incest, such confession, being a confidential communication, is inadmissible, and its subsequent repetition to a third party, under similar threats, in the presence of the husband, is incompetent.—State v. Brittain, 117 N. C. 783, 23 S. E. 433.

[h] (Pa. 1895) A boastful and defiant declaration by a husband to his wife of his misconduct, and of his intention to openly persist in his course, accompanied by insolent and brutal taunts, is not a confidential communication.—Seitz v. Seitz, 170 Pa. 71, 32 Atl. 578.

[i] (Vt. 1862) A conversation between the respondent and her husband, tending to show an admission of her guilt to him, does not belong to that class of confidential communications which the law excludes.—State v. Center, 35 Vt. 378.

§ 740. Communications in presence or hearing of others.

[a] (Kan. 1877) A wife may testify to communications (otherwise competent) made by her husband to a third person in her hearing, when he is not a party or interested in the suit.—Higbee v. McMillan, 18 Kan. 133.

[b] (Mass. 1873) A conversation between a wife and a husband in the presence of their children not over 11 years of age, and who were not shown to have paid any attention thereto, is a "private conversation" within the meaning of St. 1870, c. 393, § 1, which provides that neither the husband nor the wife shall testify as to private conversations with the other.—Jacobs v. Hesler, 113 Mass. 157.

[c] (Mass. 1881) A conversation between a husband and wife in the presence of a third person, who hears part of it, is not a private conversation within St. 1870, c. 393, § 1, cl. 1.—Fay v. Guynon, 131 Mass. 31.

[d] (Mass. 1891) In an action for debauching plaintiff's wife and alienating her affections, plaintiff was allowed to testify that in a room in defendant's house, adjoining one occupied by defendant, plaintiff asked his wife, in the presence of their 14 year old daughter, if she would go with him, to which she replied, "No, sir." *Held*, that this testimony was properly admitted, and that the communication was not privileged.—Lyon v. Prouty, 154 Mass. 488, 28 N. E. 908.

[e] (Mo. 1896) Communications between husband and wife in the presence of a child or person incapable of comprehending them is not a conversation in the presence of a third person, which authorizes its admissibility as evidence in a suit for divorce.—Schierstein v. Schierstein, 68 Mo. App. 205.

[f] (N. Y. 1891) In a criminal prosecution of her husband statements made by him to the wife in presence of a third party are not confidential communications within the meaning of Pen. Code, § 715, providing that on the trial of a person indicted for a crime the husband or wife of such person cannot be compelled to disclose a confidential communication made by one to the other during marriage.—People v. Lewis, 62 Hun, 622, 16 N. Y. Supp. 881, judgment affirmed (1892) 136 N. Y. 633, 32 N. E. 1014.

[g] (Ohio, 1844) Where plaintiff and defendant spoke different languages and plaintiff's wife understood them both and acted as interpreter between the parties, the wife's statements, made while she was pretending to interpret her husband's language, are admissible as admissions of the husband.—Schutter v. Williams, 1 Ohio Dec. 47.

[h] (Ohio) Husband and wife can testify to communications between themselves made in the known presence of a third person competent to testify, though at the time of the trial such third person be dead.—(1879) Sieving v. Seidelmeyer (Super. Ct. Cin.) 7 Ohio Dec. 609, 4

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Wkly. Law Bul. 213; (1883) Sessions v. Trevitt, 39 Ohio St. 259; (1888) Morgan v. Bartlette, 2 O. C. D. 244.

[i] (Ohio, 1881) 67 Ohio Laws, p. 111, provides that the husband and wife shall be incompetent to testify concerning any communication made by one to the other during coverture, or any act done by either in the presence of the other during coverture, unless such communication was made, or such act was done, within the known presence, hearing, or knowledge of a third person competent of being a witness. *Held*, that a husband or wife called to testify to such communication or act was competent to testify as to the known presence, hearing, or knowledge of such third person.—McCague v. Miller, 36 Ohio St. 595.

[j] (R. I. 1879) The proviso in Gen. St. c. 203, § 36, that neither the husband nor wife of a party shall be permitted, in testifying, "to disclose any communication made to him or her by the other during their marriage," covers those made in the presence of third parties as well as those made in private confidence.—Campbell v. Chace, 12 R. I. 333.

[k] (Tenn. 1866) Conversations between husband and wife, or admissions made by either to the other, in the presence of a third person, do not belong to that class of privileged communications between the husband and wife which, upon grounds of public policy, and to preserve the happiness of the married state, are so carefully protected by the well-established rules of evidence.—Allison v. Barrow, 43 Tenn. (3 Cold.) 414, 91 Am. Dec. 291.

[l] (Vt. 1892) A husband may testify to a conversation with testatrix, his wife, in the presence of others, in which she admitted that certain real estate of which title stood in her was their joint property; such agreement not being a matter of marital confidence, but purely a business transaction, had in the presence of witnesses.—In re Buckman's Will, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930.

§ 741. —— Testimony of third person.

[a] (Kan. 1895) A conversation participated in by a husband, his wife, and a third person is in no sense a privileged communication, and may be given in evidence by such third person.—State v. Gray, 55 Kan. 135, 39 Pac. 1050.

[b] (Mass. 1872) There is no rule that third persons who hear a private conversation between husband and wife shall not give it in testimony.—Commonwealth v. Griffin, 110 Mass. 181.

[c] (Mass. 1876) Under St. 1870, c. 393, § 1, cl. 1, excluding the testimony of a wife as to transactions between her husband and herself when no one else is present, the testimony of witnesses to statements made to them by a husband or wife in regard to such transactions is inadmissible.—Brown v. Wood, 121 Mass. 137.

§ 742. Communications before marriage.

[a] (Ill. 1882) A husband may testify in favor of his wife to transactions and conversations occurring before marriage.—Otis v. Spencer, 102 Ill. 622, 40 Am. Rep. 617.

§ 743. Effect of divorce or death of husband or wife.

[a] The death of a husband or wife does not remove the disability of the survivor to testify to conversations held with each other during marriage.

—(Cal. 1877) In re Low's Estate, Myr. Prob. 143;

(Del. 1853) Gray v. Cole, 5 Har. 418; Farmers' Bank v. Same, Id.;

(Ga. 1859) Lingo v. State, 29 Ga. 470;

(Ind. 1871) Noble v. Withers, 36 Ind. 193;

(Tenn. 1873) Pillow v. Thomas, 60 Tenn. (1 Baxt.) 120.

[b] A divorced wife cannot testify to confidential communications between her and her husband made during the existence of the marriage relation.

—(Ind. 1872) Mercer v. Patterson, 41 Ind. 440;

(1882) Perry v. Randall, 83 Ind. 143;

(Mo. 1882) Schnabel v. Schnabel, 12 Mo. App. 587;

(Pa. 1887) Brock v. Brock, 116 Pa. 109, 9 Atl. 486.

[c] (Ala. 1885) In criminal cases neither husband nor wife can testify as to communications between them, though they have been subsequently divorced.—Owen v. State, 78 Ala. 425, 56 Am. Rep. 40.

[d] (D. C. 1879) A woman cannot testify as to statements concerning his pedigree made to her by her deceased husband.—Brooks v. Francis, 3 MacArthur, 109.

[e] (Ga. 1869) A widow is not a competent witness in an action brought by her, as administratrix, on a note belonging to her intestate's estate, as to any facts which came to her knowledge by reason of the confidential relation of husband and wife during her coverture.—Jackson v. Jackson, 40 Ga. 150; McIntyre v. Meldrim, Id. 490.

[f] (Ill. 1871) Where the statutes provide that in a suit brought by the executor of a deceased person, the defendant shall not be allowed to testify, and also that no husband or wife shall be competent to testify for or against each other as to any transaction or conversation occurring during the marriage whether called as a witness during its existence or after its dissolution, it could not have been intended that after the husband's death, his widow might be admitted to testify as to such transaction or conversation. Had such been the intent of the statute, it would have provided that in such case the defendant also should be allowed to testify at least to the same transaction or conversation.—Reeves v. Herr, 59 Ill. 81.

[g] (Ill. 1876) In an action for the seduction of a wife, she, though subsequently divorced, will not be permitted to testify for the defense as to facts which came to her knowledge during the existence of the marital relation.—Crose v. Rutledge, 81 Ill. 266.

[h] (Ill. 1876) In an action for the seduction of a wife, she may testify to facts occurring after she was divorced in which her former husband did not participate, and which affect her and the person calling her.—Crose v. Rutledge, 81 Ill. 266.

[i] (Ill. 1895) Under Rev. St. 1893, c. 51, § 5, which states when husband and wife may testify for or against each other, but provides that "nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other except in suits between such husband and wife," a man cannot, in a suit against third persons, testify as to admissions made to him during marriage by his deceased wife.—Goelz v. Goelz, 157 Ill. 33, 41 N. E. 756.

[j] (Ind. 1885) A widow cannot testify to communications made to her during marriage by her deceased husband; Rev. St. 1881, § 497, providing that husband and wife are not competent witnesses to communications made to each other.—Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213.

[k] (Ind. 1891) Defendant made the murder of a child begotten in illicit intercourse a con-

dition of marrying the mother, and, after she had been in jail several years for the crime, obtained a divorce. *Held*, under such circumstances, the state might show when it was that she made known his complicity in the crime, although she had previously shielded him.—Sage v. State, 127 Ind. 15, 26 N. E. 667.

[l] (Iowa, 1861) Revision 1860, § 3984, excluding communications made by husband and wife during the continuance of the marriage, does not render the wife incompetent after the death of the husband as to matters which she knew of her own knowledge.—Romans v. Hay's Adm'r, 12 Iowa, 270.

[m] (Kan. 1872) A divorced wife, in an action against her husband and his vendee to set aside a deed of the homestead because her signature to the deed was obtained by duress, cannot be allowed to testify to threats made to her by her husband while the marriage relation existed.—Anderson v. Anderson, 9 Kan. 112.

[n] (Kan. 1886) The plaintiff caused the deposition of one of the defendants to be taken prior to the trial, in which the witness gave testimony concerning communications had with her husband during the marriage, and prior to his death. *Held*, that the testimony falls within the prohibition of the Code which forbids husband or wife "to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards," and its admission over the objection of the defendants was error. Civ. Code, § 323.—French v. Wade, 35 Kan. 391, 11 Pac. 138.

[o] (La. 1878) A widow is a competent witness to prove the dying declarations of her husband, as the rules of evidence as between husbands and wives are no longer applicable after the husband's death.—State v. Ryan, 30 La. Ann. 1176.

[p] (Mich. 1874) The testimony of one who was formerly the wife of a defendant, but who has obtained a divorce from him, as to a transaction between the defendant and a third person, is not within the statute prohibiting the examination of husband or wife, "as to any communication made by one to the other during the marriage."—Herrick v. Odell, 29 Mich. 47.

[q] (Mich. 1886) Under How. Ann. St. § 7546, a husband, even after the death of his wife, cannot be permitted to testify as to confidential communications made by her to him during marriage.—Maynard v. Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

[r] (Mich. 1888) Where persons have been divorced it is error to allow the wife, against the husband's objection, to testify to communications made by him to her before the divorce was granted, and it is also error to allow him to be cross-examined in regard to them.—Hitchcock v. Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

[s] (Mo. 1872) A widow should not be allowed to disclose the confidential communications of her deceased husband.—Spradling v. Conway, 51 Mo. 51.

[t] (Neb. 1895) Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married; nor shall they, after the marriage relation ceases, be permitted to testify as to such communications. Code Civ. Proc. § 332.—Buckingham v. Roar, 45 Neb. 244, 63 N. W. 398.

[u] (N. Y. 1865) In an action of ejectment to recover dower a widow should not be permitted to testify to what her deceased husband said to her when they were alone, and which tended to show that he did not deliver the deed under which the defendant claims title until after her marriage to him, although it was dated before.—Keator v. Dimmick, 46 Barb. 158.

[v] (Pa. 1846) In a suit between her deceased husband's estate and a stranger, the widow is competent to testify to facts which were not confided to her by her husband, or learned in consequence of her domestic relations.—Cornell v. Vanartsdalen, 4 Pa. (4 Barr) 364.

[w] (Pa. 1881) A widow cannot testify in support of claims against her husband's estate, with regard to confidential communications made by him to her.—Appeal of Robb, 98 Pa. 501.

[x] (Tenn. 1870) A widow of a testator is not competent to prove declarations made by her husband during the marriage.—German v. German, 47 Tenn. (7 Cold.) 180.

[y] (Vt. 1835) A widow cannot be called to testify as to anything disclosed to her by her husband's communications with her.—Williams v. Baldwin, 7 Vt. 503.

[yy] (Va. 1886) Although the wife is dead, her husband cannot testify to the consideration of a postnuptial settlement upon her.—Marks v. Spencer, 81 Va. 751.

[z] (Wis. 1870) When the relation of husband and wife has ceased, as by a divorce, the former wife may be admitted as a witness against the former husband to prove a communication not confidential, but which must have been intended by the husband that she should make known to the public when he made the communication to her.—Crook v. Henry, 25 Wis. 569.

[zz] (Wis. 1870) Hence, in an action of replevin by a person who had been divorced, *held*, that evidence by the former wife showing that she had received authority from him while the relationship of husband and wife existed between them, to sell the goods in question, was admissible.—Crook v. Henry, 25 Wis. 569.

3. FIDUCIARY OR CONTRACT RELATIONS IN GENERAL.

IN GENERAL, § 744.
PARTNERS, § 745.
TELEGRAPH COMPANIES AND SENDERS OF MESSAGES, § 746.

§ 744. In general.

[a] (U. S. 1809) A head clerk of a party is not privileged to refuse to testify for his adversary because standing in confidential relations to his employer.—Corps v. Robinson, Fed. Cas. No. 3,252 [2 Wash. C. C. 388].

[b] (Conn.) Witnesses must testify what a party told to them in confidence, and under an engagement of secrecy, unless they are attorneys of the party in the cause.—(1792) Mills v. Griswold, 1 Root, 383; (1793) Sherman v. Sherman, Id. 486; (1796) Calkins v. Lee, 2 Root, 363.

[c] (Conn. 1875) A patentee, believing that a third person was making the patented article in violation of an injunction, procured another to order the patented article from such person. *Held*, that communications by an agent employed to obtain the article to the patentees both in their oral form and afterwards in an affidavit as to the facts were privileged.—Knowles v. Peck, 42 Conn. 386, 19 Am. Rep. 542.

[d] (La. 1842) A broker, examined to prove the market value of stocks, will not be compelled to disclose the names of persons to whom he has sold shares of the same stock, and whose names, there being no intention to examine them to contradict him, are immaterial.—Jonau v. Ferrand, 3 Rob. 364.

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[e] (Md. 1829) The cashier of a corporation is not protected from testifying in a case in relation to dealings of the corporation with a party to the suit.—Winder v. Diffenderffer, 2 Bland, 166.

[f] (Mich. 1879) Banking business is not privileged from judicial scrutiny. So *held* on a bill by the executrix of a deceased partner of a manufacturing firm for an account by the survivor, charging fraudulent concealment of the profits of the firm business, continued after the decease, his banker being summoned as a witness.—Heath v. Waters, 40 Mich. 457.

[g] (Pa. 1789) A witness cannot refuse to testify because he is the confidential agent of one of the parties.—Holmes v. Comegys, 1 Dall. 439, 1 L. Ed. 213.

[h] (Pa. 1892) The officers of a bank can be compelled to testify as to whether there are any records in their books by which they can identify notes deposited with them for collection or discount, and the parties to those notes. —McManus v. Freeman (Com. Pl.) 2 Pa. Dist. R. 144.

§ 745. Partners.

[a] (U. S. 1872) Letters between partners concerning a lawsuit which they expect to and do begin are privileged; so are letters which concern only litigation of the party writing them.—In re Krueger, Fed. Cas. No. 7,942 [2 Low. 182].

[b] (Tex. 1888) A letter by one partner to another regarding the nature and purpose of the firm's purchase from an insolvent is not a privileged communication.—Wills Point Bank v. Bates, 72 Tex. 137, 10 S. W. 348.

§ 746. Telegraph companies and senders of messages.

[a] (U. S. 1894) Messages in the hands of telegraph companies are not privileged communications, and their production will be compelled by subpœna duces tecum, in aid of an investigation by a grand jury of acts with which such companies are in no way connected. —In re Storror (D. C.) 63 Fed. 564.

[b] (Iowa, 1880) Code 1873, § 1328, provides that any person employed in transmitting messages by telegraph, who makes known the contents of any message sent or received, to any person except to him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor. *Held*, that this section does not apply to the use of such messages, by the parties to them, as evidence, and the operator having them in his possession may be compelled to produce them.—Woods v. Miller, 55 Iowa, 168, 7 N. W. 484.

[c] (Me. 1870) A telegraphic operator is not privileged to refuse to testify, upon a criminal trial, to the contents of a message sent by him. —State v. Litchfield, 58 Me. 267.

[d] (N. Y. 1889) Telegrams are not, as to the operator or custodian, privileged communications.—People v. Webb (Sup.) 5 N. Y. Supp. 855.

[e] (Pa. 1851) An officer of a telegraph company may be compelled to produce a telegraphic dispatch sent over the wires, when he is called as a witness in a suit involving the party who sent the dispatch. The production of the telegram is not an "unlawful exposure of another's business or acts," within the meaning of the act of April 14, 1851.—Henisler v. Freedman, 2 Pars. Eq. Cas. 274.

[f] (W. Va. 1874) Telegraphic dispatches are not privileged communications, but may be called for and given in evidence whenever in the opinion of the court they are regarded as proper or competent testimony.—National Bank v. National Bank, 7 W. Va. 544.

4. COMMUNICATIONS TO OR ADVICE BY ATTORNEY OR COUNSEL.

IN GENERAL, § 747.
STATEMENTS TO CLERKS, STUDENTS, AND OTHERS NOT ADMITTED TO THE BAR, § 748.
RELATION OF ATTORNEY AND CLIENT, § 749.
—— PARTIES AND INTERESTS REPRESENTED BY ATTORNEY, § 750.
—— EMPLOYMENT IN MATTER OTHER THAN THAT TO WHICH COMMUNICATION RELATES, § 751.
PROFESSIONAL CHARACTER OF EMPLOYMENT IN GENERAL, § 752.
SUBJECT-MATTER OF TESTIMONY IN GENERAL, § 753.
SUBJECT-MATTER OF COMMUNICATION OR ADVICE IN GENERAL, § 754.
—— CRIMINAL OR OTHER WRONGFUL ACT OR TRANSACTION, § 755.
INSTRUCTIONS OR COMMUNICATIONS AS TO WILL, § 756.
INSTRUCTIONS OR COMMUNICATIONS AS TO CONVEYANCE, ASSIGNMENT, OR MORTGAGE, § 757.
COMMUNICATIONS TO PROSECUTING ATTORNEY, § 758.
SOURCE OF INFORMATION IN GENERAL, § 759.
COMMUNICATIONS BETWEEN ATTORNEY AND THIRD PERSON, § 760.
CONVERSATIONS BETWEEN PARTIES IN PRESENCE OF ATTORNEY, § 761.
EXISTENCE, CONTENTS, OR PRODUCTION OF DOCUMENTS, § 762.
CONFIDENTIAL CHARACTER OF COMMUNICATION OR ADVICE, § 763.
COMMUNICATIONS IN PRESENCE OR HEARING OF OTHERS, § 764.
—— TESTIMONY OF THIRD PERSON, § 765.
TERMINATION OF RELATION, § 766.
DEATH OF CLIENT, § 767.

Relationship of attorney and client as affecting competency in general, see ante, §§ 121–123.

Compelling attorney for bankrupt to testify in bankruptcy proceedings, see "Bankruptcy," vol. 6, cc. 458, 459, § 401.

§ 747. In general.

[a] Communications by a client to his attorney, in the course of professional employment, cannot be divulged without the client's consent.

—(Ill. 1891) Swaim v. Humphreys, 42 Ill. App. 370;

(Md. 1848) Chew v. Farmers' Bank of Maryland, 2 Md. Ch. 231;

(Miss. 1852) Parkhurst v. McGraw, 24 Miss. (2 Cushm.) 134;

(N. Y. 1848) Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189;

(Ohio, 1860) King v. Barrett, 11 Ohio St. 261;

(Pa. 1887) Kaut v. Kessler, 114 Pa. 608, 7 Atl. 586;

(S. D. 1894) Austin, Tomlinson & Webster Manuf'g Co. v. Heiser, 6 S. D. 429, 61 N. W. 445;

(Vt. 1852) Wetherbee v. Ezekiel, 25 Vt. 47.

[b] (U. S. 1803) An attorney at law cannot be compelled to disclose any fact the knowledge of which has been communicated to him by his client.—Murray v. Dowling, Fed. Cas. No. 9,959 [1 Cranch, C. C. 151].

[c] (U. S. 1872) Correspondence between a district attorney representing the United States and the attorney general is confidential in its nature.—United States v. Six Lots of Ground, Fed. Cas. No. 16,299 [1 Woods, 234].

[d] (Ala. 1874) The rule which forbids the examination of an attorney as a witness, re-

specting "confidential communications" between him and his client, extends only to disclosures which are prejudicial to the client, and may be waived by him; but there is no principle of public policy which prevents the attorney from testifying as a witness for his client, in a contest with another person.—Rowland v. Plummer, 50 Ala. 182.

[e] (Fla. 1875) A person who has been the attorney of the plaintiff cannot, as a witness for the defendant, testify as to any facts which came to his knowledge by means of his confidential relations with the plaintiff.—Buckmaster v. Kelley, 15 Fla. 180.

[f] (Ga. 1853) An attorney may not testify for or against his client, in any case, as to any matter or thing the knowledge of which he may have acquired from his client, or during the existence, and by reason, of the relationship of client and attorney.—Riley v. Johnston, 13 Ga. 260.

[g] (Ga. 1859) The testimony of an attorney in a case, to facts which have come to his knowledge in such capacity, is inadmissible under the statute.—Causey v. Wiley, 27 Ga. 444.

[h] (Ga. 1878) The act of 1866, declaring that no attorney "shall be compellable to give evidence for or against his client," repeals the act of 1859 in that regard, and permits an attorney to testify as other witnesses, if he sees fit.—Willis v. West, 60 Ga. 618.

[i] (Ga. 1887) The rule excluding confidential communications between an attorney and his client extends, under Code, § 3798, to a communication between the attorney of an insurance company and the company's agent.—Fire Ass'n of Philadelphia v. Fleming, 78 Ga. 733, 3 S. E. 420.

[j] (Ga. 1893) It was not error to refuse to permit defendant to prove by his counsel that he (the defendant) desired to include in his statement to the jury made at a former trial certain matters, but refrained from so doing under the advice of the same counsel; since, if the sayings of accused, made in his own interest, were admissible at all, his attorney was not, under the act of August 4, 1887, a competent witness to prove them, as they were confidential communications between himself and his client.—Lewis v. State, 91 Ga. 168, 16 S. E. 986.

[k] (Ill. 1882) An attorney at law may testify to facts coming to his knowledge while transacting business for his client, in an action to which his client is not a party.—Payne v. Miller, 103 Ill. 442.

[l] (Ind. 1840) Where an attorney is consulted on business within the scope of his profession, the communications between him and his client are strictly confidential; and the attorney should neither be required nor permitted by any judicial tribunal to divulge them against his client, if the latter object to the evidence.—Jenkinson v. State, 5 Blackf. 465.

[m] (Ind. 1859) In a suit against an attorney for disobedience of instructions, he may, as a witness, disclose confidential communications with the client.—Nave v. Baird, 12 Ind. 318.

[n] (Kan. 1887) A communication from a client to his attorney may be admitted in evidence, but the attorney, without his client's consent, is prevented from testifying concerning such communication.—Tays v. Carr, 37 Kan. 141, 14 Pac. 456.

[o] (La. 1860) An attorney should be excused from answering interrogatories when he declares on oath that he cannot answer the same without disclosing matters confided to him by his client, or advice given by him to his client concerning business about which he was retained.—Shaughnessy v. Fogg, 15 La. Ann. 330.

[p] (La. 1860) Communications made by a prisoner to his counsel in the course of professional employment are not admissible as evidence against him in a criminal prosecution.—State v. Hazleton, 15 La. Ann. 72.

[q] (La. 1860) An attorney ought not to testify as to matters confided to him by his client.—Holmes v. Barbin, 15 La. Ann. 553.

[r] (Md. 1848) The rule that communications which a client makes to his legal adviser for the purpose of professional advice or aid shall not be disclosed stands upon such firm grounds of public policy, and is so well forfeited by authority, that it would be impossible to contest it.—Chew v. Farmers' Bank of Maryland, 2 Md. Ch. 231.

[s] (Mass. 1869) On cross-examination of a party who offers himself as a witness at a trial, his previous communications with his counsel are not privileged.—Inhabitants of Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333.

[t] (Mich. 1892) Plaintiff, who testified through an interpreter, was told by his counsel during a recess of the court that he (the plaintiff) had stated his case differently to him (the counsel). Plaintiff contended that the interpreter had misunderstood him, or that the stenographer had reported him incorrectly, and, on re-examination, was allowed to correct his testimony. *Held*, that plaintiff's counsel could not be called, against his objection, to testify to the conversation with his client during the recess.—Erickson v. Milwaukee, L. S. & W. Ry. Co., 93 Mich. 414, 53 N. W. 393.

[u] (Mo. 1856) The rule which protects the communications made to one's legal adviser from being given in evidence extends to all cases in which a client applies to his counsel for his aid in the line of his profession.—Johnson v. Sullivan, 23 Mo. 474.

[v] (Neb. 1886) An attorney was employed to foreclose a mortgage, and during the litigation the plaintiff denied his authority to prosecute a collateral action, which, if prosecuted, would work an estoppel on plaintiff. *Held*, that in a subsequent action, in which the authority of the attorney to act was important for the purpose of determining the rights of parties affected by the first decree, the attorney may testify as to his employment, to the instructions given him by his client, and his approval of the course pursued.—Brigham v. McDowell, 19 Neb. 407, 27 N. W. 384.

[vv] (Nev. 1866) In a suit by an attorney to recover his fees he will not be prevented from testifying to facts necessary to establish his case on the ground that his information was obtained while acting as counsel for the defendant.—Mitchell v. Bromberger, 2 Nev. 345, 90 Am. Dec. 550.

[w] (N. Y. 1809) A witness cannot be compelled to disclose any confidential communication made to him as counsel in any cause then actually commenced or to be commenced.—McTavish v. Denning, Anth. N. P. 113.

[ww] (N. Y. 1851) The rule which prohibits an attorney from disclosing professional communications does not arise from the moral obligation to preserve a secret confided to him, nor from the peculiar power of the court to regulate the conduct of attorneys as officers of the court, nor yet from any general grounds of public policy forbidding confidential communications to be disclosed. The rule is a mere extension of the immunity of the party to his substitute, the attorney.—Rochester City Bank v. Suydam, 5 How. Prac. 254, 3 Code Rep. 249.

[x] (N. Y. 1870) The rule prohibiting an attorney or counsel of a party, or the clerk of such attorney or counsel, from testifying to statements of his client against his consent, was not changed by the Code making parties

competent witnesses for or against themselves.—Brand v. Brand, 39 How. Prac. 193.

[xx] (N. Y. 1889) Though Code Civ. Proc. § 915, authorizes a judge or court to whom a commission to take testimony in the state is presented to compel witnesses to appear and testify, when it is obvious that a cross-examination of the attorney concerning letters in his possession, written by plaintiff in the suit for which the evidence is being taken, to the witness' client and others, is simply an attempt to bring out facts material in a suit by his client against such plaintiff, and it does not appear that the letters are material in the former suit, the attorney will not be compelled to produce them, though they are not privileged communications.—In re Whitlock, 51 Hun, 351, 3 N. Y. Supp. 855, reversing judgment (1888) 15 Civ. Proc. R. 204, 2 N. Y. Supp. 683.

[y] (N. Y. 1890) Where an attorney who is examined as a witness states under oath that certain questions propounded to him involve communications made to him by his client in the course of his professional employment, he will be excused from answering such questions.—McClure v. Goodenough (Super. N. Y.) 19 Civ. Proc. R. 191, 12 N. Y. Supp. 459.

[yy] (Pa. 1838) The exclusion of communications made by a client to his counsel is confined to cases in which the client is interested.—Hamilton v. Neel, 7 Watts, 517.

[z] (Pa. 1845) An attorney who was summoned as garnishee in an attachment on a judgment against a client was bound to answer whether he had received from his client a sum of money in trust to pay a certain precentage to his creditors, as an attorney is not privileged from communicating facts concerning his client where the attorney himself is a party to the transaction or agreement which he is called upon to disclose.—Jeanes v. Fridenberg, 3 Clark, 199.

[zz] (Pa. 1853) In an action on a promissory note, the plaintiff's attorney was called as a witness to prove that the note was not the property of the plaintiff. He declined to state any communications made to him by his client, and the court refused to compel him.—Miller v. Weeks, 22 Pa. (10 Harris) 89.

§ 748. Statements to clerks, students, and others not admitted to the bar.

Interpreter, see post, § 765 [j].

[a] A communication made by a client to an attorney's clerk, in regard to a suit prosecuted by the clerk's principal as attorney, is equally privileged as if made to the attorney in person.—(Cal. 1855) Landsberger v. Gorham, 5 Cal. 450;

(N. Y. 1857) Sibley v. Waffle, 16 N. Y. 180.

[b] (U. S. 1892) A solicitor of patents, who is not an attorney at law, is not privileged from testifying under Rev. St. § 4908, which provided that a witness on the trial of an interference need not "disclose any secret invention or discovery made or owned by himself."—Brungger v. Smith (C. C.) 49 Fed. 124.

[c] (Ala. 1889) Communications to a confidential clerk of a firm of attorneys, made by one who knows that such clerk is not an attorney, and who does not know his relations to the firm, and without showing any desire to have the clerk carry the communications to the attorneys, are not privileged.—Hawes v. State, 88 Ala. 37, 7 South. 302.

[d] (Ill. 1878) The rule as to privileged communications from a client applies only to licensed attorneys.—McLaughlin v. Gilmore, 1 Ill. App. (1 Bradw.) 563.

[e] (Ind. 1880) Statements relating to the accident, made by the husband of plaintiff suing a city for personal injuries caused by a defective gutter crossing, to a clerk of a law firm, in plaintiff's absence, are inadmissible in evidence as against her, if the husband was not acting as her agent, and are privileged if he was so acting, where such clerk, although not a member of the firm, supposed he was being consulted professionally as an attorney.—City of Indianapolis v. Scott, 72 Ind. 196.

[f] (Iowa, 1859) Communications made by a client to one whom he supposed to be an attorney, and whom he employed as such, but who, although doing business as a member of the bar, was not in fact admitted at that time, are not privileged.—Sample v. Frost, 10 Iowa, 266.

[g] (Mass. 1851) Where a person goes to the office of an attorney at law to obtain professional advise, and there consults with a student at law in the office, the communications made by him to the student in the course of such consultation are not protected from disclosure in court, even if he supposes the student to be an attorney.—Barnes v. Harris, 61 Mass. (7 Cush.) 576, 54 Am. Dec. 734.

[h] (N. H. 1829) The privilege of clients to have their communications to counsel kept secret extends, not only to communications made to professional men, but to those made to any other person employed to manage a cause as counsel.—Bean v. Quimby, 5 N. H. 94.

[i] (N. Y. 1829) The privilege of not disclosing a communication made by a client to counsel is confined to counsel, though it may be extended to the clerks of counsel.—Jackson v. French, 3 Wend. 337, 20 Am. Dec. 699.

[j] (Ohio, 1878) Communications made by an accused to a party who was in the habit of trying justice's court cases, but who had not been admitted to the bar, with reference to defending an action against him, cannot be excluded as privileged communications.—State v. Burkhardt, 7 Ohio Dec. 537, 3 Wkly. Law Bul. 845.

[k] (Ohio, 1887) The statements of one accused of crime, made to one whose regular employment is, and for many years has been, practicing law before justices of the peace, and whose aid and counsel is sought as such attorney or counselor, such statements being made in answer to the inquiries of such adviser as to what the facts concerning the alleged offense were, are privileged communications, and it is error to allow such adviser to testify, upon the trial of the accused, to the statements so made, although the witness had not been admitted to practice in the courts of the state.—Benedict v. State, 44 Ohio St. 679, 11 N. E. 125.

[l] (Pa. 1890) Communications to a law student, employed by plaintiff to advise and assist her in her suit, are not privileged.—Schubkagel v. Dierstein, 131 Pa. 46, 18 Atl. 1059, 25 Wkly. Notes Cas. 185, 6 L. R. A. 481.

[m] (Tenn. 1879) The provision of Code, § 3973, that "no attorney or counsel shall be permitted to disclose any communication made to him as attorney before, pending, or after a suit," applies to a person licensed under Acts 1867, c. 24, to practice law before any justice of the peace or the county court.—Scales v. Kelley, 70 Tenn. (2 Lea) 706.

[n] (Vt. 1829) Confidential communications to professional men, other than attorneys, are not privileged.—Dixon v. Parmelee, 2 Vt. 185.

[o] (Vt. 1850) Communications made by a party to one who is acting as his counsel in the commencement and management of a suit, but who has not been admitted as an attorney, and who is not a clerk in the office of an attorney, are not privileged, although he may be pursuing the study of the law under the direction and instruction of one who is an attorney.—Holman v. Kimball, 22 Vt. 555.

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[p] (Wis. 1854) A communication made by a party to a witness who had been employed to assist him in a trial, but who was not an attorney, counselor, or solicitor, is not privileged. —Brayton v. Chase, 3 Wis. 456.

§ 749. Relation of attorney and client.

[a] A communication from a party to an attorney is not privileged where the relation of attorney and client did not exist between them.
—(Cal. 1885) George v. Silva, 68 Cal. 272, 9 Pac. 257;
(Ga. 1887) Brown v. Matthews, 79 Ga. 1, 4 S. E. 13;
(Neb. 1886) Romberg v. Hughes, 18 Neb. 579, 26 N. W. 351; (1896) Home Fire Ins. Co. v. Berg, 46 Neb. 600, 65 N. W. 780;
(Tenn. 1895) Henry v. Nubert (Ch. App.) 35 S. W. 444; Nubert v. Henry, Id.

[aa] Friendly communications to an attorney do not render him incompetent as a witness.
—(D. C. 1880) Oliver v. Cameron, MacArthur & M. 237; (1893) Patten v. Glover, 1 App. D. C. 466;
(Ill. 1852) Goltra v. Wolcott, 14 Ill. (4 Peck) 89;
(N. Y. 1803) Hoffman v. Smith, 1 Caines, 157.

[b] A statement made to an attorney is not privileged, unless made with the object of obtaining professional advice.
—(Mass. 1866) Lynde v. McGregor, 95 Mass. (13 Allen) 172;
(N. Y. 1862) Marsh v. Howe, 36 Barb. 649;
(S. C. 1854) Branden v. Gowing, 7 Rich. Law, 459.

[bb] (Ala. 1893) Where a person talks with an attorney, with a view to retaining him, the conversation is privileged, though the relation of attorney and client is never established between them.—State v. Tally, 102 Ala. 25, 15 South. 722.

[c] (Ark. 1878) Communications made by a person to an attorney while taking his professional advice are not admissible in evidence, even though no fee were charged or paid.—Andrews v. Simms, 33 Ark. 771.

[cc] (Cal. 1889) The testimony of a witness as to conversations with a party to an action cannot be excluded on the ground that the witness was an attorney at law, and the communication was confidential, unless it appears that he was the attorney for the party, and the communication was made in the course of professional employment.—Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

[d] (Cal. 1889) The testimony of a witness as to conversations with a party to an action cannot be excluded on the ground that the witness was an attorney at law and the communication was confidential, unless it appears that he was the attorney for the party and that the communication was in fact confidential, or at least that it was so regarded at the time by the party making it.—Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

[dd] (Colo. 1894) Gen. St. § 3649, subd. 2, excluding an attorney's testimony as to communications by the client, may be applied though no retainer has been paid, promised, or charged.—Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848.

[e] (Colo. 1894) Under Gen. St. § 3649, subd. 2, communications to an attorney are privileged when he voluntarily listens to his client's preliminary statements, or gives advice thereon, though there are no further relations between them.—Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848.

[ee] (Ga. 1859) A party's counsel may testify as to facts learned by him from the opposite party, who told them to him desiring to retain him, but after he had been retained by his present client.—Thompson v. Wilson, 29 Ga. 539.

[f] (Ga. 1880) Statements made to an attorney by a woman while she was anticipating employing him to conduct a prosecution for an alleged rape upon her *held* privileged.—Young v. State, 65 Ga. 525.

[ff] (Ga. 1893) Under Act Aug. 4, 1887, which provides that no attorney shall be competent or compellable to testify to any matter or thing, knowledge of which he may have acquired from his "client" by reason of "the anticipated employment of him as attorney," communications made to an attorney who is consulted, but not afterwards employed, to undertake the service concerning which the communications were made, are confidential.—Peek v. Boone, 90 Ga. 767, 17 S. E. 66.

[g] (Ill. 1846) To entitle communications between individuals to be considered as privileged, the relation of client and attorney must exist; they must be made in relation to a matter in which the client's private interest is concerned, and for the purpose of enabling the attorney to understand his client's cause, or his legal rights.—Granger v. Warrington, 8 Ill. (3 Gilman) 299.

[gg] (Ill. 1877) Knowledge obtained by an attorney during negotiations as to the amount which he should receive for his services in prosecuting a contemplated suit, the negotiations resulting in no employment, are privileged.—Thorp v. Goewey, 85 Ill. 611.

[h] (Ind. 1850) A., one of two plaintiffs, called upon B., an attorney, to employ him to bring a suit on an official bond of a justice of the peace. No fee was paid, and circumstances prevented B. from bringing the suit; but, at the time, A. made statements in regard to the subject-matter of said suit, which the defendant in the present case proposed to prove against A. *Held*, that the circumstances rendered the communications privileged, and B. should have been precluded from testifying to them.—Reed v. Smith, 2 Ind. (2 Cart.) 160.

[hh] (Ind. 1873) Communications made in consultation by a client to his attorney are privileged, though no action is at the time pending or contemplated concerning the matter of which such statements are made.—Bigler v. Reyher, 43 Ind. 112.

[i] (Ind. 1895) In an action arising under a will, the testator's attorney may testify as to conversations with testator occurring before the relation of attorney and client arose.—Jennings v. Sturdevant, 140 Ind. 641, 40 N. E. 61.

[ii] (Ind. 1895) Where testator's widow, after asking his surviving law partner to call at her residence after business hours, confers with him in reference to certain claims against his estate, in regard to her own personal income, and then turns the conversation to other matters, afterwards attempting to explain away his objection that the will of her husband, as presented for probate by her, was different from one whose terms were explained by deceased to him, she cannot insist upon the exclusion of his testimony as to what she said on the ground that it was privileged, as a communication to an attorney by his client.—McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336.

[j] (Iowa, 1883) The testimony of attorneys upon matters in which they did not act in any professional capacity, and upon which no information was received through the confidential relation of attorney and client, is competent.—Reinhart v. Johnson, 62 Iowa, 155, 17 N. W. 452.

[jj] (La. 1826) Confidential communications cannot, without the client's consent, be divulged

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by the attorney though not feed.—Bailly v. Robles, 4 Mart. (N. S.) 361.

[k] (Me. 1854) It is a privileged communication if application is made to counsel for professional services, although the relation of attorney and client do not exist in fact.—Sargent v. Inhabitants of Hampden, 38 Me. 581.

[kk] (Me. 1895) Statements of fact made in good faith to an attorney at law, for the purpose of obtaining his professional guidance, are privileged communications, though the relation of attorney and client does not exist.—Wade v. Ridley, 87 Me. 368, 32 Atl. 975.

[l] (Md. 1851) A communication to an attorney may be confidential, although the party making the communication is, at the time, under an impression that another person, also interested in the case, is to pay the attorney's fee.—Hunter v. Van Bomhorst, 1 Md. 504.

[ll] (Mich. 1857) A communication made to an attorney under the impression that the attorney had consented to act as such for the party making it is privileged; but it must be made to the attorney as the legal adviser of the party, and for the purpose of obtaining his legal opinion on some legal obligation.—Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321.

[m] (Mich. 1890) In replevin for mortgaged chattels, where the question involved is whether or not part of the property was released at the time it was transferred by the mortgagee to a third person who assumed the mortgage, statements which the mortgagee's attorneys made to him while seeking their advice, on the day of the transfer, are inadmissible in evidence.—Riley v. Conner, 79 Mich. 497, 44 N. W. 1040.

[mm] (Mo. 1872) The rule protecting professional communications is broad enough to embrace a case where the one seeking counsel pays no fee and employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterwards employed on the other side. Limitations, if allowed, might be unknown to laymen; and if they cannot feel perfect freedom in all cases, then, instead of the perfect confidence that should exist, the intercourse might be restrained by fear and marred by dissimulation on the part of the client, and the object of the rule be defeated; and besides, a door would be opened to fraud.—Cross v. Riggins, 50 Mo. 335.

[n] (Neb. 1891) Letters written to an attorney by a debtor for the purpose of employing him professionally to procure the release of a judgment are inadmissible in evidence, in an action thereon, to repel the bar of the statute of limitations, under Code Civ. Proc. §§ 323, 328, which expressly prohibit an attorney from giving evidence of any confidential communication made to him by his client, unless the client consents thereto.—Nelson v. Becker, 32 Neb. 99, 48 N. W. 962.

[nn] (Neb. 1895) Under Code Civ. Proc. § 328, subd. 4, and Id. § 333, making privileged communications between attorney and client, a communication to an attorney is not privileged unless the relation of attorney and client existed at the time it was made.—Basye v. State, 45 Neb. 261, 63 N. W. 811.

[o] (Nev. 1891) Communications to plaintiff's attorney in a case which is fictitious are not privileged, since he was acting both for plaintiff and defendants.—Haley v. Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

[oo] (N. Y. 1845) Communications to an attorney, solicitor, or counselor are sacred which are made respecting a party's rights where there are conflicting claims made by another party that must result in litigation unless compromised or abandoned, notwithstanding that no fee was asked or expected by the counsel.—March v. Ludlum, 3 Sandf. Ch. 35.

[p] (N. Y. 1878) A communication made to an attorney at law for the purpose of getting advice as to the law applicable to the facts stated therein *held* to be privileged, although the advice was given upon a hypothetical statement of the facts, and the attorney had no general retainer.—Bacon v. Frisbie, 15 Hun, 26.

[pp] (N. Y. 1880) In an action against F. and R. to recover damages for an alleged conspiracy to defraud, it appeared that at the time of the transactions K. was in the practice of the law, and was also carrying on a wholesale liquor store; that both before and after certain communications from R. to K., K. had given R. legal advice; that at the time of the communication K. gave R. his opinion as a lawyer upon the case presented, but in K.'s store, and without receiving any fee, and that there was no general retainer, nor was any suit then pending. K. testified that he did not consider that R. was advising with him at the time. *Held*, that evidence of the communications was improperly received.—Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627, reversing (1878) 15 Hun, 26.

[q] (N. Y. 1889) In an action by a widow for dower in lands conveyed by the husband during coverture, the defense was that the husband purchased the property for his sister, who paid the consideration, and that he took the title in his own name without her knowledge. The attorney who drew the contract between the husband and his grantor testified that he was counsel for the parties to the contract; that he represented both the husband and his grantor—that is, he represented the person for whom the husband was acting, though he never saw the sister in the matter; that the husband paid him. *Held*, that evidence of declarations made by the husband to the attorney at interviews, with reference to the contract of purchase and deed, prior to the acquisition of title, and of a conversation subsequent to that time, in which he spoke of the property as his sister's, and asked the attorney to prepare a deed to his grantee, was inadmissible.—McIntyre v. Costello, 53 Hun, 636, 6 N. Y. Supp. 397.

[qq] (N. Y. 1889) Consolidation Act, § 215 (Laws 1882, c. 410), requires the corporation counsel to furnish every department and officer of the city government such advice and legal assistance, as attorney in or out of court, as may be required. *Held*, that his advice to the board of assessors is privileged, and the board cannot be compelled to disclose such advice on its return to a writ of certiorari.—People v. Gillon, 18 Civ. Proc. R. 109, 9 N. Y. Supp. 243.

[r] (N. Y. 1890) In an action for money which plaintiff alleged he had loaned to defendant to promote an election at which they were both candidates, the testimony of a witness as to communications made to him by plaintiff was objected to as privileged communications to him, as an attorney at law. The witness was the political friend of both parties. Plaintiff sought his intervention to procure a settlement, and as soon as the nature of the business was disclosed the witness declined to act. *Held*, that his testimony was properly admitted.—Avery v. Mattice, 56 Hun, 639, 9 N. Y. Supp. 166, judgment affirmed (1892) 132 N. Y. 601, 30 N. E. 1152.

[rr] (N. Y. 1890) Advice given by an attorney for which no compensation is asked or expected, and none given, is not a privileged communication.—In re Monroe, 2 Con. Sur. 395, 20 N. Y. Supp. 82; In re Grennell (Sur.) 20 N. Y. Supp. 82.

[s] (N. Y. 1891) In an action on a note, a witness testified that at the date of the note he was the attorney for the owner thereof in reference to a claim of the owner against the maker; that after some negotiation the note sued on, bearing the indorsement of defendant, was delivered in settlement of the claim; that he (wit-

ness) acted for both parties in procuring the settlement, "as a sort of mutual friend"; that he went to New York three times while endeavoring to procure a settlement, his expenses for two trips being paid by the owner of the note, and partly paid for the third by defendant, but that he received only enough to pay his expenses; and that he was not retained as counsel by either side, and was not asked by defendant so to act. *Held*, that statements made by defendant to the witness in relation to the indorsement were not communications between attorney and client "in the course of professional employment," within Code Civ. Proc. § 835.—Haulenbeek v. McGibbon, 60 Hun, 26, 20 Civ. Proc. R. 406, 14 N. Y. Supp. 393.

[ss] (N. Y. 1894) One who objects to the testimony of an attorney as relating to a privileged communication between attorney and client must prove that the communication was made to the attorney while he was acting for the client, or was for the purpose of obtaining advice.—Mowell v. Van Buren, 77 Hun, 569, 28 N. Y. Supp. 1035.

[t] (N. Y. 1896) The examining magistrate in a homicide case (one H.) had been counsel for defendant in all his legal matters, and at the time of the examination was his attorney in a pending action. When the examination began, defendant asked H. to be his attorney, to which H. replied that he could not be. Next day defendant sent for H., and said he wanted to talk with him about his case. H. said he could not and would not be his attorney. Defendant replied that he did not wish to consult him as counsel, but to talk to him as a person in whom he had confidence. *Held*, that the communications then made by defendant to H. were not privileged.—People v. Hess, 8 App. Div. 143, 40 N. Y. Supp. 486.

[tt] (N. C. 1844) A communication voluntarily made to counsel after he has refused to be employed by the party making it does not come within the rule of confidential communications.—Setzar v. Wilson, 26 N. C. 501.

[u] (Pa. 1848) Communications to an attorney are not protected, unless he was employed as an attorney, and then he may state facts other than those which were confidentially communicated, or which came to his knowledge while acting in that capacity.—Beeson v. Beeson, 9 Pa. (9 Barr) 279.

[uu] (Tenn. 1892) An objection to certain evidence, on the ground that witness is defendant's attorney, and if allowed to testify will disclose confidential communications, will not be sustained, where it appears that witness was not defendant's attorney at the time of such communications, and has not been since.—Ellis v. State, 92 Tenn. (8 Pickle) 85, 20 S. W. 500.

[v] (Tex. 1862) A communication, to be privileged as made in professional confidence, must have been made to a person who was acting for the time being in the character of legal adviser of the person who made it, and must also have been made for the purpose of obtaining professional advice or aid in the matter to which the communication related.—Flack's Adm'r v. Neill, 26 Tex. 273.

[vv] (Tex. 1878) Conversation with an attorney by persons proposing to buy land, in which the attorney spoke of the existence of claims against the land, does not constitute privileged communications; no payment being made or demanded for counsel.—Titus v. Johnson, 50 Tex. 224.

[w] (Tex. 1888) S., an attorney, testified that, in conducting negotiations for certain mortgages from the assignors to defendants, the subject of an assignment was never raised between the parties until he told the assignors that they could make an assignment; that this was several days after the mortgages were executed, and after the assignors had failed to agree with their creditors; that in all the transactions he was acting as counsel for the mortgagees, and did not represent the assignors, though he afterwards drew the deed of assignment. *Held*, that the evidence was proper, as it was not shown that he was acting as counsel for the assignors at the time.—Simmons Hardware Co. v. Kaufman, 77 Tex. 131, 8 S. W. 283.

[ww] (Vt. 1856) Where there is no retainer and nothing to show that the one party sought advice with any view to regulate his future conduct in regard to a pending or expected litigation, the communication is not privileged.—Thompson v. Kilborne, 28 Vt. (2 Williams) 750, 67 Am. Dec. 742.

[www] (Vt. 1856) In order to render communications from a party to an attorney privileged from being disclosed in evidence by the latter, they must be of a confidential and professional character; and the attorney must be acting, for the time being, in the character of legal adviser; or the party must have good reason to suppose he is so acting.—Coon v. Swan, 30 Vt. 6.

[x] (Vt. 1856) Therefore, where one, by profession an attorney, was endeavoring, merely as a neighbor, and without any suit in court, to procure from an insurance company the allowance of a claim in favor of another, without anything being said by either party in regard to his being engaged in the matter or paid for his services, and with no intention or expectation on his part to charge anything therefor, it was *held* that admissions made to him by the claimant, while assisting him in this way, in regard to the nature of his claim, were not privileged from being disclosed in evidence by the attorney.—Coon v. Swan, 30 Vt. 6.

[y] (Vt. 1873) In order to render communications privileged because made by the party to the witness confidentially as his counsel, the relation of counsel and client must have existed at the time, and the communication must have been made for the purpose of obtaining advice in regard to legal rights, and, though it is not necessary that such witness should have been retained generally in the matter as to which advice was sought, he must have been counsel in such matter, and the communication made to him as such.—Earle v. Grout, 46 Vt. 113.

[yy] (Vt. 1896) Defendant, arrested for intoxication, sent for an attorney to visit him in jail, to determine if he was in fact intoxicated. The attorney visited him in company with another, appeared for him in the city court, but ceased to act before trial ended, and did not appear at all in the county court. *Held*, that the knowledge the attorney obtained from his visit in respect to defendant's condition was not privileged.—State v. Fitzgerald, 68 Vt. 125, 34 Atl. 429.

[z] (Wis. 1861) A grantee of land obtained by fraud, in pursuance of an attorney's suggestion, employed him to draw a deed of it to a third party. Subsequent conversations between this grantor and his grantee in the presence of the attorney showed that the transaction was in bad faith between these two parties. The attorney, though occasionally employed by both parties, had been retained by neither in this matter, and had not intended to charge the grantor for his advice; but, after one of the conversations, one of the parties remarked to him that he could not say anything, since he was an "attorney," or "their attorney." *Held* that, in a suit to set aside the conveyance, the attorney could, against the objection of the defendants, testify to his advice and to their conversations.—Dunn v. Amos, 14 Wis. 106.

[zz] (Wis. 1886) A. and B. called on an attorney, and requested him to make a bill of sale from A. to B. The attorney refused, telling them that he was engaged on the other side of

the business. *Held*, on the issue of the bona fides of a similar bill of sale, that the attorney was competent to testify to the above.—Tucker v. Finch, 66 Wis. 17, 27 N. W. 817.

[zzz] (Wis. 1887) A simple inquiry of an attorney as to the existence of a matter of fact in which the inquirer is interested, does not create the relation of client and attorney between them, so as to make their communications privileged, and prevent the attorney from testifying with reference thereto.—Plano Mfg. Co. v. Frawley, 68 Wis. 577, 32 N. W. 768.

§ 750. —— Parties and interests represented by attorney.

Communications in presence of others, see post, §§ 764–766.

[a] (Ga. 1872) Communications by one party to the attorney of the other, looking toward a compromise, are not privileged, even though accompanied with a proposal that in case the terms are accepted the attorney shall act for both parties in carrying them into effect, if the compromise is declined.—McLean v. Clark, 47 Ga. 24.

[b] (Ill. 1888) In an action against a city for personal injuries sustained through a defective sidewalk, it is not error to allow one who had been attorney for the city on a former trial of the cause to testify to communications made to him by the street commissioner in reference to the sidewalk in question, the purpose of the testimony being to impeach the commissioner's testimony.—City of Rockford v. Falver, 27 Ill. App. 604.

[c] (Ind. 1875) On the trial of an action brought by a married woman to recover possession of her separate real estate from her vendee, a witness may not, over her objection, detail a conversation had with her by him as the attorney of her husband, in relation to the sale of certain personal property purchased with money derived from the sale of such real estate. In such case the attorney will be regarded as the attorney of both the husband and wife.—Scranton v. Stewart, 52 Ind. 68.

[d] (Ind. 1887) Where an attorney acts for both parties, he is a competent witness, and communications made to him are not within the rule prohibiting an attorney from divulging confidential communications.—Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782.

[e] (Ind. 1891) A husband called upon a lawyer, who had formerly acted for him, and requested him to draw a contract for his wife. *Held*, that the wife, and not the husband, was the client, and that with her consent the lawyer might testify regarding the matter.—Bingham v. Walk, 128 Ind. 164, 27 N. E. 483.

[f] (Mo. 1858) The act concerning witnesses prescribes that an attorney shall be incompetent to testify concerning any communication made to him by his client in that relation, or his advice thereon. And this applies to the case where two persons, having opposite interests, consult the same attorney, at the same time, concerning the matter in dispute.—Hull v. Lyon, 27 Mo. 570.

[g] (Nev. 1895) Communications by parties to an attorney acting professionally for all in the same transaction are not, as between such parties, privileged.—Livingston v. Wagner, 23 Nev. 53, 42 Pac. 290.

[h] (N. J. 1885) Where two persons employ an attorney in the same business, communications made by them in pursuance of such common retainer are not privileged inter se.—Gulick v. Gulick, 39 N. J. Eq. (12 Stew.) 516.

[i] (N. Y. 1882) Where an attorney acted for two clients, his communications with them are not privileged in a subsequent suit between their representatives.—Sherman v. Scott, 27 Hun, 331.

[j] (N. Y. 1886) A communication made by one interested in the estate of one deceased to its attorney is not privileged, the relation of attorney and client not existing.—Althouse v. Wells, 40 Hun, 336.

[k] (Pa. 1894) Three sisters, K., S., and P., were excluded by the will of their half-brother from any share in his estate. The husband of S., representing the contestants, engaged an attorney, and instituted a contest; K. and S. being made plaintiffs, and P. one of the defendants. The contest was settled by the proponent of the will paying a certain sum to plaintiff's attorney. *Held*, on the trial of the claim of P. against the estate of S. for a share in the money so obtained, that the confidential relations of the attorney to K. and S. did not prevent his testifying that P. was a contestant, and had promised to contribute to the expenses and that he appeared for her as well as K. and S.—In re Seip's Estate, 163 Pa. 423, 30 Atl. 226, 35 Wkly. Notes Cas. 401, 43 Am. St. Rep. 803; Appeal of Probst, Id.

[l] (Vt. 1858) Communications in regard to the facts of a suit, made to the attorney therein by one who is a nominal party, but has no interest in the suit, are not privileged from being disclosed in evidence.—Allen v. Harrison, 30 Vt. 219, 73 Am. Dec. 302.

[m] (Va. 1888) Communications by an assignor, since deceased, to the attorney of the assignee, are not privileged, where the attorney acted for the assignee, though under direction of the assignor.—Hall v. Rixey, 84 Va. 790, 6 S. E. 215.

§ 751. —— Employment in matter other than that to which communication relates.

[a] (Cal. 1881) Statements made to an attorney are not privileged merely because the attorney has, at different times, transacted business for the party making the statements, they not being made in reference to any business that he was then transacting, nor in connection with professional employment.—Carroll v. Sprague, 59 Cal. 655.

[b] (Ga. 1858) An attorney in a case may testify as to facts which occurred in another case previous to his employment in this case under St. 1850.—Churchill v. Corker, 25 Ga. 479.

[c] (Iowa, 1877) Communications made to an attorney, in the course of a professional consultation, which do not relate to the subject-matter of the consultation, are not privileged.—State v. Mewherter, 46 Iowa, 88.

[d] (Mo. 1864) An attorney who has managed the general affairs of the defendant can testify as to communications made to him by defendant when not acting as his atttorney. Such communications are not privileged.—Wilson v. Godlove, 34 Mo. 337.

[e] (Neb. 1886) When an attorney is employed for a particular purpose, and before such employment he informs his client that he has been employed against him in a case unconnected with the employment, the relation of attorney and client does not exist as regards the purpose of the first employment, and statements to the attorney regarding the controversy involved in the first employment are not privileged communications.—Clay v. Tyson, 19 Neb. 530, 26 N. W. 240.

[f] (N. Y. 1802) The secrets of a client, which an attorney is bound not to disclose, are communications made as instructions for conducting a cause, and not any extraneous or impertinent communications.—Riggs v. Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 145.

[g] (N. Y. 1862) Two years after judgment had been obtained in a suit, the holder thereof

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having already assigned it to another, he happened incidentally to mention it to his attorney in the suit, who was at the time, also, his attorney in another suit, but not at all for the purpose of professional consultation. *Held*, that this could not exclude his remarks from being given in evidence on the ground of being privileged communications; they were not properly such.—Marsh v. Howe, 36 Barb. 649.

[h] (N. Y. 1896) A conversation between an attorney and a person relative to the person's being a member of a firm is not privileged merely because the attorney was counsel for him in certain matters, he not having been counsel for him relative to firm matters, and the conversation not having been at either of their places of business or in connection with any business between them.—Stanfield v. Knickerbocker Trust Co., 1 App. Div. 592, 37 N. Y. Supp. 600.

[i] (Pa. 1895) A legatee stated to her testator's regularly employed attorney, knowing him to be such, that she wanted to get the amount of her bequest during testator's lifetime, and desired the attorney to aid her. The attorney refused to do so, and there was no employment in the matter. *Held*, that the fact that the attorney had previously been occasionally employed by the legatee did not render her communication privileged.—In re Turner's Estate, 167 Pa. 609, 31 Atl. 867; Appeal of Whitney, Id.

[j] (Wis. 1887) An attorney informed defendant that he had been employed by plaintiff, and could not advise with him with reference to the note in suit, and defendant thereafter made statements to him. *Held*, that such statements were not privileged, although the attorney may have represented defendant in other matters as to which the relation of client and attorney still existed.—Plano Mfg. Co. v. Frawley, 68 Wis. 577, 32 N. W. 768.

§ 752. Professional character of employment in general.

Employment of conveyancers, see post, § 757.

[a] (U. S. 1896) Statements made by an applicant for a pension, to one acting as his attorney in the matter, are privileged communications, and cannot be proved in an action upon a policy of life insurance subsequently applied for and obtained by the pensioner.—Mutual Life Ins. Co. v. Selby, 72 Fed. 980, 19 C. C. A. 331, 44 U. S. App. 282.

[b] (Ga. 1854) An attorney at law, engaged in the defense of a suit, notifies the plaintiff to sue other parties. *Held*, that under the act of 1850, "to regulate the testimony of attorneys at law," he is competent to prove the notice; he being presumed to be acting as attorney in fact, and not at law.—Collins v. Johnson, 16 Ga. 458.

[c] (Ga. 1874) Directions by a client to his attorney to make a certain contract, *held*, after its execution, not to constitute a privileged communication.—Burnside v. Terry, 51 Ga. 186.

[d] (Ill. 1883) An attorney merely employed to draw up the necessary papers to a contract already agreed upon by the parties, no legal advice being required, may testify as to what he knows of the transaction.—Smith v. Long, 106 Ill. 485.

[e] (Ind. 1860) Where the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed as a scrivener merely to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him while thus engaged will not be regarded as privileged.—Borum v. Fouts, 15 Ind. 50.

[f] (Iowa, 1841) The rule which excludes evidence of communications to counsel is confined to such as are made in strictly professional intercourse.—Pierson v. Steorts, Morris, 136.

[g] (Iowa, 1894) Code 1873, § 3643, prohibits an attorney from revealing confidential communications, when intrusted to him in his professional capacity, and necessary to enable him to discharge his duty according to the usual course of practice. *Held* that, in an action by the executors of F. to cancel releases of mortgages held by F. against B., the attorney who drew the releases for F. could testify that F. took the releases away, and that he afterwards brought them to his office, and said they were "papers that belonged to B., and she wanted to know if I would keep them in my safe for her."—Toms v. Beebe, 90 Iowa, 612, 58 N. W. 925.

[h] (Miss. 1873) When an attorney is employed only as scrivener, to draft an instrument of a particular description, and no advice is sought, he may testify as to what occurs in relation to such transaction.—Randel v. Yates, 48 Miss. 685.

[i] (Mo. 1894) A statement by one under indictment, to an attorney, not retained by him, whom he requested to carry a message to the chief of police, is admissible in evidence.—State v. Hedgepeth, 125 Mo. 14, 28 S. W. 160.

[j] (N. Y. 1859) A communication made by a client to an attorney in reference to personal estate, on retaining him to draw an affidavit for the reduction of the assessment on the estate, is privileged.—Williams v. Fitch, 18 N. Y. 546.

[k] (N. Y. 1864) The rule which protects professional communications of clients to their attorneys or counsel from disclosure should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or anticipated.—Whiting v. Barney, 30 N. Y. 330, 86 Am. Dec. 385.

[l] (Pa. 1834) It is not necessary that a suit should be pending in order to exclude an attorney's testimony.—Beltzhoover v. Blackstock, 3 Watts, 20, 27 Am. Dec. 330.

[m] (Pa. 1852) A communication between an attorney and client to be privileged must be so connected with the professional character of the counsel as to afford a presumption that this formed the ground of the confidence.—In re Matthews' Estate, 1 Phila. 292.

[n] (Tenn. 1858) In order that a communication to an attorney may be privileged, it is not necessary that a suit should be pending or anticipated, nor that there should be a regular retainer, or the payment of a fee; but the communication must be in a professional character, in relation to some act passed, or right or interest in existence.—McMannus v. State, 39 Tenn. (2 Head) 213.

[o] (Tex. 1885) An attorney who drafted for a client an affidavit on which perjury was assigned may not testify as to the statements made by his client at the time.—Hernandez v. State, 18 Tex. App. 134, 51 Am. Rep. 295.

[p] (Tex. 1891) Communications made to an abstractor of titles and an attorney at law by one who employed him to search a title, paying him for making the abstract only, and not made with a view of obtaining advice, are not entitled to the privilege of professional communications.—Stallings v. Hullum, 79 Tex. 421, 15 S. W. 677.

§ 753. Subject-matter of testimony in general.

[a] (U. S. 1826) A counsel may be asked whether he had been retained by a party as counsel or attorney; but he cannot be asked what claim or title he was employed to maintain.—Chirac v. Reinicker, 24 U. S. (11 Wheat.) 280, 6 L. Ed. 474.

[b] (Ala. 1835) Where an attorney had erased an indorsement on a bond held by his client, on which a suit was pending, and had no knowl-

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edge of the contents of the indorsement except what was obtained as attorney in the cause, he was not to be bound to testify as to those contents.—Crawford v. McKissack, 1 Port. 433.

[c] (Ala. 1880) An attorney cannot refuse to disclose by whom he was employed in a judicial proceeding.—Mobile & M. Ry. Co. v. Yeates, 67 Ala. 164.

[d] (Ala. 1887) An attorney may be compelled to testify that he wrote a note, which was signed in his presence by his client, and that, as attorney, he paid, the same day, a certain sum of money, to the client; such evidence being a statement of facts, and not communications made in professional confidence.—Chapman v. Peebles, 84 Ala. 283, 4 South. 273.

[e] (Ala. 1888) Defendant was arrested for attempting to obtain money on false pretenses from a railroad company. It was alleged that he sought to obtain damages for two trunks which he falsely claimed had been lost by the company. *Held*, that the attorney of defendant was properly required to testify as to his employment by defendant to demand compensation from the company.—White v. State, 86 Ala. 69, 5 South. 674.

[ee] (Cal. 1869) The rule as to the exclusion of testimony on privileged communications must be strictly construed; it applies only to those made by the client in the course and for the purposes of the employment of the attorney. He may be required to state by whom he was employed.—Satterlee v. Bliss, 36 Cal. 489.

[f] (Ga. 1855) The service of a copy of interrogatories upon an attorney is not such "a matter or thing acquired from his client, or during the existence and by reason of the relationship of client and attorney," under St. 1850, as to be regarded as a confidential communication.—McDougald v. Lane, 18 Ga. 444.

[ff] (Ga. 1857) An attorney at law is protected from answering to facts which came to his knowledge by the confidential disclosures of his client during the relation of attorney and client; but he is bound to disclose the name of his client, and whether the party represented be fictitious.—Martin v. Anderson, 21 Ga. 301.

[g] (Ga. 1858) A question as to the amount of an attorney's fee and the terms on which it was paid is, when relevant, not objectionable as touching a confidential communication between attorney and client.—Smithwick v. Evans, 24 Ga. 461.

[gg] (Ga. 1877) Where judgments rendered on notes payable one day after date were attacked on the ground that suit was brought on them before they were due, and it appeared that they were in fact made on a day different from their date, the attorney representing the payee at the time they were given could not be compelled, against his objection, to testify to the precise time when they were given.—Raefle v. Moore, 58 Ga. 94.

[h] (Ga. 1894) An attorney is incompetent to testify as to the contents of an insurance policy, if his knowledge thereof was acquired while acting in his professional capacity.—Freeman v. Brewster, 93 Ga. 648, 21 S. E. 165.

[hh] (Ill. 1867) An attorney cannot be compelled to testify whether or not a certain guaranty written above the payee's name and in a different handwriting on the back of a note, was there when placed in his hands for collection.—Dietrich v. Mitchell, 43 Ill. 40, 92 Am. Dec. 99.

[i] (Ill. 1879) An attorney is not privileged from testifying to any agreement made with the opposite party at the request of his own client, such a transaction not coming within the rule of privileged communications between attorney and client.—Thayer v. McEwen, 4 Ill. App. 416.

[ii] (Ill. 1891) An attorney may testify that, before a judgment in behalf of his client had been entered of record, an execution was issued and delivered to the witness, who placed it in the hands of the sheriff.—Swaim v. Humphreys, 42 Ill. App. 370.

[jj] (Iowa, 1877) An attorney who has received money to hold it pending decision as to its ownership is not privileged, when called as witness in a garnishment, to refuse to state where he has deposited it.—Williams v. Young, 46 Iowa, 140.

[jj] (La. 1841) The disclosure of the time of receiving and paying over certain moneys by an attorney, who is garnisheed, which he had received on account of his client, cannot be objected to as disclosing professional secrets.—Comstock v. Paie, 18 La. 479.

[k] (La. 1842) An attorney may be compelled to state how he obtained possession of papers introduced in evidence when it does not appear that he received them from the client or his agent.—Reynolds v. Rowley, 3 Rob. 201, 38 Am. Dec. 233.

[kk] (La. 1842) The rule of confidential communications does not extend to an attorney in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done with them or where they may be found.—Travis v. January, 3 Rob. 227.

[l] (La. 1842) An attorney in such case may be as properly called on to produce the papers or disclose facts which may lead to their discovery as the client himself. Code Prac. arts. 140, 473.—Travis v. January, 3 Rob. 227.

[ll] (La. 1860) Under Civ. Code, art. 2262, forbidding an attorney to give evidence of anything confided to him by his client without the client's consent, an attorney may be questioned to ascertain who was his client, when the relationship begun and ended, and what money had been received and what paid over.—Shaughnessy v. Fogg, 15 La. Ann. 330.

[m] (La. 1860) An attorney may be asked through whose agency, or in what manner, or at what time, he was retained.—Shaughnessy v. Fogg, 15 La. Ann. 330.

[mm] (Me. 1841) A counselor at law is bound to disclose by whom he was employed in a cause, and that he was instructed by one person to follow the directions of another in the prosecution of the business, although the knowledge was acquired by confidential consultations as counsel and clients.—Gower v. Emery, 18 Me. (6 Shep.) 79.

[n] (Md. 1862) That a lawyer brought a suit for certain persons under a certain firm name, collected the claim, and, in accordance with an assignment and direction by letter from one of the firm, paid it to a third party, is admissible evidence, and does not come within the protection of "privileged communications" of a client.—Fulton v. Maccracken, 18 Md. 528, 81 Am. Dec. 620.

[nn] (Mass. 1876) Where the signature to a note in suit is in dispute, defendant's attorney may be allowed to testify as to whether it was defendant's signature, if he is not required to base his testimony on any communication made by defendant to him in his professional capacity.—Brown v. Jewett, 120 Mass. 215.

[o] (Mass. 1883) An attorney who testifies to the fact that a client called himself by a certain name discloses no confidential communication.—Commonwealth v. Bacon, 135 Mass. 521.

[oo] (Mo. 1886) Upon the trial of defendants charged with stealing, among other things, $160 "of current silver coins of the United States," defendants' attorney was permitted to testify as to the kind of money defendants paid him

as a retainer, to wit, $45 in silver and $5 in gold. *Held* error, the transaction being a privileged communication.—State v. Dawson, 90 Mo. 149, 1 S. W. 827.

[p] (N. H. 1833) An attorney cannot be compelled to testify concerning the satisfaction of an instrument at the time it was placed in his hands by his client to be put in suit.—Brown v. Payson, 6 N. H. 443.

[pp] (N. H. 1854) If a legal document is executed or altered in the presence of counsel, he will not be privileged from testifying as to the fact.—Patten v. Moor, 29 N. H. (9 Fost.) 163.

[q] (N. H. 1854) The rule which privileges an attorney or counsel from disclosing confidential communications does not extend to facts which have come to his knowledge, by being done in his presence, though he was present in consequence of his engagement as counsel.—Patten v. Moor, 29 N. H. (9 Fost.) 163.

[qq] (N. M. 1857) In suit against A. and B. as partners, evidence of an attorney that he had once been employed by them to bring some suits for them as a firm is not inadmissible on the ground of its being a privileged communication.—Waldo v. Beckwith, 1 N. M. 182.

[r] (N. Y. 1808) An attorney in a suit may be examined to prove the state of a paper that has come into his hands.—Baker v. Arnold, 1 Caines, 258.

[rr] (N. Y. 1886) Where defendant in supplementary proceedings testified that he executed a bill of sale to a person to whom he was introduced by his attorney, and that he knew nothing of such person, the attorney could not refuse to testify as to who such person was on the ground that the inquiry involved a confidential communication.—Pond v. McKay, 2 City Ct. R. 293.

[s] (N. Y. 1887) Code Civ. Proc. § 835, rendering an attorney incompetent to disclose confidential communications from his client, does not prevent an attorney from testifying in favor of defendant, in an action by his client against a constable for failing to return an execution, that he directed the constable not to levy the execution, and that he had authority to control the execution while in the constable's hands.—Hampton v. Boylan, 46 Hun, 151.

[ss] (N. Y. 1887) An attorney is not forbidden to testify as to his client's handwriting, as a knowledge of it may be gained without confidential communication.—Holthausen v. Pondir, 55 N. Y. Super. Ct. (23 Jones & S.) 73.

[t] (N. Y. 1888) In an action by judgment creditors to subject land standing in the name of a third person as the property of defendant, plaintiff's attorney, who had been attorney for defendant when the judgment was obtained against him, and when the land was purchased and the title taken to such third person, is not competent to testify whether he had obtained information while acting as such attorney that would lead him to believe that defendant was the owner of the property, jointly with such third person.—Eastman v. Kelly, 49 Hun, 607, 1 N. Y. Supp. 866.

[tt] (N. Y. 1888) Where plaintiff's attorney is asked if he has not an interest in the result of the action to the extent of a share of the recovery, he cannot be excused from answering on the ground that the question seeks a disclosure of the relations between attorney and client.—Eastman v. Kelly, 49 Hun, 607, 1 N. Y. Supp. 866.

[u] (N. Y. 1889) Compelling defendant, in an action for breach of marriage promise, to testify whether he gave to his counsel all the letters received from plaintiff, is not prohibited.—Chellis v. Chapman, 52 Hun, 613, 7 N. Y. Supp. 78, judgment affirmed (1891) 125 N. Y. 214, 26 N. E. 308.

[uu] (Or. 1890) Where, on proceedings supplementary to execution, defendant's attorney testifies that, after the action was begun, he had in his possession money, notes, and other evidences of indebtedness, the property of defendant, he may be required to specify what he had, and to state what he did with it, such facts not being privileged, under Code, § 712, subd. 2, providing that an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice thereon, in the course of professional employment.—State v. Gleason, 19 Or. 159, 23 Pac. 817.

[v] (Pa. 1800) An attorney cannot disclose confidential communications of his client, but may give evidence of collateral facts—as that the client expressed himself satisfied with a certain security.—Heister v. Davis, 3 Yeates, 4.

[vv] (Pa. 1845) An attorney is not privileged as a witness from communicating facts concerning his client, when he himself is a party to the transaction. Thus, when an attorney was summoned as garnishee in an attachment suit, *held*, that he was bound to answer interrogatories as to whether he had received from his client a sum of money in trust to pay a certain percentage to such of his creditors as would accept the same in full satisfaction of their respective debts.—Jeanes v. Fridenberg, 3 Clark, 199, 5 Pa. Law J. 65.

[w] (Pa. 1894) Where a widower consults his counsel about taking out letters on his wife's estate, and hands him her papers, including a deed which he had made to her in contemplation of marriage, the counsel is violating no professional confidence in testifying to this transaction and its date, and that after the widower's death, the papers having remained all the while in his hands, he found the signature to the deed erased.—Turner v. Warren, 160 Pa. 336, 28 Atl. 781, 34 Wkly. Notes Cas. 245.

[ww] (Tenn. 1878) Whether a deed drawn by an attorney for his client was written subsequent to the day of its date and after a certain suit is a question of fact, and not privileged, and the attorney will be compelled to answer in regard thereto.—Rundle v. Foster, 3 Tenn. Ch. 658.

[x] (Tenn. 1884) Where the provision of the Code governing the subject but embodies the rule of the common law, it is only to communications received by an attorney from his client which are of a professional or confidential nature that the attorney may not testify. He may prove his client's handwriting, may state what money he received, and to whom he paid it.—Johnson v. Patterson, 81 Tenn. (13 Lea) 626.

[xx] (Tex. 1873) An attorney cannot excuse himself from stating as a witness how he obtained possession of a paper which is the basis of his client's suit, upon the ground that he might be violating professional confidence if required to testify.—Allen v. Root, 39 Tex. 589.

[y] (Tex. 1894) Where counsel for plaintiff, under leave of court, left the court room for the purpose of securing from the county clerk the original of a contract filed by his client to secure a mechanic's lien, and returned with a paper purporting to be such original contract, but which he claimed was not, if called to the stand as a witness he could not refuse to answer questions tending to establish the identity of the paper, on the ground that its contents were privileged.—Warner Elevator Mfg. Co. v. Houston (Civ. App.) 28 S. W. 405; Houston v. Pond Engineering Co., Id.

[yy] (W. Va. 1882) If, by reason of improper disclosures of professional communications made by defendant, charged with murder by shooting with a pistol, to his attorney, it is suspected that the pistol with which the murder was committed is in the trunk of the attorney

at a hotel, and the trunk is searched and the pistol is there found, the state may show the fact that the pistol was there found, but not anything said by the attorney.—State v. Douglass, 20 W. Va. 770.

[z] (Wis. 1868) Plaintiff's attorney, called as a witness in an action on a promissory note, is bound to answer a question by the defendant as to who owned the note when he negotiated its sale to the plaintiff, the payee, though formerly his client, not being a party in interest, and the question calling for no facts communicated to him by the plaintiff.—De Witt v. Perkins, 22 Wis. 473.

[zz] (Wis. 1892) In an action against an agent to recover a balance due on account of moneys received by the agent from the sale of property for plaintiff, where there was a conflict of evidence whether plaintiff or another person purchased certain property at a chattel mortgage sale, for a subsequent sale of which the agent claimed commissions, the admission of the testimony of plaintiff's attorney that he received a check from plaintiff with which to pay the fees of the person who made the sale under the chattel mortgage, and that he paid such fees therewith, was not a violation of Rev. St. § 4076, exempting an attorney from disclosing communications of a client, or advice given thereon.—C. Aultman & Co. v. Ritter, 81 Wis. 395, 51 N. W. 569.

§ 754. Subject-matter of communication or advice in general.

[a] (U. S. 1861) A letter from a client to an attorney, complaining that the latter has betrayed his trust in certain matters, and stating that these facts have been communicated to another lawyer for the purpose of obtaining a settlement with the dishonest attorney, is not one of those confidential communications which the law forbids the attorney to disclose.—Laflin v. Herrington, 66 U. S. (1 Black) 326, 17 L. Ed. 45.

[b] (U. S. 1890) Defendant, who was deceased's partner, about a week after the latter's disappearance, and before his body was found, consulted an attorney, stating that deceased was missing, and that he had taken partnership funds with him, and inquiring whether defendant could hold the partnership property as security for his share of the money. *Held*, that the consultation was privileged, and that it was error, on defendant's trial for murder, to permit the attorney to testify to defendant's statements on the theory that they showed a scheme to defraud the relatives of deceased, as such scheme was not at all manifest except by assuming defendant's guilt of the murder.—Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954.

[c] (U. S. 1892) Defendant and other persons signed a written contract with an attorney to pay him certain fees for defending all suits brought against them to recover assessments on the stock of a corporation, the expense to be borne "by us pro rata on the amount of stock subscribed by us as set opposite our names." This contract was subsequently filed by the attorney in a probate court as a voucher for a claim for fees against the estate of one of the signers. From there it was obtained by another attorney, and, in a suit against another signer, was offered as evidence that the latter was a stockholder. *Held*, that the document fell within the rule protecting confidential communications between attorney and client, and was inadmissible.—Liggett v. Glenn, 51 Fed. 381, 2 C. C. A. 286, 4 U. S. App. 438; Glenn v. Liggett, Id.; Id. (C. C.) 47 Fed. 472; Same v. Foy, Id.; Same v. Dorsheimer, Id.; Same v. Fry, Id.; Same v. Taussig, Id.; Same v. Priest, Id.; Same v. Dausman, Id.; Same v. McKellops, Id.; Same v. Berthoud, Id.

[d] (U. S. 1896) There is no rule of law preventing counsel from giving testimony in behalf of their client, and in corroboration of his statements, as to admissions made prior to the suit, and in the course of an interview sought by the client for the purpose of ascertaining defendant's view of the transaction giving rise to the suit.—Baldwin v. National Hedge & Wire-Fence Co., 73 Fed. 574, 19 C. C. A. 575, 39 U. S. App. 162.

[e] (Ala. 1845) An application to an attorney at law, by a colored person, to draw a petition to the legislature for his freedom, is not a privileged communication between attorney and client. Quære, if the disclosure had been of the facts upon which he rested his claim to freedom.—State v. Marshall, 8 Ala. 302.

[f] (Ala. 1846) A. consulted a lawyer as to the means of avoiding responsibility for the costs of several suits which B. had instituted in his name, and the counsel advised that a motion be made to the court to compel B. to give security. In the course of the conversation, A. remarked that he had $400 or $500 of the money of B. in his hands. *Held*, that this was a privileged communication.—Brasier v. Fortune, 10 Ala. 516.

[g] (Conn. 1884) An attorney cannot be asked whether his client told him that he intended to testify otherwise than in conformity to statements made professionally to the attorney.—State v. Barrows, 52 Conn. 323.

[h] (Ga. 1867) The attorney of a plaintiff in ejectment who is administrator of an estate cannot be compelled to testify whether or not he is employed to bring the suit for the individual benefit of his client.—Doe v. Mattox, 37 Ga. 289.

[i] (Ill. 1885) Communications by a widow to her attorney, and by him communicated to the devisees, accompanied by directions to inform such devisees of her husband that his deeds to her, made after the will was executed, were for the mere purpose of preserving the estate, and that any residue left after paying debts should be divided in accordance with the provisions of the will, are not privileged.—Scott v. Harris, 113 Ill. 447.

[j] (Ind. 1855) A foreigner unacquainted with the English language engaged an interpreter to state the case to the attorneys in order to employ them in the suit. Suit having been brought and the interpreter having sworn to an admission made to him by the defendant of the indebtedness, the defendant offered to prove by the attorneys that the interpreter in stating the case to them stated that he had never made such admission. *Held*, that the testimony by such attorneys was inadmissible as it concerned a conversation which was privileged.—Maas v. Bloch, 7 Ind. 202.

[k] (Ind. 1863) In order to show assent by the original parties to the alteration of a note, evidence was offered of their having proposed to the plaintiff's counsel to confess judgment on the note if he thought they could do it with safety. *Held*, that this appeared to be in the nature of a professional consultation and was inadmissible.—Bowers' Adm'r v. Briggs, 20 Ind. 139.

[l] (Ind. 1887) Statements made by a client to an attorney, for the purpose of being communicated and acted upon by him in bringing about a partition of lands, are not privileged.—Bruce v. Osgood, 113 Ind. 360, 14 N. E. 563.

[m] (Iowa, 1893) On an indictment for forgery, in altering the findings in a civil case, a letter written by defendant to one of his attorneys in the civil action, to whom a copy of the findings had been given, requesting that such copy be sent to him (defendant), for the alleged purpose of showing it to a third person, is not a confidential communication, necessary and

proper to enable the attorney to act, so as to make it privileged, under Code 1873, § 3643.—State v. Kidd, 89 Iowa, 54, 56 N. W. 263.

[n] (Iowa, 1893) The copy of the findings returned by defendant to the attorney, though a confidential communication, was not privileged, under Code 1873, § 3643, as it was not necessary to enable him to act.—State v. Kidd, 89 Iowa, 54, 56 N. W. 263.

[o] (Iowa, 1895) Code 1873, § 3643, providing that no attorney, in giving testimony, shall disclose any confidential communication made to him in his professional capacity, does not prohibit an attorney from testifying, on an issue as to whether a deed to a decedent was intended as a mortgage, that he acted for decedent's administrator in collecting a note made by the grantor to decedent, and that on its payment the land covered by the deed was reconveyed to the grantor.—Caldwell v. Meltveldt, 93 Iowa, 730, 61 N. W. 1090; Same v. Tow, Id.

[p] (Me. 1847) Every communication made by a client to his legal adviser, for the purpose of professional aid or advice upon the subject of his rights and liabilities, is privileged, whether such communication be material to the aid or advice sought, or not, and cannot be revealed, without the assent of the client.—Aiken v. Kilburne, 27 Me. (14 Shep.) 252.

[pp] (Me. 1882) It is competent for an attorney who prepares a bill in equity signed and sworn to by his client, and filed in court, to testify where his client was described in said bill as residing, and such statement involves no violation of professional confidence.—Alden v. Goddard, 73 Me. 345.

[q] (Me. 1882) Nor would it be a confidential communication if verbally stated to him by his client while the bill was in preparation.—Alden v. Goddard, 73 Me. 345.

[qq] (Mass. 1859) In an action by an officer on an agreement to indemnify him for making an attachment, the facts that the defendant directed his attorney to make the attachment, and that upon being asked for a bond of indemnity he consulted his attorney, and was told by him that if he directed the attachment to be made, or agreed to indemnify the officer, he would be liable, whether he signed the bond or not, are not inadmissible as privileged communications with counsel.—Day v. Moore, 79 Mass. (13 Gray) 522.

[r] (Mass. 1870) The admission of an attorney's testimony that he had advised a client seeking to collect a claim for intoxicating liquors to get a promissory note signed by the debtor, and to indorse it for value before it was due to an innocent third person, *held*, in an action on the note, to be a violation of the rule excluding privileged communications.—Higbee v. Dresser, 103 Mass. 523.

[rr] (Mich. 1886) Plaintiff and his brother went to the office of an attorney to have a power of attorney drawn enabling defendant, their father, to draw money belonging to them, the latter not being present. While there, plaintiff, as defendant alleged, stated that he intended to give the money to defendant, stating his reasons therefor. Plaintiff sued to recover the money which defendant collected under the power. *Held*, that the conversation was not a privileged communication, it not being made to enable the attorney to give advice, or to render professional services, and the attorney was therefore competent to testify for defendant that the conversation occurred.—House v. House, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570.

[s] (Mich. 1890) Where, on a prosecution for larceny for taking a horse from the possession of another under claim of right by virtue of a chattel mortgage, defendant testified that he was advised by an attorney that he had a right to take the horse if he could do so peaceably, it was error to allow such attorney to testify as to the advice given.—People v. Hillhouse, 80 Mich. 580, 45 N. W. 484.

[ss] (Minn. 1882) A request to an attorney to appear in and defend an action is not a privileged communication, and the fact of the retainer or employment may be proved by the testimony of the attorney.—Hickman v. Troll, 29 Minn. 124, 12 N. W. 347.

[t] (Minn. 1889) On trial of an appeal from an order admitting a will to probate, an attorney at law, who had been testator's attorney, was permitted to disclose communications made to him by deceased on business matters, and the advice and counsel given thereon. The object was to lay a foundation for the admission in evidence of the opinion of said attorney as to the sanity of the testator, and there was nothing in the testimony which in any manner reflected upon the character or reputation of the deceased. *Held*, that contestant, who was one of the heirs at law of the deceased, could not exclude such testimony on the ground of privileged communications.—In re Layman's Will, 40 Minn. 371, 42 N. W. 286.

[tt] (Miss. 1876) The rule that professional intercourse between client and attorney should be protected by profound secrecy is not limited in its application to advice given or opinions stated; it extends to facts communicated by the client, to all that passes between client and attorney, in the course and for the purpose of the business.—Longsfield v. Richardson, 52 Miss. 443.

[u] (N. Y. 1842) In order to protect communications made to an attorney or counselor as privileged communications, it is not necessary that they should be made in relation to a suit pending, or even in contemplation of a suit. If he is consulted professionally or facts are communicated to him for the purpose of obtaining his advice or assistance professionally, the communication is privileged, and he has no right to disclose it, or produce the correspondence on the subject without the consent of his client.—Crosby v. Crosby, 2 Chan. Sentinel, 15.

[uu] (N. Y. 1842) A solicitor, employed to foreclose a mortgage, being examined as witness, was asked whether he had received any written instructions from his client, in relation to the sale and the amount to be bid by him. *Held*, that he could not be compelled to answer, it being a matter of professional confidence.—Stuyvesant v. Peckham, 3 Edw. Ch. 579.

[v] (N. Y. 1851) Where the attorney or counsel has an interest in the facts communicated to him, or when their disclosure becomes necessary to protect his own personal rights, he is exempted from the obligation of secrecy.—Rochester City Bank v. Suydam, 5 How. Prac. 254.

[vv] (N. Y. 1854) Scire facias to revive a judgment in favor of plaintiff's representatives. The plaintiff's attorney in the original suit was called by the defendant to testify to an alleged admission of payment, made by his client after judgment recovered, and before execution was issued, while the attorney's authority to issue execution and satisfy the judgment continued, and was permitted so to testify, though the communication was made to him as a guide in issuing or withholding the execution.—Clark v. Richards, 3 E. D. Smith, 89.

[vvv] (N. Y. 1863) The rule protecting professional communications does not preclude an attorney from testifying that in collecting a claim his client had assigned he acted on behalf of such client, and that the latter forbade him to pay over the proceeds to the assignee.—Mulford v. Muller, 3 Abb. Dec. 330.

[w] (N. Y. 1873) The rule that confidential communications between attorney and client are privileged applies, although the communications do not relate to litigation; and it ex-

tends equally to both parties.—Carnes v. Platt, 36 N. Y. Super. Ct. (4 Jones & S.) 360, 15 Abb. Prac. (N. S.) 337.

[ww] (N. Y. 1888) Testimony of a conversation between plaintiff and his attorney immediately after the accident, relating to the case and the retainer of the attorney, is properly excluded.—Ney v. City of Troy, 50 Hun. 604, 3 N. Y. Supp. 679, judgment affirmed (1890) 123 N. Y. 628, 25 N. E. 952.

[x] (N. Y. 1892) Where the issue is whether an assignment of a mortgage was made for the benefit of the mortgagee's wife, allowing the attorney who was employed by the mortgagee to draw the assignment to testify as to conversations between the mortgagee and the assignee is not reversible error, where the statements testified to as made by the mortgagee are not essential to the wife's recovery, and the only objection made is to the admission of the entire conversation.—Brennan v. Hall, 131 N. Y. 160, 29 N. E. 1009, affirming (1891) 60 Hun, 583, 14 N. Y. Supp. 864.

[y] (Pa. 1849) Facts stated to an attorney to show that the cause in which he is sought to be retained does not conflict with the interests of a client for whom he is already employed are not confidential communications.—Heaton v. Findlay, 12 Pa. (2 Jones) 304.

[yy] (Tenn. 1858) The rule that communications between an attorney and his client are privileged does not apply to mere abstract legal opinions on general questions of law, either civil or criminal.—McMannus v. State, 39 Tenn. (2 Head) 213.

[z] (Vt. 1888) An attorney who, while acting for plaintiff, comes into possession of the note sued on, and the specification on which it is based, is properly excluded from testifying in defendant's behalf that, while acting for plaintiff, he furnished defendant a specification of plaintiff's claim materially different from the one on file in the case, as such paper is a privileged communication.—Hicks' Estate v. Blanchard, 60 Vt. 673, 15 Atl. 401.

[zz] (Vt. 1888) Nor should defendant's agent, to whom the specification was furnished, be permitted to testify to that fact.—Hicks' Estate v. Blanchard, 60 Vt. 673, 15 Atl. 401.

§ 755. —— Criminal or other wrongful act or transaction.

[a] (U. S. 1879) Privileged communications between counsel and client are those which are lawful, and which relate to the business of the client, and fall within the scope of professional duty. A communication relating to the perpetration of a crime by the counsel is not privileged.—In re Cole, Fed. Cas. No. 2,975.

[b] (Mich. 1885) Professional communications are not privileged, when such communications are for an unlawful purpose, having for their object the commission of a crime.—People v. Van Alstine, 57 Mich. 69, 23 N. W. 594.

[c] (Mich. 1889) Statements to his attorney by one who has admitted his connection with a crime, and testifies against another as an accomplice, are not privileged communications, but may be admitted as other statements made out of court are admitted, to impeach the witness.—People v. Gallagher, 75 Mich. 512, 42 N. W. 1063.

[d] (Mo. 1884) Statements made in consultation with an attorney while seeking legal advice as to a prospective violation of the law are not privileged.—State v. McChesney, 16 Mo. App. 259.

[e] (Mo. 1892) Communications made by a client to an attorney while seeking professional advice as to the best method of defrauding his creditors are not privileged.—Hamil v. England, 50 Mo. App. 338.

[f] (Mo. 1894) Communications between an attorney and his client concerning proposed infractions of law are not privileged.—Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39.

[g] (N. H. 1889) On a trial for assault, testimony of an attorney that at a certain time after the assault he was employed by a third person to do some business with defendant, and after the business was transacted defendant used threatening language against the assaulted person, is not objectionable as disclosing a privileged communication.—State v. Merchant, 65 N. H. 124, 18 Atl. 654.

[h] (N. J. 1891) In order that the rule of professional privilege may apply, there must be both professional employment and professional confidence; whereas if the client has a criminal or fraudulent object in view in his communication with his counsel, one of those elements must necessarily be absent; because if the object is avowed, the client does not consult his adviser professionally; if it is not disclosed, he reposes no confidence.—Matthews v. Hoagland, 48 N. J. Eq. (3 Dick.) 455, 21 Atl. 1054.

[i] (N. J. 1891) If the communication or conference between client and counsel is to devise means by which a crime is to be committed, in which the attorney takes an active part, there is no privilege, for he ceases to be counsel, and becomes particeps criminis; while if he takes no part, there is no professional privilege, because it cannot be a solicitor's business to advise in furtherance of a criminal object.—Matthews v. Hoagland, 48 N. J. Eq. (3 Dick.) 455, 21 Atl. 1054.

[j] (N. Y. 1848) The seal of professional confidence has never been held to cover a communication made to an attorney, to obtain professional advice or assistance, as to the commission of a felony, or any other crime which is malum in se.—Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

[k] (N. Y. 1848) Although the seal of secrecy imposed upon communications made by a client to his attorney ought not to exist for dishonest purposes, or to enable a client to perpetrate a fraud, or to violate the laws under the advice of counsel, yet the law is well settled that, where an attorney is employed by his clients to assist them in a transaction which, from what is said in his presence, he must know to be a fraud upon their creditors, he cannot testify to such communications without their consent.—Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

[l] (N. Y. 1859) Communications between a client and his counsel are privileged, but the privilege does not extend to a combination between them to prevent the court from compelling the production of important papers at the trial.—People v. City of New York, 29 Barb. 622.

[m] (N. Y. 1859) A communication made to an attorney at law, by a person seeking professional advice or assistance to enable him to forge a contract, is not privileged, and the attorney who was called as a witness can be required to disclose it.—People v. Blakeley, 4 Parker, Cr. R. 176.

[n] (Tex. 1886) Privileged communications in criminal cases are subject to two rules: (1) To be privileged, they must pass between the client and his attorney in professional confidence, and in the legitimate course of the latter's legitimate employment. (2) If the communications are made by the client to the attorney before the commission of the crime, and for the purpose of being guided or helped in the commission, they are not privileged; and this second rule is not affected by the fact that the attorney is wholly without blame.—Orman v. State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662.

[o] (Tex. 1887) In a trial for murder it appeared that the deceased had used insulting language concerning defendant's mother and sister. Defendant consulted counsel as to what would be the penalty for killing the deceased. *Held* not a privileged communication.—Orman v. State, 24 Tex. App. 495, 6 S. W. 544.

[p] (Tex. 1891) In a prosecution of defendant for perjury in swearing that he did not sign a certain order, the testimony of the attorney who drew the order for defendant to sign, that he did sign it, is not incompetent on behalf of the state on the ground that it is a privileged communication.—Rahm v. State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

[q] (Tex. 1892) In a trial for murder, testimony of deceased's attorney that, several days before the killing, deceased asked his advice as to how he could kill defendant and avoid the legal consequences, is not a privileged communication.—Everett v. State, 30 Tex. App. 682, 18 S. W. 674.

[r] (Tex. 1894) Communications by a client to his attorney of an intent to violate the insolvency law by permitting certain creditors to obtain preferences are not entitled to protection as confidential.—Taylor v. Evans (Civ. App.) 29 S. W. 172.

[s] (Utah, 1875) The doctrine of privileged communications does not apply to a case where a client, being about to commit a criminal act, informs an attorney of his intention, and asks information or advice from him as to the effect or consequences of such acts.—People v. Mahon, 1 Utah, 205.

[t] (Vt. 1874) M. told his attorney, who assisted him in the confession of a judgment against himself in favor of a creditor, that he did it that he might not have his piano sold on execution so his other creditors could not attach it. *Held*, that such communication was privileged.—Maxham v. Place, 46 Vt. 434.

[u] (Wis. 1854) The following question was put to an attorney: "Was not this your arrangement; were you not to charge every person for whom you obtained a loan from your client a certain per cent., which per cent. was to be over the [legal] interest mentioned in the mortgage and note, the greater part of which was to go to your client, and only a small portion to you for making out papers, etc.?" *Held*, that this question must be answered.—Dudley v. Beck, 3 Wis. 274.

[v] (Wis. 1854) Where the attorney and client both engage in committing a wrongful act, the former cannot refuse to disclose the facts of the transaction on the ground that his knowledge thereof resulted from the relationship of attorney and client.—Dudley v. Beck, 3 Wis. 274.

§ 756. Instructions or communications as to will.

[a] (U. S. 1865) On a question of marriage and legitimacy, an attorney, who drew a will for the alleged husband, now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preceding and connected with the preparation of the will.—Blackburn v. Crawford, 70 U. S. (3 Wall.) 175, 18 L. Ed. 186.

[b] (Cal. 1895) Where the attorney who drew a will witnesses it, at testator's request, he is free, if the will is contested, to testify as to any fact concerning its execution which he learned by virtue of his professional relation.—In re Wax's Estate, 106 Cal. 343, 39 Pac. 624.

[c] (Cal. 1895) Code Civ. Proc. § 1881, subd. 2, providing that an attorney cannot be examined, without the consent of his client, as to communications made to him by the client in the course of professional employment, does not preclude an attorney who witnessed a will he had drawn for decedent from testifying as to testator's mental capacity and instructions in regard to the will, as, by requesting him to witness the will, decedent waived the provisions of the statute.—In re Mullin's Estate, 110 Cal. 252, 42 Pac. 645.

[d] (Ind. 1893) The selection by the testator of the attorney who drew the will to act as an attesting witness is a waiver of the statutory privilege as to communications between attorney and client, and on a contest of the will the attorney may testify as to conversations between himself and the testator as to the character and contents of the will then desired.—Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

[e] (Ind. 1893) An attorney who drew the will cannot testify as to testatrix's mental condition.—Gurley v. Park, 135 Ind. 440, 35 N. E. 279.

[f] (Iowa, 1894) Code 1873, § 3643, provides that no practicing attorney shall disclose any confidential communication, unless the party in whose favor this prohibition is made waives it. *Held*, that a testator, by requesting the attorney who has drawn the will to witness it, waives the prohibition, and such attorney may testify as to testator's mental condition.—Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

[g] (Md. 1848) Communications made by a client to a witness in relation to the provisions of her will, in the drawing of which the witness was acting as her attorney, the reasons assigned for such provisions and the conversations that took place on the subject cannot be disclosed, being made to him as a legal adviser, for the purpose of advice.—Chew v. Farmers' Bank of Maryland, 2 Md. Ch. 231.

[h] (Mo. 1836) An attorney who draws up a will is competent to testify of its contents, in order to set it up as a lost will; and his testimony is not subject to the objection that it discloses confidential communications of a client.—Graham v. O'Fallon, 4 Mo. 338.

[i] (Mo. 1892) Communications made to a lawyer employed to draw a will, relative to the amount of land which the testator intended to convey by a certain deed theretofore executed, are not admissible in a suit to reform the deed after the testator's death, on the ground of mistake.—Sweet v. Owens, 109 Mo. 1, 18 S. W. 928.

[j] (N. Y. 1879) Where an attorney who drew up a will for his client accepts a retainer to oppose its probate, he cannot claim exemption from testifying as to the preparation of the will, on the ground of his attorney's privilege.—Sheridan v. Houghton, 6 Abb. N. C. 234, 16 Hun, 628.

[k] (N. Y. 1881) A testator's communication to an attorney as to a codicil not executed *held* to be privileged under Code, § 835, on a contested application for probate of a codicil previously executed.—Pearsall v. Elmer, 5 Redf. Sur. 181.

[l] (N. Y. 1881) Otherwise, it seems, as to communications relating to the codicil presented for probate.—Pearsall v. Elmer, 5 Redf. Sur. 181.

[m] (N. Y. 1882) Upon opposition to the probate of a will on the ground that the testator intended to embody in it the substance of a former will, a draft of which, with the signature torn off, was in the possession of a lawyer, but that a mistake was made, *held*, that the lawyer was not excused from presenting it on the ground that it was a privileged communication.—In re Chapman, 27 Hun, 573.

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[n] (N. Y. 1886) The draftsman of a will, although an attorney, is not incompetent, under Code, § 835, to testify, in support of the will, to the instructions given him by the testator.—In re Chase's Will, 41 Hun, 208.

[o] (N. Y. 1886) An attorney who drew a will may testify, on its probate, to what transpired between the testator and himself in the process of its preparation and publication.—In re Austin's Will, 42 Hun, 516.

[p] (N. Y. 1887) On the probate of a will, the attorney who drew it can properly testify to the facts and of the declarations of the deceased in respect to the execution and accompanying it.—In re Boury's Will, 8 N. Y. St. Rep. 809.

[q] (N. Y. 1888) An attorney, in receiving the directions of one intending to make his will, acts in his professional capacity, though he merely reduces the directions to writing, without questioning or advising, and is incompetent to testify to any information received in that way, under Code Civ. Proc. § 835, forbidding an attorney to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment.—Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874, reversing Whelpley v. Loder (1883) 1 Dem. Sur. 368.

[r] (N. Y. 1888) A testator who requests the attorney employed to draw his will to become a witness to it, waives the attorney's privilege from testifying to conversations had with testator at the time of drawing the will, for the purpose of enabling him to execute testator's instruction; Code Civ. Proc. § 836, imposing the obligation of secrecy, unless "expressly waived" by the client.—In re Coleman's Will, 111 N. Y. 220, 19 N. E. 71.

[s] (N. Y.) An attorney cannot testify as to any act or word of his client on the subject of the disposition of his property, the making of his will or its execution, when not made in the presence of third persons.—(1889) Mason v. Williams, 53 Hun, 398, 6 N. Y. Supp. 479; (1889) In re O'Neil's Estate (Sur.) 7 N. Y. Supp. 197; (1891) In re McCarthy's Will, 59 Hun, 626, 14 N. Y. Supp. 2; (1892) Id., 65 Hun, 624, 20 N. Y. Supp. 581.

[t] (N. Y. 1889) The attorney may testify that he received his instructions relative to the provisions of the will from testator, as such instructions could not be confidential.—In re McCarthy, 55 Hun, 7, 8 N. Y. Supp. 578.

[u] (N. Y. 1891) Under Code Civ. Proc. §§ 835, 836, providing that an attorney shall not be allowed to disclose a communication made by his client to him in the course of his professional employment unless the privilege is expressly waived by the client, a testator by procuring the attorney who draws his will to be a subscribing witness waives the privilege as to communications relative to a disinherited son, though decedent expressly requests that they be regarded as confidential.—In re Lamb, 21 Civ. Proc. R. 324, 18 N. Y. Supp. 173.

[v] (N. Y.) A request by testator to an attorney to draw his will, and sign it as an attesting witness, is a waiver of the obligation of secrecy imposed by section 835, within the meaning of section 836, which authorizes the client to "expressly waive" such obligation; and hence such attorney is competent to testify to the execution of the will when it is propounded for probate.—(1892) In re Gagan's Will (Sur.) 20 N. Y. Supp. 426; (1893) Id., 66 Hun, 632, 21 N. Y. Supp. 350, following In re Coleman's Will (1888) 111 N. Y. 220, 19 N. E. 71.

[w] (Pa. 1861) In an issue of devisavit vel non, the fact that the testator was too imbecile to make communications to his counsel when they met is not incompetent testimony on account of the professional relation; professional communications are privileged, but the fact that imbecility prevented them from being made is not.—Daniel v. Daniel, 39 Pa. (3 Wright) 191.

[x] (Pa. 1880) Statements made to counsel in regard to the preparation of a will are confidential, both before and after the client's death.—In re Bennett's Estate, 13 Phila. 331.

[y] (Wis. 1893) Where an attorney who drew a will signs it as a witness at the request of testatrix, he is free, in an action to contest the will, to testify to any fact in regard to the will and its execution which he learned by virtue of his professional relation.—McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

§ 757. Instructions or communications as to conveyance, assignment, or mortgage.

Presence of both parties, see post, § 764.

[a] Communications made to an attorney, in his professional capacity, by an owner of property, respecting a transfer of it, cannot be disclosed in evidence by the attorney.
—(Mass. 1831) Foster v. Hall, 29 Mass. (12 Pick. 89, 22 Am. Dec. 400;
(Pa. 1834) Beltzhoover v. Blackstock, 3 Watts, 20, 27 Am. Dec. 330.

[aa] (U. S. 1840) The federal court will not permit counsel to testify as to facts disclosed by his client, upon an application to him as a conveyancer to draw a deed.—Remington v. Linthicum, 39 U. S. (14 Pet.) 84, 10 L. Ed. 364.

[b] (U. S. 1869) Matters relating to a conveyance to an attorney by his client and a reconveyance to client's wife are not within the privilege of confidential communications between attorney and client which enable an attorney to refuse to testify regarding the same.—In re Bellis, Fed. Cas. No. 1,274 [3 Ben. 386].

[bb] (Ala. 1877) When an attorney is employed to make a plan by which the husband may secure lands to the wife in payment of an admitted indebtedness, and is afterwards employed by the wife to file a bill for the specific performance of the executory contract agreed on, he cannot testify as a witness at the instance of a subsequent purchaser from the husband, against the objection of the husband and wife that a mistake was made in the description of the lands conveyed.—Blunt v. Strong, 60 Ala. 572.

[c] (Cal. 1865) When an attorney while acting professionally for a client receives at the latter's request a deed of his land, and conveys it to a third party, no consideration moving in either of the transactions, these facts are not privileged communications such as an attorney is excused from disclosing.—Hager v. Shindler, 29 Cal. 47.

[cc] (Colo. 1873) Privileged communications between attorney and client do not include declarations made to one employed merely to prepare a mortgage.—Machette v. Wamless, 2 Colo. 169.

[d] (Colo. 1887) Plaintiff and defendant had been partners in options on mining property. The day after plaintiff had sold his interest to defendant, defendant sold a half interest in the property to a third party at a large advance. Plaintiff sued defendant for an accounting, alleging fraudulent concealment of the negotiations with the third party. On the trial the lawyer at whose office defendant and the owners and the third party met, and who drew for them the deed from the owners to the third party, was asked as to conversations had with him at the time of drawing the deed, and also as to conversations between the parties when they met at his office to talk between themselves. Defendant objected to the questions, on the ground that the communications were between attorney and client, and privileged. The evidence showed that the lawyer never made

any communication to defendant in the character of legal adviser, and his only employment was to draw the deed. *Held*, that the court erred in rejecting the testimony.—Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599.

[dd] (Conn. 1886) Instructions by a grantor to an attorney drawing a deed are not, ordinarily, privileged communications.—Todd v. Munson, 53 Conn. 554, 4 Atl. 99.

[e] (Dak. 1888) An attorney who is employed by a person only for the purpose of drawing up a deed and bill of sale to be executed to such person by another may testify, on behalf of the latter, as to what was said between the parties, and between them and himself, for the purpose of showing that the bill of sale was intended as a mortgage.—O'Neill v. Murray, 6 Dak. 107, 50 N. W. 619.

[ee] (Ill. 1861) An attorney who is merely employed to draw a deed or mortgage without giving any legal advice in regard thereto cannot decline to testify to statements made by his employer on the ground that they are privileged communications.—De Wolf v. Strader, 26 Ill. (16 Peck) 225, 79 Am. Dec. 371.

[f] (Ill. 1886) Conversations between an assignor of property subsequently attached and his attorney who drew up the assignment to the claimant in the attachment proceedings are privileged, and the attorney cannot, at the trial of the attachment, be questioned with reference to the purpose and intent of the debtor in making the assignment.—Hollenback v. Todd, 119 Ill. 543, 8 N. E. 829.

[ff] (Ill. 1888) When there is an unrecorded assignment of securities on agreement to pay the assignor a certain yearly sum, accompanied by a written agreement by the assignee, also unrecorded, to surrender back the property to the assignor when the latter should demand it, the attorney for the assignee, who drew the assignment, is competent to testify to the statements made by the assignor, at the time of its execution, as to his purpose in making the assignment, such a communication not being privileged.—Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642.

[g] (Ind. 1891) It was not error to permit an attorney to testify as to the contents of an assignment of lease, bill of sale, and contract between defendants, where he acted solely in the capacity of a scrivener; and the fact that he had been the legal adviser of one of the defendants, and that he was paid by him for writing such papers, did not affect the capacity in which he acted, when the proof was otherwise clear that he acted as a scrivener only.—Thomas v. Griffin, 1 Ind. App. 457, 27 N. E. 754.

[gg] (Iowa, 1881) Communications between a party to a contract for the sale of personal property and his attorney, in reference to the matter, are not admissible in a subsequent proceeding to set aside the sale as a fraud against creditors.—Singer v. Sheldon, 56 Iowa, 354, 9 N. W. 298.

[h] (Iowa, 1891) Statements by the purchaser of mortgaged property to an attorney whom he had employed to draw the conveyance, and whom he wished to retain "to keep the mortgage alive," but who declined that employment, are not privileged.—Theisen v. Dayton, 82 Iowa, 74, 47 N. W. 891.

[hh] (Iowa, 1895) On an issue as to whether an agreement was made, at the time of the execution of a mortgage securing several debts, that its proceeds should be applied first to the payment of a specific debt, testimony of the attorney who drew up the mortgage as to the conversation between the parties at the time is competent, the matter not being privileged.—Wyland v. Griffith, 96 Iowa, 24, 64 N. W. 673.

[i] (Ky. 1892) In an action to set aside a deed of land purchased by M., since deceased, conveying to her a life estate only, with remainder to defendant, on the ground of undue influence exerted over her by defendant, an attorney called in by M. to draw the deed, employed by her professionally, to see that she got a good title, cannot testify in defendant's favor as to what was said to him by her when drawing the deed, under Civ. Code, § 606, subd. 5, declaring that no attorney shall testify concerning a communication made to him in his professional character, by his client, without the client's consent.—Carter v. West, 93 Ky. 211, 19 S. W. 592.

[ii] (Ky. 1892) Under Civ. Code, § 606, subd. 5, prohibiting an attorney from testifying concerning communications made to him in his professional character without his client's consent, an attorney called by a grantee to draw a deed conveying to her a life estate with a remainder to another cannot testify to her declarations in favor of the remainderman in an action to set aside the deed for undue influence after her death.—Carter v. West, 93 Ky. 211, 19 S. W. 592.

[j] (Mass. 1833) A debtor requested an attorney at law to draw up a mortgage of his personal property, and disclosed the purpose of the transaction, but neither asked nor received any legal advice as to its effect. *Held*, that the attorney's testimony as to such disclosure was admissible.—Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 25 Am. Dec. 415.

[jj] (Mass. 1833) Such mortgage having been prepared, by which the property was conveyed to A. for the purpose of preventing its being attached by creditors, and being executed in A.'s presence, it was *held* that the attorney was not prohibited from testifying as to A.'s communications to him.—Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 25 Am. Dec. 415.

[k] (Mass. 1833) A communication, made by a debtor to an attorney at law, to whom he applied to draw up a mortgage deed, merely to explain his motives, but no legal advice as to the effect of the conveyance was asked or given, is not a privileged communication, which the attorney is precluded from testifying to.—Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 25 Am. Dec. 415.

[kk] (Mich. 1889) In an action for the value of land which plaintiffs allege defendant agreed to exchange for land conveyed by them, conveyancers who drew the deed from plaintiffs are competent witnesses as to what transpired while the deed was being drafted, though they were also attorneys for plaintiffs.—Dikeman v. Arnold, 78 Mich. 455, 44 N. W. 407.

[l] (Miss. 1848) Where A. consulted B., an attorney at law, to draw a conveyance of his property to C., and at the same time made communications to B. in regard to the object of the conveyance, and B. declined the employment, it was *held* that the communications made to B. were made to him in his professional character, and he could not be allowed to give them in evidence.—Crisler v. Garland, 19 Miss. (11 Smedes & M.) 136, 49 Am. Dec. 49.

[ll] (Mo. 1892) The relation of attorney and client does not exist where the attorney, acting as notary public, takes the acknowledgment of a mortgagor to a chattel mortgage not written by the attorney, and communications made by the mortgagor to the attorney as to the purpose of its execution are not within Rev. St. 1889, § 8925, declaring communications between attorney and client privileged.—C. Aultman & Co. v. Daggs, 50 Mo. App. 280.

[m] (Nev. 1890) An attorney employed by the parties to a deed to draw it up, cannot, in a controversy between one of the parties and a third person, be compelled, over the objection of such party, to testify as to communi-

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cations between himself and his clients, at the time the deed was made, tending to show that it was intended as a mortgage.—Gruber v. Baker, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

[mm] (N. J. 1884) Defendant employed a lawyer to make deeds from himself to a third person, from that person to defendant's wife, and a declaration of trust by her. *Held*, that communications by the husband to the lawyer, who was called as a witness by the wife, were not privileged.—Gulick v. Gulick, 38 N. J. Eq. (11 Stew.) 402.

[n] (N. Y. 1848) Although an attorney who witnesses a deed for his clients may be compelled to testify to the execution of such deed, and also to testify whether it was antedated, whether it was in the same form in which it now appears at the time of its execution, or has been altered, and whether it was actually delivered at the time he subscribed his name thereto as a witness, and also, in case the deed is lost, or is in the hands of the adverse party, who refuses to produce it, to testify to its contents, yet he cannot testify to communications made to him by such clients, tending to show that the object of such deed was to hinder or delay their creditors in the collection of their debts.—Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

[nn] (N. Y. 1860) An attorney employed by a mortgagee to draw a mortgage, and who acts for him in the execution and delivery of the instruments, not being employed by the mortgagor in the capacity of attorney, is a competent witness to prove the consideration of the mortgage and what transpired between him and the mortgagor, as the facts so coming to his knowledge were not privileged communications.—Woodruff v. Hurson, 32 Barb. 557.

[o] (N. Y. 1863) The testimony of one who was the attorney of a mortgagee and his legal adviser in taking a mortgage, offered to prove the bargain between the mortgagors and the mortgagee, cannot be excluded upon the objection that the bargain thus made was in the nature of a privileged communication between attorney and client.—Prouty v. Eaton, 41 Barb. 409.

[oo] (N. Y. 1869) A witness, who was a lawyer, being under examination, was questioned touching a certain conveyance made to him by a bankrupt and his wife, the subject-matter of which conveyance was immediately reconveyed by the witness to bankrupt's wife. *Held* that, under the circumstances, the questions were such as might be asked, and witness could not rely on his privilege of confidential communications between attorney and client to refuse to answer.—In re Bellis, 38 How. Prac. 79, Fed. Cas. No. 1,274.

[p] (N. Y. 1872) On a trial for murder, an attorney employed by the prisoner on the day of the alleged murder to draw for him certain papers, viz., a lease and receipt, cannot be compelled to testify to the drawing of such papers by him, or to the contents thereof, nor as to the state of either of the papers when delivered to the prisoner, where such papers are not in any manner necessarily connected with the perpetration of the crime, and they cannot, of themselves, in any way aid in the commission of any fraud or crime.—Graham v. People, 63 Barb. 468.

[pp] (N. Y. 1872) In an action against the grantees in a deed, upon a covenant therein that they would assume and pay certain specified incumbrances as portions of the purchase money, an attorney and counselor who drew the deed was asked whether the deed was read over to the grantees after it was drawn, and whether the question was raised then as to whether the grantees would be personally liable on the deed. These questions were objected to, as calling for privileged communications between attorney and client. The objections were overruled by the referee, and the evidence admitted. *Held*, that this was an error, for which a new trial must be granted.—Rogers v. Lyon, 64 Barb. 373.

[q] (N. Y. 1872) In an action against the grantees in a deed on a covenant therein that they would pay certain incumbrances, questions to the attorney who drew the deed as to whether it was read over to the grantees after it was drawn and as to whether the question was then raised concerning the liability of the grantees were objectionable, as calling for privileged communications.—Rogers v. Lyon, 64 Barb. 373.

[qq] (N. Y. 1877) An attorney employed to draw a deed is competent to testify as to the directions received by him from the parties, and as to the transaction between them at the time; knowledge acquired under such circumstances not being within the class of privileged communications.—Hebbard v. Haughian, 70 N. Y. 54.

[r] (N. Y. 1880) F., the owner of a lot upon which R. and C. each held a mortgage, called with them upon H., an attorney, and requested him to draw such papers as might be necessary, whereby F. conveyed the lot to W. by a deed in which W. assumed to pay the mortgages. In an action to foreclose the R. mortgage, and to hold W. (who had paid the C. mortgage) liable for any deficiency arising on the sale, W. claimed that he was not liable on the covenant, and that the deed, though absolute on its face, was intended as a mortgage. *Held*, that the relation of attorney and client did not exist between H. and W.; and H.'s testimony was not excluded by Code, § 835.—Root v. Wright, 21 Hun, 344, reversed (1881) 84 N. Y. 72, 38 Am. Rep. 495.

[rr] (N. Y. 1889) The testimony of an attorney that he drew a deed in controversy, and counseled plaintiff in regard to the subject-matter thereof, is inadmissible, except so far as it relates to the fact that he drew the deed.—Barry v. Coville, 53 Hun, 620, 7 N. Y. Supp. 86.

[s] (N. Y. 1889) In an action by the grantor's widow to have an absolute deed declared a mortgage, though the testimony of the grantor's counsel, that the grantor told him that he had a great deal of money from defendant, and requested him to prepare the deed, may be a disclosure of a privileged communication, its admission is not prejudicial to plaintiff.—Sidway v. Sidway, 54 Hun, 634, 7 N. Y. Supp. 421.

[ss] (N. Y. 1889) Under Code Civ. Proc. § 835, providing that "an attorney or counselor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment," a notary is not incompetent to testify as to where an acknowledgment of a deed was taken, though he was also employed by the grantor as attorney to draw the deed.—Mutual Life Ins. Co. v. Corey, 54 Hun, 493, 7 N. Y. Supp. 939, judgment affirmed (1892) 135 N. Y. 326, 31 N. E. 1095.

[t] (N. Y. 1891) M., an attorney at law, was employed to draft a deed, which he did, and, on being questioned thereafter in respect to its provisions, refused to disclose the same, upon the ground that it would be improper and unprofessional. After the deed was executed, he subscribed it as an attesting witness. *Held*, in an action to set aside the deed as fraudulent, that the relation of attorney and client existed between M. and the grantor, and that he was incompetent to testify as to her declarations made when the deed was executed, and that the disability was not removed by his subsequent attestation of the deed as subscrib-

ing witness.—Rousseau v. Bleau, 60 Hun, 259, 14 N. Y. Supp. 712.

[tt] (N. Y. 1891) In an action involving the question whether a mortgage executed to one J., and by him assigned to a third person, was assigned absolutely or for the benefit of one M., a witness who acted as counsel for J. in the execution and assignment of the mortgage may testify that the assignee told the witness that J. wanted him (the assignee) to take an assignment of the mortgage and hold it for M.; such statement not involving a professional communication between witness and J., within Code Civ. Proc. § 835, and it appearing that witness had never acted as counsel for defendants' testator.—Brennan v. Hall, 60 Hun, 583, 20 Civ. Proc. R. 434, 14 N. Y. Supp. 864, judgment affirmed (1892) 131 N. Y. 160, 29 N. E. 1009.

[u] (N. Y. 1891) In such case the witness may testify that J. (his client) directed him to make an assignment of the mortgage to the assignee for the benefit of M.—Brennan v. Hall, 60 Hun, 583, 20 Civ. Proc. R. 434, 14 N. Y. Supp. 864, judgment affirmed (1892) 131 N. Y. 160, 29 N. E. 1009.

[uu] (N. Y. 1894) Directions given by a client to his attorney, as to provisions to be inserted in a deed, are not privileged communications.—Van Alstyne v. Smith, 82 Hun, 382, 31 N. Y. Supp. 277.

[v] (N. C. 1888) In an action between a grantor and grantee it is competent to show by the attorney who wrote the deed what was said by the parties at the time touching the transaction, and it cannot be regarded as privileged, whether he was acting as attorney for the one who called him, or both.—Michael v. Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

[vv] (Pa. 1849) Communications of the object for which an assignment of a mortgage was made, to a counsel concerned for the assignee, on the distribution of the proceeds of the mortgaged premises, are privileged, although no question then arose as to the object of the assignment, and the counsel considered the communications in the light of a casual conversation.—Moore v. Bray, 10 Pa. (10 Barr) 519.

[w] (Pa. 1852) A conveyancer is not a legal adviser, and the relation of client and counsel does not, in a proper sense, arise between conveyancers and those who employ them; and hence communications to them are not privileged.—In re Matthews' Estate, 5 Clark, 149, 4 Am. Law J. (N. S.) 356, 9 Leg. Int. 11, 1 Phila. 292.

[x] (S. C. 1887) An attorney who is a witness to a declaration of trust advised and drawn by himself is a competent witness to prove the consideration of the instrument.—Brazel v. Fair, 26 S. C. 370, 2 S. E. 293.

[y] (S. C. 1889) In an action by a creditor to set aside a deed on the ground that his debtor, deceased, was the real purchaser, testimony of an attorney that before the execution of the deed the debtor consulted him professionally, and requested him to draw a deed of the property, saying that he did not want the title in his own name because of his creditors, and that the deed and receipt for the consideration were drawn, but never executed, is inadmissible; the statements being confidential communications between attorney and client.—Watson v. Young, 30 S. C. 144, 8 S. E. 706.

[yy] (Tenn. 1873) An attorney retained by the husband to aid in having land, bought by the husband at chancery sale, conveyed to the wife, cannot be heard to disclose any communication made pending the relation touching the purposes of the conveyance.—Lockhard v. Brodie, 1 Tenn. Ch. 384.

[z] (Va. 1814) An attorney employed to draw a deed is bound to secrecy in respect to matters disclosed to him by those who employ him.—Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513.

[zz] (Wis. 1877) An attorney at law, employed to draw an assignment of a mortgage, acts as an attorney, and not as a notary merely; and the court should not permit him, as a witness, to testify against his client as to disclosures made to him by the latter in the course of such employment.—Getzlaff v. Seliger, 43 Wis. 297.

§ 758. Communications to prosecuting attorney.

[a] (Conn. 1787) Communications to the state's attorney, by a prisoner, are confidential, and the attorney will not be admitted to testify to them.—State v. Phelps, Kirby, 282.

[b] (Ind. 1873) Communications made to a prosecuting attorney relative to criminals or suspected persons are privileged, and cannot be divulged without the consent of the person making them.—Oliver v. Pate, 43 Ind. 132.

[c] (Ind. 1877) A statement made by a witness before the grand jury is not a privileged communication to the prosecuting attorney.—State v. Van Buskirk, 59 Ind. 384.

[d] (Iowa, 1894) Under Code 1878, § 3643, making communications to an attorney in his professional capacity privileged, the prosecuting attorney cannot be required to testify as to communications made to him by the prosecuting witness in a criminal case.—State v. Houseworth, 91 Iowa, 740, 60 N. W. 221.

[e] (Mich. 1882) Where the surety for a county official sued his principal for money paid to his use in satisfying his bond to the public, the testimony of the prosecuting attorney as to facts learned as the law officer of the county, and as a member of the committee appointed to obtain a surrender of the principal's property in settlement of his liabilities to the public, was not privileged.—Lange v. Perley, 47 Mich. 352, 11 N. W. 193.

[f] (Mich. 1884) Statements made to the prosecuting attorney by the complainant, at the commencement of a prosecution for adultery, which tend to discredit his testimony, are not privileged communications.—People v. Davis, 52 Mich. 569, 18 N. W. 362.

[g] (Mo. 1885) Conversations between a prosecuting witness and an attorney voluntarily assisting the state's attorney are not privileged in a subsequent action against such witness for malicious prosecution.—Meysenberg v. Engelke, 18 Mo. App. 346.

[h] (Ohio, 1876) On trial of an indictment for seduction under promise of marriage, admissions made by the female seduced, in a confidential conversation with her attorney, are privileged, and are not admissible to impeach her testimony.—Bowers v. State, 29 Ohio St. 542.

[i] (Vt. 1839) A state attorney must divulge what passes in the grand jury room when required to do so in a court of justice.—Clark v. Field, 12 Vt. 485.

§ 759. Source of information in general.

[a] (U. S. 1827) Attorneys are bound to testify as to any matter concerning their clients which has come to their knowledge in any other way than by confidential communication.—Rhoades v. Selin, Fed. Cas. No. 11,740 [4 Wash. C. C. 715].

[b] (U. S. 1869) The attorney is only privileged as to information derived from his client, as such, not that acquired while acting as attorney for the client.—In re O'Donohoe, Fed. Cas. No. 10,435.

[c] (U. S. 1876) An attorney at law, when sworn as a witness, is not privileged from disclosing facts relating to his client's cause not

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confided to him by the client.—In re Donohue, Fed. Cas. No. 3,990 [2 Hask. 17].

[d] (Cal. 1859) An attorney may be called upon to disclose facts learned from sources other than the statements of his client, in order to show, from these facts, notice to himself in the transaction.—Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

[e] (Ga. 1889) To render an attorney incompetent under Acts 1887, p. 30, he must have derived his information from his client by virtue of his relation as attorney, or by reason of the anticipated employment of him as attorney; and if he acquires his knowledge in any other manner he is both competent and compellable to testify.—Skellie v. James, 81 Ga. 419, 8 S. E. 607.

[f] (Ill. 1868) An attorney may testify to facts he learns and knows from other sources than from the relation of attorney and client, though he cannot disclose confidential communications of his client.—Chillicothe Ferry, Road & Bridge Co. v. Jameson, 48 Ill. 281.

[g] (La. 1827) An attorney may disclose any facts the knowledge of which was not acquired confidentially in his profession.—Reeves v. Burton, 6 Mart. (N. S.) 283.

[h] (Mo. 1893) Memoranda made by defendant's attorney while present with defendant at a settlement with plaintiff's firm, showing the application of certain notes and credits, are not privileged, and are admissible on the part of plaintiff.—Deuser v. Hamilton, 52 Mo. App. 394.

[i] (N. Y. 1821) Where an attorney, after the commencement of a suit, without any communication from his client, acquires a knowledge of his handwriting, he may be questioned as to its identity; as an attorney may testify to a collateral fact within his knowledge or as to a fact which he may know without being intrusted with it as an attorney in the cause.—Johnson v. Daverne, 19 Johns. 134, 10 Am. Dec. 198.

[j] (N. Y. 1834) Counsel can protect himself from testifying against his client only so far as his information was imparted to him by his client.—Bogert v. Bogert, 2 Edw. Ch. 399.

[k] (N. Y. 1844) The privilege of an attorney or counselor extends to information derived from his client, as such, either by oral communications, or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel by such client.—Crosby v. Berger, 11 Paige, 377, 42 Am. Dec. 117.

[l] (N. Y. 1844) The privilege does not extend to information derived from other persons or other sources, although the information is derived or obtained while acting as such attorney or counsel.—Crosby v. Berger, 11 Paige, 377, 42 Am. Dec. 117.

[m] (Ohio, 1832) Attorneys are bound to testify as to any matter concerning their clients which has come to their knowledge in any other way than by confidential communication.—Rogers v. Dare, Wright, 136.

§ 760. Communications between attorney and third person.

[a] (U. S. 1885) Communications made to a counselor in the course of his professional employment, by persons other than the client or his agents, are not privileged. The rule extends only to communications made by or on behalf of the client.—Randolph v. Quidnick Co. (C. C.) 23 Fed. 278.

[b] (Miss. 1877) A statement made to an attorney in the presence and at the instance of his client, by a third person, is not a privileged communication.—Perkins v. Guy, 55 Miss. 153, 30 Am. Rep. 510.

[c] (N. Y. 1892) Communications from third persons, to whom an attorney has been referred by his client, are not privileged.—In re Mellen, 63 Hun, 632, 18 N. Y. Supp. 515, judgment affirmed (1893) 138 N. Y. 615, 33 N. E. 1083.

[d] (N. Y. 1893) Where a client refers a person to his attorney for information in respect to any matter, the testimony of such person as to statements made by the attorney is competent, as the rule that the admissions of an attorney in conversation with third persons are not admissible against his client does not apply to such case.—Galle v. Tode, 74 Hun, 542, 26 N. Y. Supp. 633, judgment affirmed (1896) 148 N. Y. 270, 42 N. E. 673.

§ 761. Conversations between parties in presence of attorney.

[a] (Cal. 1863) Although an attorney cannot be compelled to disclose communications made to him in that capacity by his client, he is bound to testify, like any other witness, to statements made by the client to other persons, or by other persons to the client, or to each other in his presence.—Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114.

[b] (Ga. 1850) The statute prohibiting attorneys from giving evidence does not extend to a conversation between a plaintiff and defendant in his presence, and while drawing up a bill of sale of the matter in dispute for one of the parties.—Corbett v. Gilbert, 24 Ga. 454.

[c] (Iowa, 1882) Mere statements made in the presence of counsel, but not made to him, are not privileged communications.—Shaffer v. Mink, 60 Iowa, 754, 14 N. W. 726.

[d] (Minn. 1892) Conversations between the parties to a mortgage in the hearing of an attorney employed to draft it, which do not embrace any communications made to him as an attorney or for the purpose of obtaining his advice or legal opinion, are not privileged, within the meaning of Gen. St. 1878, c. 73, § 10, which provides that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional duty.—Hanson v. Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

[e] (N. J. 1868) Agreements made in the presence of an attorney between his client and the opposite party are not privileged communications.—Carr v. Weld, 19 N. J. Eq. (4 C. E. Green) 319.

[f] (N. J. 1896) A counselor at law, who was present at a conversation between his client and a third person, is a competent witness, in behalf of the latter, to prove what was said.—Roper v. State, 58 N. J. Law (29 Vroom) 420, 33 Atl. 969.

[g] (N. Y. 1841) An attorney may testify as to transactions by his client with third parties in his presence.—Coveney v. Tannahill, 1 Hill, 33, 37 Am. Dec. 287.

[h] (N. Y. 1888) On the accounting of an executor it was sought to charge him with certain money, claimed to have been advanced to him by the testator as a portion of the share which would come to him after the testator's death, but which he claimed had been given him by the testator, and the testimony of an attorney to whom he had gone with the testator to have an agreement drawn in regard to the money was offered in proof of his claim. *Held*, that the testimony of the attorney as to statements which each party openly made to the other, and which portrayed no confidence reposed in him, was competent.—In re Hicks, 14 N. Y. St. Rep. 320.

[i] (Pa. 1891) An attorney at law may testify to what took place between two persons in his office, although both were his clients.—In re

Weaver's Estate (Orph. Ct.) 9 Pa. Co. Ct. R. 516.

[j] (S. C. 1884) An attorney for a trust estate was employed to draw a deed from the trustee to the cestui and a mortgage back. *Held*, that statements made in his presence by one to the other were not privileged.—Moffatt v. Hardin, 22 S. C. 9.

[k] (Tex. 1895) On an issue whether an absolute conveyance by the defendant husband and wife to plaintiff, in trust to pay the former's debts, was intended as a mortgage, it was proper to admit testimony by one who, at the time of the transaction, was the husband's attorney, as to interviews between the husband, his creditors, and witness, before and at the time of the conveyance, with reference to it, and as to what the wife told him regarding the deed when she acknowledged it.—Houx v. Blum, 9 Tex. Civ. App. 588, 29 S. W. 1135.

§ 762. Existence, contents, or production of documents.

[a] An attorney may be called on to prove the existence of papers intrusted to him by his client, and that they are in his possession, so as to enable the opposite party, on the attorney's refusal to produce them, to give parol evidence of their contents.

—(U. S. 1827) Rhoades v. Selin, Fed. Cas. No. 11,740 [4 Wash. C. C. 715];
(N. Y. 1820) Brandt v. Klein, 17 Johns. 335; (1820) Jackson v. McVey, 18 Johns. 330; (1841) Coveney v. Tannahill, 1 Hill, 33, 37 Am. Dec. 287.

[b] An attorney or counsel, who as such has been intrusted with papers, is not bound to produce them in evidence on the call of the opposite party or of a third person.

—(Conn. 1807) Lynde v. Judd, 3 Day, 499;
(N. Y. 1817) Jackson v. Burtis, 14 Johns. 391;
(Vt. 1832) Durkee v. Leland, 4 Vt. 612.

[c] An attorney holding a paper delivered to him by his client, which the grand jury are desirous of seeing, as evidence against such client, is not bound to produce it.

—(Mass. 1811) Anonymous, 8 Mass. 370;
(Vt. 1801) State v. Squires, 1 Tyler, 147.

[d] (U. S. 1892) The admissibility of a paper containing communications between client and attorney is not dependent upon the manner in which possession thereof was obtained from the attorney, but upon the inherent character of the communication itself, as it can only be deprived of its character as a privileged communication by some unequivocal act on the part of the client himself.—Liggett v. Glenn, 51 Fed. 381, 2 C. C. A. 286, 4 U. S. App. 438; Glenn v. Liggett, Id.

[e] (U. S. 1890) A party cannot excuse noncompliance with a subpœna duces tecum commanding him to produce documents, unprivileged in his own hands, by showing that he has delivered them into the hands of his counsel.—Edison Electric Light Co. v. United States Electric Lighting Co. (C. C.) 44 Fed. 294.

[ee] (Ala. 1835) An attorney who has obliterated an indorsement on the bond belonging to his client, on which bond suit is pending, and who states upon oath that he has no knowledge of the contents of the indorsement but that which he had received as attorney in the cause, is not bound to testify as to the contents of that indorsement.—Crawford v. McKissack, 1 Port. 433.

[f] (Conn. 1880) A bill of particulars in a suit pending was prepared for the plaintiff under his direction by a person not an attorney at law, and by the latter handed to plaintiff's attorney, who made no use of it, as the case was settled. The paper afterwards came into the hands of the executor of the other party, and became important evidence in favor of the estate upon a claim presented by the former plaintiff against it. *Held*, that it was not a privileged communication.—Appeal of Pulford, 48 Conn. 247.

[g] (Ga. 1872) A solicitor cannot be compelled to produce or disclose the contents of an answer, verified by a client, since deceased, and left with him to be filed or not as he should think best, and which has not been filed.—Neal v. Patten, 47 Ga. 73.

[h] (Ga. 1877) The court has no power to compel the counsel of one of the parties to disclose on oath, in spite of his claim of privilege, that he has in court one of his client's title papers, and to produce it, to be used in the suit as evidence for the opposite party; especially, where notice to produce has not been previously given.—Dover v. Harrell, 58 Ga. 572.

[i] (Ind. 1860) An attorney who has in his possession receipts which his client could be compelled to produce or disclose can also be compelled to produce them or testify as to their contents.—Andrews v. Ohio & M. R. Co., 14 Ind. 169.

[j] (Ind. 1889) An attorney of defendant can be compelled to produce a letter from plaintiff to defendant, in his possession, to be read in evidence.—Harrisburg Car Mfg. Co. v. Sloan, 120 Ind. 156, 21 N. E. 1088.

[k] (La. 1860) Documents placed by defendant in charge of his counsel in the course of his employment in a civil suit are inadmissible against defendant in a criminal prosecution; such matters being privileged.—State v. Hazleton, 15 La. Ann. 72.

[l] (Md. 1859) An attorney may be obliged to produce papers which his client could be obliged to produce.—Ex parte Maulsby, 13 Md. 625.

[m] (Minn. 1889) An attorney is not obliged to produce a writing intrusted to him by his client, or to disclose its contents, without his consent, but he may be required to state whether he has it in his possession, for the purpose of authorizing the adverse party to give parol evidence of its contents.—Stokoe v. St. Paul, M. & M. Ry. Co., 40 Minn. 545, 42 N. W. 482.

[n] (Mo. 1869) An attorney cannot testify as to the condition and appearance of a deed of trust and the trust notes at the time they were exhibited to him on the occasion of his employment for the purpose of foreclosing the deed of trust.—Gray v. Fox, 43 Mo. 570, 97 Am. Dec. 416.

[o] (N. J. 1891) The privilege of professional secrecy is not confined to the knowledge derived by counsel from communications made to him by, or in conference with, the clients, but extends to information obtained from documents submitted for his inspection or custody.—Matthews v. Hoagland, 48 N. J. Eq. (3 Dick.) 455, 21 Atl. 1054.

[p] (N. Y. 1819) Where a note, which had been protested, originally came to an attorney from his client, one of the indorsers, and another indorser, against whom a suit was commenced and a judgment by confession entered, satisfied the judgment and then requested the attorney to collect the money, and was afterwards indicted for perjury, the attorney could not withhold the note on the ground of professional confidence.—In re Neafie, 4 City H. Rec. 168.

[q] (N. Y. 1823) Letters written by a client to his attorney, in relation to professional business, transacted by him for the client, are privileged communications, the voluntary disclosure of which, by the attorney, is a breach of trust; and such letters are inadmissible as evidence in a suit by a third person against the

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client.—Wilson v. Troup, 7 Johns. Ch. 25, affirmed, 2 Cow. 195, 14 Am. Dec. 458.

[r] (N. Y. 1831) A party wishing to avail himself in evidence of a paper in possession of his adversary's attorney must give notice to produce it. He cannot have the benefit of the evidence by subpœnaing the attorney to produce it, and compelling him to testify whether it was delivered to him by his client as supporting the action or defense.—McPherson v. Rathbone, 7 Wend. 216.

[s] (N. Y. 1849) Counsel will be excused from producing deeds in their possession, and which they received in their character as counsel, and from testifying as to their contents.—Kellogg v. Kellogg, 6 Barb. 116.

[t] (N. Y. 1853) An attorney who declines to produce a paper on the ground that he received it in his character of counsel for the defendant, after he was employed as such in the action, and considers himself under obligations not to disclose or produce it, unless by the consent of his client, cannot be required to produce it.—People v. Benjamin, 9 How. Prac. 419.

[u] (N. Y. 1859) Where papers which the court seeks to have an attorney produce are needed for the purpose of identification, the attorney is guilty of contempt if he refuses to produce them, notwithstanding he might be protected from disclosing their contents.—People v. City of New York, 29 Barb. 622.

[v] (N. Y. 1861) The refusal of a witness to produce papers, acknowledged to be in his possession, for the reason that it would be a breach of his privilege as attorney, is assuming the right of determining the question of privilege for himself, and his refusal is a contempt.—In re Mitchell, 12 Abb. Prac. 249.

[w] (N. Y. 1875) A bond of indemnity, executed by his counsel to a defendant who wishes to terminate a pending action on account of his being in bad health and intending to go abroad, is properly excluded as a privileged communication, upon plaintiff's seeking to require defendant to produce the bond in evidence, if it contains any statements and recitals of fact which if made by the obligee would have been available to plaintiff.—Genet v. Ketchum, 62 N. Y. 626.

[x] (Pa. 1881) Where a client has placed in his attorney's hands a lease, the latter cannot be compelled to produce it in evidence against the client in a criminal prosecution.—Commonwealth v. Moyer, 15 Phila. 397.

[y] (Tex. 1872) An attorney cannot refuse to disclose whether or not he or his client has possession of a deed, on the ground of privileged communication, where the question is propounded for the purpose of laying a foundation for secondary evidence of its contents.—Zabel v. Schroeder, 35 Tex. 308.

[yy] (Vt. 1892) An attorney to whom a note is shown by a client, and who gives a professional opinion thereon, is not competent, in a subsequent suit on the note, to testify as to whether an indorsement thereon is the same as it was when the note was submitted to him for an opinion.—Arbuckle v. Templeton, 65 Vt. 205, 25 Atl. 1095.

[z] (W. Va. 1881) An attorney who was a witness in his client's favor was compelled by subpœna duces tecum to produce a written agreement with his client which showed that his fees were partly contingent upon the result of the suit. *Held* proper, the case not coming within the rule as to professional communications.—Moats v. Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

[zz] (Wis. 1889) A wife's attorney in a divorce suit cannot produce letters written by the husband to the wife during marriage, though the contents were not shown, but only the address, etc., tending to show that defendant did not know where his wife was, such letters being confidential papers between an attorney and his client.—Selden v. State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144.

§ 763. Confidential character of communication or advice.

[a, b] (Ark. 1894) On an issue whether the purchaser of a stock of goods knew of the seller's intent to defraud his creditors, evidence by the purchaser's attorney that he informed the purchaser, shortly before the sale, that he had claims for collection against the seller, is not objectionable as a communication from client to attorney.—Rosewater v. Schwab Clothing Co., 58 Ark. 446, 25 S. W. 73.

[c] (Cal. 1891) Communications to an attorney, which were intended to be imparted by him to others, are not privileged.—Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65.

[d] (D. C. 1880) Where an attorney, in compliance with the directions from his client, has made known to the other party all the communications which had been made to him by the client, he cannot refuse, when called as a witness by the opposing party, to testify as to such communications, as the client, by making such request of the attorney, waived the right to object to the admission of the evidence on the ground of it being a privileged communication.—Oliver v. Cameron, MacArthur & M. 237.

[e] (La. 1828) An attorney may prove what he is directed to plead; what is to be spread on the record is not confidential.—Cormier v. Richard, 7 Mart. (N. S.) 177.

[f] (Me. 1839) To exclude the communications of client to counsel from being given in evidence, it is not necessary that they should have been given under any injunction of secrecy.—Wheeler v. Hill, 16 Me. (4 Shep.) 329.

[g] (Me. 1850) Solicitors, counselors, and attorneys are not permitted to disclose, without the assent of their clients, any communications made to them in reference to their professional employment. This protection extends to all communications made with a view to obtain professional aid and advice, and in order to entitle a client to it, it is not essential that he should be apprised of it, or that he should enjoin secrecy.—McLellan v. Longfellow, 32 Me. 494, 54 Am. Dec. 599.

[h] (N. Y. 1809) Terms of compromise, offered by a counsel to the creditors of his client, are not confidential, and must be disclosed.—McTavish v. Denning, Anth. N. P. 113.

[i] (N. Y. 1818) Words used by an attorney in detailing a statement of a case to a person to whom he applies to become security on the bringing of a writ of error are to be deemed made in the course of judicial proceedings, and privileged.—Blunt v. Zuntz, Anth. N. P. 180.

[j] (N. Y. 1889) The testimony of an attorney for executors, that by the direction of his client he employed the plaintiff to do the work sued for, is competent, as it was not a privileged communication between an attorney and his client, being made for the express purpose of being communicated to the plaintiff, who under the authority given was to be employed for defendants.—Martin v. Platt, 51 Hun, 429, 4 N. Y. Supp. 359.

[k] (N. Y. 1890) A communication by plaintiff to his attorney, for the purpose of its publication to defendant, is not privileged.—Bartlett v. Bunn, 56 Hun, 507, 10 N. Y. Supp. 210.

[l] (N. Y. 1892) Under Code Civ. Proc. §§ 835, 836, prohibiting an attorney from disclosing communications made by a client to him in the course of professional employment, unless the privilege is expressly waived, where a deed

is delivered to an attorney with instructions to deliver it to the grantee, such instructions to deliver the deed are a waiver of all objection that might otherwise be made to the proof of that fact by the attorney.—Rosseau v. Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578.

[m] (N. Y. 1892) Testimony of an attorney to prove the delivery of a deed to him by a deceased grantor, with instructions to deliver it to the grantee, is not within Code Civ. Proc. § 835, prohibiting an attorney from disclosing communications made by a client to him in the course of professional employment, as the communication is not confidential.—Rosseau v. Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578.

[n] (N. Y. 1893) Where a client imparts certain facts to her attorney, and requests him to communicate them to a person with whom she has business transactions to which the facts relate, and the attorney does so, such facts do not constitute a privileged communication as to which such attorney may not testify.—Collins v. Robinson, 72 Hun, 495, 25 N. Y. Supp. 268.

[o] (Tex. 1884) A communication made by a party to a suit to an attorney, to be communicated to the adverse party, is not privileged.—Henderson v. Terry, 62 Tex. 281.

[p] (Va. 1814) The rule that attorneys ought not to be permitted to give evidence of facts imparted to them by their clients when acting in their professional character extends to all cases in which the attorney is applied to in the line of his profession, whether such facts were communicated with an injunction of secrecy or for the purpose of asking advice.—Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513.

§ 764. Communications in presence or hearing of others.

[a] Declarations by one to an attorney, in the presence of the adverse party, are not privileged.
—(Ind. 1888) Colt v. McConnell, 116 Ind. 249, 19 N. E. 106;
(Mo. 1891) Deuser v. Walkup, 43 Mo. App. 625;
(N. Y. 1889) Smith v. Orego, 54 Hun, 22, 7 N. Y. Supp. 86.

[b] Communications between an attorney and his client, openly made before a third person, are not privileged.
—(Ala. 1880) Mobile & M. Ry. Co. v. Yeates, 67 Ala. 164;
(N. Y. 1890) Greer v. Greer, 58 Hun, 251, 20 Civ. Proc. R. 71, 12 N. Y. Supp. 778.

[c] (Ala. 1856) The rule is founded in public policy, that holds all information acquired by an attorney from his client, touching matters that come within the ordinary scope of professional employment, as privileged communications; but, where two parties select the same attorney, and make their communications in the presence of each other, in regard to the same subject-matter, each party waives his right to regard those communications as confidential, and in asserting their rights under the contract, each is entitled to a disclosure of its stipulations.—Parish v. Gates, 29 Ala. 254.

[d] (Ill. 1885) Statements made to an attorney by two parties to a transaction, in the presence of each other, are not confidential communications within the rule requiring their exclusion; and in an action between such parties relating to the subject-matter of the communication, it is not error to allow the attorney to testify concerning them.—Lynn v. Lyerle, 113 Ill. 128.

[e] (Ill. 1888) Where the grantor and grantee in a deed brought it to an attorney, already signed and acknowledged, and asked his opinion as to what was necessary to convey the title, statements made to the attorney by the parties in the presence of each other are not confidential communications, and the attorney can testify thereto in a suit to set aside the deed.—Griffin v. Griffin, 125 Ill. 430, 17 N. E. 782.

[f] (Iowa, 1896) In a civil action for seduction, a witness for defendant testified that, prior to the alleged seduction, he had intercourse with plaintiff. Afterwards, she, her father, her attorney, and such witness had a conversation in her attorney's office as to a certain plan to relieve her from the effect of the witness' testimony in preventing her from obtaining employment as a school teacher; and such attorney agreed that, if witness was prosecuted, he would act as his attorney. *Held*, in a subsequent prosecution of such witness for perjury, that what was said by witness in such conversation in the hearing of such attorney, prior to their agreement, was not privileged.—State v. Swafford, 98 Iowa, 362, 67 N. W. 284.

[g] (Kan. 1893) Communications made to an attorney who was acting for both parties, and made in the presence of both parties, are not privileged.—Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892.

[h] (Ky. 1854) An attorney at law who had acted as such for two defendants in a suit brought against them may be required to testify in a subsequent suit between the two to a communication made to him by the parties in the presence of each other.—Rice v. Rice, 53 Ky. (14 B. Mon.) 417.

[i] (Mass. 1892) The fact that confidential communications by a client to an attorney were made in the presence of a third person does not qualify the attorney as a witness in regard to such communications.—Blount v. Kimpton, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554.

[j] (Mich. 1886) When the parties in disagreement lay the facts in the case before an attorney for his opinion thereon, the question of privileged communication does not arise to exclude his testimony in a subsequent action, since there can be no privilege when both parties hear the communication, and where they are not made by a client confidentially to obtain counsel.—Cady v. Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

[k] (Mich. 1895) Communications to an attorney with reference to a matter between him and his client, made, in the client's presence, by one who retained him for the client, and was to pay him for his services, are not privileged, in an action by the client against the person making them.—Frank v. Morley's Estate, 106 Mich. 635, 64 N. W. 577.

[l, m] (N. Y.) All communications by a client to his counsel, for purposes of professional advice or assistance, are privileged, whether such advice or aid relates to a suit pending or contemplated, or to any other matter proper for such advice or aid. But where the communications are made in the presence of all the parties to the controversy, they are not privileged, and are competent evidence between such parties.—(1841) Coveney v. Tannahill, 1 Hill, 33, 37 Am. Dec. 287; (1864) Whiting v. Barney, 30 N. Y. 330, 86 Am. Dec. 385; (1871) Britton v. Lorenz, 45 N. Y. 51.

[n] (N. Y. 1862) Two parties, a borrower and a lender, called upon an attorney and consulted him for their common information upon the legality of the mode in which they proposed to effect the loan. In a subsequent lawsuit, growing out of this transaction, it was *held* that one of them could not, without the consent of the other, require the attorney to divulge this conversation.—Whiting v. Barney, 38 Barb. 393, reversed 30 N. Y. 330, 86 Am. Dec. 385.

[o] (N. Y. 1862) Where professional communications are made by two or more clients joint-

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ly to a mutual legal adviser, the fact that one of the clients, who has since died, might, if living, be called on to prove the facts which were stated by him to the attorney, did not entitle the other party to the testimony of the attorney.—Whiting v. Barney, 38 Barb. 393, reversed (1864) 30 N. Y. 330, 86 Am. Dec. 385.

[p] (N. Y. 1864) Where both parties are present at the time when a communication is made by one of them to his attorney or counsel, there is nothing confidential in the communication, and the testimony of the attorney in regard to it is admissible.—Whiting v. Barney, 30 N. Y. 330, 86 Am. Dec. 385, reversing (1862) 38 Barb. 393.

[pp] (N. Y. 1869) An attorney who acted as counsel in relation to a bill of sale when both parties to the action were present may testify as to what was said at the time he drew the bill of sale, for where the communications to an attorney are made in the presence of all the parties to the controversy, they are not privileged, and are competent evidence as between the parties.—Britton v. Lorenz, 3 Daly, 23, affirmed (1871) 45 N. Y. 51.

[q] (N. Y. 1881) Where communications are made to an attorney by either of two or more parties in the presence of the others, while he is employed as their common attorney in matters in which they are mutually interested, and in which their interests are adverse, such communications are privileged in a suit between them, or either of them, and a third person.—Root v. Wright, 84 N. Y. 72, 38 Am. Rep. 495, reversing (1880) 21 Hun, 344.

[r] (N. Y. 1886) A lawyer who drew up a deed of trust from A., since deceased, to B., may testify as to conversations had where both were present.—Rosenburg v. Rosenburg, 40 Hun, 91.

[s] (N. Y. 1888) Statements made to a lawyer, while consulting him professionally, by one party, in the presence of the other, are not privileged, and are admissible in an action between the administrators of such parties.—Hurlburt v. Hurlburt, 50 Hun, 600, 2 N. Y. Supp. 317, judgment affirmed (1891) 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482.

[t] (N. Y. 1889) The attorney employed by a testator to write his will is not disqualified by Code Civ. Proc. § 835, prohibiting attorneys from testifying to a confidential communication, from relating a conversation with testator, occurring at the time the will was executed, in the presence of the subscribing witnesses, bearing on testator's sanity, as such a conversation is evidently not confidential.—In re McCarthy, 55 Hun, 7, 8 N. Y. Supp. 578.

[u] (N. Y. 1891) The rule making communications between attorney and client privileged (Code Civ. Proc. § 835) does not apply in a controversy between the representatives of two persons, who together consulted an attorney, as to admissions made during such consultation.—Hurlburt v. Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482, affirming (1888) 50 Hun, 600, 2 N. Y. Supp. 317.

[v] (N. Y. 1891) The attorney who drew a deed by which a wife sold her separate estate, the money from which was alleged to have been given to testator, her husband, to invest for her use, testified to a declaration by testator, at the time the deed was drawn, made in the presence of plaintiff, and relating to the agreement for the investment of the money. *Held*, that the testimony was not privileged.—Sheldon v. Sheldon, 58 Hun, 601, 11 N. Y. Supp. 477, judgment reversed (1892) 133 N. Y. 1, 30 N. E. 730.

[w] (N. Y. 1891) An attorney at law, the draughtsman of a will, is competent to testify as to statements made by the testator in the presence of the attorney and of the subscribing witness, just before the execution of the will, as to his satisfaction with its contents.—In re Smith, 61 Hun, 101, 15 N. Y. Supp. 425.

[x] (N. Y. 1892) Code Civ. Proc. § 835, making communications between attorney and client privileged, does not apply in an action between two persons who went to an attorney together, and were equally interested in the subjects discussed in the presence of the attorney, and in the advice which was given.—Hard v. Ashley, 63 Hun, 634, 18 N. Y. Supp. 413, judgment affirmed 136 N. Y. 645, 32 N. E. 1015, following Hurlburt v. Hurlburt (1891) 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482.

[y] (N. C. 1889) In an action by executor on notes payable to testator, communications made by testator to his attorney, who drew the notes and deeds of trust securing them, made at the time they were drawn in the presence of defendant and the person from whom he bought the land to pay for which the money was borrowed, are not privileged.—Hughes v. Boone, 102 N. C. 137, 9 S. E. 286.

[yy] (N. C. 1891) Where declarations are made by defendant to her counsel in the presence of plaintiff they are not privileged, and the counsel may testify to them, especially where he had acted as counsel for both parties, though at the time the declarations were made he was acting for defendant only.—Carey v. Carey, 108 N. C. 267, 12 S. E. 1038.

[z] (Ohio, 1876) Confidential admissions to her attorney made by a female who has been seduced under a promise of marriage are not deprived of their character as privileged communications by the fact that her mother was present at the consultation in which they were made.—Bowers v. State, 29 Ohio St. 542.

[zz] (Pa. 1888) Where an attorney, acting for both plaintiff and defendant, prepared a contract for them to sign, the communications of the parties to such attorney, being made in the presence of each other, were not confidential.—Appeal of Goodwin Gas-Stove & Meter Co., 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696.

§ 765. — Testimony of third person.

[a] (Conn. 1859) A communication was made by a client to an attorney in the office of the latter, which was in his dwelling house, and in the presence of a son of the attorney, who lived in his family, but who had no connection with the professional business of his father. *Held*, that the communication was not, in relation to the son, a privileged one, and that it might be disclosed by his testimony.—Goddard v. Gardner, 28 Conn. 172.

[b] (Idaho, 1894) Though confidential communications between attorney and client are privileged, and neither can be allowed to reveal them, where such communications are overheard by a third person, either by accident or design, such person can testify to them.—State v. Perry, 4 Idaho, 224, 38 Pac. 655.

[c] (Iowa, 1885) Where a client makes statements to his counsel in the presence of a third person who is not employed in the business of the counsel, such person may testify as to the statements.—State v. Sterrett, 68 Iowa, 76, 25 N. W. 936.

[d] (Mass. 1859) A third person who overhears a confidential communication between an attorney and his client may testify of it.—Hoy v. Morris, 79 Mass. (13 Gray) 519, 74 Am. Dec. 650.

[e] (Mo. 1887) A third person who was present when communications were made to an attorney which the attorney would not be compelled to disclose cannot decline to testify concerning such communications on the ground that they were privileged.—Weinstein v. Reid, 25 Mo. App. 41.

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[f] (Mo. 1891) An administrator, finding among the effects of intestate after his death a deed executed by the intestate to his son, consulted his attorney in regard thereto, taking the son with him. The administrator paid for the consultation, but required the son to repay him. *Held*, that the administrator was competent to testify to admissions made by the son in such interview as against the objection of the son that the communication was privileged as between attorney and client, such rule not applying to third persons who were present at a conference between attorney and client, and not media of communication.—Tyler v. Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

[g] (N. Y. 1829) A person in no way connected with the counsel present at a communication made to him by a client is bound to testify thereto, as the privilege of not disclosing a communication made by a client to counsel is confined to the counsel.—Jackson v. French, 3 Wend. 337, 20 Am. Dec. 699.

[h] (N. Y. 1895) One who overhears a conversation between a lawyer and his client, and who stands in no relation of confidence to either, may testify to the conversation.—People v. Buchanan, 145 N. Y. 1, 39 N. E. 846.

[i] (Tex. 1885) An attorney's mother-in-law, being present at a time when professional communications were made to the attorney, overheard them. *Held*, that she could be required to testify concerning them.—Walker v. State, 19 Tex. App. 176.

[j] (Va. 1814) An interpreter between a client and an attorney is under the same obligation to conceal the facts disclosed by the client as is the attorney.—Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513.

§ 766. Termination of relation.

[a] (Del. 1858) One who has been attorney and counsel for the plaintiff in an action on trial is incompetent to testify as to any fact coming to his knowledge during his connection with the action, although such connection has ceased with the leave of the court.—Andrews v. Thompson, 1 Houst. 522.

[b] (Del. 1863) An attorney who gave counsel to a party during the settlement of an estate was incompetent to testify as to statements or declarations made to him by the party on a certain occasion after the settlement of the estate and after he had ceased to be counsel.—Bush v. McComb, 2 Houst. 546.

[c] (Ind. 1893) One is not disqualified, by reason of having been attorney for another, from testifying to statements made to him by the latter after he was no longer a practicing attorney.—Doan v. Dow, 8 Ind. App. 324, 35 N. E. 709.

[d] (Ind. 1895) Under Burns' Rev. St. 1894, § 505 (Rev. St. 1881, § 497), making confidential communications between attorney and client privileged matter, the fact that the relation of attorney and client once existed does not preclude such attorney from giving evidence of nonprofessional communications subsequently made to him by such client.—Harless v. Harless, 144 Ind. 196, 41 N. E. 592.

[e] (La. 1857) A witness, called to testify to the existence and contents of a deed, cannot be objected to on the ground that he obtained his information as attorney of the party against whom he is called to testify, if the deed had been intrusted to him after the relation of attorney to the party had ceased.—Williams v. Benton, 12 La. Ann. 91.

[f] (La. 1887) Communications by a client to his attorney cannot be given in evidence without the client's consent. It does not matter that the relations of client and counsel have ceased, or that the client be dead.—Morris v. Cain's Ex'rs, 39 La. Ann. 712, 1 South. 797, 2 South. 418.

[g] (Md. 1827) A solicitor is not permitted to reveal the confidential communications made to him by his client either before or after the termination of the suit.—In re Chase, 1 Bland, 206, 17 Am. Dec. 277.

[h] (Neb. 1894) An attorney cannot disclose confidential communications made by a client while the relation continues; but those made after the relation has terminated may be proved, though they are substantially the same as those given while the relation existed.—Brady v. State, 39 Neb. 529, 58 N. W. 161.

[i] (N. Y. 1816) If, after the relation of attorney and client has ceased, the client voluntarily repeat to the attorney what he had communicated while that relation existed, the attorney is a competent witness as to this communication.—Yordan v. Hess, 13 Johns. 492.

[j] (N. Y. 1862) Where one has been tried and acquitted and no other proceedings in relation to the indictment, its trial, or the offense charged in it, appear to have been in contemplation, and the party tried has afterwards a conversation with the person who acted as his counsel in the proceedings, but upon a matter unconnected with them, such counsel is a competent witness to testify to this conversation.—Mandeville v. Guernsey, 38 Barb. 225.

[k] (N. Y. 1862) Where one has consulted his attorney as to the arrangements upon which he proposes to make a loan, his remarks at subsequent interviews on the matter, undoubtedly drawn out by the confidential relations existing between himself and the attorney, cannot be testified to by the latter without consent.—Whiting v. Barney, 38 Barb. 393.

[l] (N. Y. 1889) Where litigation has ceased with the judgment for defendant, which is affirmed on appeal, the attorney for plaintiff cannot be compelled to disclose his late client's address, for, though the relation of attorney and client had ceased so far as the action was concerned, the attorney could not be compelled to disclose his client's address for the purpose of enabling the defendant to pursue him by new proceedings founded on the judgment.—Walton v. Fairchild (City Ct. N. Y.) 4 N. Y. Supp. 552.

[m] (N. Y. 1892) When an attorney, after drawing a will for testator, severed his professional relations with him, and subsequently, in a casual conversation, was told by testator that he proposed to give one of his legatees a certain sum in addition to her legacy in the will, such communication is not privileged.—Wadd v. Hazleton, 62 Hun, 602, 17 N. Y. Supp. 410, judgment reversed (1893) 137 N. Y. 215, 33 N. E. 143, 33 Am. St. Rep. 707, 21 L. R. A. 693.

§ 767. Death of client.

[a] (Ill. 1885) Communications or statements of a client to his attorney are not privileged, after the client's death, on an inquiry as to what was intended by the deed of the client, in a controversy between his devisees and a grantee claiming under his deed, made after the execution of his will; but the client's death does not remove the privileged character of the communications in case of a conflict as to the rights and interests of the client and those claiming under him and third persons.—Scott v. Harris, 113 Ill. 447.

[b] (La. 1840) Confidential communications are but the more sacred that the client is dead. Civ. Code, art. 2262.—Hart v. Thompson's Ex'r, 15 La. 88.

[c] (N. Y. 1843) Where a solicitor becomes the executor of his client, and is made a defendant to reach the property which had been held by such client, his privilege as an attorney ceased, and he cannot protect himself from answering concerning the property on the ground

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of confidential communication.—Crosby v. Berger, 4 Edw. Ch. 254, affirmed (1844) 11 Paige, 377, 42 Am. Dec. 117.

5. COMMUNICATIONS TO OR INFORMATION ACQUIRED BY PHYSICIAN OR SURGEON.

IN GENERAL, § 768.
NATURE OF ACTION OR PROCEEDING, § 769.
WHO ARE PHYSICIANS AND SURGEONS, § 770.
RELATION OF PHYSICIAN AND PATIENT, § 771.
PROFESSIONAL CHARACTER OF EMPLOYMENT, § 772.
SUBJECT-MATTER OF COMMUNICATIONS, INFORMATION, OR TESTIMONY, § 773.
MODE OR FORM OF COMMUNICATION OR ACQUISITION OF INFORMATION, § 774.
CONFIDENTIAL CHARACTER OF COMMUNICATION, § 775.
COMMUNICATIONS IN PRESENCE OR HEARING OF OTHERS, § 776.
DEATH OF PATIENT, § 777.

§ 768. In general.

[a] (Cal. 1892) Where a physician, who was called as a witness by defendant, had obtained his knowledge of the case by prescribing for plaintiff, he was incompetent to testify, under Code Civ. Proc. § 1881, which provides that a physician cannot, without the consent of his patient, testify as to any information acquired in attending the patient, which was necessary to enable him to prescribe for her.—Freel v. Market St. Cable Ry. Co., 97 Cal. 40, 31 Pac. 730.

[b] (Ind. 1883) Under Rev. St. 1881, § 497, relative to the competency of witnesses, a physician cannot be compelled to divulge, to his patient's injury, information acquired by him in the discharge of his professional duties to such patient.—Excelsior Mut. Aid Ass'n v. Riddle, 91 Ind. 84.

[c] (Ind. 1885) A physician cannot be examined as a witness as to matters divulged to him by a patient.—Carthage Turnpike Co. v. Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653.

[d] (N. Y. 1834) Where a master compelled a physician to disclose information acquired by him in attending a patient professionally, and which was necessary to enable him to prescribe for the patient, the testimony was laid out of consideration, in the decision of the cause in which it was taken.—Johnson v. Johnson, 4 Paige, 460.

[e] (N. Y. 1841) A physician is incompetent to prove matters which came to his knowledge while he was employed professionally; and his deposition, if taken in such case, will be rejected.—Hanford v. Hanford, 3 Edw. Ch. 468.

[f] (N. Y. 1876) The provision of 2 Rev. St. p. 406, § 73, prohibiting a physician from disclosing confidential statements, is not repealed by Code, § 390, authorizing the examination of an adverse party as a witness.—Edington v. Mutual Life Ins. Co., 67 N. Y. 185.

[g] (N. Y. 1877) Under 2 Rev. St. p. 406, § 73, expressly forbidding a physician to testify as to information acquired while attending in his official capacity, the physician who attended deceased was incompetent to testify to information acquired by him, in an action on a life insurance policy.—Dilleber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182.

[h] (N. Y. 1878) The provision in 3 Rev. St. (6th Ed.) p. 671, § 119, that "no person duly authorized to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character," applies to the examination of a physician as a witness, unless expressly waived by the patient.—Grattan v. National Life Ins. Co., 15 Hun, 74.

[i] (N. Y. 1885) Code, §§ 834, 836, explicitly prohibit a physician from testifying to information acquired while attending a patient professionally, unless the patient waives the privilege.—Renihan v. Dennin, 38 Hun, 270.

[j] (N. Y. 1891) In a suit on an insurance policy, the certificate of the attending physician as to the cause of death, furnished the company together with the other proofs of death, is an admission by the claimant that the cause of death, as stated in the certificate, is true, and such certificate is not therefore incompetent, under Code Civ. Proc. § 834, providing that a physician shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity.—Buffalo Loan, Trust & Safe Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, affirmed (1890) 56 Hun, 303, 9 N. Y. Supp. 346.

[k] (N. Y. 1891) The attending physician of an assured during his last illness is incompetent to testify, in an action on a policy, to any knowledge acquired as such attending physician.—Patten v. United Life & Accident Ins. Ass'n, 61 Hun, 627, 16 N. Y. Supp. 376, judgment reversed (1892) 133 N. Y. 450, 31 N. E. 342.

[l] (N. Y.) A physician may testify to any knowledge obtained from personal acquaintance with a deceased patient before his professional relations commenced and after they ceased, but not as to knowledge obtained during the pendency of such professional relations.—(1892) Fisher v. Fisher, 129 N. Y. 654, 29 N. E. 951; (1893) In re Loewenstine's Will (Com. Pl.) 2 Misc. Rep. 323, 21 N. Y. Supp. 931.

[m] (N. Y. 1894) In an action on a life insurance policy, testimony of the physician of the insured as to what he treated her for before the policy was issued is properly excluded, where the physician states that the information on that subject was necessary to enable him to treat the insured.—Redmond v. Industrial Ben. Ass'n, 78 Hun, 104, 28 N. Y. Supp. 1075.

[n] (N. Y. 1894) Where the defense is set up, in an action on a life insurance policy, that the insured falsely represented that he was in good health, when in fact he was suffering from the disease of which he died, it is error to permit physicians to testify that the insured called on them for professional advice, and that they were specialists in the disease of which he died.—McCormick v. United Life & Accident Ins. Ass'n, 79 Hun, 340, 29 N. Y. Supp. 364.

[o] (N. Y. 1896) Code Civ. Proc. § 834, providing that a physician shall not disclose any information acquired in attending a patient, does not forbid a physician from testifying as an expert in an action for injuries for which he treated plaintiff, though the knowledge acquired by him while attending plaintiff professionally may influence his answers to the hypothetical questions.—Meyer v. Standard Life & Accident Ins. Co., 8 App. Div. 74, 40 N. Y. Supp. 419.

[p] (Tex. 1886) Communications made to a physician professionally are not privileged, in the absence of a statutory provision making them so.—Steagald v. State, 22 Tex. App. 464, 3 S. W. 771.

§ 769. Nature of action or proceeding.

[a] (Cal. 1893) A will contest is a civil action, within the meaning of Code Civ. Proc. § 1881, subd. 4, providing that in such action a medical man cannot, without the patient's consent, be examined as to any information necessarily acquired in attending him.—In re Flint's Estate, 100 Cal. 391, 34 Pac. 863.

[b] (Cal. 1894) The rule as to privileged communications between physician and patient does not apply in criminal cases; and it is proper to permit the prosecution, in a murder case, to cross-examine defendant's physician as to the diseases for which he had treated defendant, where the defense is insanity.—People v. Lane, 101 Cal. 513, 36 Pac. 16.

[c] (Cal. 1895) Under Code Civ. Proc. § 1881, subsec. 4, limiting the privilege of a physician to civil cases, a physician may testify as to communications by a patient in criminal cases. —People v. West, 106 Cal. 89, 39 Pac. 207.

[d] (Cal. 1895) Defendant, a physician, accused of having caused the death of a patient by procuring for her a miscarriage by unlawful means, called as a witness another physician, to prove that deceased applied to him before she did to the defendant, and what her condition was at that time. *Held* an error to exclude his testimony.—People v. West, 106 Cal. 89, 39 Pac. 207.

[e] (Ind. 1894) In an action against a physician for malpractice he may testify concerning what occurred at an examination of his patient's injury, and the nature of the injury, though Rev. St. 1881, § 497 (Rev. St. 1894, § 505), provides that physicians shall not disclose the result of examinations, or confidential communications made by the patient.—Becknell v. Hosier, 10 Ind. App. 5, 37 N. E. 580.

[f] (N. Y. 1850) The statute provision which declares that "no person duly authorized to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which was necessary to enable him to prescribe for such patient as a physician, or to any act for him as a surgeon," is not applicable to testamentary cases.—Allen v. Public Administrator, 1 Bradf. Sur. 221.

[g] (N. Y. 1883) In a contest over the probate of a will, the attending physicians of deceased may disclose information obtained professionally.—Whelpley v. Loder, 1 Dem. Sur. 368.

[h] (N. Y. 1886) Code Cr. Proc. § 392, provides that rules of evidence shall be alike in criminal and civil cases, and Code Civ. Proc. § 834, prohibits physicians from disclosing information coming to them professionally and necessary to enable them to act in their professional capacity. *Held*, that the testimony of a physician as to statements made to him in his professional capacity by a woman upon whom an abortion had been committed, and which were necessary to enable him to treat her, was inadmissible in a criminal action against another for the crime of committing an abortion. —People v. Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661, reversing (1885) 3 N. Y. Cr. R. 338.

[i] (N. Y. 1886) The opinion of such physician as to whether an abortion had been performed, based in part on such statements, is also inadmissible.—People v. Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661, reversing (1885) 3 N. Y. Cr. R. 338.

[j] (N. Y. 1886) The rule laid down in People v. Pierson (1880) 79 N. Y. 424, that sections 834 and 836 of the New York Code of Civil Procedure, prohibiting physicians from disclosing information obtained by them in a professional capacity while attending on a patient, did not cover a case where the prohibition was invoked solely for the protection of a criminal, has no application to testamentary cases.—Renihan v. Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770.

[k] (N. Y. 1887) Code, §§ 834, 835, prohibiting testimony of attending physicians, are applicable to inquisitions in lunacy.—In re Baird, 11 N. Y. St. Rep. 263.

[l] (N. Y. 1889) Testimony of physicians, from knowledge acquired by professional interviews with the testator, cannot be considered in will cases.—Mason v. Williams, 53 Hun, 398, 6 N. Y. Supp. 479; In re O'Neil's Estate (Sur.) 7 N. Y. Supp. 197; In re Connor's Will, 55 Hun, 606, 7 N. Y. Supp. 855.

[m] (N. Y. 1891) Code Civ. Proc. § 834, prohibiting a physician from disclosing information acquired in attending a patient in a professional capacity, does not apply to an inquisition in lunacy, as no one can be better qualified to testify to the sanity or insanity of the supposed lunatic than the physician who attended him.—In re Benson (Co. Ct.) 16 N. Y. Supp. 111.

§ 770. Who are physicians and surgeons.

[a] (Mich. 1895) How. Ann. St. § 7516, providing that communications to persons authorized to practice medicine or surgery shall be privileged, relates to general practitioners, and dentists are not "surgeons," within the meaning of such act.—People v. De France, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139.

[b] (Mo. 1877) A drug or prescription clerk, as a witness in an action for injuries, cannot refuse, under a claim of privilege, to state what medicines he has furnished to the injured party. —Brown v. Hannibal & St. J. R. Co., 66 Mo. 588.

[c] (N. Y. 1859) The rule that communications to a physician in a medical capacity are privileged (2 Rev. St. p. 406, § 73) is to be construed strictly, and does not extend to communications made to a student in his office, unless shown to fall within the statute.—Kendall v. Grey, 2 Hilt. 300.

[d] (N. Y. 1887) A witness who, at the time he obtained the information offered in evidence, was not licensed or in any manner authorized to practice medicine, though he acted as a physician, is not within Code Civ. Proc. § 834, excluding testimony as to information acquired professionally by persons "duly authorized to practice physic or surgery."—Wiel v. Cowles, 45 Hun, 307.

§ 771. Relation of physician and patient.

[a] (Colo. 1894) In a prosecution for murder, the defense being insanity, the court, on defendant's motion, with the consent of the district attorney, appointed a physician to make an examination and to testify on the trial as to the defendant's mental condition. *Held*, that an examination and consultation between defendant and the physician was not confidential, and the physician could be called by the state to testify in rebuttal, though he had not been called by the defendant.—Nesbit v. People, 19 Colo. 441, 36 Pac. 221.

[b] (Ind. 1890) Under Rev. St. 1881, § 497, declaring that physicians shall not be competent witnesses as to matters communicated to them in the course of their professional employment, the partner of a physician is not competent to testify as to what he learns of the condition of a patient when the latter is at the offices of the firm for treatment by the witness' partner.—Aetna Life Ins. Co. v. Deming, 123 Ind. 384, 24 N. E. 86, 375.

[c] (Ind. 1894) The testimony of a physician, employed by defendant railroad company, who attended deceased at his home, as to statements made by deceased as to the manner in which the accident occurred, the statements being made in answer to questions by the physician, was properly excluded as confidential.—New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

[d] (Ind. 1895) Testimony as to deceased's testamentary capacity, based on facts ascertained while collecting a bill for professional serv-

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ices, is not within Rev. St. 1894, § 505 (Rev. St. 1881, § 497), forbidding a physician to disclose matters communicated to him in his professional capacity.—Bower v. Bower, 142 Ind. 194, 41 N. E. 523.

[e] (Mo. 1893) A physician who examined a patient in order to prescribe for her is not competent to testify to the results of the examination, where it was made at the instance of a third person, through whose negligence the patient was injured, unless the patient knew that the physician examined her in the interest of the third person, and not in her own.—Weitz v. Mound City Ry. Co., 53 Mo. App. 39.

[f] (N. Y. 1858) The Revised Statutes of this state establish the same law of privileged communication between physician and patient as exist between attorney and client. Nor is it necessary that the relation of physician and patient should actually exist, if the visit was made under such circumstances as to lead the party visited to suppose that the visit was professional, and to act on it as such.—People v. Stout, 3 Parker, Cr. R. 670.

[g] (N. Y. 1878) Where one applied to a physician for medicine to be administered to an absent third person, alleging that she had a certain sickness, *held*, that the physician was not precluded from testifying as to the applicant's statements, against the latter's objection.—Babcock v. People, 15 Hun, 347.

[h] (N. Y. 1879) A physician could, without violation of 2 Rev. St. p. 406, § 73, prohibiting the disclosure of information acquired professionally, which was necessary in order to be able to prescribe for the patient, testify whether, at the date of the application, in his opinion, D. enjoyed good health; he not having attended D. professionally for the last preceding three years, but continuing his acquaintance with him.—Edington v. Ætna Life Ins. Co., 77 N. Y. 564, reversing (1878) 13 Hun, 543.

[i] (N. Y. 1881) A., at the request of his employer, called on a physician, who examined his lungs, and found them badly diseased. A month later A.'s brother obtained a life insurance policy, and represented A.'s health to be good, and that he had never had pulmonary disease. In an action upon the policy, the physician was allowed to testify as to the examination. *Held*, that under Code, § 834, the evidence was improperly admitted.—Grattan v. Metropolitan Life Ins. Co., 24 Hun, 43.

[j] (N. Y. 1886) Code Civ. Proc. §§ 834, 836, forbidding the disclosure by a physician, when examined as a witness, of any information acquired by him while attending a patient, which was necessary to enable him to act in the capacity, unless the patient expressly waives the provision, applies in trials of will contests, to cases where the physician attended a patient upon request of another physician, and not of the patient himself, and is not limited to confidential communications.—Renihan v. Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770.

[k] (N. Y. 1887) Code Civ. Proc. § 834, rendering a physician incompetent to testify as to professional communications, does not disqualify a physician who was called in by testatrix's attorney, but without her consent, to examine her mental condition, and who, without prescribing or being recognized by her as her physician, at her request subscribes her will, from testifying to her sanity on the probate of her will.—In re Freeman, 46 Hun, 458.

[l] (N. Y. 1889) Under Code Civ. Proc. § 834, which forbids a physician from disclosing any information acquired by him "in a professional capacity, and which was necessary to enable him to act in that capacity," a physician who has been called in by one who has just suffered an accident cannot testify as to his conversing with his patient about her injuries, and making an examination of her.—Feeney v. Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544.

[m] (N. Y. 1889) One who seeks to exclude the evidence of a physician must show facts bringing the case within the statute; and, where the physician testifies that he was not acting in a professional capacity when he obtained the information, and the contrary is not shown, his evidence is properly admitted.—Stowell v. American Co-operative Relief Ass'n, 52 Hun, 613, 5 N. Y. Supp. 233.

[n] (N. Y. 1889) Physicians who state that they made the rounds of a hospital with the attending physician, "out of curiosity," and "assisted him in making the examination of" deceased, and "partly attended" her, but did not have charge of her, and had charge of the different wards with the attending physician, cannot testify as to decedent's condition in an action on an insurance policy on decedent's life, under Code Civ. Proc. § 834, which provides that no person duly authorized to practice physic or surgery may disclose any information acquired in attending a patient in a professional capacity, and necessary to enable him to act in that capacity.—Grossman v. Supreme Lodge Knights and Ladies of Honor, 53 Hun, 637, 6 N. Y. Supp. 821.

[o] (N. Y. 1890) Physicians, who were sent to the jail to examine a prisoner accused of murder, whose defense was mental irresponsibility, were properly allowed to testify for the prosecution as to his mental capacity. Their visit did not give rise to the relation of patient and physician.—People v. Kemmler, 119 N. Y. 580, 24 N. E. 9.

[p] (N. Y. 1890) In an action for personal injuries, a physician in defendant's employ can testify as to statements made to him by plaintiff of the circumstances of the accident when he called upon her for the sole purpose of procuring for defendant information about the injury, and the circumstances of the accident, and gave plaintiff no reason to believe that he intended to render her any professional services.—Heath v. Broadway & S. A. R. Co., 57 N. Y. Super. Ct. (25 Jones & S.) 496, 8 N. Y. Supp. 863.

[q] (N. Y. 1892) A physician who has attended a person professionally, and has also seen her at various other times when not in attendance on her professionally, may testify to her mental condition from knowledge and information acquired by him when not treating her professionally.—Fisher v. Fisher, 129 N. Y. 654, 29 N. E. 951, affirmed (1890) 55 Hun, 610, 9 N. Y. Supp. 4.

[r] (N. Y. 1893) On a trial of accused for murder of his wife, evidence by the uncle of the deceased that, as her physician, he removed a dead foetus of five months' formation, and that defendant said he had performed two operations on his wife, and supposed everything was removed, is not incompetent as privileged communications, since the witness was not employed by defendant.—People v. Harris, 136 N. Y. 423, 33 N. E. 65.

[s] (N. Y. 1893) On a trial of accused for murder of his wife by poison, the evidence of the attending physicians as to the symptoms of the deceased and defendant's conduct and statements is not incompetent as privileged communications.—People v. Harris, 136 N. Y. 423, 33 N. E. 65.

[t] (N. Y. 1893) Where a physician not in professional attendance on a patient secured knowledge of his condition while on a visit to the medical superintendent of the asylum in which the patient was confined, during which time he assisted the superintendent in the discharge of his professional duties, his testimony as to the patient's condition, relating wholly to matters which were alike apparent to all per-

sons sufficiently skilled in medical science, is admissible.—In re Loewenstine's Will (Com. Pl.) 2 Misc. Rep. 323, 21 N. Y. Supp. 931.

[u] (N. Y. 1893) Testimony as to what a physician called in consultation said of the nature of the disease to the attending physician in the presence of the patient is inadmissible against the patient.—Morris v. New York, O. & W. Ry. Co., 73 Hun, 560, 26 N. Y. Supp. 342, judgment reversed (1895) 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675.

§ 772. Professional character of employment.

[a] (Cal. 1895) Code Civ. Proc. § 1881, subd. 4, providing that a physician cannot be examined, without the consent of his patient, as to communications made to him by the patient, in the course of professional employment, does not preclude the physician, who attended decedent during his sickness, and who at decedent's request witnessed the will, from testifying as to his mental capacity.—In re Mullin's Estate, 110 Cal. 252, 42 Pac. 645.

[b] (N. Y. 1890) A surgeon, who had been requested to examine plaintiff by his attending physician two weeks after the accident resulting in the alleged injury occurred, is not disqualified from testifying against plaintiff as to the existence of the alleged injuries, where it does not appear that the witness was requested or expected to treat or prescribe for plaintiff, or that he did either.—Henry v. New York, L. E. & W. R. Co., 57 Hun, 76, 10 N. Y. Supp. 508, 19 Civ. Proc. R. 188.

[c] (N. Y. 1893) A physician who was sent by the prosecution to examine and report on the sanity of a prisoner committed on a charge of murder does not act in the capacity of attending a patient, or of professional adviser, and is competent to testify on the trial what defendant stated to him, at the time of his examination, about the killing.—People v. Sliney, 137 N. Y. 570, 33 N. E. 150.

[d] (Pa. 1889) A physician is not bound to make a post mortem examination or attend a man who has received a mortal injury unless he chooses; but if he does, he cannot withhold his knowledge of the facts if it is required in a judicial investigation by the coroner as to death, and he is legally subpœnaed.—Commonwealth v. Higgins, 5 Kulp, 269.

§ 773. Subject-matter of communications, information, or testimony.

[a] (U. S. 1885) Statements in a proof of death as to the previous complaints and ailments of the insured, made by his physician, are privileged communications within the meaning of the Indiana statute, and not admissible to show that the answers made to certain questions in the application for insurance were false.—Dreier v. Continental Life Ins. Co. (C. C.) 24 Fed. 670.

[b] (Ark. 1877) The admissions of a patient, to a physician, while the latter was in attendance during her illness, and which were not necessary to enable him to prescribe for her, or do any act as a surgeon, may be proved by the physician.—Collins v. Mack, 31 Ark. 684.

[c] (Ga. 1842) The declarations of a sick negro to her physician are inadmissible in evidence, except as to the disease of which she was afflicted at the time of the conversation.—Brown v. Lester, Geo. Dec. 77, pt. 1.

[d] (Ind. 1860) In an action for the seduction of a married woman, a physician cannot, under our statute, be allowed to disclose a confession by the wife of her previous adulteries.—Harris v. Rupel, 14 Ind. 209.

[e] (Ind. 1887) Under Rev. St. 1881, § 497, subd. 4, making physicians incompetent to testify "as to matters communicated to them as such, by patients, in the course of their professional business," evidence of a physician, in an action to recover damages for personal injuries, that he visited the plaintiff and examined her as a patient, in his professional capacity, and that he found no evidence of any injury such as that complained of, is inadmissible, unless the plaintiff consents or otherwise waives the privilege granted by such section.—Williams v. Johnson, 112 Ind. 273, 13 N. E. 872.

[f] (Ind. 1890) A physician who dresses the wounds of a man injured by an accident cannot testify as to statements as to the cause of the accident, made to him by his patient while being so treated.—Pennsylvania Co. v. Marion, 123 Ind. 415, 23 N. E. 978, 18 Am. St. Rep. 330, 7 L. R. A. 687.

[g] (Ind. 1896) In a bastardy case, it is not error to exclude evidence given by relatrix in the examination before a justice of the peace, and to refuse to permit her to be cross-examined concerning an examination of her made by a certain physician when accompanied by a man other than defendant, since the matter to which such evidence relates is privileged.—Post v. State, 14 Ind. App. 452, 42 N. E. 1120.

[h] (Ind. 1896) In a bastardy case, an affidavit by defendant for continuance on the ground of the absence of a witness who is a physician stated that the witness would testify that relatrix and a man other than defendant called on the witness, and said they were husband and wife, and wished him to examine her to ascertain if she was pregnant, and, if she was, to relieve her of the child, etc. *Held*, that the facts proposed to be proved did not show that relatrix called on such physician to have an abortion performed, or for a criminal purpose, so as to make the law applicable to such cases apply to such facts.—Post v. State, 14 Ind. App. 452, 42 N. E. 1120.

[i] (Ind. 1896) In a bastardy case, it was not error to deny defendant a continuance on account of the absence of a witness who is a physician, and would testify that relatrix called on him in his professional capacity, in company with a man other than defendant, and desired to be relieved of the child, and that he made no attempt to relieve her of the child, since what such physician learned was privileged and inadmissible.—Post v. State, 14 Ind. App. 452, 42 N. E. 1120.

[j] (Iowa, 1882) In an action for breach of promise, a physician called for the defense was asked if, at a certain time previous to the trial, plaintiff had consulted him as to getting rid of a child with which she was pregnant. *Held*, there being no evidence of unlawful purpose, that the communication was privileged.—Guptill v. Verback, 58 Iowa, 98, 12 N. W. 125.

[k] (Iowa, 1884) The answer of a party injured by the negligent starting of a railroad train, made in response to a question by the attending physician as to how the accident occurred, is a privileged communication.—Raymond v. Burlington, C. R. & N. Ry. Co., 65 Iowa, 152, 21 N. W. 495.

[kk] (Kan. 1895) Statements made by an injured employé to a surgeon called to attend him as to the position of the employé immediately preceding the accident are not privileged.—Kansas City, Ft. S. & M. R. Co. v. Murray, 55 Kan. 336, 40 Pac. 646.

[l] (Mich. 1870) Under Comp. Laws, § 4323, forbidding a physician from disclosing any information which he may have acquired in attending a person in his professional capacity, a physician was not competent, in an action for divorce, to testify that the husband had a venereal disease, it not appearing that the physician had any information except such as he had acquired in a professional capacity.—Briggs v. Briggs, 20 Mich. 34.

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[ll] (Mich. 1878) In an action for damages for injuries caused by the defendant's violence, *held*, that the testimony of the plaintiff's physician, that the plaintiff had admitted to him that the injury had existed before the act of violence, could not, under Comp. Laws, § 5943, be excluded, if it did not appear that the patient's disclosure was necessary to enable him to prescribe.—Campau v. North, 39 Mich. 606, 33 Am. Rep. 433.

[m] (Mich. 1882) In a chancery case, where testimony was taken before a commissioner, an attempt was made to impeach the character of one of the parties, and a physician testified that he had attended upon a woman who had a private disease, and who was said to have been employed in the family of this party. *Held*, that the physician grossly violated the rules of professional ethics, and Comp. Laws, § 5943, which prohibits physicians from revealing facts concerning their patients; that the commissioner should have refused to take testimony given in such plain violation of law.—Storrs v. Scougale, 48 Mich. 387, 12 N. W. 502.

[mm] (Mich. 1887) In an action upon a life policy, deceased having stated in her application that she had been treated for typhoid fever by Dr. H., it was error to preclude Dr. H. from testifying as to whether he had treated her for typhoid fever, on the ground that it was a matter of privilege, on which the plaintiff could insist.—Brown v. Metropolitan Life Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894.

[n] (Mich. 1890) Evidence of a doctor that he attended a certain person professionally, as to the number and dates of his visits, and that he was the family physician of such person, is not within the prohibition of How. St. § 7516, providing that a physician shall not disclose any information which he may have acquired in attending any patient in his professional capacity, and which was necessary to enable him to prescribe for such patient as a physician.—Breisenmeister v. Supreme Lodge K. P. of the World, 81 Mich. 525, 45 N. W. 977.

[nn] (Mich. 1891) It is proper for plaintiff's physician to testify that when called in professionally he was told by plaintiff that she had sued defendant, and would want him as a witness, since such testimony has no reference to plaintiff's condition.—Cooley v. Foltz, 85 Mich. 47, 48 N. W. 176.

[o] (Mich. 1891) In an action for assault and battery defendant may introduce as witnesses the physicians who attend plaintiff, and prove the fact of such attendance, but they cannot testify as to her condition where their knowledge was acquired in their professional capacity, since How. St. § 7516, prohibits a physician from disclosing any information which he may have acquired in attending a patient in his professional capacity.—Cooley v. Foltz, 85 Mich. 47, 48 N. W. 176.

[oo] (Mich. 1893) In an action for a personal injury received October 23d, defendant claimed that the injury was due to an accident to plaintiff August 9th, and a physician swore that he attended plaintiff for the earlier injury from August 10th to September 3d. *Held*, that defendant was entitled to ask the physician whether he discharged plaintiff from treatment on September 3d, as the fact of treatment by a physician is not a matter of privilege.—Dittrich v. City of Detroit, 98 Mich. 245, 57 N. W. 125.

[p] (Mo. 1885) Information given to a physician as such to enable him to prescribe intelligently is privileged.—Norton v. City of Moberly, 18 Mo. App. 457.

[pp] (Mo. 1887) Rev. St. § 4017, makes a physician incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." *Held* that, in an action for personal injuries caused by a defective sidewalk, a physician who was called to treat plaintiff after the accident was incompetent to show that plaintiff had been drinking.—Kling v. City of Kansas, 27 Mo. App. 231.

[q] (Mont. 1877) The provision of Cod. St. p. 125, § 450, that a physician shall not testify, without the consent of the patient, as to any information he may have acquired while attending the same, *held* not to exclude testimony of a physician, on trial of a patient for incest, that one of the defendants had stated to him that they, the defendants, had had sexual intercourse.—Territory v. Corbett, 3 Mont. 50.

[qq] (N. Y. 1839) A physician, consulted by a seducer as to the means of producing an abortion, is not privileged from testifying.—Hewitt v. Prime, 21 Wend. 79.

[r] (N. Y. 1859) Testimony of a physician as to the nature of his patient's disease, and its mode of treatment, introduced to prove the value of his services, is not incompetent as involving a disclosure of confidential communications.—Kendall v. Grey, 2 Hilt. 300.

[rr] (N. Y. 1873) In an action for divorce, upon the ground of adultery, a physician testified to certain circumstances and conversations tending to establish the fact of adultery, and stated that he derived his information from the defendant as a patient, in professional confidence. *Held*, that the testimony of witness was inadmissible, under the statute forbidding the disclosure by a physician of professional communications. 2 Rev. St. p. 406, § 73.—Hunn v. Hunn, 1 Thomp. & C. 499.

[s] (N. Y. 1877) A physician cannot testify as to the condition of deceased from information acquired upon examination necessary to enable the physician to prescribe for him.—Dilleber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182.

[ss] (N. Y. 1886) Under Code, §§ 834, 836, prohibiting a physician from disclosing information acquired in attending a patient in a professional capacity and necessary to enable him to act, a consulting physician may not testify in proceedings for the probate of the patient's will. Nor is the statute limited to the prohibition of disclosures of information of a confidential nature only.—Reinham v. Dennin, 18 Abb. N. C. 101; Renihan v. Same, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770.

[t] (N. Y. 1887) Under Code Civ. Proc. § 834, providing that a physician "shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," the affidavit of the physician of a person who is charged with being an habitual drunkard cannot be read in support of an application for the appointment of a committee.—In re Hoyt, 20 Abb. N. C. 162.

[tt] (N. Y. 1887) In an action for damages for personal injuries to plaintiff at a railroad crossing, a physician who attended plaintiff was asked by defendant whether during one of his professional visits plaintiff stated to witness that when approaching the crossing on the occasion of the accident he heard persons hallooing to him, and saw a man swing his hat, but did not think where he was until the train was almost upon him. *Held*, that it was error to exclude the evidence under Code Civ. Proc. § 834, forbidding a physician to disclose information "acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."—Brown v. Rome, W. & O. R. Co., 45 Hun, 439.

[u] (N. Y. 1887) On the probate of a will the family physician is competent to testify to the facts and events not connected with physical complaints, and which were not obtained for the purpose of treating a patient.—In re Boury's Will, 8 N. Y. St. Rep. 809.

[uu] (N. Y. 1887) The testimony of a testatrix' physician is incompetent on the question of her testamentary capacity.—In re Hannah, 11 N. Y. St. Rep. 807.

[uuu] (N. Y. 1888) In an action for personal injuries necessitating the amputation of plaintiff's leg, the question asked the physician who performed the operation "What was the condition of plaintiff's leg at that time?" was properly excluded.—Jones v. Brooklyn, B. & W. E. R. Co. (City Ct. Brook.) 3 N. Y. Supp. 253, judgment affirmed (1890) 121 N. Y. 683, 24 N. E. 1098.

[v] (N. Y. 1889) The question of testator's belief as to contestant's insanity being a material matter to explain his testamentary provisions in her behalf, his conversations with the physicians on that subject are admissible, and do not come within Code Civ. Proc. § 834, as that applies only to communications necessarily made to a physician by a patient in the course of professional treatment.—Hoyt v. Hoyt, 112 N. Y. 493, 20 N. E. 402, affirming (1887) 9 N. Y. St. Rep. 731.

[vv] (N. Y. 1889) In an action on a life insurance policy, defendant may prove by physicians that they attended the insured professionally, though information acquired in such attendance cannot be disclosed.—Numrich v. Supreme Lodge Knights and Ladies of Honor (City Ct. N. Y.) 8 N. Y. Supp. 552.

[w] (N. Y. 1889) Defendant was indicted for manslaughter in aiding a woman to produce a miscarriage. He entered the office of a physician, and stated that the woman in question was very sick, and that the physician must come at once. On the physician's saying, in answer to a question, that he would like to know what the difficulty was before leaving the office, as such knowledge would enable him to provide himself with the proper remedies, defendant informed him that the woman was about three months advanced in pregnancy; that she inserted a catheter into her womb, and that defendant then blew into it; that he did so because the same process had proved successful on a former occasion. *Held*, that such statements to the physician were privileged.—People v. Brower, 53 Hun, 217, 6 N. Y. Supp. 730, 7 N. Y. Cr. R. 292.

[x] (N. Y. 1890) A physician examined as a judgment debtor in supplementary proceedings cannot be required to deliver up to the receiver his original books of account, containing information received while attending his patients, showing the nature of their maladies, under Code Civ. Proc. § 834, forbidding physicians to make such disclosures; a list of the accounts having been already furnished the receiver.—Kelly v. Levy (City Ct. N. Y.) 8 N. Y. Supp. 849.

[xx] (N. Y. 1890) On proceedings to probate a will, evidence of a physician as to a statement made to him by decedent, and which he testifies was not necessary to enable him to act in his professional capacity, is admissible.—In re Halsey's Estate, 9 N. Y. Supp. 441, 2 Con. Sur. 220.

[y] (N. Y. 1891) Upon issues as to testamentary capacity and undue influence, the opinion of the physician attending testator, derived from observations while so acting, as to whether testator "could correctly and intelligently comprehend the nature and condition and value of his property," is inadmissible.—Van Orman v. Van Orman, 58 Hun, 606, 11 N. Y. Supp. 931.

[yy] (N. Y. 1891) On a reference of a claim against the estate of an intestate for services as a professional nurse, which was disputed by the administrator, physicians who had attended deceased testified that the claimant acted as his nurse, and that their knowledge of the fact was derived from having seen her acting in that capacity, and from statements to that effect made to them by the intestate. *Held*, that such testimony was admissible.—Pandjiris v. McQueen, 59 Hun, 625, 13 N. Y. Supp. 705.

[z] (N. Y. 1891) The physician who attended testator was competent to testify as to his condition at the time of a certain transaction, where the physician further stated that the information which he obtained while attending testator was not such as was necessary to enable him to act professionally, and that testator's condition was such that any person of ordinary intelligence could have understood it.—Herrington v. Winn, 60 Hun, 235, 14 N. Y. Supp. 612, 20 Civ. Proc. R. 326.

[zz] (N. Y. 1892) Code Civ. Proc. § 834, declaring that a physician shall not be allowed to disclose as a witness "any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," does not prohibit a physician from testifying that he attended a person in his professional capacity, and that the patient was sick, or from giving the number of times and the dates when the patient applied to him, and the places where he attended him, for the purpose of showing that the patient was not in good health at a certain time.—Patten v. United Life & Accident Ins. Ass'n, 133 N. Y. 450, 31 N. E. 342.

[zzz] (N. Y. 1893) On a trial of accused for murder of his wife, evidence by the uncle of the deceased, that as her physician he removed a dead fœtus of five months' formation, and that defendant said he had performed two operations on his wife, and supposed everything was removed, is not incompetent as privileged communications.—People v. Harris, 136 N. Y. 423, 33 N. E. 65.

§ 774. Mode or form of communication or acquisition of information.

[a] (Ind. 1881) Under a statute protecting "matters confided" to physicians "in the course of their profession," *held*, that a physician could not testify as to what he had learned of his patient's ailments either by examination, observation, or oral communication.—Masonic Mut. Ben. Ass'n v. Beck, 77 Ind. 203, 40 Am. Rep. 295.

[b] (Ind. 1888) Under Rev. St. 1881, § 497, which forbids physicians to testify as to matter communicated to them, as such, by patients in the course of their professional duties, a physician cannot prove the mental and physical condition of his patient, whether his knowledge was derived from the latter's words, his own observation, or his professional examination.—Heuston v. Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409.

[c] (Iowa, 1895) Code 1873, § 3643, providing that a physician shall not give in evidence any confidential communication properly intrusted to him in his professional capacity, extends to the knowledge acquired by personal examination of a patient.—Prader v. National Masonic Acc. Ass'n, 95 Iowa, 149, 63 N. W. 601.

[d] (Mich. 1870) Comp. Laws, § 4323, forbidding a physician to disclose any information which he may have acquired while attending any patient in his professional character, and which information was necessary to prescribe for such patient or act for him, does not con-

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fine the information acquired by communications made by the patient to the physician, but protects whatever in order to enable the physician to prescribe was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose. — Briggs v. Briggs, 20 Mich. 34.

[e] (Minn. 1873) Information acquired by a physician otherwise than in a professional capacity, and not necessary to enable him to prescribe or act for the patient, is not privileged under Gen. St. 1866, c. 73, § 10, subd. 4 (Gen. St. 1878, c. 73, § 10).—Jacobs v. Cross, 19 Minn. 523 (Gil. 454).

[f] (Mo. 1880) A physician cannot testify to facts acquired professionally from a patient, whether gained from statements or examination, unless they are so superficially apparent that it is evident that no confidence exists concerning them. — Linz v. Massachusetts Mut. Life Ins. Co., 8 Mo. App. 363.

[g] (Mo. 1882) Under Rev. St. § 4019, making a physician incompetent to testify as to "information" derived by him from his patient, *held*, that "information" included not only communications made by the patient, but knowledge obtained by the observation or examination of the physician.—Gartside v. Connecticut Mut. Life Ins. Co., 76 Mo. 446, 43 Am. Rep. 765.

[h] (Mo. 1887) A physician cannot testify, against his patient's objection, touching the latter's condition, regardless of whether he derived the information from his patient's statement or from his own observation.—Corbett v. St. Louis, I. M. & S. Ry. Co., 26 Mo. App. 621.

[i] (N. Y. 1876) The provision of 2 Rev. St. p. 406, § 73, prohibiting a physician from disclosing any information received by him necessary to enable him to prescribe for a patient, includes not only information from statements of the patient, but such knowledge as the physician may acquire from the patient, from statements of others, present at the time, or from his own observation of the patient's symptoms and appearance, it being presumed, from the relationship of the parties, that information so imparted was given or obtained for the purpose of enabling the physician to prescribe for the patient, and was therefore material. Accordingly, in an action upon a policy of life insurance, an offer by defendant, to prove by a physician who had been consulted professionally by the assured, that prior to the application he was afflicted with certain diseases for which the witness treated him, is properly excluded, although the testimony is expressly limited to what the witness knew, independent of any information given or statements made by the assured.—Edington v. Mutual Life Ins. Co., 67 N. Y. 185, reversing (1875) 5 Hun, 1.

[j] (N. Y. 1879) In a contest of probate of a second codicil on the ground of incompetency and undue influence, testimony of a physician who had attended the testator during the last eight years of his life *held* not to be inhibited by Code, § 834, as information acquired while attending the deceased professionally. And if it were, the contestants, as personal representatives of the deceased, might waive the same. —Staunton v. Parker, 19 Hun, 55.

[k] (N. Y. 1880) The prohibition, in Code Civ. Proc. § 834, of a physician's disclosure of information acquired in attending a patient professionally, necessary to enable him to prescribe, includes information received by eye or ear, from observation of the patient's symptoms, from the patient himself, or from the statements of others around him. Nor need it be shown by formal proof in the first instance that the information was necessary to enable the physician to prescribe.—Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617.

[l] (N. Y. 1883) On an issue as to the truth of representations made by an applicant for life insurance as to his physical condition, a physician who had never seen the applicant before or since an examination made by him was incompetent to testify as to what opinion he had formed, based on the general sight of the man before he had made the examination, or had any conversation with him, as the communications to the physician's sense of sight are within the statute.—Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372.

[m] (N. Y. 1887) Code Civ. Proc. § 834, prescribes: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." S. was on trial for murder, and his only defense was insanity. One Dr. B. had, for several months preceding the trial, been jail physician, and while he had looked after all the jail prisoners in a general way, and examined and kept the accused under his observation, he had never prescribed for nor professionally attended him. Dr. B. was called as a witness for the state. *Held* not error and not in contravention of Code Civ. Proc. § 834, to permit him to answer a hypothetical question as to defendant's sanity, from which question was excluded all knowledge which he had of the defendant personally, and which was based entirely upon facts occurring before defendant came to the jail.—People v. Schuyler, 106 N. Y. 298, 12 N. E. 783, affirming (1887) 43 Hun, 88.

[n] (N. Y. 1887) Such witness was not rendered incompetent because he stated that it was questionable whether, in answering the hypothetical question, he could exclude from his mind the knowledge he had obtained from the defendant in seeing him in the jail; it nowhere appearing that he had any knowledge obtained while attending defendant professionally, or that he had received any information necessary to enable him to attend as a physician, or ever prescribed for defendant, or that witness in answering took into consideration any improper elements.—People v. Schuyler, 106 N. Y. 298, 12 N. E. 783, affirming (1887) 43 Hun, 88.

[o] (N. Y. 1887) Under Code Civ. Proc. § 834, providing that a physician shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, which was necessary to enable him to act in that capacity, a physician who attended testator during the last year of his life was competent to testify that he had observed the testator during this time when he was not attending him as a physician, and as to facts which only went to observations made of outward physical facts open to the sight of any person. —Burley v. Barnhard, 9 N. Y. St. Rep. 587.

[p] (N. Y. 1889) The mental condition of a deceased person being in issue, her physician testified that he made visits both professionally and unprofessionally; also that he first noticed a change in her memory about a year before her death, the change being that she did not recollect things as she had formerly done; and that, whereas at the beginning of his treatment she always recollected the kinds of medicine used, in the latter part of her life she could not remember them from one visit to another. *Held* incompetent.—Brigham v. Gott, 51 Hun, 636, 3 N. Y. Supp. 518.

[q] (N. Y. 1889) The evidence cannot be justified on the ground that the witness may have made his observations as to her failing mem-

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ory during those visits which were not professional. His testimony clearly indicates that they were made in the course of his medical treatment.—Brigham v. Gott, 51 Hun, 636, 3 N. Y. Supp. 518.

[r] (N. Y. 1889) A physician who has attended a testatrix professionally, and visited her socially, cannot give his opinion of her testamentary capacity, formed from impressions received from the friendly visits, as such impressions necessarily relate to knowledge acquired professionally, and it is immaterial whether the information received from her, on which his impressions were based, was necessary to a proper treatment of her case.—In re Darragh, 52 Hun, 591, 610, 5 N. Y. Supp. 58, reversing judgment (1888) 3 N. Y. Supp. 283, 1 Con. Sur. 170.

§ 775. Confidential character of communication.

[a] (Iowa, 1883) A communication from an injured man, made in response to a question from his physician as to how his injury was received, asked for the purpose of ascertaining the facts in order to properly treat him, is a "confidential communication," within Code 1873, § 3643, and inadmissible in evidence.—Raymond v. Burlington, C. R. & N. Ry. Co., 17 N. W. 923.

[b] (N. Y. 1880) On a trial of P. for the murder of W. by poison, a physician who attended W. was a competent witness as to the condition in which he found W., both from his own observation and from what W. told him. There was nothing therein confidential within Code Civ. Proc. § 834.—Pierson v. People, 79 N. Y. 424, 85 Am. Rep. 524.

[c] (N. Y. 1887) In probate proceedings involving the testamentary capacity of a decedent, a physician who had attended her might properly be asked to tell her condition during the time he had attended her, "provided the information which you give us, and which you so acquired in attending on her, was not necessary to enable you to act in your capacity as physician."—In re Darragh's Estate, 15 N. Y. St. Rep. 452.

§ 776. Communications in presence or hearing of others.

[a] (Ind. 1894) Rev. St. 1881, § 497, disqualifying physicians from testifying as to matters told them by patients in the course of their business, does not forbid one in charge of an ambulance, sent by a stranger to take plaintiff home after his accident, to testify as to what plaintiff then said to the physician as to the cause of the accident.—Springer v. Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244.

[b] (Iowa) A physician cannot be allowed to disclose a privileged communication made in his presence to his partner.—(1883) Raymond v. Burlington, C. R. & N. Ry. Co., 17 N. W. 923; (1884) Id., 65 Iowa, 152, 21 N. W. 495.

§ 777. Death of patient.

[a] (N. Y. 1876) The rule that prohibits disclosure by a physician is not terminated by the death of the patient. As the rule was made for the benefit of the patient, he may waive it; but, until there is such a waiver, the physician should not be allowed to testify.—Cahen v. Continental Life Ins. Co., 41 N. Y. Super. Ct. (9 Jones & S.) 296.

[b] (N. Y. 1880) The prohibition in Code Civ. Proc. § 834, of a physician's disclosure of information acquired in attending a patient professionally, necessary to enable him to prescribe, is not removed by the death of the patient.—Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617.

6. CONFESSIONS OR OTHER COMMUNICATIONS TO CLERGYMAN OR MINISTER OF RELIGION.

§ 778. In general.

[a] Admissions made to a clergyman may be received in evidence, in a criminal case, if not made to him in his professional character, in the course of discipline enjoined by the church.

—(Ind. 1877) Gillooley v. State, 58 Ind. 182; (N. Y. 1835) People v. Gates, 13 Wend. 311.

[b] (Cal. 1880) On a contest as to the probate of a will, it appeared that a Roman Catholic priest had made a preliminary examination of deceased to learn whether she was in a proper condition of mind to make a confession. *Held*, that her answers on such examination were not privileged communications within Code, § 1881, excluding confessions made to a priest in his professional character.—In re Toomes' Estate, 54 Cal. 509.

[c] (Ind. 1881) Statements made to an elder, also a deacon in the church, who was looking up evidence to sustain charges against a member of the church, are not confessions within the meaning of Acts 1879, p. 245, rendering clergymen incompetent to testify as to confessions made in the course of discipline enjoined by their church.—Knight v. Lee, 80 Ind. 201.

[d] (Iowa, 1895) Code 1873, § 3643, making confidential communications to a minister in his professional capacity privileged, does not prevent a minister to whom one accused of crime makes a voluntary statement in justification of his acts from testifying to such statements on the trial of such person on an indictment subsequently found, but based on the same facts as the first accusation.—State v. Brown, 95 Iowa, 381, 64 N. W. 277.

7. COMMUNICATIONS TO OR INFORMATION ACQUIRED BY PUBLIC OFFICERS.

§ 779. In general.

[a] (U. S. 1827) In a criminal prosecution, the officer who apprehended the prisoner being examined as a witness for the United States is not bound to disclose the name of the person from whom he received the confidential information which led to the prisoner's detection. Such a disclosure would be prejudicial to the public in the administration of justice by deterring persons from making disclosures of crimes which they know to have been committed.—United States v. Moses, Fed. Cas. No. 15,825 [4 Wash. C. C. 726].

[b] (U. S. 1890) Communications between an applicant for a patent and the patent office touching an unissued patent are not recognized as privileged either by any express legislation or by any rule of law.—Edison Electric Light Co. v. United States Electric Lighting Co. (C. C.) 44 Fed. 294.

[c] (U. S. 1895) A deputy collector of internal revenue cannot be compelled to testify, in a criminal proceeding in a state court, as to statements made to him by an applicant for a special retail liquor dealer's tax stamp, which statements were made for the purpose of being reduced to writing and embodied in the records of the internal revenue office.—In re Huttman (D. C.) 70 Fed. 699.

[d] (Mass. 1872) In an action for maliciously and falsely representing to the treasury department of the United States that plaintiff was intending to defraud the revenue, defendants cannot be compelled to answer interrogatories as to whether they did or did not give or cause to be given information to the department con-

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cerning the alleged intention to defraud, such evidence being excluded because of the confidential nature of such communications.—Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736.

8. ASSERTION OF PRIVILEGE, OBJECTIONS, AND DETERMINATION AS TO ADMISSIBILITY.

PERSONS ENTITLED TO ASSERT PRIVILEGE OR OBJECT TO ADMISSIBILITY, § 780.
WAIVER OF PRIVILEGE, § 781.
—— ACTS CONSTITUTING WAIVER, § 782.
EXCLUSION ON COURT'S OWN MOTION, § 783.
OBJECTIONS TO ADMISSIBILITY, § 784.
WAIVER OF OBJECTIONS, § 785.
EVIDENCE AS TO NATURE AND CIRCUMSTANCES OF COMMUNICATION, § 786.
DETERMINATION AS TO ADMISSIBILITY, § 787.

§ 780. Persons entitled to assert privilege or object to admissibility.

[a] The privilege of a counsel, attorney, or solicitor not to divulge any matter communicated to him in professional confidence, is not that of the attorney, etc., but of the client.

—(U. S. 1826) Chirac v. Reinicker, 24 U. S. (11 Wheat.) 280, 6 L. Ed. 474;

(N. Y. 1816) Yordan v. Hess, 13 Johns. 492;

(Va. 1814) Parker v. Carter, 4 Munf. 273, 6 Am. Dec. 513.

[b] (Ark. 1860) A witness cannot be required to state communications made in confidence to his attorney.—Bobo v. Bryson, 21 Ark. 387, 76 Am. Dec. 406.

[c] (Ind. 1873) Communications made in consultation by a client to his attorney are privileged and protected from inquiry when the client is a witness as well as when the attorney is a witness.—Bigler v. Reyher, 43 Ind. 112.

[d] (Kan. 1877) The client as well as the attorney may refuse to testify to what was said between them at an interview in professional confidence. The rule which provides that an attorney shall be incompetent to testify concerning communications made to him by his client, in that relation, or his advice thereon, without the client's consent, would be of no utility or benefit, if the client could be compelled, against his consent, to make such disclosures.—State v. White, 19 Kan. 445, 27 Am. Rep. 137.

[e] (Md. 1831) An attorney whose client is not a party, to object or consent to his examination, cannot be permitted to speak of any fact which came to his knowledge as such attorney, as the privilege belongs to the client and not to the attorney.—Hodges v. Mullikin, 1 Bland, 503.

[f] (Mich. 1890) One who sues upon a benefit certificate, as assignee thereof, may raise the question of privilege as to the testimony of the physician of the insured.—Breisenmeister v. Supreme Lodge K. P. of the World, 81 Mich. 525, 45 N. W. 977.

[g] (Mich. 1894) The privilege as to communications between physician and patient is that of the patient; and where, in an action by the patient, plaintiff does not object to the testimony of the physician in regard thereto, it is error to exclude it.—Lincoln v. City of Detroit, 101 Mich. 245, 59 N. W. 617.

[h] (Minn. 1890) The rule relating to privileged communications does not apply to questions put to a client as to statements made by him to his attorney.—State v. Tall, 43 Minn. 273, 45 N. W. 449.

[i] (Mo. 1884) The patient or his representative may put the patient's physician's testimony in evidence, although, if offered by the adverse party, it would be deemed privileged.—Groll v. Tower, 85 Mo. 249, 55 Am. Rep. 358.

[j] (N. Y. 1876) The right of objecting to the disclosure of privileged communications made to a physician is not limited to the patient and his personal representatives, but an assignee may exercise it, and his right is not affected by the decease of the patient.—Edingson v. Mutual Life Ins. Co., 67 N. Y. 185.

[k] (N. Y. 1881) The protection afforded a client under Code Civ. Proc. § 835, providing that an attorney shall not be allowed to disclose a communication made by his client to him in the course of his professional employment, may be invoked by the executor on proceedings for probate before admission of the will.—Pearsall v. Elmer, 5 Redf. Sur. 181.

[l] (N. Y. 1891) Under Pen. Code, § 715, which provides that the wife of an indicted person may testify, but cannot be compelled to disclose confidential communications made by the defendant, the objection that a question calls for such a disclosure may be made by the defendant instead of by the witness.—People v. Wood, 126 N. Y. 249, 27 N. E. 362.

[m] (N. Y. 1892) An attorney cannot raise the objection that certain communications to him were privileged, where the person making them has disclaimed the existence of the relation of attorney and client between himself and the witness.—In re Mellen, 63 Hun, 632, 18 N. Y. Supp. 515, judgment affirmed (1893) 138 N. Y. 615, 33 N. E. 1083.

[n] (Ohio, 1879) In an action against a garnishee for falsely answering that he had no property of the debtor, it appeared that the debtor had transferred property to R., who had transferred it to the garnishee. *Held*, that R.'s attorney might, with the consent of R., testify for plaintiff as to the transfer to R., without the consent of the other parties to the transfer.—Stoppel v. Woolner (D. C.) 4 Ohio Dec. 489, 4 Wkly. Law Bul. 576.

[o] (Pa. 1845) A sheriff is entitled to the same privilege, in his communications with his attorney, as other persons.—Paxton v. Steckel, 2 Pa. (2 Barr) 93.

[p] (Pa. 1890) A third person cannot object to the disclosure of confidential communications by an attorney.—Appeal of McNulty, 135 Pa. 210, 19 Atl. 936.

[q] (Tex. 1892) The claim that the communications of attorney and client are privileged is personal to the latter, and cannot be made by his adversary.—Smith v. Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

[r] (Vt. 1856) The privilege in regard to communication between counsel and client extends to both parties.—Hemenway v. Smith, 28 Vt. (2 Williams) 701.

§ 781. Waiver of privilege.

Waiver of obligation of secrecy by requesting attorney to witness will, see ante, § 756.

[a] (Cal. 1887) Where a physician called as a witness refuses to answer a relevant and material question on the ground of "privilege," and his patient waives that privilege, the court should compel him to answer.—Valensin v. Valensin, 73 Cal. 106, 14 Pac. 397.

[b] (Cal. 1893) Code Civ. Proc. § 1881, subd. 4, providing that a physician cannot, without consent of the patient, be examined as to any information acquired in attending the patient, necessary to enable him to act, cannot be waived by a contesting heir as against the proponent widow, so that a physician, in a will contest based on testator's incapacity, can testify that he prescribed for testator for mental trouble.—In re Flint's Estate, 100 Cal. 391, 34 Pac. 863.

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[c] (Ill. 1865) The rule of professional sanctity which prevents an attorney at law from testifying in regard to matters confided to him in his professional capacity is for the benefit of the client, who may waive the obligation, and the heir of the client is entitled to the same prvilege.—Fossler v. Schriber, 38 Ill. 172.

[d] (Ill. 1885) The privileged character of communications by a client to his attorney is personal to the client, who may waive the privilege by disclosing the matters communicated, and if he does so, other parties cannot object. —Scott v. Harris, 113 Ill. 447.

[e] (Ind. 1863) In section 3 of the act of 1861 (2 Gav. & H. St. p. 168), the term "confidential communications" seems to be limited to matters confided to attorneys, physicians, and clergymen, and does not include communications between husband and wife, and the right to waive objections to their disclosure, therefore, does not apply to the latter.—Bevins v. Cline's Adm'r, 21 Ind. 37.

[f] (Ind. 1889) Though a physician, who attended testator in his last illness, was incompetent to testify that he was of sound mind unless his legal representative consented, yet the latter, seeking to maintain the will, could waive the objection, and call the physician for such purpose.—Morris v. Morris, 119 Ind. 341, 21 N. E. 918.

[g] (Ind. 1898) Where there is no legal representative of a testatrix, her physician cannot testify as to her mental condition, from his knowledge and information, and from conversations with her, as no one but the patient, or, in case of her death, her personal representative, can waive the seal of secrecy and confidence as to communications with a physician. —Gurley v. Park, 135 Ind. 440, 35 N. E. 279.

[h] (Iowa, 1894) The executor may waive the privilege of communications between testator and his physician, so as to admit the latter's testimony as to testator's mental condition.—Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

[i] (Mich. 1879) The provision of Comp. Laws, § 5943, excluding a physician's testimony as to facts learned in the treatment of a patient, may be waived by the patient.—Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667, 3 N. W. 173; Scripps v. Foster, 41 Mich. 742, 3 N. W. 216.

[j] (Mich. 1879) The provision of Comp. Laws, § 5943, excluding a physician's testimony as to matters learned while attending a patient, may be waived by the patient, or by those who represent his interests after his death; and the proponents of a will may examine testator's physician for the purpose of showing testator's mental condition while he was being treated by witness.—Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882.

[k] (Mich. 1883) The privilege of secrecy as to what passes between attorney and client is the privilege of the client, and he may testify as to what advice he acted under in a matter, or the attorney may, with the client's consent, testify as to what advice he gave in regard thereto.—Passmore v. Passmore, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62.

[l] (Miss. 1887) An accomplice who had turned state's evidence was asked a question, the answer to which would have divulged a confidential statement to his attorney. *Held* admissible, as by turning state's evidence he waived all privileges regarding facts pertinent to the issue, and could be compelled to disclose confidential communications to counsel.—Jones v. State, 65 Miss. 179, 3 South. 379.

[m] (Mo. 1860) An attorney at law is a competent witness in a cause in which he is engaged as attorney; he may testify as to privileged communications made to him by his client, if they are otherwise relevant, when called upon by his client so to do.—Riddles v. Aikin, 29 Mo. 453.

[n] (Mo. 1886) Rev. St. 1879, § 4017, prescribing that a physician or surgeon shall be incompetent to testify concerning any information which he may have acquired from any patient while attending him in a professional character, does not create an absolute disqualification, and the patient may call the physician as a witness to testify as to information thus acquired.—Carrington v. City of St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108.

[o] (Mo. 1886) The patient may waive the privilege attaching to communications between himself and his physician, and in that event it is competent for the physician to testify as to such communications.—Blair v. Chicago & A. Ry. Co., 89 Mo. 383, 1 S. W. 350.

[p] (Mo. 1886) In an action for personal injuries caused to plaintiff's wife, the attending physician may testify what the wife told him about her injuries, if the husband and wife waive their privilege.—Blair v. Chicago & A. Ry. Co., 89 Mo. 334, 1 S. W. 367.

[q] (Mo. 1889) In proceedings to contest a will the defendant devisee may waive the protection of Rev. St. 1879, § 4017, which provides that information acquired by a physician, in his professional capacity, shall be privileged, and may introduce the attending physician of testatrix as a witness.—Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552.

[r] (Mo. 1891) Rev. St. 1889, § 8925, providing that a physician shall be incompetent to testify concerning information acquired from a patient while attending him in a professional character, merely confers the privilege of suppressing such information upon the patient, which the latter may waive.—Davenport v. City of Hannibal, 108 Mo. 471, 18 S. W. 1122.

[s] (N. H. 1880) The privilege of communications between attorney and client may be waived by the client.—Sleeper v. Abbott, 60 N. H. 162.

[t] (N. Y. 1835) The rule that a physician shall not be permitted to disclose information acquired by him in attending a patient professionally is a privilege of the patient, and may be waived by him.—Johnson v. Johnson, 14 Wend. 637.

[tt] (N. Y. 1838) Counsel professionally consulted may be required to testify, if the privilege be waived by the party who consulted him, although the interest in the subject-matter of the confidential communication has passed to a third person, who objects to the disclosure.—Benjamin v. Coventry, 19 Wend. 353.

[u] (N. Y. 1862) Where professional communications are made by two or more clients jointly, to their common legal adviser, the seal of confidence can only be removed by all of them; the consent of a majority only is insufficient; and one or more of them cannot require a disclosure as evidence against the others without their consent.—Whiting v. Barney, 38 Barb. 393, reversed (1864) 30 N. Y. 330, 86 Am. Dec. 385.

[uu] (N. Y. 1883) On probate of a will, an attorney of deceased may testify to communications received in the course of his professional employment, when the attorney is called to testify by the executor, who alone could object; that parties contesting the will object to his testifying is of no consequence.—Whelpley v. Loder, 1 Dem. Sur. 368.

[v] (N. Y. 1885) An executor is not authorized to remove the seal of secrecy placed upon the lips of clergymen, physicians, and attorneys under sections 833, 834, and 835, Code, as to knowledge obtained by them in their confidential relations with a party since deceased.—

Westover v. Ætna Life Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1.

[vv] (N. Y. 1888) The privilege of physicians and attorneys, given by Code Civ. Proc. §§ 834, 835, as to information received in the course of their professional employment, applies to proceedings to probate a will, and cannot be waived, after the patient's or client's death, by her executor or any one else.—Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874, reversing Whelpley v. Loder (1883) 1 Dem. Sur. 368.

[w] (N. Y. 1889) Under Code Civ. Proc. § 836, allowing a person to waive the right of having his communications with his counsel kept secret, a party may call his counsel to testify to conversations between them.—Smith v. Crego, 54 Hun, 22, 7 N. Y. Supp. 86.

[ww] (N. Y. 1894) Laws 1891, amending Code Civ. Proc. § 836, so as to provide that privileged communications by a patient to his physician may be waived only on the trial, does not apply to an action on a policy issued before the amendment, and containing an express waiver of the privilege as to communications between the insured and his physician.—Foley v. Royal Arcanum, 78 Hun, 222, 28 N. Y. Supp. 952.

[x] (N. Y. 1895) Code Civ. Proc. § 836, as amended in 1893, provides that a physician may testify as to the facts which come to his knowledge while attending a patient professionally, if the validity of the last will and testament of such deceased patient is in question, and the provisions of section 834 are waived by the executor or the surviving husband, widow, or any heir at law or any next of kin. *Held*, that such waiver may be made by any one of the persons named in the statute, and it is not necessary that they should unite to make the waiver effective.—In re Murphy's Will, 85 Hun, 575, 33 N. Y. Supp. 198, 24 Civ. Proc. R. 413, 2 N. Y. Ann. Cas. 77.

[xx] (N. Y. 1895) A clause in an application for life insurance waiving the provision of section 834 is authorized by section 836, as it is a reasonable construction of the statute that its provisions are "expressly waived upon the trial" by producing thereat a proper stipulation to that effect.—Dougherty v. Metropolitan Life Ins. Co., 87 Hun, 15, 33 N. Y. Supp. 873.

[y] (N. Y. 1895) It is not contrary to public policy to permit an applicant for life insurance to waive the provision of section 834, as the privilege is personal to the patients, and is of no interest to the general public.—Dougherty v. Metropolitan Life Ins. Co., 87 Hun, 15, 33 N. Y. Supp. 873.

[yy] (Ohio, 1879) In an action to reach property alleged to have been fraudulently conveyed, the attorney of the first grantee with his consent may testify as to facts obtained in his capacity as attorney, without consent of the other parties to the transaction.—Stoppel v. Woolner, 2 Cleve. Law Rep. 252, 4 Ohio Dec. 489.

[z] (Va. 1871) The privilege of confidential communications to the counsel of one of several parties jointly indicted for a conspiracy to commit a particular crime, made in the presence of all, and therefore privileged as to all, cannot be released by one alone.—Chahoon v. Commonwealth, 21 Grat. 822.

[zz] (Va. 1881) The waiver by a client of the privilege which protects professional communications with his attorney must be distinct and unconditional.—Tate v. Tate's Ex'r, 75 Va. 522.

[zzz] (Va. 1881) The rule of law which protects professional communications, being for the benefit of the client, may be waived by him.—Tate v. Tate's Ex'r, 75 Va. 522.

§ 782. —— Acts constituting waiver.

[a] (U. S. 1888) Defendant, alleging that she was deceived in relation to her rights by her counsel, and having given testimony in relation thereto, cannot object to testimony by such counsel upon the same matters.—Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488.

[b] (U. S. 1824) Where a plaintiff examines his attorney as a witness, he waives his privilege, and upon cross-examination the attorney is bound to answer generally.—Crittenden v. Strother, Fed. Cas. No. 3,394 [2 Cranch, C. C. 464].

[c] (U. S. 1885) Where a corporation has produced in evidence fragmentary parts of the letters of its attorney, written to the other officers of the company, it cannot be allowed to shelter itself behind the privilege to insist upon the privacy of the communications.—Western Union Tel. Co. v. Baltimore & Ohio Tel. Co. (C. C.) 26 Fed. 55, 23 Blatchf. 419.

[d] (U. S. 1888) The provisions of Rev. St. § 4017, prohibiting a physician from testifying as to any information acquired from a patient on a professional visit, may be waived by the patient, and a waiver in an application for life insurance is binding on the beneficiary.—Adreveno v. Mutual Reserve Fund Life Ass'n (C. C.) 34 Fed. 870.

[e] (Ga. 1887) The fact that certain correspondence between an attorney and his client had been admitted in evidence upon a former trial, in violation of the rule relating to confidential communications, does not justify a repetition of the error at a subsequent trial.—Fire Ass'n of Philadelphia v. Fleming, 78 Ga. 733, 3 S. E. 420.

[f, g] (Ind. 1873) The immunity from disclosure of communications made to a prosecuting attorney relative to criminals or suspected persons is a privilege personal to the one making them, which is not waived by his voluntarily testifying generally in his own behalf in an action against him for malicious prosecution; but it is waived if, being a witness in his own behalf, he voluntarily discloses what statements he has made to a prosecuting attorney, and the latter may then testify relative to the communications.—Oliver v. Pate, 43 Ind. 132.

[h] (Ind. 1881) An applicant for life insurance stated in the application, in answer to an interrogatory, the name and address of his family physician. *Held* not equivalent to consent that such physician might testify in an action on the policy.—Masonic Mut. Ben. Ass'n v. Beck, 77 Ind. 203, 40 Am. Rep. 295.

[i] (Ind. 1885) In an action on a life insurance policy, the prohibition of testimony by physicians as to attendance on the insured before the application may be waived by the beneficiary, but the waiver as to one does not prevent his asserting the privilege as to other physicians.—Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769.

[ii] (Ind. 1887) Under Rev. St. 1881, § 497, subd. 4, making physicians incompetent to testify as to matters communicated to them as such by patients in the course of their professional business, the plaintiff's merely testifying that witness was the physician who attended her is not a waiver of the privilege.—Williams v. Johnson, 112 Ind. 273, 13 N. E. 872.

[j] (Ind. 1890) The taking of depositions of witnesses to break the force of their testimony, as given in their depositions previously taken by the adverse party, is not a waiver of an objection to the competency of the witnesses.—Ætna Ins. Co. v. Deming, 123 Ind. 384, 24 N. E. 86, 375.

[k] (Ind. 1891) In an action for malpractice, the introduction by plaintiff of testimony by himself, his wife, and her mother, as to all that was done by defendant at the time of performing the surgical operation, constituted a waiver of Rev. St. § 497, which renders physicians incompetent to testify as to such matters,

and the exclusion of the testimony of a consulting physician, present at such operation, was error.—Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442.

[l] (Iowa, 1890) Code 1873, § 3643, forbids physicians to testify as to communications made to them in their professional capacity, unless the party in whose favor the prohibition is made waives the right conferred. *Held*, the fact that plaintiff testified to her general good health during several years prior to an accident, and that a certain physician had occasionally attended her, constituted no waiver of the right, and it was error to allow him to testify to communications then made as to her condition of health.—McConnell v. City of Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778.

[m] (Mich. 1885) In an action to recover for personal injuries, the fact that plaintiff called her physician as a witness, who testified as to her condition before and after the injury, will not render admissible the evidence of another physician as to information which came to his knowledge while in professional attendance upon her, and which it was necessary to obtain in order that he might prescribe for her.—Dotton v. Albion Common Council, 57 Mich. 575, 24 N. W. 786.

[n] (Mich. 1890) The statements in the proofs of death are a waiver of the privilege only in so far as such statements refer to the matter claimed to be privileged.—Breisenmeister v. Supreme Lodge K. P. of the World, 81 Mich. 525, 45 N. W. 977.

[nn] (Mich. 1890) Though a party has waived the privilege upon one trial, he may claim it upon a new trial of the same case.—Breisenmeister v. Supreme Lodge K. P. of the World, 81 Mich. 525, 45 N. W. 977.

[o] (Mo. 1890) Under Rev. St. 1889, § 8925 (Rev. St. 1879, § 4017), providing that a physician or surgeon shall be incompetent to testify concerning any information acquired in a professional character, where one has had two physicians attending him he does not, by calling one of them as a witness concerning his injuries, thereby waive the incompetency of the other to testify against him.—Mellor v. Missouri Pac. Ry. Co., 14 S. W. 758.

[oo] (Mo. 1891) A patient, calling his physician to testify, does not thereby waive his right to object to other physicians, who may have treated him, testifying on the same subject.—Mellor v. Missouri Pac. Ry. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36.

[p] (Nev. 1891) Gen. St. § 3406, provides that a physician shall not be examined, without the patient's consent, as to information acquired in attending the patient. *Held*, that on indictment for rape of a child of seven the privilege may be waived by the implied consent of her parents, and the fact that the prosecution was instituted by them, who, with the child, were the principal witnesses, and testified to the nature of the complaint for which the physician prescribed, warrants such implication.—State v. Depoister, 21 Nev. 107, 25 Pac. 1000.

[pp] (N. Y. 1848) Where communications are made by several clients to an attorney respecting the business for which he is employed by them, the assent of one of them, or even of a majority of them, will not authorize him to testify respecting them, although the client whose assent has not been obtained is not a party to the suit in which the testimony is sought, especially where such testimony will affect the moral character of all the clients.—Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

[q] (N. Y. 1885) Where a witness produces papers on the summons of one party, the adverse party may put them in evidence. And this rule applies, although the witness is the attorney of the party summoning him, and the papers represent communications which, though material, might have been deemed privileged, had the party summoning not waived his privilege by his summons.—Hoyt v. Jackson, 3 Dem. Sur. 388.

[qq] (N. Y. 1887) The fact that plaintiff had introduced evidence concerning a consultation between witness, plaintiff's physician, and another physician as to her case does not constitute a waiver of the objection to the admission of the communications from plaintiff to her physician.—Record v. Village of Saratoga Springs, 46 Hun, 448, affirmed (1800) 120 N. Y. 646, 24 N. E. 1102, 31 N. Y. St. Rep. 998.

[r] (N. Y. 1887) A party who introduces upon a trial the testimony of her physician as to matters which are made privileged by the statute, so far waives the privilege that she cannot maintain an objection to his testimony when offered, upon a subsequent trial, by the adverse party.—McKinney v. Grand St., P. P. & F. R. Co., 104 N. Y. 352, 10 N. E. 544.

[rr] (N. Y. 1889) Code Civ. Proc. § 834, provides that a physician or surgeon shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. Section 836 provides that said section applies to every examination of a person as a witness, unless the provision thereof is expressly waived by the patient. *Held*, that such provision is waived where the patient's attorney calls the physician as a witness, and states that as his attorney he waives the privilege.—Alberti v. New York, L. E. & W. R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765, affirming (1887) 43 Hun, 421.

[s] (N. Y. 1889) Where defendant himself examines his counsel as a witness, he waives the privilege, and an objection to the counsel's testimony on the ground of incompetency cannot be sustained.—Stockwell v. Boyce, 53 Hun, 630, 5 N. Y. Supp. 948; Masterton v. Same, 53 Hun, 630, 6 N. Y. Supp. 65.

[ss] (N. Y. 1890) The privilege of a physician from testifying as to the condition of plaintiff's leg when he amputated it is not waived by plaintiff's bringing an action for the injuries to his leg, and by offering testimony to the fact that it was broken, nor by the fact that defendant after the accident sent its physician to the plaintiff, and at the trial examined him fully in relation to plaintiff's injuries.—Jones v. Brooklyn, B. & W. E. R. Co. (City Ct. Brook.) 3 N. Y. Supp. 253, judgment affirmed (1890) 121 N. Y. 683, 24 N. E. 1098.

[t] (N. Y. 1890) Where plaintiff, in an action for personal injuries, testifies as to his consultation with a physician concerning the injury, he waives his privilege.—Marx v. Manhattan Ry. Co., 56 Hun, 575, 10 N. Y. Supp. 159, 18 Civ. Proc. R. 384.

[tt] (N. Y. 1891) Where plaintiff, suing for personal injuries, has testified without any reservation whatever as to his injuries and their effect upon him, this is a waiver of the privilege, and it is error to exclude the testimony of his physician as to what he had learned of plaintiff's condition.—Treanor v. Manhattan Ry. Co. (Com. Pl.) 16 N. Y. Supp. 536, 28 Abb. N. C. 47, 21 Civ. Proc. R. 364, reversing (1891) 14 N. Y. Supp. 270.

[u] (N. Y. 1893) In an action for personal injuries producing a miscarriage, plaintiff, by bringing suit, and putting her physical condition on trial, does not waive the privilege of Code Civ. Proc. § 834, so as to render admissible the testimony of physicians who attended her some months before the accident, but not afterwards.—Butler v. Manhattan Ry. Co. (Su-

I think, are privileged," great weight ought to be attached to this testimony, although expressed as an opinion; for the attorney could better understand the relation between him and the client than any one else.—Orton v. McCord, 33 Wis. 205.

§ 787. Determination as to admissibility.

[a] (Ind. 1868) In support of an application by the wife for an allowance pending her suit for divorce, an affidavit of the family physician, if containing some matters not confidential as to the health of the husband and wife, ought not to be rejected as a whole.—Schlosser v. Schlosser, 29 Ind. 488.

[b] (Kan. 1893) In a proceeding by writ of error coram nobis to obtain relief from a sentence of imprisonment imposed seven years before on a plea of guilty obtained by duress, the deposition of plaintiff in the proceeding, who was still in prison, and not present at the trial, stated that one K. had never acted as his attorney, but on the trial K. testified that he was counsel for plaintiff when a certain conversation between them occurred. *Held*, that the action of the lower court in excluding this conversation as a privileged communication would not be disturbed.—State v. Calhoun, 50 Kan. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838.

[c] (Mo. 1858) Whether a communication is privileged is a question for the court.—Hull v. Lyon, 27 Mo. 570.

[d] (N. J. 1891) In a civil suit, the first test as to whether the communication between attorney and client involved a purpose which was or was not tainted with fraud, as affecting the privilege, is the issue as made by the pleadings in the cause.—Matthews v. Hoagland, 48 N. J. Eq. (3 Dick.) 455, 21 Atl. 1054.

[e] (N. C. 1889) It is for the court to determine whether a communication to an attorney is privileged, and for this purpose it had the right to inspect the deed of trust to the attorney to secure the notes, which was drawn by the attorney at the same time as the notes.—Hughes v. Boone, 102 N. C. 137, 9 S. E. 286.

[f] (Pa. 1846) An attorney is not to judge what is or is not privileged from disclosure. He must state the occasion and circumstance of the act or communication, and the general nature of the matter alleged to be privileged, so that the court may decide whether he shall be compelled to testify or not.—Jeanes v. Fridenberg, 5 Pa. Law J. 65.

[g] (Tex. 1889) In a proceeding to try the right of property, which plaintiff had attached in an action against S., the defendant claimed under a bill of sale from S., which plaintiff attacked as made with the intent to defraud creditors. Plaintiff offered as a witness the attorney who drew the bill of sale. The attorney testified that in drawing the bill of sale he acted as attorney for S., for whom he acted before and since, and that S. had waived his privilege. The attorney was employed by defendant in this case after the bill had been executed, but was discharged when it appeared that defendant's and S.'s interests were conflicting. Defendant testified that he and S. went together to the attorney, and he asked the attorney to draw the bill, and paid him for it. *Held*, that as the evidence was conflicting as to whether the attorney was employed by defendant, the admissibility of communications, made to him at the time the bill was drawn, was for the determination of the trial judge.—Harris v. Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

[h] (Vt. 1894) The question whether communications by defendant to an attorney were made by defendant while consulting him professionally, or while employing him merely as a scrivener, so as not to render them privileged, is for the trial court.—Childs v. Merrill, 66 Vt. 302, 29 Atl. 532.

III. EXAMINATION.

(A) TAKING TESTIMONY IN GENERAL, §§ 788-906.
(B) CROSS-EXAMINATION AND RE-EXAMINATION, §§ 907-1007.
(C) PRIVILEGE OF WITNESS, §§ 1008-1071.

Commitment for contempt of witness refusing to testify, see ante, § 39.

Effect of examination of witness by party objecting to witness as incompetent, see ante, § 537.

Examination of contradicting witness, see post, §§ 1278, 1279.

—— *of impeaching witness, see* post, § 1203.

Examination of witness by party objecting to competency as waiver of objection, see ante, §§ 191, 728.

—— *making inconsistent statements in general, see* post, § 1219.

—— *to sustain character of witness, see* post, § 1172.

Admissibility of evidence at former trial or in other proceeding as depending on opportunity to cross-examine, see "Evidence," vol. 20, cc. 3541-3543, § 2411.

Comments on witnesses or questions to witnesses, in argument of counsel, see "Trial," vol. 46, cc. 1061, 1062, § 282; cc. 1084-1088, §§ 299, 300.

Conduct of examination in bankruptcy proceedings, see "Bankruptcy," vol. 6, cc. 459, 460, § 402.

Curing error in exclusion of evidence by further examination of same witness in criminal prosecutions, see "Criminal Law," vol. 15, cc. 954-956, § 3148.

Errors and irregularity in, as ground for new trial, see "New Trial," vol. 37, cc. 867, 868, § 55.

Examination as to opinion evidence, see "Evidence," vol. 20, cc. 3316-3334, §§ 2290-2305.

—— *before grand jury, see* "Grand Jury," vol. 24, cc. 2761-2763, §§ 77, 78.

—— *by committee of council, see* "Municipal Corporations," vol. 36, cc. 196, 197, § 200.

—— *in action to recover duties paid, see* "Customs Duties," vol. 15, cc. 1552, 1555, § 249.

—— *in equity, see* "Equity," vol. 19, cc. 1236-1238, §§ 736-738.

—— *in extradition proceedings, see* "Extradition," vol. 23, cc. 293-296, § 15; cc. 334-336, § 45.

—— *in preliminary examination of accused, see* "Criminal Law," vol. 14, cc. 1120, 1121, § 487.

—— *in taking depositions, see* "Depositions," vol. 16, cc. 1088-1117, §§ 133-164.

Examination of experts, see "Evidence," vol. 20, cc. 3455-3490, §§ 2364-2378.

—— *as to handwriting, see* "Evidence," vol. 20, cc. 3513, 3514, § 2390.

Examination of witnesses by referee for purpose of report of testimony, see "Reference," vol. 42, c. 871, § 105.

—— *in probate proceedings, see* "Wills," vol. 49, cc. 870-872, § 764.

Examination on reference to take account, see "Account," vol. 1, cc. 631, 632, § 117 [b, f, i].

Failure to ascertain knowledge of witness affecting right to new trial for newly discovered evidence in criminal prosecutions, see "Criminal Law," vol. 15, cc. 155, 156, § 2319.

Harmless error in examination of witnesses on appeal in criminal prosecutions, see "Criminal Law," vol. 15, cc. 920–925, §§ 3130, 3131, 3133, 3134.

In proceedings before arbitrators, see "Arbitration and Award," vol. 4, cc. 152, 153, § 181.

Matters about which witness may be examined in bankruptcy proceedings, see "Bankruptcy," vol. 6, cc. 456–459, §§ 399–401.

Misconduct of counsel for prosecution in examining witness ground for new trial, see "Criminal Law," vol. 15, cc. 36, 37, § 2198.

Necessity of objections before trial to answers of witness making deposition, see "Depositions," vol. 16, cc. 1312–1314, § 817.

—— *of objection to, at trial, as basis for new trial, see* "New Trial," vol. 37, c. 880, § 63.

Power and duty of board of equalization of taxes to summon and examine, see "Taxation," vol. 45, c. 1190, § 867.

—— *of register on examination in bankruptcy proceedings to examine witnesses, see* "Bankruptcy," vol. 6, c. 460, § 403.

Remarks and conduct of judge in reference to examination of witnesses, see "Criminal Law," vol. 14, cc. 2255, 2256, §§ 1524, 1525.

Right of witness to counsel in examination in bankruptcy proceedings, see "Bankruptcy," vol. 6, cc. 460, 461, § 404.

(A) TAKING TESTIMONY IN GENERAL.

1. IN GENERAL, §§ 788-791.
2. DISCRETION OF COURT, §§ 792-797.
3. OATH OR AFFIRMATION, §§ 798-806.
4. MODE OF TESTIFYING IN GENERAL, §§ 807-816.
5. QUESTIONS IN GENERAL, §§ 817-828.
6. QUESTIONS ASSUMING FACTS, §§ 829-832.
7. QUESTIONS INVOLVING CONCLUSIONS OR MATTERS OF OPINION, §§ 833-836.
8. LEADING QUESTIONS, §§ 837-851.
9. EXAMINATION BY COURT OR JURY, §§ 852-857.
10. ANSWERS, §§ 858-867.
11. REFRESHING MEMORY IN GENERAL, §§ 868-873.
12. REFRESHING MEMORY BY USE OF MEMORANDA AND OTHER WRITINGS, §§ 874-892.
13. TESTIMONY FROM MEMORANDA OR OTHER WRITINGS, §§ 893-896.
14. CALLING ATTENTION TO AND EXPLANATION OF FORMER STATEMENTS OR TESTIMONY, §§ 897, 898.
15. RECALLING WITNESSES, §§ 899-905.
16. EXAMINATION AFTER TAKING OR USE OF DEPOSITION, § 906.

Compelling attendance and testimony of witness, see ante, §§ 1–9.

1. IN GENERAL.

ORDER, COURSE, AND EXTENT OF EXAMINATION, § 788.
CONTROL OF COURT IN GENERAL, § 789.
EXAMINATION BY PARTY, § 790.
SOURCE OF KNOWLEDGE AS DETERMINING NECESSITY FOR TESTIFYING, § 791.

§ 788. Order, course, and extent of examination.

Discretion of court, see post, §§ 792–797.

Scope of examination in general on recalling witness for cross-examination, see post, § 904.

[a] (Ala. 1850) Where a witness, after testifying to a proposition made by him to defendant at the request of plaintiff, and defendant's reply, states that plaintiff also mentioned his reason for making the proposition, and requested him to communicate it to defendant, which he did not do, this furnishes no sufficient ground for excluding the evidence. If defendant deems the reason material, it is his duty to elicit it by cross-examination of the witness.—Rose v. Thompson, 17 Ala. 628.

[b] (Ala. 1893) In an action by a locomotive engineer for personal injuries caused by the derailment of his engine while passing over a curve on a spur track, where defendant contends that plaintiff was running his engine at too great speed, it is proper to ask plaintiff "what was the usual rate of speed for running trains on the spur track," and such question is not open to the objection that it would show that plaintiff had previously run at an unsafe speed on the curve.—Kansas City, M. & B. R. Co. v. Webb, 97 Ala. 157, 11 South. 888.

[c] (D. C. 1893) The fact that a witness for defendant was asked if he had not stated that there were negroes on the jury who could be bought is not ground for reversal, as tending to prejudice the jury against the witness.—United States v. Schneider, 21 D. C. 381.

[d] (Ill. 1879) In the examination of witnesses on a question of damages, they are properly questioned as to collateral matters which may aid in ascertaining the damages.—City of Aurora v. Love, 93 Ill. 521.

[e] (Ill. 1889) A party should not be allowed to call as his own witness, and examine at length, a person whom the adverse party had called and examined as to the same matters, where the first-mentioned party has had an opportunity to fully cross-examine the witness. —Alexander v. Mandeville, 33 Ill. App. 589.

[f] (Iowa, 1888) In an action by an heir and distributee of an estate against the executor, another heir and distributee having testified concerning a bill of goods paid for by plaintiff for testator, it is not error to refuse to allow plaintiff to state the amount he paid, whether the testimony is competent in rebuttal of the statement of defendant's witness or not, there being nothing in the form of the question indicating that its purpose was that of rebuttal. —Harrow v. Brown, 76 Iowa, 179, 40 N. W. 708.

[g] (Iowa, 1892) In an action on a lost supersedeas bond, where a witness admits that he prepared the abstract on the appeal by defendant in the case in which the bond was alleged to have been given, but his memory as to the bond is defective, it is proper to ask him why he had stated in such abstract that defendant had "filed in said supreme court his supersedeas bond approved by the clerk thereof."—Rosenthal v. Bilger, 86 Iowa, 246, 53 N. W. 255.

[h] (Ky. 1882) It is not proper to ask a witness if he has not made statements to others out of court that certain substantive facts exist, for the purpose of proving that he has made such statements, where he has not testified as to the existence of such facts, as that would transform declarations made out of court into substantive testimony.—Loving v. Commonwealth, 4 Ky. Law Rep. 457.

[i] (La. 1893) Defendant, charged with perjury for having, in a cause wherein he was accused of wounding one C., falsely sworn that C. had on March 18, 1892, told O. that he had cut her accidentally, and that she did not wish

him punished, asked a witness whether C. had not on March 29, 1892, told her that accused had cut her accidentally. *Held*, that the question was inadmissible to impeach the credibility of C., since she was not a witness, and no foundation was laid therefor.—State v. Spencer, 45 La. Ann. 1, 12 South. 135.

[j] (Mich. 1876) A wide latitude of examination should be allowed to a party who has to prove a negative.—Anderson v. Russell, 34 Mich. 109.

[k] (N. H. 1860) Either party is entitled, if he insist upon it, to have a witness state fully upon the stand all the details of his testimony; and the court cannot properly limit the direct examination of a witness to the single inquiry whether or not he has heard the testimony of a preceding witness, and concurs therein.—Eames v. Eames, 41 N. H. 177.

[l] (N. Y. 1868) Where the question is immaterial whether a witness purchased a judgment for himself or for the judgment debtor, he may be asked on the direct examination, "For whom did you purchase that judgment?" and also, "In your negotiation with the [judgment creditor] for whom were you acting?"—Carnes v. Platt, 29 N. Y. Super. Ct. (6 Rob.) 270.

[m] (Pa. 1840) A witness, called to state a particular fact, cannot be led to make a full statement of the defendant's case which is not yet opened to the court and jury.—Farmers' Bank v. Strohecker, 9 Watts, 237.

[n] (S. C. 1892) Where several persons are tried jointly for murder, one of them may be required to cross-examine the witnesses for the state in advance of the cross-examination by the other defendants, and also to put up the witnesses for his defense in advance of their witnesses.—State v. Howard, 35 S. C. 197, 14 S. E. 481.

[o] (Tex. 1856) In an action for the recovery of certain land, plaintiff called a witness and asked him where he was born, which was the only question asked. On cross-examination defendant asked him if he ever disavowed a certain deed after arriving at majority, and whether he had ever disaffirmed his deed for the land in controversy. *Held*, that the answer to such cross-examination was properly received, though the examination was not pertinent to the direct examination, as an adverse party may make a witness his own and examine him as his own witness as well before he leaves the stand as afterwards.—Stuart v. Baker, 17 Tex. 417.

[p] (Tex. 1880) Questions respecting the mode of examining a witness or relative to the scope of interrogation allowable in the examination, should be raised and disposed of while the witness is on the stand. Controversy between counsel on such matters cannot be adjusted by requesting special instructions upon them to be given to the jury.—Holbert v. State, 9 Tex. App. 219, 35 Am. Rep. 738.

[q] (Wis. 1861) The state constitution secures to parties in a chancery suit the right to have the witnesses examined in open court, subject to those exceptions provided for in cases at law.—Brown v. Runals, 14 Wis. 693.

§ 789. Control of court in general.

See post, § 827 [h].

Discretion of court as to length of examination, see post, § 793.

Examination by court or jury, see post, §§ 852–857.

[a] (Iowa, 1859) The court has no power to change the question to a witness after it has been answered by him.—Pelamourges v. Clark, 9 Iowa, 1.

[b] (Iowa, 1882) It is right and proper for the court, when objections are made to questions asked a witness, to state what the court deems is the proper course to be taken, and to indicate to the witness what matters should be considered in answering the question.—Britton v. Des Moines, O. & S. R. Co., 59 Iowa, 540, 13 N. W. 710.

[c] (Iowa, 1894) The court may, in case a witness for the state shows that he is unwilling to testify, direct him to stand aside for 10 minutes to collect his thoughts.—State v. Gillett, 92 Iowa, 527, 61 N. W. 169.

[d] (Mich. 1876) It is not error for the court to interrupt a witness who is proceeding, after objection by counsel on the other side, to testify to advice of counsel, which so far as the record shows appeared to be mere hearsay.—Kenyon v. Woodruff, 33 Mich. 310.

[e] (N. Y. 1854) A justice may send a witness from the stand when counsel persist in an improper course of examination, tending to delay or embarrass the adverse party, or to hinder the course of justice, or disrespectful to the court.—Peck v. Richmond, 2 E. D. Smith, 380.

[f] (Pa. 1895) Where, on an investigation by a committee of the city council, a witness refuses to answer a question, and, pursuant to the provision of Act June 1, 1885, art. 15, for referring to the court questions involving the rights and duties of witnesses, the court is petitioned for an order commanding him to testify, it is error for it to refuse to give him time to answer the petition and prepare his defense, he being notified of the rule to show cause only an hour before it is returnable.—In re Paist, 166 Pa. 530, 31 Atl. 256, 36 Wkly. Notes Cas. 89; Appeal of Simon, Id.

§ 790. Examination by party.

Persons who may cross-examine, see post, § 910.

[a] (Ky. 1829) It is not error to prevent a party, who appears by counsel, from interrogating a witness himself.—Talbot v. Talbot's Representatives, 25 Ky. (2 J. J. Marsh.) 3.

[b] (Ky. 1839) Where one of several joint defendants discharged his counsel in form, for the purpose of evading a rule of court requiring the examination of witnesses to be made by the counsel of the parties, it was *held* that the court rightly refused to permit him to examine the witness.—In re Singleton's Will, 38 Ky. (8 Dana) 315.

§ 791. Source of knowledge as determining necessity for testifying.

Questions calling for answers not based on personal knowledge, see post, § 825.

Source of knowledge as affecting competency of witness, see ante, § 81.

[a] (N. J. 1883) Where a person attends court under subpœna as a witness, he must testify, under the direction of the court, as to what he knows, however he procures his knowledge.—Fonda v. Bolton, 6 N. J. Law J. 240.

2. DISCRETION OF COURT.

IN GENERAL, § 792.
LENGTH OF EXAMINATION, § 793.
QUESTIONS, § 794.
—— LEADING QUESTIONS, § 795.
—— REPETITION OF QUESTIONS, § 796.
RECALLING WITNESS, § 797.

Allowing witness to take bill of particulars to testify as to correctness as discretionary with court, see post, § 893 [f].

Control and discretion of court on cross-examination, see post, §§ 923–930.

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Discretion as to admission of answer to question assuming facts in issue, see post, § 832 [c].
—— *as to examination by court, see* post, § 852.
—— *of court as to explanation of testimony, see* post, § 898.
—— *of court to compel witness to refresh memory by inspecting memorandum, see* post, § 890 [a].
Examination of witness ignorant of language as within discretion of court, see post, §§ 811, 812 [a].
Mode of examining deaf and dumb witness as within discretion of court, see post, § 809.
Discretion of trial court as to separation of witness or exclusion from courtroom, see "Appeal and Error," vol. 3, cc. 1670, 1671, § 3845 [o, z].
Existence of discretion of trial court, see "Appeal and Error," vol. 8, cc. 1684–1688, §§ 3853–3856.

§ 792. In general.

[a] (U. S. 1896) The order in which evidence shall be introduced is in the discretion of the court.—Putnam v. United States, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118.

[b] (Ala. 1874) In the examination of witnesses, much must necessarily be left to the discretion of the presiding judge in the court below, particularly in the case of a female child of tender years, who is offered as a witness to prove carnal abuse of her person; and this discretion will not be revised by the appellate court, unless it clearly appears to have been improperly exercised.—Wade v. State, 50 Ala. 164.

[c] (Ala. 1885) The court may, in its discretion, to prevent confusion of a witness, interrupt the examination, and, where no injury is apparent, such interruption is not ground for reversal.—Carney v. State, 79 Ala. 14.

[d] (Ala. 1887) The mode of conducting the examination of witnesses is generally a matter of discretion with the trial court.—Drum v. Harrison, 83 Ala. 384, 3 South. 715.

[e] (Ark. 1882) The court may, in its discretion, allow a departure from the usual order in examining witnesses.—Campbell v. State, 38 Ark. 498.

[f] (Cal. 1887) The discretion of the trial court in determining whether it will direct a witness to ascertain some fact in order to be able to testify to it will not be reviewed on appeal.—People v. Ching Hing Chang, 74 Cal. 389, 16 Pac. 201.

[g] (Iowa, 1862) The discretion of the lower courts in controlling the course of examination is very large, and will only be interfered with when manifestly abused.—Samuels v. Griffith, 13 Iowa, 103.

[h] (Iowa, 1893) It is not an abuse of discretion for the court to direct a witness to "just answer his question now," when the witness had previously answered evasively, and the answer which caused the court to make the remark was of an evasive character.—State v. Farley, 87 Iowa, 22, 53 N. W. 1089.

[i] (Mass. 1895) The extent to which collateral matters can be gone into is within the discretion of the court.—Robinson v. Cutter, 163 Mass. 377, 40 N. E. 112.

[j] (Mo. 1895) The discretion of the trial court in permitting a witness, who was present during the trial, to compare two signatures in a trial for murder, though all other witnesses were excluded from the courtroom, will not be disturbed on appeal.—State v. David, 131 Mo. 380, 33 S. W. 28.

[k] (N. J. 1856) The conduct of a trial, and the general course of examination of the witnesses, rests very much in the sound discretion of the presiding judge, and does not constitute ground of error.—State v. Fox, 25 N. J. Law (1 Dutch.) 566.

[l] (N. J. 1857) The conduct of the trial, and the general course of the examination of witnesses, e. g. whether questions in chief may be put after the cross-examination, rests very much in the discretion of the judge, and does not constitute a ground of error.—Donnelly v. State, 26 N. J. Law (2 Dutch.) 463, affirmed in error (1857) 26 N. J. Law (2 Dutch.) 601.

[m] (N. Y. 1835) Where a witness, in advance of a question put to him by the party who calls him, states a fact requiring explanation, the court may, in its discretion, permit the party to examine into the grounds of the statement of the witness.—Bakeman v. Rose, 14 Wend. 105, affirmed (1837) 18 Wend. 146.

[n] (N. Y. 1854) It is entirely a matter of discretion with the court whether the preliminary oath as to interest, or the oath in chief, shall be administered. But the better and more approved practice now is to swear the witness in chief, and bring out the facts showing his interest, either on direct or cross examination.—Seeley v. Engell, 17 Barb. 530, reversed (1856) 13 N. Y. (3 Kern.) 542.

[o] (N. Y. 1878) The fact that a proper question was put to a prisoner, testifying in his own behalf, in an overbearing or indecorous manner, will not be reviewed, unless it be clearly shown that injustice resulted.—Arnold v. People, 75 N. Y. 603.

[p] (N. Y. 1882) A witness once called to testify is presumed to be present until conclusion of the trial. When one examined for the plaintiff has left and is wanted by defendant, the court may, at discretion, suspend the trial until he can be brought in.—Neil v. Thorn, 88 N. Y. 270.

[q] (N. Y. 1886) Where the items are numerous, and therefore difficult to be retained in the memory, the court, in its discretion, may permit a reference to memoranda proven to be correct, both as to items and their values.—Wise v. Phœnix Fire Ins. Co., 101 N. Y. 637, 4 N. E. 634, affirming (1883) 18 Wkly. Dig. 128.

[r] (N. Y. 1887) It is discretionary with the court or referee to permit counsel for a witness examined under supplementary proceedings to participate in the examination, when the rights of the parties seem to require such aid, and the court or referee may at all times limit and restrict the right of counsel and keep them within proper bounds.—Schwab v. Cohen, 13 N. Y. St. Rep. 709.

[s] (N. Y. 1891) It is optional with the court whether to strike out an answer by a witness, pertinent in itself, because not responsive to the question asked.—Hare v. Mahoney, 60 Hun, 576, 14 N. Y. Supp. 81.

[t] (Pa. 1818) The time and manner of examining a witness is in the discretion of the court before which the trial takes place.—Duncan v. McCullough, 4 Serg. & R. 480.

[u] (Tex. 1879) In the examination of witnesses and the manner in which they may be permitted to give their testimony, the discretion of the judge may be exercised.—Toohig v. Elliott, 2 Posey, Unrep. Cas. 641.

§ 793. Length of examination.

[a] The trial judge is vested with a sound discretion to stop the prolonged and unnecessary examination of a witness.
—(Ind. 1857) Rosser v. McColly, 9 Ind. 587;

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(La. 1896) State v. Southern, 48 La. Ann. 628, 19 South. 668;
(S. C. 1854) Morein v. Solomons, 7 Rich. Law, 97.

[b] (Ind. 1856) A court has a discretion as to the length of time a witness shall be examined, and when it did not appear that the party objecting expressed a wish to ask any further questions, the court refused to consider that discretion abused.—Mulhollin v. State, 7 Ind. 646.

[c] (N. Y. 1889) A refusal to allow plaintiff to be asked a question on a subject on which he had been thoroughly examined, is within the discretion of the trial court, though plaintiff has not rested his case.—Bonelle v. Pennsylvania R. Co., 51 Hun, 640, 4 N. Y. Supp. 127, judgment affirmed Barrelle v. Same (1890) 121 N. Y. 697, 24 N. E. 1099.

§ 794. Questions.

Discretion as to allowing witness to testify without being asked questions, see post, § 816.

[a] (Conn. 1890) It is in the discretion of the court to exclude questions framed with the design to call out certain facts and exclude other facts connected with the same transaction.—Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

[b] (Ga. 1887) The propriety of allowing a question which misrecites the testimony of the witness, and is calculated to lead him into error, is within the discretion of the trial court.—Harris v. Central R. R., 78 Ga. 525, 3 S. E. 355.

[c] (Mass. 1894) In an action for injuries caused by slipping and falling on ice in a depression in the sidewalk, it was in the discretion of the trial court to exclude the question, "Is there anything which causes you to remember particularly the condition of the sidewalk on that day?" where it was put to plaintiff's witness to show that she remembered it because she slipped on the ice in the depression.—Neal v. City of Boston, 160 Mass. 518, 36 N. E. 308.

[d] (N. Y. 1890) The objection to the question, "State whether there was any signal, either by the ringing of the bell or blowing of the whistle of that train, before it got to the crossing," that it was improper in form, was not well taken, as form of question is in the discretion of the court.—Totten v. New York, L. E. & W. R. Co., 57 Hun, 585, 10 N. Y. Supp. 572.

§ 795. —— Leading questions.

Discretion of court as to leading questions on cross-examination, see post, § 927.

[a] It is within the discretion of the court to permit leading questions.
—(Ala. 1848) Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; (1859) Sayre v. Durwood, 35 Ala. 247; (1876) Hinds v. State, 55 Ala. 145; (1893) Huntsville, Belt Line & M. S. Ry. Co. v. Corpening, 97 Ala. 681, 12 South. 295; (1893) Anderson v. State, 104 Ala. 83, 16 South. 108;
(Cal. 1886) People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; (1888) People v. Goldenson, 76 Cal. 328, 19 Pac. 161;
(Ga. 1884) Cade v. Hatcher, 72 Ga. 359; (1884) Farkas v. Stewart, 73 Ga. 90; (1889) Parker v. Georgia Pac. Ry. Co., 83 Ga. 539, 10 S. E. 233; (1893) Howard v. Johnson, 91 Ga. 819, 18 S. E. 132;
(Ill. 1844) Williams v. Jarrot, 6 Ill. (1 Gilman) 120; (1858) Parmelee v. Austin, 20 Ill. (10 Peck) 35; (1875) Doran v. Mullen, 78 Ill. 342;
(Ind. 1875) Snyder v. Snyder, 50 Ind. 492; (1883) App v. State, 90 Ind. 73; (1891) Lake Shore & M. S. Ry. Co. v. Anthony, 12 Ind. App. 126, 38 N. E. 831;
(Iowa, 1872) State v. Bodekee, 34 Iowa, 520; (1888) State v. Pugsley, 75 Iowa, 742, 38 N. W. 498;
(Kan. 1881) State v. McAnulty, 26 Kan. 533;
(Mass. 1862) Green v. Gould, 85 Mass. (3 Allen) 465;
(Mich. 1894) Lungerhausen v. Crittenden, 103 Mich. 173, 61 N. W. 270; (1896) Emlaw v. Travelers' Ins. Co., 108 Mich. 554, 66 N. W. 469;
(Minn. 1869) State v. Staley, 14 Minn. 105 (Gil. 75); (1896) Couch v. Steele, 63 Minn. 504, 65 N. W. 946;
(Mo. 1856) State v. Hughes, 24 Mo. 147; (1860) Smith v. Hutchings, 30 Mo. 380; (1872) King v. Mittalberger, 50 Mo. 182; (1876) Chaney v. Phœnix Ins. Co., 62 Mo. App. 45, 1 Mo. App. Rep'r, 703; (1892) Carder v. Primm, 52 Mo. App. 102; (1893) State, to Use of Guthrie, v. Martin, Id. 511;
(Neb. 1892) St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137; (1896) Baum Iron Co. v. Burg, 47 Neb. 21, 66 N. W. 8;
(N. H. 1861) Severance v. Carr, 43 N. H. 65; (1863) Steer v. Little, 44 N. H. 613;
(N. Y. 1854) Cheeney v. Arnold, 18 Barb. 434; (1888) Duryea v. Vosburgh, 49 Hun, 609, 1 N. Y. Supp. 833;
(Ohio, 1898) Deveaux v. Clemens, 17 Ohio Cir. Ct. R. 33;
(Or. 1889) State v. Chee Gong, 17 Or. 635, 21 Pac. 882;
(R. I. 1878) State v. Tracey, 12 R. I. 216;
(Tex. 1869) Maloney v. Roberts, 32 Tex. 136; (1893) Campbell v. Fisher (Civ. App.) 24 S. W. 661; (1896) Harris v. State, 37 Tex. Cr. R. 441, 36 S. W. 88;
(Wis. 1887) Baker v. State, 69 Wis. 32, 33 N. W. 52; (1893) Proper v. Same, 85 Wis. 615, 55 N. W. 1035; (1895) Porath v. Same, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

[aa] Leading questions to an unwilling witness are allowable at the discretion of the court.
—(Ala. 1841) Towns v. Alford, 2 Ala. 378;
(Pa. 1843) Bank of Northern Liberties v. Davis, 6 Watts & S. 285.

[b] (U. S. 1894) Permitting the prosecuting attorney, on the ground of surprise at answers of a witness produced by him, to put leading questions, is within the sound discretion of the trial judge.—St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

[c] (U. S. 1891) Where an attachment is levied on the ground that defendants have disposed of their property in fraud of creditors, and a third person intervenes, claiming the attached property under an assignment for the benefit of creditors, it is within the discretion of the court, on the trial of the intervention, to refuse to allow plaintiff to put leading questions to the assignors.—Sanger v. Flow, 48 Fed. 152, 1 C. C. A. 56, 4 U. S. App. 32.

[d] (U. S. 1892) In introducing impeaching testimony, by showing former contradictory statements, it is within the discretion of the trial court to permit a leading question to be put to a witness where that mode of interrogation is best calculated to elicit the truth.—Union Pac. Ry. Co. v. O'Brien, 49 Fed. 538, 1 C. C. A. 354, 4 U. S. App. 221.

[e] (Ala. 1890) On trial for rape, the rulings of the court permitting leading questions to be put to the prosecutrix in respect to the act

in order to get the facts before the jury are not revisable.—Brassell v. State, 91 Ala. 45, 8 South. 679.

[f] (Cal. 1885) Leading questions put to a party by his counsel may be stricken out at the discretion of the trial court.—Morris v. Lachman, 68 Cal. 109, 8 Pac. 799.

[g] (Ill. 1895) It is not an abuse of judicial discretion to sustain objections to leading questions put to witnesses that are intelligent, and not hostile to the examining party.—Crean v. Hourigan, 158 Ill. 301, 41 N. E. 880.

[h] (Ill. 1895) An unwilling and evasive witness may, in the discretion of the court, be examined with leading questions.—Cassem v. Galvin, 158 Ill. 30, 41 N. E. 1087, affirming (1894) 53 Ill. App. 419.

[i] (Iowa, 1890) In a rape case, prosecutrix, a girl 11 years old, after having made a general statement of the affair, was asked to "state to the jury whether or not" there were certain evidences of violence, and whether or not defendant occupied a certain position. *Held* that, considering the age and situation of the witness, it was a proper exercise of discretion to permit this form of question.—State v. Watson, 81 Iowa, 380, 46 N. W. 868.

[j] (Iowa, 1891) The insured having testified generally in regard to the goods on hand at the time of the fire, it is within the discretion of the court, in an action on the policy, to allow leading questions by which his attention is directed to particular classes of goods.—Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507.

[k] (Iowa, 1895) On trial for seduction, where it is difficult to induce the prosecuting witness to tell the story of the crime, it is not an abuse of discretion for the court to allow leading questions.—State v. Bauerkemper, 95 Iowa, 562, 64 N. W. 609.

[l] (Me. 1874) Where a witness is unwilling, or is adverse to the party by whom he is called, it is in the discretion of the court to permit the party calling him to ask him leading questions and to cross-examine him.—State v. Benner, 64 Me. 267.

[m] (Mich. 1878) In a prosecution for an assault with intent to ravish, it is discretionary with the court to allow somewhat leading questions to the complaining witness as to her outcries at the time of the offense, and as to the length of time she was confined to her bed afterwards.—Ulrich v. People, 39 Mich. 245.

[n] (Mich. 1896) The issue being whether defendant collected the proceeds of an insurance policy for plaintiff under an agreement not to make any charge therefor, it was within the discretion of the court to permit a witness to be asked in order to refresh his recollection, whether, shortly before the trial, he did not say to plaintiff's attorney that defendant said to plaintiff that he (defendant) had not intended to charge much, if anything, for getting the money, but that now he would make it cost plaintiff as much as possible.—Dillon v. Pinch, 110 Mich. 149, 67 N. W. 1113.

[o] (Minn. 1884) Allowing leading questions to a witness, evidently ignorant, and unable to speak English, and whose examination, even through an interpreter, was accompanied with some difficulty, is within the discretion of the trial court.—Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103.

[p] (N. Y. 1847) The extent to which counsel may lead a witness is in the discretion of the court at the trial.—Sears v. Shafer, 1 Barb. 408.

[q] (R. I. 1894) It is within the sound discretion of the court to permit counsel to read to a witness his testimony on the trial of another case involving the same subject, this being equivalent to the asking of a leading question.—Wilson v. New York, N. H. & H. R. Co., 18 R. I. 598, 29 Atl. 300.

[r] (Tex. 1893) A witness for defendant testified on cross-examination that defendant made certain statements to him, and that he had testified to everything that was said by defendant at the time. *Held*, that where, after repeatedly asking the witness if something else had not been said by defendant, and witness answering, "No," defendant's counsel put a leading question, the discretion of the court in sustaining an objection thereto would not be disturbed.—Lafferty v. State (Cr. App.) 24 S. W. 507.

[s] (Va. 1889) In a trial for seduction the matron of the lying-in hospital where prosecutrix was confined testified that defendant stated that he intended to marry prosecutrix when the child was born and put into the hospital. The commonwealth's attorney was permitted to ask her whether defendant confessed or admitted that he seduced the prosecutrix under promise of marriage, to which she answered that he did, and qualified her answer by adding the same statement as before. She seemed reluctant to testify or slow of understanding. *Held* not error, as the question did not result in anything material, and for the further reason that leading questions are discretionary with the trial court.—Hausenfluck v. Commonwealth, 85 Va. 702, 8 S. E. 683.

[t] (Wis. 1883) Allowing leading questions in the matter of statements or admissions of defendant is not error, because in the discretion of the court, and necessary for the purpose of impeachment by contradiction of witnesses on the trial of the case.—Rounds v. State, 57 Wis. 45, 14 N. W. 865.

§ 796. —— Repetition of questions.

Discretion of court as to repetition of question in the same or another form on cross-examination, see post, § 928.

Repetition in general, see post, § 827.

[a] The court may, in its discretion, disallow questions calling for answers already explicitly made.

—(Ala. 1895) Evans v. State, 109 Ala. 11, 19 South. 535;

(Tex. 1896) Plew v. State (Cr. App.) 35 S. W. 366.

[aa] (Ga. 1888) The state may, in the discretion of the court, be allowed to contradict matter in the prisoner's statement by a witness already examined, though to do so involves a repetition by the witness of some of his former testimony.—McKinne v. State, 81 Ga. 164, 9 S. E. 1091.

[b] (Md. 1890) How far a witness may be pressed on the same question is largely within the discretion of the court; and, where the prosecutrix stated that she did not remember having previously testified that she was born in 1870, the accused was not prejudiced by not being permitted to ask "whether she would say she did not so swear," where she was subsequently permitted to show by other witnesses that she had previously so testified.—Brown v. State, 72 Md. 477, 20 Atl. 140.

[c] (Mich. 1888) It is discretionary with the court to allow questions already answered by a witness to be repeated.—Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303.

[d] (Pa. 1870) There is no legal right to require a witness to repeat a former part of his testimony. This rests in sound discretion, and the court may interfere, although no objection is made by the opposite party.—Aiken v. Stewart, 63 Pa. (13 P. F. Smith) 30.

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§ 797. Recalling witness.

Discretion of court as to recalling witness for cross-examination and re-examination, see post, § 930.

[a] It is within the discretion of the trial judge to allow a witness previously examined to be recalled.

—(Ala. 1890) Riley v. State, 88 Ala. 193, 7 South. 149; (1892) Louisville & N. R. Co. v. Barker, 96 Ala. 435, 11 South. 453;
(Ark. 1873) Wallace v. State, 28 Ark. 531;
(Ind. 1877) Killian v. Eigenmann, 57 Ind. 480; (1887) Nixon v. Beard, 111 Ind. 137, 12 N. E. 131;
(Iowa, 1881) Sweet v. Wright, 57 Iowa, 510, 10 N. W. 870;
(Ky. 1889) Rhodes v. Commonwealth, 10 Ky. Law Rep. 722;
(Minn. 1862) Lynd v. Picket, 7 Minn. 184 (Gil. 128), 82 Am. Dec. 79; (1882) Keating v. Brown, 30 Minn. 9, 13 N. W. 909;
(Mo. 1874) State v. Hamilton, 55 Mo. 520;
(N. Y. 1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; (1830) Law v. Merrills, 6 Wend. 268; (1860) Treadwell v. Stebbins, 19 N. Y. Super. Ct. (6 Bosw.) 538; (1895) Doolittle v. Gambee, 88 Hun, 364, 34 N. Y. Supp. 861;
(N. C. 1833) Barton v. Morphis, 15 N. C. 240; (1852) State v. Weaver, 35 N. C. 491; (1886) Same v. Gooch, 94 N. C. 987;
(Tex. 1885) Pierson v. State, 18 Tex. App. 524;
(Va. 1895) Burke v. Shaver, 92 Va. 345, 23 S. E. 749.

[b] It is within the discretion of the trial court to allow a witness to be recalled, and to correct a statement previously made.

—(Ala. 1875) Rhodes v. Lowry, 54 Ala. 4;
(Iowa, 1886) Miller v. Hartford Fire Ins. Co., 70 Iowa, 704, 29 N. W. 411;
(Tex. 1888) Gulf, C. & S. F. Ry. Co. v. Pool, 70 Tex. 713, 8 S. W. 535.

[c] Whether a witness shall be recalled after the evidence is closed is discretionary with the court.

—(N. Y. 1896) Niendorff v. Manhattan Ry. Co., 4 App. Div. 46, 38 N. Y. Supp. 690;
(N. C. 1896) Sutton v. Walters, 118 N. C. 495, 24 S. E. 357.

[d] The refusal to allow a witness to be recalled for the purpose of laying a predicate to impeach him is within the discretion of the trial court, and is not revisable.

—(Ala. 1883) Bell v. State, 74 Ala. 420;
(Tex. 1877) Garza v. State, 3 Tex. App. 286.

[e] (U. S. 1896) It is within the discretion of the court to allow a witness to be recalled to make a change in the statements made by him on cross-examination.—Faust v. United States, 163 U. S. 453, 16 Sup. Ct. 1112, 41 L. Ed. 224.

[f] (U. S. 1830) After a witness has been once examined, it is matter of discretion in the court to permit him to be examined on new matter, and not a matter of right.—United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78].

[g] (Cal. 1884) Where a witness was on the stand, and the court, having asked whether the counsel desired to ask any further questions, received no answer, and thereupon dismissed the witness, and refused to allow him to be recalled, *held*, that such matters rest in the discretion of the court, and, in the absence of a clear abuse of discretion, will not be interfered with on appeal.—People v. Moan, 65 Cal. 532, 4 Pac. 545.

[h] (Cal. 1892) Leave to re-examine a witness as to matters upon which he has already been examined, having been left by Code Civ. Proc. § 2050, to the sound discretion of the court, cannot be assigned as error, although the examination is an unnecessary repetition, and tends only to emphasize a particular subject.—People v. McNamara, 94 Cal. 509, 29 Pac. 953.

[i] (Conn. 1895) Where, in an action for libel, plaintiff was asked on cross-examination whether he had a dispute with defendant about a certain bill, it was within the discretion of the court to permit plaintiff to explain what the claim was.—Dennehy v. O'Connell, 66 Conn. 175, 33 Atl. 920; Roche v. Same, Id.

[j] (Conn. 1895) Allowing a witness to explain or modify his testimony after it has been denied by other witnesses is within the discretion of the court.—Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998.

[k] (Ga. 1856) Where counsel inadvertently omitted to take down answers to certain questions in writing, and asked permission to re-examine the witness concerning the same, in order to reduce them to writing, it was *held* that it was in the discretion of the court to grant or refuse such permission, and there was no error in refusal.—Jesse v. State, 20 Ga. 156.

[l] (Iowa, 1865) It is within the discretion of the court which tries a cause to permit the recall of a witness after examination and cross-examination to explain an apparent contradiction in his evidence.—State v. Rorabacher, 19 Iowa, 154.

[m] (Md. 1872) Recalling a witness for the purpose of stating what his testimony was is discretionary with the court.—Green v. Ford, 35 Md. 82.

[n] (Md. 1890) Where a witness has been examined, cross-examined, and then re-examined, and excused from the stand, the question of whether he may be recalled for further examination rests entirely within the discretion of the trial court; and, from the exercise thereof, no appeal will lie.—Brown v. State, 72 Md. 468, 20 Atl. 186.

[o] (Mich. 1862) Where one, after the rebutting evidence of the opposite party is all in, recalls a witness of his own, it is discretionary with the court to allow him to ask questions which, at the first examination, might have been perfectly proper.—White v. Bailey, 10 Mich. 155.

[p] (Minn. 1880) The refusal of the court to recall a witness is not an abuse of discretion where it appears that the witness had testified that he knew nothing further than what he had already stated, and no oversight of counsel or misrecollection or forgetfulness of the witness is suggested as a reason for recalling him.—Merriam v. Ames, 26 Minn. 384, 4 N. W. 620.

[q] (Miss. 1831) The refusal to call a witness to restate his testimony, after a cause has been summed up and the jury charged, is matter of discretion in the court, with the exercise of which a court of review will not interfere.—Witherspoon v. Cain, 1 Miss. (Walk.) 407.

[r] (Mo. 1844) The rule that the court may, in its discretion, permit a witness to be re-examined at any time before verdict, applies to criminal cases as well as civil.—Freleigh v. State, 8 Mo. 606.

[s] (N. Y. 1857) The re-examination of a witness before he leaves the stand rests wholly in the discretion of the court or referees.—Sheldon v. Wood, 15 N. Y. Super. Ct. (2 Bosw.) 267.

[t] (Pa. 1813) A witness examined in chief, and cross-examined, may, at the discretion of the court, be recalled by the party introducing him, and examined as to new matter.—Curren v. Connery, 5 Bin. 488.

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[u] (Tenn. 1842) A witness, in a case of homicide, after having been examined in chief and discharged, came back before the state had concluded its testimony, and brought into court firearms, stating that they were the arms which the prisoner had when the witness arrested him, and that he had forgotten to mention the fact when first examined. *Held*, that the propriety or impropriety of permitting the statement to go to the jury at that time was a matter belonging to the discretion of the circuit judge.—Carroll v. State, 22 Tenn. (3 Humph.) 315.

[v] (Tex. 1870) Where witness was called to the stand three times by the plaintiff, and was not only cross-examined by defendant, but was examined by him on new matter, and as his witness, it was within the discretion of the court to refuse to allow the defendant to again put the witness on the stand, when defendant's turn to offer evidence had come.—Jenn v. Spencer, 32 Tex. 657.

[w] (Tex. 1877) The recall of a witness, after argument is commenced, is discretionary with the trial court.—Lister v. State, 3 Tex. App. 17.

3. OATH OR AFFIRMATION.

NECESSITY FOR TAKING OATH, § 798.
TIME OF TAKING OATH, § 799.
TAKING OATH WITH OTHER WITNESSES, § 800.
FORM AND REQUISITES OF OATH, § 801.
—— TRANSLATION OF DOCUMENTS IN FOREIGN LANGUAGE, § 802.
—— ESTOPPEL TO RAISE OBJECTIONS, § 803.
CONSTRUCTION OF OATH, § 804.
WAIVER OF OBJECTIONS FOR FAILURE TO TAKE OATH, § 805.
AFFIRMATION, § 806.

Cross-examination of accused in criminal prosecution who has not been sworn, see post, § 979 [a, f].

Discretion as to oath, see ante, § 792 [n]

Nature and obligation of oath as affecting competency, see ante, §§ 104–107.

Failure of witnesses to take oath as affecting right to object to reception of evidence, see "Trial," vol. 46, c. 940, § 190.

Harmless error in administering oath to witness in criminal prosecutions, see "Criminal Law," vol. 15, c. 912, § 3122.

In proceedings before arbitrators, presumption as to administration of oath, see "Arbitration and Award," vol. 4, c. 319, § 335.

—— *waiver of objections to oath, see* "Arbitration and Award," vol. 4, cc. 193, 194, § 241.

Oath in general, see "Oath," vol. 37, cc. 1741–1751.

Objections for failure to take oath, see "Trial," vol. 46, c. 940, § 190; c. 1033, § 260.

§ 798. Necessity for taking oath.

[a] (Me. 1829) It is the duty of the party calling a witness to see that he is duly sworn. Therefore, where a witness testified, believing that he had been sworn, but by some oversight the oath had been omitted, and this was not discovered by either party till after the trial, yet the verdict was set aside.—Hawks v. Baker, 6 Me. (6 Greenl.) 72, 19 Am. Dec. 191.

[b] (N. J. 1793) A juror is not allowed to give evidence to his fellow jurors without being sworn as a witness.—Anderson v. Barnes, 1 N. J. Law (Coxe) 203.

[c] (N. Y. 1804) Translations from a foreign language must be on oath.—Vandervoort v. Smith, 2 Caines, 155.

[d] (N. Y. 1880) On trial of an action for services in making a stenographic report, the accuracy of which was denied, it was error to allow plaintiff, in order to verify the same, to read aloud from the stenographic minutes taken by him, while a juror read and compared the report, and at the close stated the result of the test. In order to avail of a juror's general knowledge, he must be sworn as a witness.—Underhill v. Waite, 9 Daly, 83.

[e] (N. C. 1878) In a criminal case, it is error to allow a witness to testify for the state without being sworn.—State v. Smith, 78 N. C. 462.

[f] (Or. 1879) Where, on a prosecution for the rape of a child, the child is called as a witness, and found by the court not to possess sufficient intelligence to testify as a witness, the declarations of such child as to the circumstances of the alleged rape cannot be given in evidence, as no person can testify without being first sworn, unless by consent of parties.—State v. Tom, 8 Or. 177.

[g] (W. Va. 1896) The statements of the prosecuting attorney are not evidence against the accused, unless he is sworn, examined, and submits himself to cross-examination as any other witness.—State v. Lowry, 42 W. Va. 205, 24 S. E. 561.

§ 799. Time of taking oath.

[a] (Ark. 1884) To swear the witnesses at a trial, and put them under rule, in defendant's absence, is a violation of his rights, though it is not shown that he was prejudiced by such action.—Bearden v. State, 44 Ark. 331.

[b] (Mo. 1855) If a witness be sworn before arraignment, but after the prisoner has said in court, upon being asked, that he was ready to proceed with the trial, it is unnecessary to reswear him.—State v. Weber, 22 Mo. 321.

[c] (N. Y. 1828) A witness need be sworn but once on the trial of the same cause, though he may be examined on different days, and the matters in issue may be varied during the trial.—Bullock v. Koon, 9 Cow. 30.

[d] (Pa. 1892) The fact that a witness is not sworn before the examination begins does not affect the admissibility of that part of his testimony taken after the oath is administered.—Commonwealth v. Keck, 148 Pa. 639, 24 Atl. 161.

§ 800. Taking oath with other witnesses.

[a] (Tex. 1890) A witness who was sworn when he went upon the stand, and who was under the rule with the other witnesses, is not objectionable on the ground that he was not sworn with the other witnesses.—Rippey v. State, 29 Tex. App. 37, 14 S. W. 448.

§ 801. Form and requisites of oath.

[a] (U. S. 1867) A Chinaman, sworn as a witness upon the Bible, stated that he did not know the name of the book, but that he believed that if he should state anything untrue the court would punish him, and that after his death he would "go down there," making an emphatic gesture downward with his hand. *Held*, that the witness was sworn in such a manner as was binding on his conscience, and that he was competent to testify.—The Merrimac, Fed. Cas. No. 9,474 [1 Ben. 490].

[b] (Cal. 1893) A refusal of the court to administer to Chinese witnesses an oath other than the usual form, as authorized by Code Civ. Proc. §§ 2095, 2096, is not reversible error, such sections not being mandatory, and it not appearing that the witnesses regarded some other form of oath more binding than the usual form.—People v. Green, 99 Cal. 564, 34 Pac. 231.

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[c] (Ill. 1820) Swearing a witness by one uplifted hand is a legal swearing, independent of the statute.—Gill v. Caldwell, 1 Ill. (Breese) 53.

[d] (Ill. 1845) In a criminal case, an oath administered by holding up the hand, although the Gospels were not presented to the witness, and he did not declare that he had conscientious scruples against being sworn on the Gospels, no objection being made by prisoner at the time, was *held* legal and valid.—McKinney v. People, 7 Ill. (2 Gilman) 540, 43 Am. Dec. 65.

[e] (N. J. 1886) When a witness accepts the form of an oath as usually administered, without objections, except kissing the Bible, the court is justified in presuming that the witness intended that her conscience should be bound.—Pullen v. Pullen (Ch.) 4 Atl. 82.

[f] (N. Y. 1830) Where a witness is competent in chief, he must be sworn generally, although his examination is confined to a particular fact; and the rule that, where a party to the record is sworn to prove the loss or destruction of a paper he is sworn specially, because he is incompetent on other issues, has no application.—Jackson v. Parkhurst, 4 Wend. 369.

[g] (N. Y. 1887) Under Code Cr. Proc. § 277, where a defendant is indicted under many aliases, it is not error for the court, against the defendant's objection, to permit the clerk, after defendant's true name had been given, to repeat, in giving the oath to witnesses, the designation of defendant by many aliases, as it occurred in the indictment.—People v. Everhardt, 104 N. Y. 591, 11 N. E. 62, affirming (1886) 5 N. Y. Cr. R. 91.

[h] (N. C. 1884) That a witness did not repeat the words "So help me God," as required by the statute regulating the form of oaths, is immaterial.—State v. Mazon, 90 N. C. 676.

[i] (Ohio, 1896) The lawful form of oath to be administered to a witness is that the evidence he shall give will be the truth, the whole truth, and nothing but the truth.—In re Franklin County Com'rs, 7 Ohio N. P. 450, 5 Ohio S. & C. P. Dec. 691.

[j] (Or. 1886) A general oath that the evidence "shall be the truth, the whole truth, and nothing but the truth," etc., is all that is necessary for a witness who testifies to the signing of an instrument in his presence, and translates the language of such instrument for the benefit of the jury.—Krewson v. Purdom, 13 Or. 563, 11 Pac. 281.

[k] (Tenn. 1850) The practice in this state has been to administer the oath with an uplifted hand, and the solemn appeal to God, without inquiry of the witness whether he is conscientiously scrupulous of swearing on the Gospels, and such oath has informally been regarded as legal and binding.—Doss v. Birks, 30 Tenn. (11 Humph.) 431.

[l] (Tex. 1868) The fact that the court below caused a cross to be made, and a witness to be sworn upon such cross, is not ground for error, in the absence of any evidence showing that some other method was insisted on by the witness or opposing counsel as likely to be more binding upon the conscience of the witness.—Gonzales v. State, 31 Tex. 495.

§ 802. —— Translation of documents in foreign language.

[a] (Tex. 1867) A witness may translate to the jury documents written by him in a foreign language without being sworn as an interpreter.—Kuhlman v. Medlinka, 29 Tex. 385.

§ 803. —— Estoppel to raise objections.

[a] (Ill. 1896) A defendant in a criminal case cannot complain that, in addition to the oath prescribed by the laws, Chinese witnesses were also sworn according to a Chinese practice, where such proceeding was had at his instance.—Bow v. People, 160 Ill. 438, 43 N. E. 593.

§ 804. Construction of oath.

[a] (Pa. 1871) Where a witness is sworn to tell the whole truth, it means to tell so much of the truth as may be competent evidence, and he also takes the oath subject to the rule of law which allows him to decline to answer questions which will criminate him.—Commonwealth v. Reid, 1 Leg. Gaz. Rep. 182, 3 Leg. Gaz. 185.

§ 805. Waiver of objections for failure to take oath.

[a] (Tenn. 1896) That a witness for the state testified without being sworn is not ground for a new trial, no objection having been made to his testimony during the trial, and defendant's counsel having cross-examined the witness as one fully qualified.—Moore v. State, 96 Tenn. (12 Pickle) 209, 33 S. W. 1046.

[b] (Tex. 1893) The objection that a witness for the state was not sworn before testifying is too late, when raised for the first time on a motion for a new trial.—Goldsmith v. State, 32 Tex. Cr. R. 112, 22 S. W. 405.

§ 806. Affirmation.

[a] (U. S. 1827) By the law of Maryland witnesses can be permitted to testify upon affirmation only when they are members of some religious society which professes to be conscientiously scrupulous of taking an oath.—Bank of Columbia v. Wright, Fed. Cas. No. 883 [3 Cranch, C. C. 216].

[b] (U. S. 1829) Before a witness can be admitted to testify upon affirmation, instead of an oath, the court must be satisfied that he is one of a society who profess to be conscientiously scrupulous of taking an oath.—King v. Fearson, Fed. Cas. No. 7,790 [3 Cranch, C. C. 435].

[c] (U. S. 1829) Where a witness is considered by the Society of Quakers as a member of that society in principle and religious profession, and usually meets with them for religious worship, and has applied to be admitted to a full participation of all the civil privileges and the moral discipline of the society, he may be permitted to testify upon solemn affirmation, instead of an oath.—King v. Fearson, Fed. Cas. No. 7,790 [3 Cranch, C. C. 435].

[d] (N. J. 1833) A witness, who has no objection to being sworn, cannot be allowed to testify under affirmation.—Williamson v. Carroll, 16 N. J. Law (1 Har.) 217.

4. MODE OF TESTIFYING IN GENERAL.

IN GENERAL, § 807.
TESTIFYING AS TO CONVERSATIONS, § 808.
DEAF AND DUMB WITNESSES, § 809.
WITNESSES INCAPABLE OF SPEAKING ALOUD, § 810.
WITNESSES IGNORANT OF OR UNFAMILIAR WITH LANGUAGE, § 811.
—— INTERPRETERS, § 812.
TESTIMONY OF PARTY IN CIVIL CASE ON HIS OWN BEHALF, § 813.
TESTIMONY OF ACCUSED IN CRIMINAL PROSECUTION, § 814.
EXAMINATION OF ADVERSE PARTY IN GENERAL, § 815.
STATEMENT BY WITNESS OR TESTIMONY WITHOUT QUESTIONS, § 816.

§ 807. In general.

[a] (Cal. 1868) A witness may testify to the result of the items of an account—the amount of profit or loss—rather than to the items and

facts themselves, unless objection is made to such form of testifying.—Clark v. Gridley, 35 Cal. 398.

[b] (Tex. 1893) The fact that a witness gives his testimony by repeating it as given before the grand jury, and stating that it is true, is not ground for reversal.—Brown v. State (Cr. App.) 20 S. W. 924.

§ 808. Testifying as to conversations.

[a] (U. S. 1835) A party cannot call upon an adverse witness to state the whole of a conversation between himself and another, unless statements of his are introduced which render it important that the whole should be taken together.—Collins v. Johnson, Fed. Cas. No. 3,015a [Hemp. 279].

[b] (Cal. 1894) A witness who overheard only a part of a conversation with defendant may testify as to what he overheard.—People v. Daniels, 105 Cal. 262, 38 Pac. 720.

[c] (Colo. 1887) If what was overheard in a conversation is competent evidence, the fact that the witness who overheard it did not catch all that was said does not render such parts as he did hear inadmissible.—Denver & R. G. Ry. Co. v. Neis, 10 Colo. 56, 14 Pac. 105.

[d] (Ky. 1888) A witness testified that at the election he heard some talk between defendant and one S. about voting. He thought defendant and his brother were to vote for certain candidates if they were paid $15. Witness afterwards gave S. $5, the latter saying he had $10; but witness did not know whether defendant received the money or not. *Held*, that it was error to admit such evidence, the witness not having detailed the conversation, but his understanding of it.—Hensley v. Commonwealth, 9 S. W. 129.

§ 809. Deaf and dumb witnesses.

[a] (Conn. 1830) A deaf and dumb person, capable of relating facts correctly by signs, may give evidence by signs through the medium of an interpreter, though it appear that such person can read and write, and communicate ideas imperfectly by writing.—State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90.

[b] (Ind. 1886) The manner in which a deaf and dumb witness shall be examined is a matter largely in the discretion of the trial court, and the accuracy of the interpreters is not a question of law on which the supreme court can reverse a case, especially in the absence of any showing that the party complaining of error was injured thereby.—Skaggs v. State, 108 Ind. 53, 8 N. E. 695.

[c] (Ind. 1886) Where a question is put to a deaf and dumb witness in a criminal case which so shocks her modesty as to cause her to flee from the courtroom, the action of the court in allowing the interpreter, who followed her and brought her back, to state her answer obtained in private, without repeating the question in open court, cannot be successfully complained of by the accused, especially where it is not shown that he was injured thereby.—Skaggs v. State, 108 Ind. 53, 8 N. E. 695.

[d] (Mo. 1893) A trial court may elicit testimony from a deaf and dumb person either by signs, through the medium of an interpreter, or by writing, if the witness can write and read.—State v. Howard, 118 Mo. 127, 24 S. W. 41.

[e] (N. Y. 1845) Where the injured person is of sufficient age, and of competent though weak understanding, but is unable to talk, and can communicate and receive ideas only by signs, she may yet be sworn as a witness, and examined through the medium of a person who can understand her, who is to be sworn to interpret between her and the court and jury.—People v. McGee, 1 Denio, 19.

[f] (Tex. 1895) Where a witness is very deaf, and seems unable to comprehend questions in writing, it is proper to submit them to him printed.—Kirk v. State, 35 Tex. Cr. R. 224, 32 S. W. 1045.

§ 810. Witnesses incapable of speaking aloud.

[a] (Ga. 1858) If a witness be at the moment physically incapable of speaking loud, the court may appoint some suitable person to repeat his whispers.—Conner v. State, 25 Ga. 515, 71 Am. Dec. 184.

§ 811. Witnesses ignorant of or unfamiliar with language.

[a] (Mo. 1887) A witness was unfamiliar with English, and had stated that she could not distinguish between the terms "east" and "west," and the court refused to compel her to answer a question as to whether an assault happened on the side of the track on which the sun rises or sets. Other witnesses afterwards testified as to the locality where the assault was made. *Held*, that the refusal was no abuse of discretion.—State v. Miller, 93 Mo. 263, 6 S. W. 57.

[b] (N. Y. 1887) Where a witness was a foreigner, unaccustomed to the use of the English language, it was not error to instruct the jury that they might look beyond the literal words employed and ascertain his real meaning.—Kelly v. Davidson, 7 N. Y. St. Rep. 481.

§ 812. —— Interpreters.

Compelling attendance of interpreter, see ante, § 5 [a].

Form and requisites of oath to be administered to person translating documents in foreign language, see ante, § 802.

Interpreters for deaf and dumb witnesses, see ante, § 809.

[a] (U. S. 1834) A sworn interpreter may take advantage of the suggestions of others, who are not sworn, with regard to the proper interpretation of testimony, stating the result to the court as his own interpretation.—United States v. Gibert, Fed. Cas. No. 15,204 [2 Sumn. 19].

[b] (Cal. 1884) Where an interpreter states to the court that the witness stated something that had been told him by somebody, it is error for the court to act on such statement, and instruct the interpreter not to repeat what the witness said.—People v. Wong Ah Bank, 65 Cal. 305, 4 Pac. 19.

[c] (Ill. 1890) An interpreter is not rendered incompetent to interpret the testimony of a foreign witness by the fact that he has himself testified in the case.—Chicago & A. R. Co. v. Shenk, 131 Ill. 283, 23 N. E. 436.

[d] (Ill. 1890) Where the refusal to allow a competent interpreter to act deprives the party of a material witness, there being no other interpreter obtainable, such refusal is reversible error.—Chicago & A. R. Co. v. Shenk, 131 Ill. 283, 23 N. E. 436.

[e] (Tex. 1888) There is no law requiring the court to provide an interpreter for the benefit of a defendant who cannot speak English. Code Cr. Proc. art. 756, providing for an interpreter for a witness who does not speak English, does not apply to such a case.—Livar v. State, 26 Tex. App. 115, 9 S. W. 552.

§ 813. Testimony of party in civil case on his own behalf.

[a] (Ala. 1861) In an action by members of a firm which has dissolved, the defendant having introduced evidence to show that after the dissolution of the partnership he had paid the account to one of the partners, who had

bought out the interest of his copartner, by crediting the amount on a debt due him from that partner individually, the other partner cannot be allowed to testify in rebuttal that the partnership was not dissolved when said payment was made.—Crymes v. White, 37 Ala. 549.

[b] (Cal. 1870) A party to an action who becomes a witness in his own behalf has the same privileges as, and no greater than, any other witness.—People v. Reinhart, 39 Cal. 449.

[c] (Mass. 1859) A party to a suit, admitted as a witness in his own favor, may testify to his opinion, if an expert.—Dickenson v. Inhabitants of Fitchburg, 79 Mass. (13 Gray) 546.

[d] (Mass. 1874) Where the defendant in an action on a contract alleges that he was induced to enter into the contract by plaintiff's false and fraudulent representations, it is competent to ask him on his direct examination what induced him to sign the papers and complete the contract.—Knight v. Peacock, 116 Mass. 362.

[e] (N. Y. 1861) In an action for inducing plaintiff by false and fraudulent representations to sell goods to a third person, plaintiff cannot testify that he sold the goods relying on the truth of such representations, since one cannot testify as to the private operations of his mind.—Shaw v. Stine, 21 N. Y. Super. Ct. (8 Bosw.) 157.

[f] (Wis. 1859) Where a party offers himself as a witness, he is to be examined by his counsel just like any other witness, and, if the court allows the opposite party to interrupt the examination by interposing questions in his own behalf, a new trial must be ordered.—Howland v. Jenks, 7 Wis. 57.

§ 814. Testimony of accused in criminal prosecution.

[a] (Kan. 1886) Where a defendant in a criminal case takes the witness stand to testify in his own behalf, he assumes the character of a witness, and is entitled to the same privileges, and subject to the same treatment, and to be contradicted, discredited, or impeached, the same as any other witness.—State v. Pfefferle, 36 Kan. 90, 12 Pac. 406.

[b] (N. Y.) The same rules of evidence must govern the examination of a prisoner, when he avails himself of his privilege to become a witness, as apply to any other witness.—(1872) Marx v. People, 63 Barb. 618; (1873) Fralich v. People, 65 Barb. 48.

§ 815. Examination of adverse party in general.

Cross-examination of party examined as a witness by adverse party, see post, § 975.

Effect of calling or examination of party as witness by adverse party, see ante, §§ 722–724.

Effect on competency of adverse party of calling or examining him as witness, see ante, §§ 530–534.

Examination of adverse party as on cross-examination, see post, §§ 976–978.

—— *as to usurious transaction constituting incompetency, see* ante, § 511.

Right to examine adverse party, see ante, § 225.

Waiver of objections to affidavit for calling opposite party as witness, see "Appeal and Error," vol. 2, c. 1695, § 1213 [a].

[a] (Ga. 1860) One who calls his opponent as a witness is entitled to the benefit of the belief, as well as of the actual knowledge, of the witness, though the weight of the two species of evidence may differ.—Kitchen v. Robbins, 29 Ga. 713.

[b] (Ga. 1884) Where defendant is placed on the stand by complainant, he is in the same position as any other witness.—Cade v. Hatcher, 72 Ga. 359.

[c] (Ind. 1892) In an action against a railroad company by an employé for injuries received while coupling cars, where the complaint alleged that the engine used was defective, plaintiff cannot, under Rev. St. § 509, providing that a party may be examined as a witness concerning any matter stated in the pleading, be required to state as a witness who told him about the defects of the engine.—Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85.

[d] (La.) Under Code Prac. arts. 347, 348, providing that either party may annex interrogatories to his pleading, to which he desires the other to respond under oath, in order to make use of his answers as testimony in support of his demand, a party cannot be made a witness in his own case, except by the filing of such interrogatories.—(1811) Porche's Heirs v. Poydras, 1 Mart. (O. S.) 198; (1832) Abat v. Gormley, 3 La. 238; (1842) Martin v. Wright, 1 Rob. 299.

[e] (La.) A party examined on the trial, without specific interrogatories previously put to him, must, like any other witness, be allowed to testify generally. To confine his examination to certain facts, he must be interrogated on facts and articles.—(1842) Martin v. Wright, 1 Rob. 299; (1845) Lyons v. Flower, 10 Rob. 185.

[f] (La. 1842) In an action against a seizing creditor and a sheriff, in which the plaintiff prays for an injunction and damages, he cannot call on the sheriff to testify as a witness, since, being a party, his examination must be by interrogatories propounded to him as a party.—Dabbs v. Hemken, 3 Rob. 123.

[g] (La. 1844) In an action against a tutor for the board of his wards, the latter, though represented by their tutor, are substantial parties to the suit, and cannot be called by plaintiff as witnesses in the ordinary form.—Dwight v. Smith, 9 Rob. 32.

[h] (Mich. 1852) Defendant being sworn as a witness under Rev. St. 1846, p. 461, § 100, was asked if he ever received a policy of insurance of a certain number, to which he replied: "I don't recollect the number." Afterwards the several following questions were put to him, namely, if he ever received the policy of insurance in question, if he had in his possession a policy of insurance issued by the company, and also to look upon the policy of insurance in his possession, and to state whether it was numbered. *Held*, that under plaintiff's affidavit, made as prescribed by the statute, that facts material to the issue were within defendant's knowledge, the plaintiff had a right to examine the defendant generally as to his having received the policy and all particulars relating thereto.—Way v. Billings, 2 Mich. 397.

[i] (Mich. 1858) Where an affidavit is made by one party to a suit that a certain fact was in the knowledge of the other party, in order to take his testimony, that fact may be proved by the affiant's giving the admissible declarations of a third party. The affidavit is to point out the fact only, and the witness under it is to be examined as any other witness.—Hogan v. Sherman, 5 Mich. 60.

[j] (N. H. 1880) Defendant, called as witness by plaintiff, may be examined as to the same conversations testified by plaintiff's witness, on cross-examination, to have been held with defendant.—Homans v. Corning, 60 N. H. 418.

[k] (N. H. 1885) In an action by a town, defendant was charged with concealment of his dealings in regard to certain notes belonging to the town. *Held*, that it was competent, on

the issue of concealment, to ask the defendant whether he had at any time informed the town, or the selectmen thereof, that he had used securities of the town to raise money, which he had appropriated to his individual use, and for which he had not accounted to the town.—Errol v. Bragg, 63 N. H. 620.

[l] (N. J. 1888) Where a nonresident asks the aid of the court, and then refuses to submit himself to examination as a witness, the court may dismiss his bill, or assume as true the material facts alleged, about which he refuses to appear and testify.—Davis v. Flagg, 44 N. J. Eq. (17 Stew.) 109, 13 Atl. 257.

[m] (N. Y. 1873) Defendant, examined as a witness, was asked, on putting a receipt in evidence, whether there was not a letter attached to it when received. He answered that he did not remember, that he did not tear it off, and that he had not in his possession any letter from plaintiff. *Held*, that this examination was sufficient to enable plaintiff to prove there was a letter attached to the receipt, and to give in evidence a press copy of such letter.—Foster v. Newbrough, 66 Barb. 645.

[n] (Ohio, 1851) Under 48 Ohio Laws, p. 83, authorizing the examination of an adverse party to a suit, a party, called as a witness by the adverse party, becomes a witness in the whole suit, and has a right to disclose facts favorable to himself, as well as to the opposite party.—Tolman v. Hefflefinger, 1 Ohio Dec. 404.

[o] (Tenn. 1825) A law taking away the conclusive character formerly given by law to a woman's affidavit charging one with being the father of her illegitimate child does not allow her examination by him in open court in his prosecution for bastardy.—Goddard v. State, 10 Tenn. (2 Yerg.) 96.

§ 816. Statement by witness or testimony without questions.

[a] (U. S. 1892) It is not error to allow a witness to give his testimony in a narrative form, and if he states matters irrelevant or incompetent it is the duty of the party objecting to arrest the narrative, and move to have such testimony stricken out.—Northern Pac. R. Co. v. Charless, 51 Fed. 562, 2 C. C. A. 380, 7 U. S. App. 359.

[b] (Iowa, 1879) On trial for an offense, a witness who was present when it was committed may be asked to "state the facts as they occurred."—State v. Maxwell, 51 Iowa, 314, 1 N. W. 666.

[c] (Kan. 1885) It is within the discretion of the court to permit a witness to testify in a narrative form, and not in answer to questions.—Maier v. Randolph, 33 Kan. 340, 6 Pac. 625.

[d] (Mich. 1880) To allow a witness to testify without being questioned is within the discretion of the trial judge.—Clark v. Field, 42 Mich. 342, 4 N. W. 19.

[e] (N. Y. 1886) On a trial for murder, the court, in its discretion, may permit the district attorney to call the attention of witnesses to particular facts after they have gone through the story of the crime without interruption.—People v. Druse, 103 N. Y. 655, 8 N. E. 733.

5. QUESTIONS IN GENERAL.

IN GENERAL, § 817.
PRELIMINARY QUESTIONS, § 818.
QUESTIONS IN THE ALTERNATIVE, § 819.
INTERRUPTION OF TESTIMONY BY QUESTION, § 820.
INDEFINITE AND GENERAL QUESTIONS, § 821.
QUESTION AS AFFECTED BY OBJECTIONABLE ANSWER, § 822.
QUESTIONS OBJECTIONABLE IN PART, § 823.
ASKING AND WITHDRAWING IMPROPER QUESTIONS, § 824.
QUESTIONS CALLING FOR ANSWERS NOT BASED ON PERSONAL KNOWLEDGE, § 825.
NECESSITY FOR ANSWERING QUESTIONS, § 826.
REPETITION OF QUESTIONS OR QUESTIONS CALLING FOR A REPETITION OF TESTIMONY, § 827.
— REPETITION OF QUESTION IN DIFFERENT FORM, § 828.

Discretion of court as to questions, see ante, §§ 794–796.

Questions on cross-examination, see post, §§ 987–993.

Harmless error in rulings on questions to witnesses, see "Appeal and Error," vol. 3, cc. 2069–2073, §§ 4140–4145.

Objections to form of questions, see "Appeal and Error," vol. 2, c. 1754, § 1286; "Trial," vol. 46, cc. 983, 984, § 220.

§ 817. In general.

[a] (U. S. 1863) If the answer to a question asked may tend to prove, or may form part of the proof of, the matters alleged in the narr., though not wholly sufficient to prove them, it may be asked.—Schuchardt v. Allens, 68 U. S. (1 Wall.) 359, 17 L. Ed. 642.

[b] (Ala. 1877) A question which asks a witness to state in one sweeping answer whether or not the statements in the four named sections of the bill are true is objectionable.—Blunt v. Strong, 60 Ala. 572.

[c] (Cal. 1887) A question put to a witness in the following form: "State only what you know about the matter"—is not objectionable.—Hicks v. Riverside Fruit Co., 72 Cal. 303, 13 Pac. 873.

[d] (Colo. 1892) A question to a witness upon his examination in chief embracing the very substance of the issue on trial, and calling for an answer which, if accepted, amounts to a determination of such issue, is improper.—Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275.

[e] (Kan. 1874) It is not necessary that every question put to a witness shall be so broad and comprehensive that the answer shall be evidence of some issue in the case. If all the answers to a series of questions upon the same general subject, taken together, are competent, each is competent, and a question tending to elicit such an answer should be allowed.—Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362.

[f] (Me. 1852) Where a question to a witness is not fully answered, the opposite party may elicit a full answer.—Mason v. Tallman, 34 Me. 472.

[g] (Mass. 1849) The supposed maker of certain notes, alleged to be forged, testified, on the trial of an indictment for uttering the same, that he had given the defendant one note of the tenor of those mentioned in the indictment, and but one, and that the notes given in the course of his business in Boston were entered in the books kept by his clerk; and the clerk testified that he kept an account of the supposed maker's transactions in Massachusetts, and that he knew of the latter's giving one note corresponding with the description of the notes set forth in the indictment. The prosecuting officer then proposed to inquire of the clerk whether he knew of the supposed maker's giving the defendant any other such note than the one he had mentioned. *Held*, that the term "such" did not limit the inquiry to a note of a particular tenor or purport, but to the giving of any note of a like kind, and that the question was therefore admissible.—Commonwealth v. Miller, 57 Mass. (3 Cush.) 243.

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[h] (Mass. 1860) In support of an indictment for maintaining a nuisance from a certain day "to the day of the finding of this indictment," a witness may be asked whether he knew of any such act from the first day named "to the day of the finding of this indictment."—Commonwealth v. Shea, 80 Mass. (14 Gray) 386.

[i] (Minn. 1869) A question, asked of a partner, "Who were the members of your firm?" is not objectionable on the ground that it is a mixed question of law and fact, and a question for the jury.—Gates v. Manny, 14 Minn. 21 (Gil. 13).

[j] (Minn. 1887) Where the witnesses know the situation of the land sought to be condemned for a right of way of a railroad, the fact that the questions put to them do not accurately define the land is harmless error.—Cedar Rapids, I. F. & N. Ry. Co. v. Ryan, 37 Minn. 38, 33 N. W. 6.

[k] (N. Y. 1830) If it is apparent that the witness is in the interest of the adverse party, it is proper to give the direct the character of a cross examination.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[l] (N. Y. 1861) In an action brought by one of two parties on a cause of action which accrued to the firm and had been released by the copartner to the plaintiff, a question put to a witness, "What was said by the plaintiff about commencing suit in New York rather than in London?" was excluded by the court. *Held* that, if the word "plaintiff" was intended to refer to the copartner who had released and who had been examined as a witness, the question was not competent, except for the purpose of contradicting him or affecting his credibility; but, if it was intended to refer to the actual plaintiff, the testimony was in its nature competent, and its relevancy could not be determined on the face of the question.—Weber v. Kingsland, 21 N. Y. Super. Ct. (8 Bosw.) 415.

[m] (N. Y. 1886) A question which is clearly an attempt indirectly to get in testimony which is inadmissible directly, concerning transactions between the witness and one deceased, may not be asked.—Viall v. Leavens, 39 Hun, 291.

[n] (N. Y. 1889) Although a question does not appear to be obnoxious to Code Civ. Proc. § 829, providing that a party shall not be examined as to transactions had with a decedent, yet it is properly excluded when a previous answer to substantially the same question is incompetent.—Sallade v. Gerlach, 54 Hun, 635, 7 N. Y. Supp. 181, 17 Civ. Proc. R. 420, judgment affirmed (1892) 132 N. Y. 548, 30 N. E. 372.

[o] (S. C. 1895) A general interrogatory addressed to a witness whose deposition is being taken, "If you know anything else that will benefit the plaintiff, state same fully," is not objectionable as leading, or as depriving defendant of the right to cross-examine such witness relative to matters brought out by the question.—Hill v. Georgia, C. & N. R. Co., 43 S. C. 461, 21 S. E. 337.

[p] (Vt. 1859) It is competent to ask witnesses what knowledge they have of the dissolution of a firm, without first asking whether it was a matter of general notoriety.—Wait v. Brewster, 31 Vt. 516.

§ 818. Preliminary questions.

Leading, preliminary, or introductory questions, see post, § 840.

[a] (Ala. 1879) A female witness at a criminal trial may be asked whether she is a widow.—Cooper v. State, 63 Ala. 80.

[b] (Mich. 1896) On trial of one for murdering her husband to obtain insurance on his life, an insurance agent, who had testified that he demanded policies back from defendant, was asked why he demanded them. *Held* that, as a preliminary question, it was proper.—People v. Pope, 108 Mich. 361, 66 N. W. 213.

[c] (N. Y. 1891) Witness, a detective, was asked on a trial for grand larceny: "On the night before this larceny, had you heard that there were three pickpockets working this town?"—the object being to have the officer explain how he came to be connected with the prisoner's case. *Held*, that the question was in its nature preliminary to something else, and, though having no proper place in the examination, was harmless to defendant, and its admission insufficient as ground for reversal of the judgment.—People v. Wilkinson, 60 Hun, 582, 14 N. Y. Supp. 827.

[d] (N. C. 1886) It is not error to allow a plaintiff to ask one of his witnesses where he lives, for the purpose of showing that he lives with the defendant, as it tends to identify the witness, and to show his opportunity to be informed in respect to the matter about which he is testifying.—Pittman v. Camp, 94 N. C. 283.

§ 819. Questions in the alternative.

Leading questions in the alternative, see post, § 845.

[a] (N. H. 1855) In the direct examination of a witness, it is the better practice not to put questions in the alternative.—Webster v. Clark, 30 N. H. (10 Fost.) 245.

§ 820. Interruption of testimony by question.

[a] (N. C. 1879) It is the duty of the presiding judge to allow a witness to finish a proper answer to a proper question before being pressed with another question.—State v. Scott, 80 N. C. 365.

[b] (Wis. 1859) If the court allows the examination of a party to be interrupted by questions interposed by the opposite party, a new trial must be ordered.—Howland v. Jenks, 7 Wis. 57.

§ 821. Indefinite and general questions.

Indefinite questions on cross-examination, see post, § 993.

[a] (U. S. 1829) On an indictment for a nuisance in keeping a public gaming-house, the question, "Who dealt the cards?" is too general, and the witness is not bound to answer.—United States v. Strother, Fed. Cas. No. 16,412 [3 Cranch, C. C. 432].

[b] (Conn. 1893) In an action to recover for an injury to plaintiff's horse from a collision with defendant's team, caused by defendant's alleged negligence in hitching his team where they would be easily frightened, a question, asked of one of plaintiff's witnesses, whether the team was "standing in the ordinary place in the ordinary way," was improper, being too vague, and assuming the existence of a custom to hitch horses at the place where defendant's horses were frightened, a fact neither admitted nor proved.—Bassett v. Shares, 63 Conn. 39, 27 Atl. 421.

[c] (Fla. 1887) A question to a witness is not objectionable because general in its terms, the court having authority to restrain or correct the witness when he goes beyond the bounds of legal evidence.—Mann v. State, 23 Fla. 610, 3 South. 207.

[d] (Ga. 1878) Where the issue was whether a mortgage had been settled by the giving of new notes in place of the one which it was executed to secure, it was not competent to ask the maker generally whether the new notes were not given in settlement of a former indebt-

edness, without specifying what indebtedness.—Davis v. Dunn, 61 Ga. 123.

[e] (Ga. 1888) General questions touching the case and the various issues involved in it are not objectionable, whether the witness under examination in open court be a party to the action or not.—Van Winkle v. Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299.

[f] (Ill. 1873) In an action against a railway company for killing plaintiff's intestate at a highway crossing, involving the negligence of deceased, as well as that of the company, questions to a witness as to the general habits of deceased, without specifying the nature or kind of habits sought to be proved, are properly excluded for want of particularity.—Chicago, R. I. & P. R. Co. v. Bell, 70 Ill. 102.

[g] (Ill. 1877) On the issue whether a deceased party has promised to pay his daughter $3,000 for her services, an interrogatory, "Just state what the arrangement between you and your father was?" is too broad.—Orr v. Jason, 1 Ill. App. (1 Bradw.) 439.

[h] (Ind. 1859) A question to a witness as to his residence, etc., "previous to the time," etc., without stating how long previous, is too indefinite.—Bersch v. State, 13 Ind. 434, 74 Am. Dec. 263.

[i] (Md. 1854) In an action of trover, the question whether the witness "had ever heard the plaintiff's title disputed" is too general, and improper.—Stewart v. Spedden, 5 Md. 433.

[j] (Mich. 1887) The plaintiff was injured by a collision caused by a flat car standing partly on the main track. When on the stand he was asked the following question: "Recalling your attention to the side track there, and supposing it to have the descent which is represented by the plat put in evidence, in case an easy running flat car was given motion towards the south, and at a point where it was on a descending grade, how far, in your opinion, would that car run, if left to run without any obstruction, to the north?" *Held*, that the question was too indefinite to be material, or to admit of any satisfactory answer.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61, 34 N. W 659.

[k] (N. Y. 1882) In an action against a surviving partner, plaintiff was asked as to whether he had business transactions with the firm in a certain year, and defendant objected on the ground that the testimony should be confined to transactions with the living partner. *Held*, that the objection was valid, and that it was not proper by such a general question, to which special objection was made, to permit the plaintiff to give an answer which might include objectionable evidence.—Bristol v. Sears, 3 Civ. Proc. R. 328.

[l] (N. Y. 1893) In an action for injuries caused by being run over by a street car, where it is contended that plaintiff was drunk at the time of the accident, it is proper to refuse, as not sufficiently definite, a question to plaintiff's employer, whether, during the time of plaintiff's employment, he had "at any time" laid plaintiff off for drinking beer.—Morris v. Eighth Ave. R. Co., 68 Hun, 39, 22 N. Y. Supp. 666.

[m] (Vt. 1891) In an action against an express company for damages to a dog while in transit, where the evidence as to whether defendant's agent had given plaintiff notice that dogs must be sent at the owner's risk, as required by defendant's instructions, was conflicting, an inquiry as to whether such instructions were at defendant's local office, when not limited to the time at which it was claimed the notice was given, was properly excluded as too general.—Winchell v. National Exp. Co., 64 Vt. 15, 23 Atl. 728.

§ 822. Question as affected by objectionable answer.

[a] (Mich. 1882) A question, being proper, cannot be rendered erroneous by the statement of objectionable matter as responsive thereto.—Wilcox v. Ney, 47 Mich. 421, 11 N. W. 225.

[b] (Vt. 1888) An improper answer given by a witness to a proper question cannot be assigned as error, though the answer contravenes the statute excluding a living party when the other party is dead.—Lawrence v. Graves' Estate, 60 Vt. 657, 15 Atl. 342.

§ 823. Questions objectionable in part.

[a] (U. S. 1894) The exclusion of a question to a witness in an action on contract cannot be held erroneous, on the ground that the question related to a condition of the contract, where it also included other conditions not embraced in the contract.—United States Sugar Refinery v. Providence Steam & Gas Pipe Co., 62 Fed. 875, 10 C. C. A. 422, 18 U. S. App. 603.

[b] (Me. 1859) A compound question propounded to a witness, one part being admissible and the remainder inadmissible, may be rightfully excluded as a whole.—Wyman v. Gould, 47 Me. 159.

[c] (Md. 1843) Where a question put to a witness contains several members, some of which are objectionable, the court is not bound to select those which are not objectionable, and allow them to be put.—Whiteford v. Burckmyer, 1 Gill, 127, 39 Am. Dec. 640.

§ 824. Asking and withdrawing improper questions.

[a] (Tex. 1888) The action of counsel in propounding improper questions, and afterwards withdrawing them, stating that he did so, not because he believed the evidence inadmissible, but because he did not wish to afford any ground for exception on review, is not cause of reversal.—Missouri Pac. Ry. Co. v. Mitchell, 72 Tex. 171, 10 S. W. 411.

§ 825. Questions calling for answers not based on personal knowledge.

Source of knowledge as determining necessity for testifying, see ante, § 791.

[a] (U. S. 1885) A question calling for the information which, from any source, may be in the possession of the witness, and is not limited to facts within his knowledge, must be excluded.—First Nat. Bank v. Stewart, 114 U. S. 224, 5 Sup. Ct. 845, 29 L. Ed. 101.

[b] (Mich. 1879) In an action against a saloon keeper for injuries resulting from the sale of liquor to plaintiff's husband, where the defendant has testified that he himself sold the husband liquor on several occasions, an interrogatory by his counsel as to whether these were the only times the husband got liquor at his place is objectionable as leading, and also because it does not confine the defendant to sales within his own knowledge.—Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801.

[c] (N. Y. 1889) In an action for damages for injuries caused by falling on a sidewalk alleged to be defective, a question put to a witness, "Do you know anybody that fell over that?" was properly excluded, in that it did not show whether the witness was required to speak of his knowledge of any fall, or, more than of his knowledge, of a person who he had heard had fallen.—Hillesum v. City of New York, 56 N. Y. Super. Ct. (24 Jones & S.) 596, 4 N. Y. Supp. 806.

§ 826. Necessity for answering questions.

[a] (Me. 1860) The questions, although improperly asked, must be answered as the judge

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shall order, subject to the exclusion of the answers as evidence in legal proceedings.—Bradley v. Veazie, 47 Me. 85.

§ 827. Repetition of questions or questions calling for a repetition of testimony.

Discretion of court as to repetition of questions, see ante, § 796.

Repetition of questions in cross-examination or questions calling for repetition of answers, see post, § 990.

—— *in examination by court, see* post, § 855.

Repetition on redirect examination of testimony on direct or cross examination, see post, § 1005.

Restatement of former testimony on recalling witness for cross-examination, see post, §§ 902, 903.

[a] The court may properly refuse to allow a question which the witness has once answered to be put to him again.
—(Kan. 1888) Hughes v. Ward, 38 Kan. 452, 16 Pac. 810;
(N. Y. 1888) Remer v. Long Island R. Co., 48 Hun, 352, 1 N. Y. Supp. 124;
(Wis. 1886) Hinton v. Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

[b, c] (Ill. 1886) A witness ought not to be asked to repeat the same thing which he had testified before, nor should the same question be put to him which had been put to him before.—Hughes v. People, 116 Ill. 330, 6 N. E. 55.

[d] (Ill. 1895) After a witness has been asked what he heard the deceased say, and has answered, "All I heard him say was, 'Keep still,'" it is error to ask him, "Did you not hear him say, 'Don't?'"—Cannon v. People, 141 Ill. 270, 30 N. E. 1027.

[e] (Ind. 1872) To refuse to permit a witness to reiterate a statement is not error.—Dodge v. Dunham, 41 Ind. 186.

[f] (Me. 1857) Where a witness has testified in a former trial, and the same evidence which was offered and used in that is relevant in this, he cannot be asked what his evidence at the former trial was.—State v. Knight, 43 Me. 11.

[g] (Neb. 1891) In a bastardy proceeding, where defendant's father has repeatedly testified that defendant was at home the entire evening and night that the intercourse was alleged to have occurred at plaintiff's residence, a question put to the witness as to whether he had a distinct recollection of seeing defendant at home on that evening is properly rejected, both because it is an unnecessary repetition, and because it is leading.—Daly v. Melendy, 32 Neb. 852, 49 N. W. 926.

[h] (N. C. 1894) Where counsel persists in repeating questions, and asking questions entirely foreign to the matter in hand, so as to needlessly protract the trial, the court may, after frequently cautioning him, order the witness to stand aside.—McPhail v. Johnson, 115 N. C. 298, 20 S. E. 373.

[i] (Pa. 1884) When a witness has been repeatedly asked substantially the same question, both by counsel in cross-examination and by the court, *held* no error to exclude a repetition of the question.—Adams v. Uhler, 2 Walk. 96.

[j] (S. C. 1854) Where a question to a witness, though proper, has been several times substantially answered, it is not error for the court to overrule it.—Morein v. Solomons, 7 Rich. Law, 97.

§ 828. —— Repetition of question in different form.

[a] (Cal. 1895) Where a party as a witness testifies at length to conversations with the opposite party, it is not error to sustain an objection when he is asked by his attorney to "state that whole conversation."—Vance v. Richardson, 110 Cal. 414, 42 Pac. 909.

[b] (Ga. 1856) Where a witness was asked a leading question, which was objected to and ruled out, it was *held* that the witness might testify to the same point, if the question be properly put.—Heisler v. State, 20 Ga. 153.

[c] (Md. 1886) The court may refuse to allow the counsel to ask the driver of a street car, on which an accident occurred, whether, "according to the best of his recollection, he had, on the day of the accident, observed his practice of bringing the horses to a walk in crossing the bridge," when, as a witness, the driver had already testified that "he had no recollection on the subject, except that it was his practice to go over the bridge carefully and slow."—Baltimore & Y. Turnpike Road v. Leonhardt, 66 Md. 70, 5 Atl. 346.

[d] (Mass. 1856) It is no ground of exception that a witness, who had already testified in chief that he did not hear what was said by certain persons on a particular occasion, was not allowed to be asked by the party calling him whether one of those persons did not say such and such words on that occasion, and whether another of them did not speak to a third person.—Commonwealth v. Cooley, 72 Mass. (6 Gray) 350.

[e] (Mass. 1892) Where, in an action to recover damages for personal injuries, defendant pleaded a release and discharge, and plaintiff testified that it was not read or explained to him; that he could only read and write his own name, and that the paper was represented to him to be a receipt to show that defendant was making him a present of money, there was no error in refusing to permit him to be asked what he understood he was signing, and whether he knew the meaning of the word "released"; no offer being made to prove anything other than what he had just testified.—McGuire v. Lawrence Mfg. Co., 156 Mass. 324, 31 N. E. 3.

[f] (N. Y. 1889) After a witness in an action for personal injuries has testified that she did not know that plaintiff had ever had any difficulty with his hearing and never observed that he had any with his sight, it is improper to ask her if she thought his sight and hearing were as good as those of ordinary people she had met.—Bonelle v. Pennsylvania R. Co., 51 Hun, 640, 4 N. Y. Supp. 127, judgment affirmed Barrelle v. Same (1890) 121 N. Y. 697, 24 N. E. 1099.

6. QUESTIONS ASSUMING FACTS.

IN GENERAL, § 829.
FACTS NOT DISPUTED, § 830.
FACTS NOT PROVED, § 831.
FACTS IN ISSUE, § 832.

Leading questions assuming facts, see post, §§ 837–851.

Question assuming that witness has a memorandum with which he can refresh his memory, see post, § 874 [k].

—— *on cross-examination assuming facts, see* post, § 987.

§ 829. In general.

[a] (Ga. 1858) Counsel have no right to put a question to a witness, assuming that the witness had said something which he denies having said.—Sanderlin v. Sanderlin, 24 Ga. 583.

[b] (Ind. 1895) A question to defendant as to whether he believed he was in danger of great bodily harm from what he knows of the character of deceased, and from the nature of the assault upon him by deceased, is properly excluded as assuming a state of facts upon which defendant is supposed to have founded his belief.—Deilkes v. State, 141 Ind. 23, 40 N. E. 120.

[c] (Iowa, 1859) A question to a witness, assuming that one confined in a lunatic asylum was confined there for insanity, though somewhat objectionable, is not ground for a reversal of judgment.—Pelamourges v. Clark, 9 Iowa, 1.

[d] (Iowa, 1891) On a trial for assault with intent to murder, it appeared that the prosecuting witness, at the beginning of the difficulty, slapped defendant, who thereupon retired to another part of the room, pursued, as some witnesses testified, by the prosecuting witness, and the conflict was there renewed. *Held*, that a question put to a witness, "Now, in this last racket, did you see defendant strike" the prosecuting witness? was not objectionable, as indicating that there had been two distinct fights.—State v. Woodard, 84 Iowa, 172, 50 N. W. 885.

[e] (Wis. 1890) In an action for false representations as to the value of mining stock sold to plaintiff, the latter, having testified without objection that the stock purchased by him was worthless, was asked: "When did you first learn the truth in regard to these mines?" *Held*, that the question was not objectionable as assuming that the witness' former answer was true.—Barndt v. Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

§ 830. Facts not disputed.

[a] (Ill. 1884) In an action by a shipper of grain to recover a rebate from ordinary freight rates agreed to be made by defendant railway company's local agent, the admission of a question to plaintiff's agent, who made the contract, "With whom were the contracts for the shipment of this corn made?" is not error, on the ground that it assumes that a special contract was in fact made for the shipment of the grain, where that fact was not controverted; the only controversy being as to the agent's authority or a ratification of his act.—Erie & P. Despatch v. Cecil, 112 Ill. 180.

[b] (N. H. 1857) It is no objection to an interrogatory to a witness that it assumes facts which are not disputed; nor that it puts a hypothetical case to an expert, if the supposed case is that which is put in evidence.—Willey v. Portsmouth, 35 N. H. 303.

[c] (Tex. 1892) In a prosecution for perjury at a murder trial, a question, "What did defendant say on that trial with reference to where he and the alleged murderer were when the shots were fired?" is not objectionable as assuming that defendant and the alleged murderer were together when the shots were fired, as it only assumes that defendant said something in regard to this matter at the murder trial; and this latter assumption is proper where it is admitted that such was the fact, and the issue is as to just what defendant did say.—Hays v. State (Cr. App.) 20 S. W. 361.

§ 831. Facts not proved.

Facts in issue not proved, see post, § 832.

[a] (Cal. 1862) A question to a witness, based upon the supposition of facts not proved, is improper.—People v. Graham, 21 Cal. 261.

[b] (Cal. 1886) On the examination of a witness, counsel is not authorized to insert in a question a statement as having been made by the witness which had not in fact been made by him.—People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323.

[c] (Conn. 1893) In an action to recover for an injury to plaintiff's horse from a collision with defendant's team, caused by defendant's alleged negligence in hitching his team where they would be easily frightened, a question asked of one of plaintiff's witnesses, whether the team was "standing in the ordinary place in the ordinary way," was improper, being too vague, and assuming the existence of a custom to hitch horses at the place where defendant's horses were frightened—a fact neither admitted nor proved.—Bassett v. Shares, 63 Conn. 39, 27 Atl. 421.

[d] (Ill. 1858) A witness ought not to be permitted to answer a question which assumes the existence of a fact that has not been proved.—Carpenter v. Ambroson, 20 Ill. (10 Peck) 170.

[e] (Iowa, 1859) Defendant's question to a witness, couched in the language of plaintiff's petition, for the purpose of directing the witness' attention to the particular subject of inquiry, is not objectionable as "leading, suggestive, or assuming what is not proved."—Shields v. Guffey, 9 Iowa, 322.

[f] (Iowa, 1883) Where plaintiff testifies that he made a tender of property in the office of a certain party, and in his presence, it is error to refuse to allow such party as a witness to answer the question as to what, if anything, he knew "about a tender or an assumed tender being made there in the office by plaintiff that day," on the objection that it was assuming a state of facts without warrant therefor on which to predicate the question.—Childs v. Dobbins, 61 Iowa, 109, 15 N. W. 849.

[g] (Mich. 1892) At a trial for embezzlement it was shown that B., a clerk of the prosecuting witness, prepared a paper "purporting to show the misappropriations of money" by defendant, and that the prosecuting witness took it into an adjoining room, in which were defendant and his brothers, but there was no evidence that the statement was either shown or read to defendant. B. was asked, "As they finished the examination of that paper before they left the office, didn't you hear one of the brothers of defendant say, 'Well, we will have to fix that up'?" To which he answered, "I heard one of them make a remark." Such remark was not made in presence of defendant. B. was then permitted to testify to the contents of the statement, which was among papers which the prosecuting witness claimed to have lost. *Held*, that the question was objectionable, as it assumed a fact not proven, and that the testimony was incompetent.—People v. Lange, 90 Mich. 454, 51 N. W. 534.

[h] (Mo. 1896) A rule of defendant railroad company having been read in evidence, instructing its employés "not to go between the cars to make couplings unless they are moving at a slow and safe speed," and a witness having testified that there may be a safe rate of speed for such purpose, it was not assuming a fact which had not been proven to ask another witness "what was a safe and slow rate of speed to do coupling and uncoupling."—Hollenbeck v. Missouri Pac. Ry. Co., 34 S. W. 494.

[i] (N. Y. 1887) In an action for personal injuries alleged to have been caused by a defect in defendant's building, it having been shown that plaintiff was the owner of various tenements, it was error to allow the question to the witness, "State whether or not the defendant said to you that he had had some accident in the house, and that he ought to have had it fixed, or in some other house," as the question was not confined to the particular premises, and left the jury to infer that defendant had had such accident before, and had left the premises unrepaired.—Englert v. Kruse, 8 N. Y. St. Rep. 375.

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§ 832. Facts in issue.

Questions assuming facts in issue as leading, see post, §§ 838 [b], 842 [j].

[a] (Ala. 1892) An inquiry, on a murder trial, as to whether witness knew the place where deceased "was said to have been killed," is objectionable, in the absence of any concession on the part of defendant as to the fact of the killing, in assuming the said fact as proven, and in stating the matter also as general notoriety.—Green v. State, 96 Ala. 29, 11 South. 478.

[b] (Ark. 1854) Where the deposition of a witness is taken in the form of interrogatories and answers as to his knowledge of the history, contents, etc., of a note, and it does not appear that the original note was before the party testifying, or a copy of it referred to as an exhibit annexed to his deposition, questions not otherwise objectionable will become so, from the assumption of matter in issue; the plea having denied under oath the execution of the note.—Harsh v. Hanauer, 15 Ark. 252.

[c] (Ga. 1890) In an action on an insurance policy in which the death of the assured is in issue, it is within the discretion of the court to admit answers to interrogatories which assume the death of the assured, where it appears from the testimony of the witness as a whole that it was not affected in substance by the leading character of the interrogatories.—Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

[d] (Ga. 1892) On a trial for disturbing public worship, a witness was asked: "Did defendant do anything to disturb the congregation?" and "What was done by defendant to disturb the congregation?" *Held*, that the court did not err in requiring the questions to be modified, and properly ruled that the witness might be asked what defendant's conduct was, or whether any of the noises charged in the indictment were made by him, and if so, what; but that whether the congregation was disturbed or not was a question for the jury.—Taffe v. State, 90 Ga. 459, 16 S. E. 204.

[e] (Ga. 1893) In ejectment, where defendant claimed under a parol gift of plaintiff's intestate in consideration of board and services, defendant's mother cannot be asked what deceased ever paid her or her daughters for boarding and waiting on him, "except the houses and lots he gave your daughters." The question assumed a material collateral fact, and suggested the answer desired.—Thompson v. Ray, 92 Ga. 285, 18 S. E. 59.

[f] (Ind. 1890) In a breach of promise case, plaintiff's witness was asked: "What declaration, if any, did she make in regard to her disappointment and refusal of defendant to marry, at the time she showed you the letter?" *Held* improper, as assuming that defendant had refused to marry plaintiff.—Jones v. Layman, 123 Ind. 569, 24 N. E. 363.

[g] (Iowa, 1864) An interrogatory to a witness is bad which assumes a fact in dispute.—McClay v. Hedge, 18 Iowa, 66.

[h] (Iowa, 1893) In an action for breach of marriage promise, the questions as to "what the plaintiff was doing in the way of getting ready to be married," and "Do you know anything about Rosa making preparations for marriage?" are not objectionable on the ground that they assume the existence of a contract.—Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492.

[i] (N. Y. 1895) The admission of a question to a witness, which assumes as proven by the evidence a material fact not proven, is error.—People v. Brow, 90 Hun, 509, 35 N. Y. Supp. 1009.

[j] (Or. 1880) The question in an action on a logging contract, "Are these as good logs as other logs in the creek?" in the absence of evidence to show the kind or quality of such other logs, or what particular logs are referred to, is incompetent, as assuming the fact which it is its object to prove.—Tenny v. Mulvaney, 8 Or. 513.

[k] (Tenn. 1891) In an action for seduction and breach of promise of marriage, where plaintiff testified that defendant took her into the woods and that she was there examined by a doctor, and, on cross-examination, replied that she saw somebody on the trip, but did not remember who it was, a question by the court. "Did you see anybody as you went down in the woods?" was not error, as assuming as matter of fact that she went into the woods, a point which was denied by defendant.—Graham v. McReynolds, 90 Tenn. (6 Pickle) 673, 18 S. W. 272.

[l] (Wis. 1884) A question which assumes the existence of a fact essential to a conviction, where there was no evidence that the fact existed, is inadmissible.—Klock v. State, 60 Wis. 574, 19 N. W. 543.

7. QUESTIONS INVOLVING CONCLUSIONS OR MATTERS OF OPINION.

IN GENERAL, § 833.
CONCLUSIONS OR OPINIONS AS TO STATEMENTS OR EXPRESSIONS, § 834.
CONCLUSIONS OR OPINIONS AS TO ACTS, § 835.
EFFECT OF FRAUDULENT REPRESENTATIONS, § 836.

Leading questions, see post, § 844.
Questions involving matters of opinion in cross-examination, see post, § 988.
Admissibility of opinion evidence in general, see "Evidence," vol. 20, cc. 3112-3530, §§ 2149-2400.

§ 833. In general.

[a] (Ga. 1890) It is not error to refuse to permit a witness to answer a question calling for a conclusion of law.—McCaulla v. Murphy, 86 Ga. 475, 12 S. E. 655.

[aa] (Ill. 1862) In an action of attachment on the ground that defendant is a nonresident, a judgment for defendant will not be reversed because a witness was asked: "Does not the defendant reside at" a town named, which was in the state.—Pullian v. Nelson, 28 Ill. (18 Peck) 112.

[b] (Ill. 1870) In an action by one partner against his copartner to recover a sum alleged by defendant to have been paid for plaintiff to O., it is incompetent to ask plaintiff, when sworn as a witness, "Do you not believe to-day that O. had the $2,000?" as calling for a belief, rather than a fact.—Adams v. Funk, 53 Ill. 219.

[c] (Iowa, 1864) An interrogatory to a witness is bad which requires the witness to construe an agreement between the parties.—McClay v. Hedge, 18 Iowa, 66.

[d] (Iowa, 1864) A question as to what it would cost to do certain work "according to the contract testified to by the plaintiff" is inadmissible, because it requires the witness to put his own construction on the plaintiff's testimony as to the contract. The question should state the testimony.—McClay v. Hedge, 18 Iowa, 66.

[e] (Iowa, 1893) The question, "Do you know whether or not he [defendant] bought his father's homestead?" is not leading, and does not call for a conclusion.—Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492.

[f] (La. 1896) It was not error in a criminal case to refuse to permit defendant to ask the witness whether he would believe his own

brother under oath in case the latter testified for defendant, since it sought to elicit the opinion of the witness.—State v. Fontenot, 48 La. Ann. 283, 19 South. 113.

[g] (Md. 1890) A witness was asked by plaintiff's counsel: "If a broker is employed by the vendor of real estate to find a purchaser for his property, and he does introduce to the vendor, as a probable purchaser, a man who buys within a reasonable time, the broker is entitled to his commissions, the only qualification to this rule being the rule that, where two or more brokers are employed to negotiate the same transaction, the broker who first succeeds is entitled to full commissions, and the others are not entitled to any." *Held* objectionable, as calling for a mere statement of the law as established by usage.—Blake v. Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

[h] (Mich. 1869) W. sued T. for malicious prosecution in causing him to be arrested on a criminal charge of obtaining goods from him on false pretenses. On this charge W. was acquitted by the jury without leaving their seats. Evidence was introduced showing that the prosecution was malicious and without probable cause. The defendant then asked the prosecuting attorney, "On what ground was the plaintiff acquitted?" *Held*, that the question was incompetent.—Tefft v. Windsor, 17 Mich. 486.

[i] (N. Y. 1889) A witness who was in the employ of a witness who had testified for defendant was asked by plaintiff, "Has he [Mahoney] told you, and don't you know as a matter of fact, that he would have to pay the city any damage which the city might sustain by reason of this case?" *Held*, that the question was properly excluded, inter alia, because it asked the witness to state the necessary consequences of a future or conditional state of affairs.—Hillesum v. City of New York, 56 N. Y. Super. Ct. (24 Jones & S.) 596, 4 N. Y. Supp. 806.

[j] (N. Y. 1894) In an action for rent, it is error to allow plaintiff, in order to prove the lease, to be asked to "state to the jury what premises your firm let to defendant," "for what months defendant owes your firm rent," and "how much did you let the premises for, per month?" as such questions are leading and call for conclusions.—Rehm v. Weiss (City Ct. N. Y.) 8 Misc. Rep. 525, 28 N. Y. Supp. 772.

[k] (Wis. 1883) Upon the trial of an appeal from an award of commissioners of appraisal for land taken by a railroad company the owner of the land taken was asked how much, in his opinion, the railroad had depreciated the value of his farm as a whole. *Held*, that the question referred to the farm as owned by him at the time of the trial, exclusive of the land taken, and was proper.—Wooster v. Sugar River Valley R. Co., 57 Wis. 311, 15 N. W. 401.

§ 834. Conclusions or opinions as to statements or expressions.

[a] (Mo. 1855) Where a party undertakes to prove by a witness words which were spoken by a deceased surveyor relative to a boundary in question, the question must be put in such a manner as to draw out from the witness whatever facts the surveyor stated, and not mere general conclusions, which might be derived from a combination of law and fact.—Evans v. Greene, 21 Mo. 170.

[b] (N. J. 1795) It is improper to ask a witness what the defendant meant by an expression the witness had sworn that he had used.—State v. Mairs, 1 N. J. Law (Coxe) 453.

[c] (Vt. 1895) Where, to a question asking a witness whether a person said a certain thing, is added the expression, "or that in substance," such expression will be construed, "or those words, in substance," and is not, therefore, incompetent as asking the witness what such person meant by what he said.—Norton v. Parsons, 67 Vt. 526, 32 Atl. 481.

§ 835. Conclusions or opinions as to acts.

[a] (Me. 1855) One of a board of commissioners to report the damages in a case of flowage cannot be asked at the trial "whether or not they exercised great care in the discharge of their duty in examining the premises and making their report."—Bryant v. Glidden, 39 Me. 458.

[b] (Md. 1879) In an action on an injunction bond, evidence was introduced that plaintiff, who was engaged in supplying milk to customers, began the erection of a brick stable to replace one which had been partially burned down, and was stopped in August by an injunction, which continued until December 6th following; that after it was dissolved he went on to complete the building, and had it finished by December 25th; that, while the injunction was in force, plaintiff's cows were deprived of their accustomed and proper shelter, and were more exposed to the weather. The following question was then propounded to a witness: "What was the effect upon the cows, if any, in consequence of being exposed to the wind and cold weather because you could not finish the brick stable while the injunction suit was pending?" *Held*, that the question was proper.—Lange v. Wagner, 52 Md. 310, 36 Am. Rep. 380.

[c] (Mass. 1837) On the trial of an indictment for selling liquor, a witness for defendant having testified that, before the alleged sale, he had purchased of defendant all the spirits in defendant's shop, and paid therefor, and taken a lease of the shop, and that the alleged sale was made by an agent on his account, and not on account of the defendant, it was *held* that defendant had a right to ask the witness whether the transaction with him was an actual bona fide or only a colorable and pretended sale.—Commonwealth v. Kimball, 41 Mass. (24 Pick.) 366.

[d] (N. Y. 1860) Several notes were executed at the same time with the one in suit. A witness was allowed to be asked whether or not all belonged to the same transaction. It is a matter of fact, not of law or opinion, whether they did or not.—Ayrault v. Chamberlain, 33 Barb. 229.

[e] (N. Y. 1863) The question, "Was a certain deed delivered to take effect?" is inadmissible, as calling for a legal conclusion.—Braman v. Bingham, 26 N. Y. 483.

[f] (N. Y. 1863) The questions whether the plaintiff had been in possession of a farm since the deed to her, and "for whom did your husband do what business he did after you took the deed?" are not objectionable, on the ground of involving legal conclusions.—Knapp v. Smith, 27 N. Y. 277.

[g] (N. Y. 1874) A witness for defendant who had drawn up an assignment of the note from the testator to defendant's wife, which was not executed, was asked, "Did you suppose it [the assignment] was signed by C. [the testator] at the time?" To which he answered, "Yes." *Held* inadmissible, as the supposition of the witness was not a fact by which the rights of the testator or his representatives should be affected.—Smith v. Sergent, 4 Thomp. & C. 684.

[h] (N. Y. 1886) In an action on a nonnegotiable note payable to the order of plaintiff, when defendant sets up the defense of a payment by a deceased joint maker, the testimony of plaintiff as to whether the payment was or was not made on the note is competent, under an objection that the question is one of fact to be determined by the jury.—Evans v. Deming, 2 N. Y. St. Rep. 349.

[i] (Pa. 1836) A witness, called to authenticate a paper, cannot be asked whether, to the

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best of his impression, it is in the handwriting of the party, but may be asked as to his belief.—Carter v. Connell, 1 Whart. 392.

§ 836. Effect of fraudulent representations.

Cross-examination as to fraud, see post, §§ 963, 964.

[a] (N. Y. 1854) The prosecutor, in a trial for obtaining an indorsement by false pretenses, may testify to the influence of the defendant's representations in inducing him to indorse.—People v. Miller, 2 Parker, Cr. R. 197.

[b] (N. Y. 1860) On a trial for obtaining property by false pretenses, it is admissible to show by the party defrauded that he relied on defendant's representations.—People v. Sully, Sheld. 17.

[c] (Pa. 1893) On a prosecution for obtaining goods under false pretenses, prosecutor may be asked whether he parted with his property on defendant's representations, and whether the credit was given on that ground alone.—Commonwealth v. Boyer (Quart. Sess.) 2 Pa. Dist. R. 843.

8. LEADING QUESTIONS.

RIGHT TO USE LEADING QUESTIONS, § 837.
WHAT QUESTIONS ARE LEADING IN GENERAL, § 838.
SPECIFIC QUESTIONS IN GENERAL, § 839.
PRELIMINARY OR INTRODUCTORY QUESTIONS, § 840.
QUESTIONS AS TO STATEMENTS OR SUGGESTIONS PREVIOUSLY MADE BY WITNESS, § 841.
QUESTIONS AS TO STATEMENTS OR DIRECTIONS BY OR CONVERSATIONS BETWEEN OTHER PERSONS, § 842.
MATERIALITY OF QUESTIONS, § 843.
QUESTIONS INVOLVING CONCLUSIONS OR MATTERS OF OPINION, § 844.
QUESTIONS IN THE ALTERNATIVE, § 845.
QUESTIONS AND SUGGESTIONS IN AID OF RECOLLECTION, § 846.
CHILDREN OR WEAK-MINDED OR IGNORANT PERSONS, § 847.
UNWILLING OR HOSTILE WITNESSES, § 848.
EXPERT WITNESSES, § 849.
OBJECTIONS TO QUESTIONS, § 850.
EXISTENCE OF FACTS AUTHORIZING LEADING QUESTION AS QUESTION FOR JURY, § 851.

Discretion of court as to leading questions, see ante, § 795.

Examination of impeaching witness as to inconsistent statements, see post, § 1248.

Leading questions in examination by court or jury, see post, § 854.

—— *on cross-examination, see* post, § 989.

—— *on redirect examination, see* post, §§ 995, 996.

Right to change form of leading question and repeat, see ante, § 828 [b].

Objections in trial court to leading questions, see "Appeal and Error," vol. 2, c. 1754, § 1287.

§ 837. Right to use leading questions.

[a] A question suggestive of the answer desired may be excluded.

—(Miss. 1831) Torrance v. Hurst, 1 Miss. (Walk.) 403;

(N. Y. 1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122;

(Pa. 1814) Snyder's Lessee v. Snyder, 6 Bin. 483, 6 Am. Dec. 493;

(Tex. 1894) Galveston, H. & S. A. Ry. Co. v. Smith (Civ. App.) 28 S. W. 110.

[b] (U. S. 1840) Leading questions are not proper, except on cross-examination.—United States v. Dickinson, Fed. Cas. No. 14,958 [2 McLean, 325].

[c] (Cal. 1887) Permitting leading questions to be asked a witness in a criminal case, who evidently did not speak English fluently, upon matters to which she had already testified in substance, is not ground for reversal.—People v. Clary, 72 Cal. 59, 13 Pac. 77.

[d] (Ga. 1883) In a prosecution for murder, the fact that a witness of the killing, when on the stand, is greatly affected by her situation, does not make it error for the court to refuse to permit defendant to lead her.—Durham v. State, 70 Ga. 264.

[e] (Ga. 1887) Where, in a question objected to as leading, the matters referred to in it which might otherwise make it leading have previously been fully disclosed by the witness, the objection is not well taken.—Tift v. Jones, 77 Ga. 181, 3 S. E. 399.

[f] (Ill. 1891) It is not error to refuse to allow counsel to put leading questions to his own party, a witness for himself.—Clingman v. Irvine, 40 Ill. App. 606.

[ff] (Ill. 1892) Asking a witness, "Was he killed in this county and state?" although objectionable, is not reversible error, where the venue is not disputed.—Cannon v. People, 141 Ill. 270, 30 N. E. 1027.

[g] (Ill. 1895) Allowing a witness, on direct examination, to answer a leading question, is not reversible error, where substantially the same question is asked and answered on cross-examination.—Fox v. Steever, 156 Ill. 622, 40 N. E. 942.

[h] (Ind. 1883) A judgment will not be reversed, because of the allowance of a leading question, where it appears from the answer that the witness was not led, and no injury is shown to have resulted.—Hilton v. Mason, 92 Ind. 157.

[i] (Ind. 1884) A judgment will not be reversed, because of the allowance of leading questions, unless injury resulted from their allowance.—Weik v. Pugh, 92 Ind. 382.

[j, k] (Iowa, 1879) On a trial for assault and battery by beating plaintiff's back, a question was asked a witness: "State whether or not there were lashes there, six inches in length, where the skin had been cut so deeply the blood had come out, and was gathered in large cords?" The witness replied: "My recollection at the time is that there were cuts there that were fully six inches in length, where the skin had been broken. In regard to gathering in cords, I should not be so particular about. This whole transaction has gone entirely out of my mind. When I was subpœnaed to come here this morning, at first I had doubts that I had seen anything in the case at all." *Held*, that conceding the question to be leading, the error was not reversible, since the answer showed that the witness was not influenced in making it by the form of the question.—Reddin v. Gates, 52 Iowa, 210, 2 N. W. 1079.

[l] (Ky. 1883) Where testimony of a witness has the appearance of being true, the fact that leading questions have been put to him is not ground for reversal.—Wise v. Foote, 81 Ky. 10.

[m] (Me. 1852) Although a judge may in some cases allow leading questions to be put to a witness, questions which are leading may be excepted to for that cause.—Persons v. Bridgham, 34 Me. 240.

[n] (N. J. 1850) It is no ground for a new trial that the court permitted the plaintiff's counsel to ask his own witness a leading question.—Mershon v. Hobensack, 22 N. J. Law (2 Zab.) 372.

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[o] (Tex. 1896) Where a witness, on being asked if he was acquainted with the reputation of deceased for peace and quietude, answered that deceased was "a good sort of fellow," and on further questioning said that he did not know what "peace and quietude" meant, a refusal to permit defendant's counsel to put leading questions to the witness in order to indicate to him what was wanted was not erroneous.—Miller v. State (Cr. App.) 35 S. W. 391.

§ 838. What questions are leading in general.

[a] (U. S. 1881) A leading question is one which suggests or leads to the answer, and which embodies a material fact, and can be directly answered by "Yes" or "No."—United States v. Angell (C. C.) 11 Fed. 34.

[b] (Ga. 1892) In an action for personal injuries, interrogatories which assume hurt, suffering, or loss of time are leading.—Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494, 15 S. E. 848; Huggins v. Chattanooga, R. & C. R. Co., Id.

[c] (Ind. 1881) That a question mentions the subject to which the witness is desired to direct his answer does not render it leading.—De Haven v. De Haven, 77 Ind. 236.

[d] (Iowa, 1875) Questions leading in form, but merely intended to direct the attention of the witness to the subject-matter of his testimony, are competent.—Lowe v. Lowe, 40 Iowa, 220.

[e] (La. 1844) A question which does not indicate the answer expected, but merely directs attention to the subject in relation to which the witness is to testify, is not a leading one. A leading question is one which suggests the answer expected.—State v. Duncan, 8 Rob. 562.

[f] (La. 1890) A proper question is not rendered objectionable by a request to the witness to answer "Yes" or "No."—State v. Black, 42 La. Ann. 861, 8 South. 594.

[g] (La. 1896) Where questions did not suggest an answer to a material fact, but were asked in the way of explaining a fact not disputed, they were not leading.—State v. Fontenot, 48 La. Ann. 220, 19 South. 112.

[h] (Me. 1852) Leading interrogatories are such as suggest answers favorable to the party proposing them.—Parsons v. Bridgham, 34 Me. 240.

[i] (N. H. 1858) A question is not leading if it calls for a direct affirmative or negative answer, and is no more suggestive of one than the other.—Spear v. Richardson, 37 N. H. 23.

[j] (N. H. 1860) A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, or plainly suggests the answer which the party desires to obtain from him, whether it be put in the alternative form or not.—Page v. Parker, 40 N. H. 47.

[k] (Tex.) A leading interrogatory is one that may be answered in the affirmative or negative, and suggests the desired answer.—(1851) Able v. Sparks, 6 Tex. 349; (1856) Mathis v. Buford, 17 Tex. 152.

[l] (Tex. 1862) It is not the form of a question which necessarily determines whether it is leading or not, but whether it is so framed as to suggest to the witness the answer desired.—Tinsley v. Carey, 26 Tex. 350.

§ 839. Specific questions in general.

See ante, § 827 [g].

[a] (Ala. 1845) Where a witness testifies as to work and labor done, and money received, for which the plaintiff is seeking to recover, it is competent to inquire whether other work had been done or money received. Such a question, though it directs the attention of the witness that he may state the facts fully, cannot be said to be leading.—Strawbridge v. Spann, 8 Ala. 820.

[b] (Ala. 1857) A question in these words, "Do you know any circumstances which will show that the defendant knew his son went to school in the year 1854?" is neither leading nor otherwise objectionable in form.—Floyd v. State, 30 Ala. 511.

[c] (Ark. 1853) In a trial to establish a will, a subscribing witness was asked: "Did you subscribe said will in the presence and at the request of the testator?" *Held*, that this was a leading question.—Rogers v. Diamond, 13 Ark. (8 Eng.) 474.

[d] (Ark. 1854) The question: "Do you know whether B. was ever prosecuted for stealing a horse? If so, by whom and where?" is not objectionable as leading.—Sexton v. Brock, 15 Ark. 345.

[e] (Ark. 1857) The mode of examining a witness who is personally present at the trial is very much under the control of the presiding judge; and there is no objection to the general question whether the witness had seen the defendant play the game charged in the indictment at any time within 12 months, etc.—Orr v. State, 18 Ark. 540.

[f] (Cal. 1886) A question, "Whom did you see watching around the house?" (the place of the homicide), is not leading.—People v. De Witt, 68 Cal. 584, 10 Pac. 212.

[g] (Ga. 1890) In an action on an account, an interrogatory to plaintiff as a witness, "Examine this account, and state whether the same is just, due, correct, and unpaid," the account being exhibited to the witness, is allowable within the discretion of the trial court, and is not objectionable as leading, and intended to elicit a general answer which can be a conclusion of law only.—Clark v. Fee, 86 Ga. 9, 12 S. E. 181.

[h] (Ga. 1893) In ejectment, where defendant claimed under a parol gift of plaintiff's intestate in consideration of board and services, defendant's mother cannot be asked what deceased ever paid her or her daughters for boarding and waiting on him, "except the houses and lots he gave your daughters." The question assumed a material collateral fact, and suggested the answer desired.—Thompson v. Ray, 92 Ga. 285, 18 S. E. 59.

[i, j] (Ill. 1846) In a suit for breach of marriage promise, after a witness for the plaintiff had testified that the defendant had paid attentions to the plaintiff, the plaintiff's counsel asked the question, "Did he court her?" *Held*, that the question was not improper, as being leading.—Greenup v. Stoker, 8 Ill. (3 Gilman) 202.

[k] (Ind. 1877) In an action under 2 Rev. St. 1876, p. 277, § 674, by one maker of a note against the other to determine the question of suretyship, a question to a witness, asking him to "state what you know, if anything, of any indebtedness of" one of such makers, "named in this case, on or about" a certain year, is not leading.—Harvey v. Osborn, 55 Ind. 535.

[l] (Ind. 1881) In a case of disputed pedigree, the question, "State what you know, if anything, about your father ever recognizing B., that afterwards married D., and afterwards H., as his child?" was not objectionable as being leading.—De Haven v. De Haven, 77 Ind. 236.

[m] (Iowa, 1863) A question to a witness, "What have you seen by the way of intoxicating liquors being sold, between July 1, 1860, and April 15, 1861, in that building?" is not

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objectionable as leading.—State v. Schilling, 14 Iowa, 455.

[n] (Iowa, 1893) On an indictment for forgery, in altering the findings in a civil case, where it was contended that defendant did not have an opportunity to alter the findings without being seen, and the attorney had testified that defendant was in the office several times while the findings were there, it is competent to ask the attorney, "During this time were you in the habit of watching him, to see what he did?"—State v. Kidd, 89 Iowa, 54, 56 N. W. 263.

[o] (Ky. 1822) In an action for goods sold and delivered, the defendant introduced evidence to prove a partnership between the plaintiff and another not named in the writ. A question by the plaintiff to his clerks, "whether, from the manner in which his books were kept, and his conversations with the supposed partner, they had any knowledge of such partnership," is improper, because leading.—Snodgrass v. Broadwell, 12 Ky. (2 Litt.) 353.

[p] (Md. 1854) The question "whether witness [A.'s clerk] was in the habit of acting by said A.'s consent and with his approbation to every extent, in reference to buying goods or otherwise providing for A.'s stores during his absence," is a leading question.—Lee v. Tinges, 7 Md. 215.

[pp] (Mich. 1871) On the trial of an action for slander, it is not competent to read to the witness the words as laid in the declaration and then interrogate him concerning them, for the reason that the plaintiff thus makes known to the witness the very facts which the form of the declaration required to be shown.—Osborn v. Forshee, 22 Mich. 209.

[q] (Mich. 1879) In an action against a saloon keeper for injuries resulting from the sale of liquor to plaintiff's husband, where the defendant has testified that he himself sold the husband liquor on several occasions, an interrogatory by his counsel as to whether these were the only times the husband got liquor at his place is objectionable as leading, and also because it does not confine the defendant to sales within his own knowledge.—Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801.

[qq] (Mich. 1879) The following question, put to a witness by the contestants of a will, is not objectionable as leading: "Did you notice during the spring any weakening in testator's mind?"—Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882.

[r] (Mich. 1882) Where the good faith of a transfer from a son to his father is in question in an action of replevin brought by the father to recover the property after it has been seized on an attachment against the son, it is not leading, and is proper, to ask a witness who aided in the transfer, whether there was any suggestion by the parties that they were seeking to avoid creditors, or anything of that kind. It is also proper to ask the attachment debtor whether any portion of his object in making the transfer was to delay, hinder, or defraud creditors.—Hart v. Newton, 48 Mich. 401, 12 N. W. 508.

[rr] (Mich. 1896) A question whether an officer was instructed to go to a certain place for several days before the attachment in suit was levied is objectionable as leading.—Goeschel v. Fisher, 108 Mich. 212, 65 N. W. 965.

[s] (Miss. 1839) A witness may be asked if he was a notary public in a certain place at a certain time, if he protested a bill of exchange (exhibited), if he gave notice of protest to the drawers, or of demand and refusal of payment, and, if yea, "declare at what time and in what manner you gave such notice, to whom and in what place were notices directed, and state particularly whether said notices were forwarded in time to go out by the first mail that left on the day after protest"; and the questions are not objectionable as leading, in an action against drawers.—Sadler v. Murrah, 4 Miss. (3 How.) 195.

[ss] (Mo. 1895) In an action against a street-railroad company for injuries caused by a fall either in getting on a street car, or in getting off after the car started, where plaintiff, in testifying through an interpreter, several times used language which evidently did not express what she desired to say, it was error to exclude, as leading, the question, "When you hailed the car, did you stop on the sidewalk, or did you continue walking until you got near the car?"—Olfermann v. Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483.

[t] (N. H. 1859) The question proposed by the party calling a witness, "Did you make any agreement at that time?" is objectionable, as leading. The question might be, "Was any agreement made, by whom, at what time?" or, "What, if any, agreement did you make, and when?"—Dudley v. Elkins, 39 N. H. 78.

[tt] (N. H. 1863) In an action of trespass, a question to state whether defendant or his wife denied or disputed the right of plaintiff to hold what his deed covered by reason of any agreed line, and, if so, what line, is competent, though it is leading, as the object of the question was to inquire what was not said.—Steer v. Little, 44 N. H. 613.

[u] (N. H. 1864) Where the question was whether certain clapboards had been accepted by the plaintiff, and the plaintiff had testified that he said, "if he could sell the clapboards, he would indorse them on the note of the defendant," it was *held* that the court might properly allow the plaintiff's counsel to ask him the question, "Did you do anything to sell or dispose of the clapboards, other than to say that, if you could sell them, you would indorse them on the note, or did you do anything to measure or survey them?" notwithstanding the defendant objected to it as leading.—Hale v. Taylor, 45 N. H. 405.

[uu] (N. Y. 1875) In a trial for murder by assault, the defense was that the assault was not serious, and that deceased cut her head in falling. On cross-examination, a witness for defendant was asked whether she did not meet M. the morning after the homicide, and tell her that defendant had raised a great disturbance; and she replied in the negative. *Held*, the state having put M. on the stand, that a question to her as to whether she saw said witness on the morning after the homicide was not objectionable as leading.—Shufflin v. People, 6 Thomp. & C. 215.

[v] (N. Y. 1894) In an action for rent, it is error to allow plaintiff, in order to prove the lease, to be asked to "state to the jury what premises your firm let to defendant" and "for what months defendant owes your firm rent," and "how much did you let the premises for, per month?"—as such questions are leading, and call for conclusions.—Rehm v. Weiss (City Ct. N. Y.) 8 Misc. Rep. 525, 28 N. Y. Supp. 772.

[vv] (S. C. 1895) A general interrogatory, addressed to a witness whose deposition is being taken: "If you know anything else that will benefit the plaintiff, state same fully"—is not objectionable as leading, or as depriving defendant of the right to cross-examine such witness relative to matters brought out by the question.—Hill v. Georgia, C. & N. R. Co., 43 S. C. 461, 21 S. E. 337.

[w] (Tex. 1856) An interrogatory which asks the witness to state whether any money was received from the said S., and the amount, if any, is not leading.—Mathis v. Buford, 17 Tex. 152.

[ww] (Tex. 1887) A question asked a witness on a trial for theft of a branded animal, "Is

this the brand that was on the animal killed?" at the same time showing the witness a representation of a brand, is leading, and it is error to permit it to be answered.—Rangel v. State, 22 Tex. App. 642, 3 S. W. 788.

[x] (Tex. 1888) To ask a witness to state "whether J. left C. in September, 1884, and who did he leave in charge of his business," is not error, as leading him to state the exact day of J.'s departure, and that he (witness) was left in charge of J.'s business, where the witness has been in J.'s employ for years, and J.'s departure in September, 1884, is notorious.—Bergen v. Producers' Marble Co., 72 Tex. 53, 11 S. W. 1027.

[xx] (Tex. 1889) In an action by an engineer against a railroad company for personal injuries received by the derailment of his engine, it is reversible error to permit the plaintiff to ask his witness if he did not observe a low joint where the accident occurred, and if he did not call the roadmaster's attention to it at the time of the accident as the cause of the derailment, and make a certain remark to him, though the roadmaster had testified on cross-examination that he did not remember that the witness called his attention to the joint, or what was said, as the question was leading.—Ft. Worth & D. C. R. Co. v. Thompson, 75 Tex. 501, 12 S. W. 742.

[y] (Vt. 1891) A witness who had had large experience in nursing the insane, and who had conversed with testatrix on several occasions, was asked, "Do you think you could have sat and conversed with" testatrix "an hour and a half, * * * and not have discovered any insanity, if any existed in her?" *Held*, that the question was neither leading nor open to the objection that no foundation had been laid.—Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253.

[yy] (Vt. 1895) In a suit by a partner against his copartner and his copartner's vendee, to recover from the vendee the value of part of the firm stock in trade withdrawn and sold by his copartner, it appeared that plaintiff, who had been doing business alone in the name of a company, took defendant into partnership. Plaintiff testified that the attorney who drew the contract told them that the provision that neither partner should draw any money above his salary except for payment of debts meant the debts of the old company. To meet this defendant partner was asked whether he had ever heard plaintiff or the attorney claim that this provision meant the old company, to which he answered "No." *Held*, that the question was not incompetent, as leading.—Norton v. Parsons, 67 Vt. 526, 32 Atl. 481.

[z] (Wis. 1884) In an action against a city for personal injuries caused by a defective sidewalk, where plaintiff testified that she suffered a miscarriage by reason of the accident, the question, "State whether you are not now suffering from the effects of that fall," cannot be objected to as leading.—Wright v. City of Ft. Howard, 60 Wis. 119, 18 N. W. 750, 50 Am. Rep. 350.

[zz] (Wis. 1886) On an indictment for rape, the question asked the prosecutrix by the district attorney "Was there any blood on your underclothing after this?" is a leading question, and its allowance is error.—Hardtke v. State, 67 Wis. 552, 30 N. W. 723.

§ 840. Preliminary or introductory questions.

Preliminary questions in general, see ante, § 818.

[a] (Iowa, 1859) Defendant's question to a witness, couched in the language of plaintiff's petition, for the purpose of directing the witness' attention to the particular subject of inquiry, is not objectionable as "leading, suggestive, or assuming what is not proved."—Shields v. Guffey, 9 Iowa, 322.

[b] (Mich. 1890) It is not improper to ask a witness whether or not, at a specified time, he swore to a statement of lien for or in behalf of another, or as his agent, for the purpose of identifying the statement.—Huntoon v. O'Brien, 79 Mich. 227, 44 N. W. 601.

[c] (Miss. 1853) A leading question is one which directly suggests the answer desired, or which embodies a material fact, and admits of a simple negative or affirmative, without suggesting either; but if the object be to direct attention with more expedition to what is material, and the question propounded relates merely to introductory matter, it should not be objected to, although in form it should be leading.—Stringfellow v. State, 26 Miss. (4 Cushm.) 157, 59 Am. Dec. 247.

[d] (N. H. 1863) On a dispute as to boundary, the question, "Have you traced the dividing line through your lot?" is introductory merely, and is admissible.—Steer v. Little, 44 N. H. 613.

[e] (N. Y. 1830) If a question relate to introductory matter, and is designed only to lead the witness to what is material to the issue, it may be put, though it be leading.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[f] (N. Y. 1863) In an action to recover for work done under a special contract requiring plaintiff to conform to certain plans, a question to a witness, on introducing the plans in evidence, whether they were correct, though leading, is still proper, as mere inducement.—Stuart v. Binsse, 23 N. Y. Super. Ct. (10 Bosw.) 436.

[g] (Tex. 1852) Interrogatories are not leading which merely point to such facts as will direct the attention of the witness to the matter in relation to which his testimony is desired.—Long's Adm'rs v. Steiger, 8 Tex. 460.

§ 841. Questions as to statements or suggestions previously made by witness.

Refreshing memory by calling attention to former statements by witness, see post, § 870.

Suggestions or questions in aid of recollection, see post, § 846.

[a] (La. 1892) On a trial for murder, the prosecuting attorney asked a witness the following question: "I understand you to say that when you got there, after running there, you found one man lying partly on the banquette, and partly in the gutter, dead?" The witness answered, "Yes, sir." *Held*, that the question was not leading, but simply recapitulated the facts already testified to in order to direct the witness' mind to further questions.—State v. Walsh, 44 La. Ann. 1122, 11 South. 811.

[b] (N. Y. 1883) The direct examination of a witness, by reading to him paragraph after paragraph of an affidavit made by him a year previously, and asking him whether he swore to that, and if the statement was true, it not appearing that the witness' recollection was defective, or that the paper was shown to and read by him for the purpose of aiding his memory, is error.—Hubbell v. Bowe, 49 N. Y. Super. Ct. (17 Jones & S.) 131.

[c] (N. C. 1893) In an action against an administrator to recover on a note given by decedent, where defendant introduced a witness to show the mental incapacity of decedent, the question whether witness had not suggested an appointment of a guardian for decedent is leading, and the court did not err in excluding it.—Ducker v. Whitson, 112 N. C. 44, 16 S. E. 854.

[d] (S. C. 1892) Questions which are mere repetitions of what a witness has previously

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said cannot be objected to as leading.—Brice v. Miller, 35 S. C. 537, 15 S. E. 272.

[e] (Tex. 1867) An interrogatory, which refers a witness to a previous deposition by him in the same cause, and asks him if his answers therein were true, is leading and inadmissible. —Trammell v. McDade, 29 Tex. 360.

§ 842. Questions as to statements or directions by or conversations between other persons.

Questions in the alternative as to statements or conversations, see post, § 845.

[a] (Cal. 1896) Where it is sought to avoid a policy on the ground that insured represented to the insurance agent that the building contained less than 15 rooms, it is proper to exclude, as leading, a question asked the agent by insurer as to whether insured stated to him that the building contained less than 15 rooms. —Yoch v. Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857.

[b] (Ill. 1866) Where, in trover for the conversion of a machine, it was at issue whether the plaintiff had demanded exclusive possession of the machine, or only the right to possess it jointly with defendant, it was not leading for the plaintiff to ask the witness, by whom he proved the demand, what was said, if anything, by the plaintiff, at that time, about his interest in the machine.—Swartwout v. Evans, 41 Ill. 376.

[c] (Iowa, 1892) A question asked of a witness, on a prosecution for seduction, whether defendant, in speaking of taking liberties with the female, said that he was "going to get there," is leading, and should not be allowed.— State v. Brown, 86 Iowa, 121, 53 N. W. 92.

[d] (Iowa, 1893) Plaintiff was injured in alighting from defendant's car, and in an action therefor was asked: "You may state whether you were directed by defendant, or any one of its employés or its agents, to get off of the opposite end of this coach from the end that you did get off." *Held*, that the question was not leading.—McDonald v. Illinois Cent. R. Co., 88 Iowa, 345, 55 N. W. 102.

[e] (Miss. 1847) In a prosecution for rape, the prosecuting witness was asked: "Did the prisoner, at any time subsequent to the transaction, say anything to you about what judgment the laws of Mississippi would inflict on you, or him, or both? State it all." *Held*, that this question was leading and improper.—Turney v. State, 16 Miss. (8 Smedes & M.) 104, 47 Am. Dec. 74.

[f] (Miss. 1847) In a prosecution for rape, the prosecuting witness was asked: "If the prisoner, in any of his antecedent conversations, offered property or any other advancement to you, in order to attach you to him, say so." *Held*, that this question was leading. —Turney v. State, 16 Miss. (8 Smedes & M.) 104, 47 Am. Dec. 74.

[g] (Miss. 1847) On the trial of a prisoner for a rape, the prosecutrix testified that the violence had been committed seven months before the indictment had been found, which, so far as the record showed, was the first disclosure by the witness of the injury done to her. It appeared, also, that the prisoner had been the guardian of the witness from her early orphanage, and was her stepfather, and that she was about 16 years old at the time of the alleged crime. She was then asked, "Did the prisoner then, or at any subsequent time, say anything to you in relation to this matter to dissuade you from disclosing it? State when, where, and what he said." *Held*, that the question was leading and illegal.—Turney v. State, 16 Miss. (8 Smedes & M.) 104, 47 Am. Dec. 74.

[h] (Miss. 1894) In a suit for partition against the heirs of a decedent, complainant claiming under a deed from decedent, where complainant's wife testified that decedent had proposed to her husband to go and live with decedent, a question as to what inducement was offered by decedent, eliciting the answer that he stated that complainant had an interest in the land, and ought to take care of it, is not objectionable as leading.—Saffold v. Horne, 72 Miss. 470, 18 South. 433.

[i] (N. H. 1855) The question, "What was the nature of the conversation between said parties, and were they in earnest, or was the talk a matter of joke between them?" is not leading.—Willis v. Quimby, 31 N. H. (11 Fost.) 485.

[j] (N. H. 1863) "State what Mrs. S. said as to holding by virtue of your deed all but 50 acres of said lot," is leading, as it assumes that the claim made related to "all but 50 acres of said lot."—Steer v. Little, 44 N. H. 613.

[k] (N. Y. 1893) In an action by an attorney employed by a village, for libel, a question put to defendant as a witness, which assumes that comments had been made by the inhabitants of the village as to the acts of plaintiff, and asks him, "Was the opinion frequently expressed that he was not a proper person, under the circumstances, to be thus employed?" is leading.—Mattice v. Wilcox, 71 Hun, 485, 24 N. Y. Supp. 1060.

[l] (Pa. 1854) The question, "Did Peter Rhoades tell you where that corner was?" is not leading.—Kemmerer v. Edelman, 23 Pa. (11 Harris) 143.

[m] (Tex. 1892) In a prosecution for perjury at a murder trial, a question, "What did defendant say on that trial with reference to where he and the alleged murderer were when the shots were fired?" is not objectionable as leading, because it indicates no particular answer.—Hays v. State (Cr. App.) 20 S. W. 361.

[n] (Tex. 1895) Where it is sought to prove the death of a person by declarations of deceased members of the family, a question asking the witness to state "who that is dead told" him the facts as to which he testified, is not objectionable on the ground that it is leading and suggestive.—Davidson v. Wallingford (Civ. App.) 30 S. W. 827.

[o] (Wis. 1860) After a witness has said that he heard certain persons frequently talk about a partnership, it is not leading to ask him what they said about the partnership.—Carlyle v. Plumer, 11 Wis. 96.

§ 843. Materiality of questions.

See ante, § 795 [s].

[a] (Ark. 1851) In the examination of a witness, leading interrogatories are objectionable only when they relate to some material point.— Clark v. Moss, 11 Ark. (6 Eng.) 736.

[b] (Iowa, 1886) In an action against a surety, defendant testified that plaintiff had told him the debt was paid, which plaintiff in his testimony denied. The court, in order to arrive at the truth, asked the plaintiff this question, "You did not say to defendant you were safe or all right?" *Held* that, inasmuch as the answer to the question affirmatively or negatively would not materially strengthen plaintiff's case, defendant could not claim a reversal on the ground that the court's question was leading. —Sessions v. Rice, 70 Iowa, 306, 30 N. W. 735.

[c] (Mich. 1891) In an action to recover money paid on a note given by plaintiff at defendant's request to a third person to take the place of and release defendant's mortgage to such person, allowing a leading question to plaintiff to the effect that the house on which the mortgage existed was the individual prop-

erty of defendant was harmless error, as the inquiry was immaterial.—Tredway v. Antisdel, 86 Mich. 82, 48 N. W. 956.

§ 844. Questions involving conclusions or matters of opinion.

[a] (U. S. 1834) Upon a prosecution for piracy, the witnesses for the government were allowed, with the chart before them of the course of the vessel which was the subject of the piracy, to be asked the question whether, under the circumstances stated of the supposed time of starting of both vessels, such vessel and the vessel of the alleged pirates would or would not be likely to meet at the point marked on the chart. *Held*, that this was a direct and proper question, and not leading.—United States v. Gibert, Fed. Cas. No. 15,204 [2 Sumn. 19].

[b] (Cal. 1893) Where a witness has testified that he, as a physician, attended deceased from January to the time of his death, in October, describing his ailments, physical condition, and conversations with him, etc., a question as to the state of his mind on October 1st, based on his appearance, actions, condition, and conversation, will not be held leading or suggestive.—Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317.

[c] (Ill. 1895) Where the motorman has stated just what he did at the time of the accident, it is proper to refuse to allow him to answer a question whether he used all the means and all the power he had to stop the car and prevent it running over plaintiff, since the question is leading, and calls for a conclusion.—Springfield Consolidated Ry. Co. v. Welsch, 155 Ill. 511, 40 N. E. 1034.

[d] (La. 1885) The question "Would the defendant, after having struck the deceased with a rail, have had time to pull his knife out of his pocket, open it, and cut the man when he did?" addressed by the prosecuting attorney in a murder trial to the principal witness for the state, not an unwilling witness, is leading.—State v. Parce, 37 La. Ann. 268.

[e] (Mich. 1863) The question, "Will you state whether or not, in your judgment, these samples now shown to you are off pieces that were stolen?" is not leading.—Morrissey v. People, 11 Mich. 327.

[f] (Mich. 1879) A question whether certain work conformed to the contract specifications is not objectionable as leading, merely because answerable by "Yes" or "No," if it does not point out the desired answer.—McKeown v. Harvey, 40 Mich. 226.

[g] (Mich. 1879) The following question put to a witness by the contestants of a will is not objectionable as leading: "In your opinion, during the spring of 1887, had testator's mind weakened?"—Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882.

[h] (N. Y. 1889) In an action for personal injuries, the allowance of a question to a physician as a witness, whether plaintiff could walk without a cane, is within the discretion of the trial court, on a general objection, though it is excepted to as a leading question.—Johnson v. Brooklyn & S. A. R. Co., 53 Hun, 633, 6 N. Y. Supp. 113.

[i] (Pa. 1824) On an issue of devisavit vel non, a question to the witness as to "whether, from his actual knowledge of the alleged testator, he considered him fit or unfit to make a will," is not objectionable as leading.—Wogan v. Small, 11 Serg. & R. 141.

[j] (Tex. 1890) In an action for injuries caused by plaintiff's mules becoming frightened on defendant's bridge, and breaking through the railing of the bridge, a question to plaintiff, "Are not ordinary animals, such as are ordinarily used on farms, apt to be frightened and nervous and skittish when driven on plank roads and bridges?" is objectionable, as leading.—Baldridge & Courtney Bridge Co. v. Cartrett, 75 Tex. 628, 13 S. W. 8.

[k] (Tex. 1894) A question asked an engineer, "From your knowledge and experience as an engineer, was it possible to have stopped the train after you saw plaintiff * * * on the track?" is leading.—Galveston, H. & S. A. Ry. Co. v. Duelin, 86 Tex. 450, 25 S. W. 406.

[l] (Va. 1893) On an indictment for entering a mill with intent to steal, and stealing corn therefrom, the miller having testified that on Monday morning he missed corn which had been there Saturday night, and that there was some Fultz wheat and poplar shavings mixed in the corn, was asked if the corn he found at defendant's was the same corn, and answered that it was "in my opinion, * * * to the best of my knowledge and belief." He was then asked, "On what facts do you found your belief and knowledge?" and answered: "Because we found wheat and shavings in the corn that identified themselves. It was Fultz wheat and poplar shavings in the corn at the mill." *Held*, that the questions were not subject to exceptions as leading.—Combs v. Commonwealth, 90 Va. 88, 17 S. E. 881.

[m] (Wis. 1892) In an action for fraud in designating the boundaries of certain lots on a sale thereof, it is not error to allow plaintiff's counsel to ask him direct questions as to his belief in defendant's representations, or his taking into consideration the size of the property, as inducements to purchase.—Castenholz v. Heller, 82 Wis. 30, 51 N. W. 432.

§ 845. Questions in the alternative.

Questions in the alternative in general, see ante, § 819.

[a] (Ark. 1851) An objection that a question is leading is not necessarily obviated by putting the question in the alternative, but the rule excluding leading questions rests on the sensible effect which the question may have on the mind of the witness, by indicating the answer it is desired he should make, or furnishing him with one favorable to the point sought to be established.—Clark v. Moss, 11 Ark. (6 Eng.) 736.

[b] (Ga. 1887) In an action to recover for a personal injury to a married woman aged 40 years, questions asking her whether or not, in consequence of the injury, she suffered an abortion, and flooding was thereby caused, are not so leading, in view of the sex, age of the witness, and nature of the subject-matter, as to be inadmissible.—Powell v. Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757.

[c] (Ga. 1892) In a claim case, where a deed from the defendant in fi. fa. to the claimants, purporting to be founded on a valuable consideration, is attacked by the creditor as fraudulent because in part voluntary, an interrogatory by the latter to one of his witnesses, asking him to state whether or not the defendant in fi. fa. gave his daughter (one of the claimants) one-half of the land, is leading.—Hicks v. Sharp, 89 Ga. 311, 15 S. E. 314; Sharp v. Hicks, Id.

[d] (Iowa, 1859) A question to a brother of a deceased testator as to "whether or not testator's insanity took the form of dislike to his relatives and friends," is not objectionable as leading.—Pelamourges v. Clark, 9 Iowa, 1.

[e] (Iowa, 1880) On a trial for murder, where a witness had testified that there were nail prints in the tracks found on the ground, an inquiry as to whether he could notice distinctly or otherwise the nails in the tracks is not objectionable as leading.—State v. Moelchen, 53 Iowa, 310, 5 N. W. 186.

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[f] (Iowa, 1893) The question, "Do you know whether or not he [defendant] bought his father's homestead?" is not leading, and does not call for a conclusion.—Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492.

[g] (Iowa, 1895) In a prosecution for seduction, a question by the state, requiring prosecutrix to state whether or not defendant ever made to her a promise of marriage, is not objectionable as leading.—State v. Wickliff, 95 Iowa, 386, 64 N. W. 282.

[h] (La. 1877) A question put to a witness in a criminal proceeding, which suggests the answer, is not the less leading because propounded in the alternative, as where, on a prosecution for stealing a calf, a witness is asked the question, "Did or did not accused acknowledge to you that he had marked the calf?"—State v. Johnson, 29 La. Ann. 717.

[i] (Mo. 1834) Where a witness was asked whether or not defendant admitted in conversation that the plaintiff had not received his portion of an estate, it was *held* that the interrogatory was leading in its character, and should have been suppressed by the court.—McLean v. Thorp, 3 Mo. 215.

[j] (N. H. 1855) An interrogatory as follows: "State whether or not Willis said at this time that he would acknowledge that there never had been any delivery of the horse," is leading.—Willis v. Quimby, 31 N. H. (11 Fost.) 485.

[k] (N. H. 1856) A question to a witness, proposed in the form, "whether or not," is not ordinarily objectionable as leading. It may be so when proposed in that form, if it be otherwise in such terms that, from the nature of the question, in connection with its subject-matter, it suggests to the witness the answer desired.—Bartlett v. Hoyt, 33 N. H. 151.

[l] (N. Y. 1830) A question to a witness is leading when it plainly suggests the answer which the party puts to him, and the mere stating of the question in the alternative form, as whether or not a party did a certain act, specifying it, does not remove the objection to its being leading.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[m] (Pa. 1854) It was not a leading question to ask a director whether it was or not made known to the directors of the corporation that certain property proposed to be mortgaged to it had been previously conveyed, or whether he as director had any knowledge of such conveyance.—Wilson v. McCullough, 23 Pa. (11 Harris) 440, 62 Am. Dec. 347.

[n] (Tex. 1877) To ask the prosecuting witness the question, "Was it [the coition] done with or without your consent?" is not improper. The matter of the question is pertinent, and the form is not leading.—Coates v. State, 2 Tex. App. 16.

[o] (Tex. 1893) A witness who had testified that he heard a woman's voice at defendant's house on the evening preceding the morning on which the dead body of defendant's wife was found was asked the following questions: "Did the noise sound as if the person was in joy, or distress? Was it as if she was laughing or crying, or if she was suffering pain, or enjoying pleasure? Or was she making a mere idle noise, as if nothing was the matter with her?" *Held*, that the questions were not leading or suggestive.—Malcek v. State, 33 Tex. Cr. R. 14, 24 S. W. 417.

[p] (Va. 1849) The questions, "State whether or not you examined the horse tracks toward Crogan's," and "State whether or not you had any difficulty in following the tracks," are leading and improper.—Hopper v. Commonwealth, 6 Grat. 684.

[q] (W. Va. 1886) A question asked as follows: "State whether or not a settlement was made between you and the defendant in which the money on this note [meaning a note in controversy] was applied on the purchase money of the land"—is not objectionable as being a leading question.—State v. Henderson, 29 W. Va. 147, 1 S. E. 225.

§ 846. Questions and suggestions in aid of recollection.

Refreshing memory by use of memorandum and other writings, see post, §§ 874–892.
—— *in general, see* post, §§ 868–873.

[a] (Ala. 1882) Leading questions, intended to aid the memory of a witness in recollecting names, are permissible.—Herring v. Skaggs, 73 Ala. 446.

[b] (Ind. 1867) Leading questions are sometimes eminently proper on a direct examination. So *held* where, to prove the contents of an award, which was shown to have been lost, the plaintiff put a paper in the hands of the witness, and asked, "State whether or not this is a true copy of the award."—Adams v. Harrold, 29 Ind. 198.

[c] (Mass. 1859) Upon the trial in the court of common pleas, on appeal from a police court, of a complaint for being a common seller of intoxicating liquors, the date of the trial of which in the police court appears by the copies of the complaint and judgment, a witness may be asked, in order to fix a date in his mind, by calling his attention to an event of which he was cognizant, whether he recollected the trial in the police court, and whether he was in the defendant's shop within a month before that trial.—Commonwealth v. Melley, 80 Mass. (14 Gray) 39.

[d] (Mich. 1888) Plaintiff's intestate was killed by falling into an excavation extending beyond the sidewalk, at night. The coroner, who attended at the scene of the accident, testified that when he reached the spot he noticed that planks had been laid over the excavation, and that an electric light near by made them look like a stone sidewalk corresponding with the real walk. Counsel, desiring to ascertain the distance he was from the excavation when the sidewalk appeared continuous, asked him: "Did you not make this statement before the coroner's jury: 'In walking up G. avenue on this side, when you got within ten feet of this excavation, by reason of the stone wall and mason's platform built out on the G. side beyond the walk, consisting of horses and plank laid across, as it was last night, as a person approached it the appearance would be exactly that of a stone sidewalk?'" *Held*, that the court did not err in admitting this. The question was evidently to refresh the witness' memory, and contained nothing prejudicial to defendant.—Stone v. Standard Life & Accident Ins. Co., 71 Mich. 81, 38 N. W. 710.

[e] (N. H. 1855) A judge at the trial may permit counsel, on a direct examination, to suggest to a witness names, dates, and items, provided that the witness has exhausted his memory, and the purposes of justice require such a course to be taken.—Huckins v. People's Mut. Fire Ins. Co., 31 N. H. (11 Fost.) 238.

[f] (N. H. 1859) A witness may be asked if anything that was said at the time enables him to recollect; but he cannot be asked what was said, if that would introduce testimony otherwise improper.—Dudley v. Elkins, 39 N. H. 78.

[g] (N. Y. 1879) Where one's witness has given an ambiguous answer, he may properly be asked as to some circumstance enabling him to recollect the fact sought more clearly; as, for instance, "Is your attention called to the time of removal of the lamp from the excavation by any accident that happened?"—O'Hagan v. Dillon, 76 N. Y. 170.

[h] (S. C. 1895) It is not error to allow the prosecuting attorney to ask a leading question in order to correct a manifest mistake in the testimony of a witness introduced by the state.—State v. Johnson, 43 S. C. 123, 20 S. E. 988.

[i] (Tex. 1895) Leading questions may be allowed in order to refresh the witness' mind.—Hartsfield v. State (Cr. App.) 29 S. W. 777.

[j] (Wis. 1893) Where a witness has exhausted his recollection as to what was said on a particular occasion, it is not a leading question to ask if anything was said about a particular subject.—Born v. Rosenow, 84 Wis. 620, 54 N. W. 1089.

§ 847. Children or weak-minded or ignorant persons.

Discretion of court, see ante, § 795.

[a] (Fla. 1889) In the trial of a cause for rape, where the prosecutrix is of tender years, and is very ignorant, it is not error for the court to permit such leading questions to be propounded to the prosecutrix as in his opinion may be necessary.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[b] (Ga. 1892) On the trial of a boy for assault with intent to commit rape on a girl of nine years, the solicitor general asked the girl as a witness, "Do you know that boy over there?" pointing to defendant, and she said "Yes," and gave his name. *Held*, that the question was not improper as leading, or for any other reason.—Paschal v. State, 89 Ga. 308, 15 S. E. 322.

[c] (Ill. 1881) Upon the trial of an indictment for assault with intent to commit rape, the only witnesses testifying to criminal conduct were two girls, aged, respectively, 9 and 11. The testimony was elicited altogether by means of leading questions, calling, in most instances, for answers, "Yes" or "No." *Held*, that a conviction upon such testimony, so obtained, should be set aside.—Coon v. People, 99 Ill. 368, 39 Am. Rep. 28.

[d] (Ill. 1892) Leading questions should, if possible, be avoided in examining a child.—Sullivan v. Sullivan, 48 Ill. App. 435.

[e] (Ind. 1893) On a prosecution for rape, where the victim was only 10 years old, and inexperienced, the court properly allowed the state some latitude in leading questions.—Polson v. State, 137 Ind. 519, 35 N. E. 907.

[f] (Mich. 1887) Leading questions are not improper if put to enable the witness to understand the question, especially where such witness is ignorant of the English language.—People v. Jensen, 66 Mich. 711, 33 N. W. 811.

[g] (Mo. 1865) In an action to recover for injuries to animals upon a railroad track, a witness replied to a question as to the existence of a cattle guard that he did not know what a cattle guard was. *Held*, that it was proper for the examining counsel to describe a cattle guard, and then to ask the witness whether he had seen any such thing at the specified place.—Powell v. Hannibal & St. J. R. Co., 35 Mo. 457.

[h] (Tex. 1886) An exception to the general rule that leading questions cannot be propounded to witnesses is when the witness is weak-minded.—Armstead v. State, 22 Tex. App. 51, 2 S. W. 627.

[i] (Tex. 1887) On a trial for murder, one of the witnesses offered was a very ignorant Mexican woman, dull of comprehension, and not appearing to understand well questions propounded to her by a competent interpreter. *Held*, that in her examination leading questions were properly allowed.—Rodriguez v. State, 23 Tex. App. 503, 5 S. W. 255.

[j] (Tex. 1887) A leading question was properly admitted, when the witness was ignorant of the language, dull, and unwilling to testify.—Navarro v. State, 24 Tex. App. 378, 6 S. W. 542.

§ 848. Unwilling or hostile witnesses.

See ante, § 847 [j].

Discretion of court in examination of unwilling or hostile witness, see ante, § 795.

Examination by court or jury of unwilling witnesses, see post, § 856.

[a] (Ga. 1883) It is not error to permit the prosecution to lead a witness who appears contumacious and equivocal.—Durham v. State, 70 Ga. 264.

[b] (Ill. 1882) Leading questions may be put to a party's own witness, if he is an unwilling witness.—Bradshaw v. Combs, 102 Ill. 428.

[c] (Ill. 1892) Leading questions are proper if the witness is hostile.—Meixsell v. Feezor, 43 Ill. App. 180.

[d] (Ill. 1893) Where a witness for the prosecution is manifestly unwilling to testify, it is not error for the state's attorney to ask him leading questions.—McDonald v. People, 49 Ill. App. 357.

[e] (Ind. 1889) The prosecution was properly allowed to ask suggestive questions, reminding of time, place, and circumstances, of a witness who was a cousin and friend of accused, was with him both shortly before and shortly after the homicide, showed a purpose to assist him to escape, and manifested on the witness stand his hostility to the state, and friendship for the accused.—Conway v. State, 118 Ind. 482, 21 N. E. 285.

[f] (Iowa, 1892) In an action on a lost supersedeas bond, where plaintiff calls as a witness the attorney who appeared for defendant in the action in which the bond was alleged to have been given, and drew the bond, he may ask the witness, "Was the bond the usual statutory form of supersedeas bond?" though it is a leading question, the witness being adverse.—Rosenthal v. Bilger, 86 Iowa, 246, 53 N. W. 255.

[g] (La. 1874) It was not error to permit the attorney for the state to put leading questions to one of the witnesses without having first propounded preliminary questions, and without a refusal by the witness to answer questions propounded to her on the examination in chief, where it appeared that the witness had failed to obey the summons and had eluded the officers of the court, and when brought into court by attachment hesitated to testify and finally gave evasive answers, tending to contradict and cover up her testimony given before the recorder.—State v. Rosa, 26 La. Ann. 75.

[h] (Mass. 1858) Allowing this question to be put by the commonwealth to a reluctant witness, on direct examination, at a trial for unlawfully selling intoxicating liquors, "Do you mean to say to the jury that you have not drunk liquor there within three months?" is no ground of exception.—Commonwealth v. Thrasher, 77 Mass. (11 Gray) 57.

[i] (Mass. 1888) In a prosecution for a liquor nuisance, questions by the prosecuting attorney to unwilling witnesses for the state, who have testified that they have not bought and drunk cider upon the premises, whether they have drunk cider there, or how often they have drunk or have got or have paid for cider there, are competent on the issue whether defendant has sold cider to be drunk on the premises. The court may permit leading questions in such case.—Commonwealth v. Chaney, 148 Mass. 6, 18 N. E. 572.

[j] (Mich. 1883) To examine a witness on the assumption that he is unfriendly before there is any evidence given to warrant it, is unauthor-

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ized by the rules of evidence.—People v. Lyons, 51 Mich. 215, 16 N. W. 380.

[k] (Mich. 1886) Leading questions may be asked a witness by the party calling him when the witness, contrary to expectation, is adverse to him, as shown by his manner of answering questions.—McBride v. Wallace, 62 Mich. 451, 29 N. W. 75.

[l] (Mich. 1895) Where a witness, on a prosecution for keeping a saloon open on Sunday, was required by law to be called by the people because he was a person to whom liquors were alleged to have been sold, and was apparently unwilling to testify, it was proper to allow the prosecution to use as a basis of interrogation statements submitted and sworn to by the witness on the preliminary hearing of the case, the purpose not being to impeach him, but to overcome his disinclination to divulge by confronting him with his former statements.—People v. Case, 105 Mich. 92, 62 N. W. 1017.

[m] (Mich. 1895) Leading questions may be put to a witness by the party who calls him, where his answers are evasive, and show a disposition to favor the adverse party.—People v. Caldwell, 107 Mich. 374, 65 N. W. 213.

[n] (Mo. 1893) When a witness for the state answers reluctantly and evasively, some latitude may be allowed the state's attorney in leading questions.—State v. Keith, 53 Mo. App. 383.

[o] (N. Y. 1896) In the examination of adverse witnesses, a party is entitled to considerable latitude, and it is error to exclude questions to such witnesses directed to eliciting material testimony.—Smith v. Crocker, 3 App. Div. 471, 38 N. Y. Supp. 268.

[p] (Pa. 1892) In an action for damages from the falling of a defective scaffold, plaintiff asked his witness if defendant superintended the construction of the scaffold. "Answer. I don't remember. Question. Did you not tell me so yesterday? Answer. I don't remember." No further effort was made to refresh the witness' memory. *Held*, that plaintiff was erroneously allowed to treat him as an adverse witness and to direct to him by way of cross-examination leading questions; he not having testified to anything prejudicial to plaintiff or manifested any bias.—Fisher v. Hart, 149 Pa. 232, 24 Atl. 225, 30 Wkly. Notes Cas. 208.

[q] (Tex. 1886) Under the practice in Texas, leading questions are permissible, when the witness shows clearly an unwillingness to testify.—Taylor v. State, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656.

[r] (Vt. 1894) Under R. L. § 1009, providing that a party to a civil action may be compelled to testify as a witness for the adverse party, subject to the same rules as other witnesses, a party may be compelled to answer leading questions, though he has not been adjudged a hostile witness.—Childs v. Merrill, 66 Vt. 302, 29 Atl. 532.

§ 849. Expert witnesses.

[a] (Ala. 1890) A question to a physician offered as an expert, whether he has had many cases of obstetrics, is properly disallowed as leading.—Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65.

[b] (S. C. 1893) When a surveyor has, as an expert, fully explained a plat, and all that he saw or could find in regard to the lines therein, a question whether there were any marks to show that any persons, other than those he had mentioned, got any of the land, is leading.—Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680.

§ 850. Objections to questions.

[a] (Iowa, 1862) A leading question, prejudicial to the party asking it, cannot be objected to by the opposite party.—Cochran v. Miller, 13 Iowa, 128.

[b] (Iowa, 1885) The overruling of an objection to a leading question is ground for reversal when questions are asked so grossly leading as to indicate the answer desired, and upon the vital points in the case.—Henry v. Sioux City & P. Ry. Co., 66 Iowa, 52, 23 N. W. 260.

[c] (Iowa, 1888) Failure to object to a leading question when asked is a waiver of the objection.—State v. Maher, 74 Iowa, 82, 37 N. W. 5.

[d] (Iowa, 1888) An objection to questions as leading does not call up for review the remarks of the court in deciding that point.—State v. Pugsley, 75 Iowa, 742, 38 N. W. 498.

[e] (Wis. 1880) The objection that questions propounded to a witness are leading must be taken specially, or it is waived.—Teegarden v. Town of Caledonia, 50 Wis. 292, 6 N. W. 875.

§ 851. Existence of facts authorizing leading question as question for jury.

[a] (N. H. 1885) Whether facts exist upon which the law allows leading questions to be put to a witness by the party calling him is a question of fact to be determined at the trial.—Osgood v. Eaton, 63 N. H. 355.

9. EXAMINATION BY COURT OR JURY.

IN GENERAL, § 852.
CALLING AND EXAMINATION BY COURT, § 853.
LEADING QUESTIONS, § 854.
REPETITION OF QUESTIONS BY COURT, § 855.
UNWILLING WITNESSES, § 856.
RECALLING WITNESS FOR EXAMINATION, § 857.

Control of examination by court in general, see ante, § 789.

Cross-examination by court, see post, § 911.

Effect on competency of adverse party of examination by court, see ante, § 533.

Interrogation of witness by judge as ground for new trial in criminal prosecution, see "Criminal Law," vol. 15, c. 33, § 2187.

§ 852. In general.

[a] (Colo. 1890) The active participation of the court in the examination of a party who testifies in his own behalf cannot be relied on as error unless it be shown that the party was actually prejudiced by it.—Baur v. Beall, 14 Colo. 383, 23 Pac. 345.

[b] (Ga. 1855) The court has an unlimited right to interrogate witnesses, both in civil and criminal cases.—Epps v. State, 19 Ga. 102.

[c] (Ga. 1857) The trial judge may in his discretion examine a witness.—Bowden v. Achor, 95 Ga. 243, 22 S. E. 254.

[d] (Ill. 1860) The court may examine a witness after the parties have finished, and may, at its discretion, allow a cross-examination thereupon.—Foreman v. Baldwin, 24 Ill. (14 Peck) 298.

[e] (Ill. 1885) It was improper for the court in advance of cross-examination of a witness by counsel to examine him in a manner showing doubt as to his credibility.—Doubet v. Kirkman, 15 Ill. App. (15 Bradw.) 622.

[f] (Ind. 1881) The court has the right to submit questions to a witness, and commits no error in doing so unless the questions are in themselves objectionable or are so asked as improperly to influence the jury.—Colee v. State, 75 Ind. 511.

[g] (Ind. 1882) The trial judge has a large discretion in asking witnesses questions tend-

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ing to throw light upon their testimony.—Huffman v. Cauble, 86 Ind. 591.

[h] (Kan. 1886) The fact that the court asks questions of a witness in a civil action is not ground for reversal.—Clark v. Phelps, 35 Kan. 43, 10 Pac. 107.

[i] (Mass. 1852) In an action to recover for advertising the defendant's business card in the plaintiff's newspaper, the defendant asked a publisher "what was a fair price for advertising such a card," to which the presiding judge added, "in the manner published by the plaintiff." *Held*, that no exception existed to such question by the judge.—Palmer v. White, 64 Mass. (10 Cush.) 321.

[j] (Mo. 1887) A trial judge has the right to interrogate a witness to supply some omitted and legitimate question, or to fully develop the facts bearing on the case.—State v. Pagels, 92 Mo. 300, 4 S. W. 931.

[k] (Mo. 1888) The court may interrogate a witness to ascertain whether he understands a question asked him, and has answered it according to his understanding.—State v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

[l] (Mo. 1894) The trial court may ask a witness such questions as it deems necessary for its own information and that of the jury.—State v. Nickens, 122 Mo. 607, 27 S. W. 339.

[m] (Mo. 1895) It is proper for the court or members of the jury to question witnesses on points not clearly brought out in the case.—Schaefer v. St. Louis & S. Ry. Co., 128 Mo. 64, 30 S. W. 331.

[n] (Okl. 1895) The trial court may in its discretion aid in eliciting material matter suggested by the evidence by interrogating a witness.—De Ford v. Painter, 3 Okl. 80, 41 Pac. 96, 30 L. R. A. 722.

[o] (Pa. 1881) The court may question a witness, during his examination, for its own information, the advancement of justice, or to give the witness an opportunity for explanation.—Bickel v. Philadelphia Wood Pav. Co., 2 Walk. 150.

§ 853. Calling and examination by court.

[a] (N. Y. 1856) A party cannot be compelled to testify except at the instance of the adverse party. It is error if he testifies on motion of the justice.—McCormick v. Mulvihill, 1 Hilt. 131.

[b] (N. Y. 1889) It is not error for the court, ex mero motu, to call a witness and examine him, over the objections of counsel, when the opposing counsel accept him as their witness and conclude his examination.—O'Connor v. National Ice Co., 56 N. Y. Super. Ct. (24 Jones & S.) 410, 4 N. Y. Supp. 537.

[c] (Va. 1893) A witness present at the commission of a homicide, and named on the indictment, but not used by the prosecution, if called by the court of its own volition, and cross-examined by both sides, is not to be regarded as the witness of either party. Therefore, on defendant's demurrer to the evidence, if the testimony of such witness conflicts with the commonwealth's evidence, it will not be considered.—Clark v. Commonwealth, 90 Va. 360, 18 S. E. 440.

§ 854. Leading questions.

Leading questions in general, see ante, §§ 837–851.

[a] (Cal. 1888) It being in the discretion of the court to permit leading questions, it may, of its own motion, ask questions of witnesses in that form.—People v. Bowers, 18 Pac. 660.

[b] (Ind. 1882) The court, upon a jury trial, may put proper questions to witnesses, even leading questions.—Huffman v. Cauble, 86 Ind. 591.

[c] (Mich. 1882) It is allowable for a trial judge, in a criminal case, to ask a witness whether a conversation testified to as having taken place in his presence could have gone on without his hearing it, though such question is leading in its character.—Driscoll v. People, 47 Mich. 413, 11 N. W. 221.

§ 855. Repetition of questions by court.

Repetition of questions in general, see ante, §§ 827, 828.

[a] (S. C. 1892) The fact that a witness has already testified as to instructions received from his principal does not debar the court from asking him to again state what his instructions were.—Sanders v. Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

§ 856. Unwilling witnesses.

Leading questions to unwilling or hostile witnesses, see ante, § 848.

[a] (Ga. 1885) It is not only the privilege, but the duty, of the court, to question reluctant witnesses where they resort to subterfuge to evade telling the truth.—Varnedoe v. State, 75 Ga. 181, 58 Am. Rep. 465.

§ 857. Recalling witness for examination.

Discretion of court as to recalling witness, see ante, § 797.

Recalling witnesses in general, see post, §§ 899–905.

[a] (Ill. 1861) Where a judge takes a case under advisement, he can recall witnesses and reexamine them without notice to the party, so that he may be present and cross-examined.—Hurd v. Lill, 26 Ill. (16 Peck) 496.

[b] (Tex. 1896) It was not error for the court to recall defendant after he had testified and retired from the stand, and ask him whether he had made certain statements in his testimony.—Lafferty v. State (Cr. App.) 35 S. W. 374.

10. ANSWERS.

IN GENERAL, § 858.
SUBSTANCE OF STATEMENT OR ADMISSION, § 859.
IMITATION OF ATTITUDE AND MOVEMENTS, § 860.
RESPONSIVENESS OF ANSWER IN GENERAL, § 861.
RESPONSIVENESS OF PARTICULAR ANSWERS, § 862.
ANSWER RESPONSIVE IN PART, § 863.
IMPRESSIONS OF WITNESS, § 864.
REASONS FOR KNOWLEDGE OR RECOLLECTION OF WITNESS, § 865.
USE OF DOCUMENTS, MAPS, PLATS, DIAGRAMS, OR OTHER MATTERS TO EXPLAIN TESTIMONY, § 866.
—— CONDITIONS PRECEDENT, § 867.

Answers to questions on cross-examination, see post, § 919.

Improper answer to question as ground for striking out evidence, see "Trial," vol. 46, cc. 1004–1006, § 238.

Objection in trial court to improper answer to proper question, see "Appeal and Error," vol. 2, c. 1745, § 1273.

—— *to question as extending to answer, see* "Trial," vol. 46, cc. 984–986, § 222.

§ 858. In general.

[a] (Ala. 1851) In detinue for slaves, plaintiff claimed the same under a parol gift of the

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mother of the slaves from his maternal uncle, made while plaintiff was an infant, and delivered to his mother for him, but afterwards obtained from her possession by his uncle to prevent her from being levied on as the property of his father. *Held*, that the statement of a witness for defendant, that plaintiff's uncle when the slave was in the possession of plaintiff's mother "was in the habit of exercising control over her," was admissible, since if the term "habit," being general, required an explanation as to what the witness meant thereby, it could have been called for by cross-examination.—Nelson v. Iverson, 19 Ala. 95.

[b] (Ala. 1891) A witness, in identifying an article, stated that he could not tell positively whether it was the same. The court then told him that he could determine whether it was the same on the same principles that he would determine whether his hat or knife was his own, and he answered that he was satisfied that the article was the same. *Held*, that there was no error in the instruction to the witness, nor in the admission of his answer.—Mitchell v. State, 94 Ala. 68, 10 South. 518.

[c] (Cal. 1874) When a witness is called and sworn, an answer which he makes to a question put by the clerk of the court, demanding his name, is a part of his testimony.—People v. Winters, 49 Cal. 383.

[d] (Ga. 1853) Strict formality in the answers of a witness is not necessary, if the point in question is substantially established by his testimony.—Rome R. Co. v. Sullivan, 14 Ga. 277.

[e] (Ga. 1871) A witness is entitled to have his testimony read over to him if he desires it. But the evidence will not be so read over at the request of counsel, for the presumption is that all the legal testimony was correctly taken down under the direction of the court.—Anderson v. State, 42 Ga. 9.

[f] (Ind. 1847) The statement of a fact may be made by a witness to the best of his recollection or belief, or as he thinks the fact to be, and the evidence is admissible.—Rhode v. Louthain, 8 Blackf. 413.

[g] (Ind. 1884) Where, on a trial for assault with intent to rape, the woman assaulted testified only after having been attached and threatened with imprisonment by the court that she had been offered money not to testify by A., it was proper for the state to ask what relation A. was to defendant for the purpose of connecting defendant with the bribery, but after witness had testified that defendant knew nothing about it, the question and answer should have been withdrawn.—Lockhart v. State, 92 Ind. 452.

[h] (Ky. 1830) If the witness be competent, and the question pertinent to the issue, he should be compelled to answer.—Ragland v. Wickware, 27 Ky. (4 J. J. Marsh.) 530.

[i] (Mo. 1885) It is better for the witnesses, where the possession of personal property is controverted, to state the facts bearing on such question; but where they state simply that one party was in possession, and no effort is made by the other party, by cross-examination or otherwise, to have the particular facts relating to such possession detailed, the judgment will not be reversed because of the admission of the evidence in the objectionable form.—McMillan v. Schweitzer, 87 Mo. 402.

[j] (Neb. 1887) Where a party examined as a witness in answer to an inquiry as to a former statement states that he does not remember having made such statement, it is not equivalent to a denial that he made it.—Meyer v. Stone, 21 Neb. 717, 33 N. W. 420.

[k] (Neb. 1887) Where a party examined as a witness in answer to an inquiry as to a former statement replies, "Not in that language," such words are not equivalent to a denial of the statement.—Meyer v. Stone, 21 Neb. 717, 33 N. W. 420.

[l] (N. H. 1857) Where a witness was asked whether he had ever seen B., and if so, when and where, and he replied that he had seen him once at the store of W., in Boston, he could not tell when, and he afterwards deposed that B. purchased goods of W. at several times, it was *held* that the court could not decide that the witness had no competent knowledge of the facts he stated. That question must be left to the jury.—Dickinson v. Lovell, 35 N. H. 9.

[m] (N. Y. 1860) The maker may be allowed to state the consideration of a note without going into details, leaving the other side to bring them out by cross-examination.—Ayrault v. Chamberlain, 33 Barb. 229.

[n] (N. Y. 1878) It is competent for a witness in a criminal case to qualify his answer by the statement that the facts recited therein are given to the best of his knowledge.—Blake v. People, 73 N. Y. 586.

[o] (Tex. 1894) A witness may not answer a question by adopting the answer of another witness.—Eddy v. Lowry (Civ. App.) 24 S. W. 1076.

§ 859. Substance of statement or admission.

[a] (Mass. 1873) Where a witness does not recollect the words of an admission, he may state its substance.—Kittredge v. Russell, 114 Mass. 67.

[b] (Mich. 1875) Witnesses are allowed to give the substance of what occurs and is said in reference to the matters to which they testify, and are not required to testify verbatim.—Willard v. Fralick, 31 Mich. 431.

[c] (Mich. 1876) While a witness testifying to declarations of a party or conversations should give the words used, if able so to do, yet a general answer, embodying the substance or purport, is not objectionable, where that is all the witness can recollect.—Chambers v. Hill, 34 Mich. 523.

§ 860. Imitation of attitude and movements.

[a] (La. 1896) On a prosecution for shooting at a person it was proper to permit a state's witness to exhibit the attitude and motion of the accused when he fired.—State v. Comeau, 48 La. Ann. 249, 19 South. 130.

§ 861. Responsiveness of answer in general.

[a] (Ill. 1837) Where a witness is sworn in chief, he is bound to state all the facts within his knowledge that are applicable to the case and that can be proved by parol, and it can make no difference whether such testimony is given in answer to the interrogatories of the party against whom it operates or not.—Roberts v. Garen, 2 Ill. (1 Scam.) 396.

[b] (Iowa, 1891) Where a person who acted as treasurer of an association, while testifying in plaintiff's behalf in an action against it, stated that he never accepted the trust of treasurer, which was not responsive to the question, plaintiff was entitled to have the statement stricken out, whether material to the issue or not.—Murray v. Walker, 83 Iowa, 202, 48 N. W. 1075.

[c] (Ky. 1895) In an action against a surety on a note, evidence that the date of the note was changed by the payee after delivery is not objectionable because it was adduced through an irresponsive answer by one of plaintiff's witnesses.—Cassidy v. Hilman, 31 S. W. 726, 17 Ky. Law Rep. 461.

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[d] (Mich. 1852) Where a party sworn as a witness under the statute gives an evasive answer, the court will allow the broadest latitude of inquiry to elicit the truth, and effect the object of the law.—Way v. Billings, 2 Mich. 397.

[e] (Mich.) Only the party questioning a witness can object to his answers as not responsive.—(1874) Hamilton v. People, 29 Mich. 173; (1885) Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666.

[f] (N. H. 1854) When a witness possesses information which he knows to be important, it is his duty to communicate it, although no question may have been asked him tending to draw out such knowledge.—Streeter v. Sawyer, 28 N. H. (8 Fost.) 555.

[g] (N. J. 1839) If the answer of a witness be direct and pertinent to the question put, it is competent evidence as against the party who put the question; but statements of the witness, foreign to that question, are not competent.—Guild v. Aller, 17 N. J. Law (2 Har.) 310.

[h] (N. Y. 1891) In an action for damages to the rental value of property from the maintenance of an elevated railway, the owner of a stable adjacent to the premises was asked how much the railroad had damaged his stable. *Held*, that an answer that the elevated road had damaged the witness' "business" a certain sum, is irresponsive; but in the absence of a motion to strike it out, or to direct the jury to disregard it, an exception to its admission as incompetent is not available.—Malcolm v. Metropolitan El. Ry. Co. (Com. Pl.) 13 N. Y. Supp. 283.

[i] (N. Y. 1891) On a trial for grand larceny, a detective was allowed to testify that he had known the prisoner for several years in Toronto, and was then asked, "What does he do there?" to which witness answered, "I never knew him to do any legitimate work there. He is hanging around with thieves." There was no objection to the question, but defendant moved that the last part of the answer be stricken out as not responsive to the question, which was done. *Held*, that although the question was proper, and the answer improper, defendant, having asked that only a part of the answer be stricken out, was bound by the part that remained.—People v. Wilkinson, 60 Hun, 582, 14 N. Y. Supp. 827.

[j] (Wis. 1887) In an action against a tenant for rent and repairs of a broken window, where a witness, while being cross-examined by plaintiff's counsel, after testifying, "I knew the boy let this [the awning that probably broke the window] down, because I saw him in the door," and goes on, "I asked him if he let it down, and he said, 'Yes,' and not to say a word about it" —the refusal to strike out the last sentence, though the testimony in itself is improper, is not error, because the statement may have been responsive to counsel's question.—Colclough v. Niland, 68 Wis. 309, 32 N. W. 119.

§ 862. Responsiveness of particular answers.

[a] (Ala. 1858) To an interrogatory whether the witness heard a particular conversation about the plaintiff, and calling for all the circumstances, an answer, "I do not remember that the plaintiff's name was then mentioned," is responsive.—Smith v. Gaffard, 33 Ala. 168.

[b] (Ala. 1859) An answer stating the reasons declared by a party is not responsive to a question asking the reasons of the actions of that party; and such declarations are not competent in answer to that question.—Crews v. Threadgill, 35 Ala. 334.

[c] (Ga. 1887) A witness was asked by defendant, on cross-examination, what danger there was to his daughter after she crossed the river, to which he answered that "it was in 1870, and there were tramps and vagabond negroes traveling up and down the country. I did not know what insult or indignity might be offered her." *Held*, that the answer was responsive, and defendant's objection to it was not well taken.—Tift v. Jones, 77 Ga. 181, 3 S. E. 399.

[d] (Ind. 1893) In a will contest on the ground of testator's unsoundness of mind, a witness was asked to state a conversation between himself and one of the devisees. *Held*, that an answer that testator was crying during such conversation is properly stricken out as irresponsive.—Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

[e] (Iowa, 1887) In an action against a railroad company for damages caused by a fire set by an engine, a witness for defendant was asked what was the custom in reference to keeping the engine and netting in good condition, and the witness, instead of testifying to the custom, stated what defendant did. *Held*, that the evidence was not objectionable.—Patterson v. Chicago, M. & St. P. Ry. Co., 70 Iowa, 593, 33 N. W. 228.

[f] (Iowa, 1888) Where a witness answers an indirect question by asking another, the answer will not be struck out as not responsive.—Bell v. Chicago, B. & Q. Ry. Co., 74 Iowa, 343, 37 N. W. 768.

[g] (Iowa, 1890) The answer of a witness that the owner of horses injured on a railroad track stated, after the accident, that the bars were not sufficient to keep the horses in, is not responsive to the question whether such bars were reasonably sufficient to restrain stock.—Story v. Chicago, M. & St. P. Ry. Co., 79 Iowa, 402, 44 N. W. 690.

[h] (Iowa, 1891) Where, in answer to the question whether the witness knew a certain person, he says that he has seen a paper relating to her, it is proper to strike out the answer as not responsive.—Irlbeck v. Bierle, 84 Iowa, 47, 50 N. W. 36.

[i] (Iowa, 1893) In an action against a railroad company for personal injuries, to a question whether he looked as he usually did when he went in to make a coupling, plaintiff answered that he did not have time to look. *Held*, that a refusal to strike out such answer as not responsive was not prejudicial, since plaintiff had a right to state fully all the facts surrounding the transaction.—Horan v. Chicago, St. P., M. & O. Ry. Co., 89 Iowa, 328, 56 N. W. 507.

[j] (Kan. 1890) Where, in a proceeding to recover for land taken by a railroad company, a witness is asked, on cross-examination, a question as to his knowledge of values in the neighborhood, and volunteers the following statement: "A neighbor of mine right north of me has one hundred and twenty acres, and was offered six thousand dollars"—it is error to refuse the request of the defendant to withdraw such statement from the jury.—Chicago, K. & W. R. Co. v. Muller, 45 Kan. 85, 25 Pac. 210.

[k] (Kan. 1891) In proceedings to condemn a right of way for a railroad company, the land owner, against objection, was asked as to the value of his land per acre immediately after the building of the road, and answered that there was a "considerable difference." *Held*, that the answer was irresponsive, but as the railroad company had not asked to have it stricken out, the objection to the question would not justify a reversal of the judgment.—Chicago, K. & W. R. Co. v. Woodward, 47 Kan. 191, 27 Pac. 836.

[l] (Mich. 1890) In an action for the value of services rendered as a salesman in a carriage repository, a witness, after testifying that plaintiff was in his employ, was asked, "What is a man of his ability and character, judging from your acquaintance with him in a business way,

what are his services worth a month?" and answered, "Of course I only say what * * * [he] is worth to us; we pay him $25 a week. We find his services desirable at that price." *Held*, that the answer should have been stricken out as not responsive, and as incompetent, it not appearing what services plaintiff rendered witness, and it not being shown that witness had any knowledge of the value of the services sued for.—Williams v. Williams, 82 Mich. 449, 46 N. W. 734.

[m] (Mich. 1893) In answer to an interrogatory to name some of the prominent members of a certain association "at that time," witness stated, "Most of the state and city officers at Richmond, Va., were members, and there were other prominent members in various states whose names I cannot tell." *Held*, the answer was properly excluded, as not responsive to the question.—Angell v. Loomis, 97 Mich. 5, 55 N. W. 1008.

[n] (N. H. 1854) A witness was asked, "Did A. ever make any objection to their crossing the grass land, to you or in your hearing, before the time above mentioned; and did he not see them crossing nearly all the time before that?" He answered, "He has made that objection, to me and to others, as much as twenty times, when he has seen them cross." *Held*, that the answer was responsive to the question.—Streeter v. Sawyer, 28 N. H. (8 Fost.) 555.

[o] (N. Y. 1879) Where a plaintiff was improperly allowed to ask his witness, "Do you know of a party recovering a judgment of $5,000?" an answer, "No, but I have heard from some parties outside that there was such a thing," was not sufficiently irresponsive to relieve the plaintiff of the responsibility of the question, without declining to receive the answer.—O'Hagan v. Dillon, 76 N. Y. 170.

[p] (N. Y. 1889) A witness for plaintiff in an action for personal injuries was asked: "Is there anything you recollect that you have not stated as to the plaintiff's appearance after his return from Florida?" to which witness answered: "He was very feeble, and irritable in his disposition, after his return from Florida." *Held*, that such answer was properly struck out as irresponsive.—Bonelle v. Pennsylvania R. Co., 51 Hun, 640, 4 N. Y. Supp. 127.

[q] (N. Y. 1889) A physician, who had testified that the accident would have an effect on plaintiff's nervous system, was asked: "And do you think it affected that?" The answer was: "She is complaining of that now." *Held*, that the answer was properly stricken out as not responsive, and also because complaints made by plaintiff might be inadmissible, at least if not made to the physician for his professional guidance, and only overheard by him.—Hillesum v. City of New York, 56 N. Y. Super. Ct. (24 Jones & S.) 596, 4 N. Y. Supp. 806.

[r] (N. Y. 1889) A reply to the question whether witness could state any conversation that ever occurred between himself and plaintiff on a certain subject, that there had never been any such conversation, should be stricken out as irresponsive to the question.—Harnickell v. Parrott Silver & Copper Min. Co., 52 Hun, 610, 5 N. Y. Supp. 112.

[s] (N. Y. 1891) A witness, who testified that he owned and occupied a building in the street in question when the elevated road was built, was asked what effect the construction of the elevated railroad had on his property, to which he replied, "It destroyed my business entirely." *Held*, that such answer was responsive to the question.—Johnston v. Manhattan Ry. Co., 60 Hun, 583, 14 N. Y. Supp. 897.

[t] (N. Y. 1891) Plaintiff's intestate was killed, while delivering goods at defendant's house, by the breaking of the rope attached to a dumb-waiter, causing it to fall on him. In an action for his death, defendant's servant girl, called by plaintiff as a witness, in answer to the question, "What was it that broke that made the dumb-waiter go down?" replied, "Because he was hanging on the dumb-waiter." *Held* error to refuse the request to strike out such answer as not responsive.—Krey v. Schlussner, 62 Hun, 620, 16 N. Y. Supp. 695.

[u] (N. Y. 1892) Where a witness was asked to state the proper treatment of a "Colles fracture," including the subject of splints, and he replies that there are several different theories and methods of practice in regard to this fracture, and that, if he was told which method was intended, he would state the proper treatment, the answer was properly stricken out as not responsive to the question.—Link v. Sheldon, 64 Hun, 632, 18 N. Y. Supp. 815.

[v] (N. Y. 1892) Plaintiff's witness testified in chief that plaintiff's building was now worth from $60,000 to $65,000, and on cross-examination that $25,000 damages had been done it by the erection of defendants' road. On redirect examination, the witness was asked how much he allowed for damages from the road, to which he answered that the property would sell for $100,000 if the road was not there. *Held*, that the court properly refused to strike out the answer as irresponsive, and as relating to new matter.—Bischoff v. New York El. R. Co., 61 N. Y. Super. Ct. (29 Jones & S.) 211, 18 N. Y. Supp. 865.

[w] (N. Y. 1892) In an action by a real estate broker to recover commissions, the broker was asked, on cross-examination, concerning certain payments made to him by the purchaser of defendant's farm, and answered that some of them were for advertisements. *Held*, that the answer was responsive.—Van Doren v. Jelliffe (Com. Pl.) 1 Misc. Rep. 354, 20 N. Y. Supp. 636.

[x] (Tex. 1888) In an action against a railway company for injuries caused by negligence of its engineer, defendant asked on cross-examination whether the injury arose from ignorance of the engineer, or from some other cause. Witness answered that they were coupling cars to the caboose, and that the engineer was backing down grade to make the coupling, working steam; that he and the conductor tried to control the speed by brakes, but could not; that they signaled the engineer to shut off steam, but he did not do it; and that the force of the engine and train knocked the caboose two or three car lengths back, with the brakes very tight. *Held* responsive to the interrogatory, being a statement of the facts, and not opinion.—Houston & T. C. Ry. Co. v. Patton (Sup.) 9 S. W. 175.

[y] (Tex. 1893) In an action against a carrier for injuries to plaintiff in a wreck, defendant, in a cross interrogatory, asked a witness, if he should state anything as to the speed of the train, to state how he knew, and particularly what attention he paid to it, and also what experience he had had in learning to ascertain the speed of trains. *Held*, that an answer that "all were nervous and apprehensive, and the effect and sensations were those of very fast speed, and what seemed to me reckless speed," was responsive; the witness having, in answer to direct questions, stated that the train was running at an unusual rate of speed.—Galveston, H. & S. A. Ry. Co. v. Wesch (Civ. App.) 21 S. W. 62.

[z] (Tex. 1893) A witness, being asked by counsel for the railroad if she were not giving an opinion about the signals, was properly allowed to answer: "I know that no signals were given until after passing the crossing, and this is not a mere opinion."—Galveston, H. & S. A. Ry. Co. v. Duelm (Civ. App.) 23 S. W. 596.

[zz] (Va. 1888) The propounder of and sole beneficiary under an alleged holographic will

alleged to be a forgery, he and his son being the only witnesses testifying to its genuineness, and the will having been produced from his possession, was asked, on cross-examination, if any one besides himself knew of its execution. He answered that he had told three persons named of its execution. *Held*, that the refusal to strike out such answer as not responsive was error.—Brown v. Hall, 85 Va. 146, 7 S. E. 182.

§ 863. Answer responsive in part.

[a] (Ala. 1854) A witness having been asked whether, if plaintiff's warehouse had been as good as his own, it could have been saved by the use of ordinary diligence, answered: "Had it been as good as mine, eight such men could have saved it; but Major Dick was one." *Held*, that the latter clause of the answer was not responsive to the interrogatory.—Gibson v. Hatchett, 24 Ala. 201.

[b] (Ala. 1860) A witness said that he had bought the liquor from the prisoner, and the state asked him if he had bought more than a quart at a time, and the witness answered that he had not, and added that the liquor he had bought was not drunk on the seller's premises. *Held*, that the answer was not responsive.—Hughes v. State, 35 Ala. 351.

[c] (Ala. 1891) Plaintiff's property was attached on the ground that she was about to leave the state. She sued defendant as surety on the attachment bond. A cross-interrogatory in a deposition by plaintiff was, in effect, as follows: "Did you offer your house for sale, and tell several parties that you intended going to Pennsylvania to live? Tell all about it." She answered: "I did offer my house for sale, and spoke to several of going to Pennsylvania to visit my mother, but not about going there to reside. I told parties that I wanted to sell my house in order to provide a smaller one." *Held*, that the answer was responsive; but her answer that she told several persons that she expected to end her days at home in Alabama was not responsive.—Baldwin v. Walker, 94 Ala. 514, 10 South. 391.

[d, e] (La. 1877) Where plaintiff suing on notes, in answer to interrogatories by defendant, after directly answering an interrogatory as to whether certain letters and receipts were not written by plaintiff's firm, or by its direction, follows it up by stating at great length all the business transactions between the parties for several years, announcing rules of law governing imputation of payments, and inserting copious quotations from the correspondence of the parties, so that the answer in full amounts in effect to a "brief," or written argument of the law and facts, all of the answer not directly responsive to the question is properly stricken out.—McLear v. Succession of Hunsicker, 29 La. Ann. 539.

[f] (Md. 1893) A witness, having proved the signature of the agent to certain bills of lading, was asked on cross-examination by defendant company whether the agent was not forbidden to sign bills of lading where the goods were not actually delivered, to which he replied, "Never to his knowledge," and then added that it was almost certain that it was not so forbidden, because it would prohibit business at that place, as the custom was to sign bills of lading on railroad guaranties to deliver goods to a specified steamer. *Held* not responsive, and but a mere expression of opinion.—Lazard v. Merchants' & Miners' Transp. Co., 78 Md. 1, 26 Atl. 897.

[g, h] (N. H. 1879) In an action for personal injuries, a physician, who had attended plaintiff, on being asked if he had discovered any signs of simulation of suffering by plaintiff, replied that he had not, but discovered rather a disposition on plaintiff's part to conceal his sufferings. *Held*, that it was proper to refuse to strike out the latter part of the answer as not being in response to the question.—Plummer v. Ossipee, 59 N. H. 55.

[i] (N. Y. 1889) In an action for damages for injuries caused by falling on a defective sidewalk, plaintiff's husband was asked: "Did the plaintiff have people by whom she had been engaged to nurse?" He answered: "She had about five, and she could not attend to them." *Held*, that the latter part of the sentence was properly stricken out as not responsive.—Hillesum v. City of New York, 56 N. Y. Super. Ct. (24 Jones & S.) 596, 4 N. Y. Supp. 806.

[j] (N. Y. 1892) Where part of the answer of a witness was responsive and part not so, the court properly overruled a motion to strike out the whole answer.—Benjamin v. New York El. R. Co., 63 Hun, 629, 17 N. Y. Supp. 908.

[k] (N. Y. 1894) Where the prosecuting witness on a trial for larceny states that certain memoranda had been destroyed, as was customary, and, in reply to a question whether "they would be of some value if you had them now," says, "Yes, sir; they would be strong evidence against the prisoner,"—such answer is not responsive to the question, and should be stricken out.—People v. Oettinger, 79 Hun, 609, 29 N. Y. Supp. 927.

[l] (Tex. 1886) Where the answer of a witness in response to an interrogatory was offered as an entirety in evidence, and a part not responsive to the interrogatory was inadmissible for reasons other than that it was not responsive, the entire answer was excluded in evidence.—Kennedy v. Upshaw, 66 Tex. 442, 1 S. W. 308.

[m] (Tex. 1895) On the issue whether a certain child was born alive, a witness stated what he had been told relative to the matter by the members of the mother's family, and added, "I am sure they did not lie to me." *Held* an unwarranted comment, and that refusal to strike it out was error.—Clapp's Ex'rs v. Branch, 11 Tex. Civ. App. 203, 32 S. W. 735.

§ 864. Impressions of witness.

[a] (Ala. 1859) A witness, asked to state a conversation, cannot state the impression left on his mind from it, nor his inferences therefrom.—Crews v. Threadgill, 35 Ala. 334.

[aa] (Cal. 1892) Where, in an action for injuries caused by an exposed shaft, the testimony of a witness that he informed the foreman of the condition of the shaft was admitted to show knowledge of defendants, it was error to admit the opinions of the witness concerning the shaft.—Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

[b] (Ga. 1857) It is not competent for a witness to testify that he "thought" A. told him so and so.—Morris v. Stokes, 21 Ga. 552.

[c] (Ga. 1866) On a rule to foreclose a mortgage, the mortgagee, when introduced as a witness by the mortgagor, must answer as to his belief, especially when, owing to defective memory, he is not positive as to the facts of the case.—Huguley v. Holstein, 35 Ga. 271.

[d, e] (Iowa, 1885) A witness cannot testify as to what his "understanding" of an agreement was, in answer to a question as to what agreement was entered into.—Kelso v. Fitzgerald, 67 Iowa, 266, 25 N. W. 157.

[f] (Kan. 1873) The court may properly exclude the statements of a witness in his answer to questions put to him when such statements are not statements of any fact or conversation, but are merely the conclusions of the witness, drawn from the facts and conversations.—Da Lee v. Blackburn, 11 Kan. 190.

[g] (Me. 1839) The "impressions" of a witness, if it be understood that the fact is im-

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pressed upon his memory, but that his recollection does not rise to positive assurance, are admissible in evidence for the consideration of the jury; but if they are not derived from a recollection of the fact, and are so slight that they may have been derived from the information of others, or some unwarrantable deduction of the mind, they are not admissible.—Clark v. Bigelow, 16 Me. (4 Shep.) 246.

[h] (Me. 1864) Testimony should not be excluded because the witness uses the expressions, "It is my impression," "I think," when he means that he is testifying from recollection, or indistinct remembrance.—Humphries v. Parker, 52 Me. 502.

[i] (N. H. 1859) When a witness states that he has an impression as to the matter of inquiry, it is competent evidence, if he means that he has some recollection, however slight, founded on his personal knowledge; and whether such is his meaning is to be determined by the jury, unless it is apparent to the court, from the subject of his testimony and his other statements in connection with it, that he does not intend so to be understood.—State v. Flanders, 38 N. H. 324.

[j] (Tex. 1866) It is error to exclude a deponent's statement merely because qualified by the remark, "This is my impression"; the added clause is tantamount to saying, "This is my best recollection of the matter, though I am not absolutely certain."—Swinney v. Booth, 28 Tex. 113.

§ 865. Reasons for knowledge or recollection of witness.

[a] (Ala. 1859) It is proper for a witness to state why certain facts were impressed on his memory, unless the reason involves matter improper for the jury to hear.—Bell's Adm'r v. Troy, 35 Ala. 184.

[b] (Ala. 1880) It is always competent for a witness to state that he had a conversation with a third person, on a certain subject germane to the issue in dispute, and at a time specified, as a reason for his accurate recollection of a fact to which he has testified.—Adams v. Robinson, 65 Ala. 586.

[c] (Ala. 1895) In an action for killing plaintiff's intestate it was error to refuse to permit a witness to state that at the time deceased was attempting to board defendant's street car he heard a remark by another person which tended to call witness' attention to and impress on his mind the fact of deceased's danger.—Birmingham Electric Ry. Co. v. Clay, 108 Ala. 233, 19 South. 309.

[d] (Cal. 1889) Since a witness may be cross-examined in full respecting his reasons for his estimate of the amount of damages caused by defendant's alleged trespass, he may give his estimate, in his direct examination without stating the reasons on which it is based.—Razzo v. Varni, 81 Cal. 289, 22 Pac. 848.

[e] (Ga. 1869) A party may, in detailing the terms of a parol contract made by him, state, as one of the reasons why he is confident that his recollection is correct, that he stated the terms of the contract in the same way, to a third person, shortly after the transaction.—Scruggs v. Gibson, 40 Ga. 511.

[f] (Ga. 1895) Though the witness has no distinct and independent recollection of the details of a fact occurring in the course of the routine of his business, he may testify to his fixed habit in such cases, and state that he knows what he did in a given transaction was in accordance with that habit.—Leonard v. Mixon, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134.

[g, h] (Ind. 1891) Where a witness testifies that the engine whistle was not sounded at the time of an accident, he may also state that his attention was particularly called to the omission by the fact that his son asked him at the time why the engine did not whistle.—Louisville, E. & St. L. R. Co. v. Hart, 2 Ind. App. 130, 28 N. E. 218.

[i] (Md. 1827) The fact that a witness had once seen an entry in a Bible, belonging to the plaintiff's father, in his handwriting, of the birth of the plaintiff, which Bible was not produced, nor its absence accounted for at the trial, does not preclude such witness from stating his recollection of the time of the plaintiff's birth, independently of the entry.—Berry v. Waring, 2 Har. & G. 103.

[j] (Mich. 1864) A witness may be asked to state "any reason or circumstance" which led him to give particular attention to certain past facts appearing in evidence.—Angell v. Rosenbury, 12 Mich. 241.

[k] (Pa. 1896) In an action for injury to an employé by the breaking of a rope used to hoist a shaft, it being contended by defendant that a supply of ropes containing some suitable for the purpose was furnished, and that the workmen negligently selected one unsuitable for such a heavy shaft, a witness having testified that, when he was employed with the pulley, he selected from the stock of ropes just such slings as he chose, was asked if the other workmen had the same rights in the selection of slings as he had, and answered, "Yes," and then added, "The foreman told me." *Held* error to sustain an objection to the whole answer, it being competent so far as it rested on witness' knowledge of usage of the shop.—Prescott v. Ball Engine Co., 176 Pa. 459, 35 Atl. 224, 53 Am. St. Rep. 683, 38 Wkly. Notes Cas. 476.

[l] (Tex. 1885) To prove that a certain order of sale existed of which witness had no positive recollection, he should be allowed to state the facts which he did recollect, which led him to think that he had had such an order as his ordinary course of business, his correspondence in reference to executions on the land, etc.—Davie v. Terrill, 63 Tex. 105.

[m] (Tex. 1885) For the purpose of showing the condition of a burning building at a given time in a suit on a fire insurance policy, a witness may properly fix the time by any incident, such as the time he escaped from the ruins; and he may testify that when he escaped the fire was so far advanced as to render it impossible to rescue his mother and brother, their positions in the building being otherwise shown.—Continental Ins. Co. v. Pruitt, 65 Tex. 125.

§ 866. Use of documents, maps, plats, diagrams, or other matters to explain testimony.

Refreshing memory by use of memorandum and other writings, see post, §§ 874–892.

[a] (Ala. 1838) In trespass to try title, a witness may use a plan of the land in dispute, either to refresh his memory, or as a memorandum, if made by himself, or to make his testimony more intelligible to the jury.—Cundiff v. Orms, 7 Port. 58.

[b] (Ala. 1887) The prosecutor, who could neither read nor write, being unable to describe particularly the money deposited by him with defendant, may testify that a national bank note, exhibited to him on the trial, "looked like it."—Gady v. State, 83 Ala. 51, 3 South. 429.

[c] (Cal. 1895) In an action for personal injuries caused by an iron shaft, a witness may, when shown the size of the shaft, refer to a piece of iron of about the same dimensions.—Davis v. Pacific Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156.

[d] (Kan. 1889) It is not error to permit the owner of land, while testifying as a witness in

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his own behalf, to introduce in evidence a diagram drawn by himself showing the location of his various improvements on the land, his house, barn, orchard, meadow, cultivated land, etc., and the relative location of the railroad over the land with respect to these improvements, and to permit the witness to refer to the diagram in his testimony.—Chicago, K. & W. R. Co. v. Dill, 41 Kan. 736, 21 Pac. 778.

[e] (Me. 1857) Maps and diagrams may be used by scientific witnesses to render intelligible their verbal testimony.—State v. Knights, 43 Me. 11.

[f] (Mich. 1878) It is not error to exclude the use of a map in examining a witness who does not understand maps.—Ulrich v. People, 39 Mich. 245.

[g] (Mo. 1895) In a suit for wrongful attachment of furniture, a witness may be permitted to use photographs in explaining the description and quality of the furniture, where they are pictures of the same patterns, though not of the identical goods.—Wurmser v. Frederick, 1 Mo. App. Rep'r, 587, 62 Mo. App. 634.

[h] (N. Y. 1863) In an action to recover for work done and materials furnished in various parts of a building, under a special contract requiring the plaintiff to conform to plans and specifications which formed part of the contract, other plans, as well as maps and drawings, exhibiting the various parts of the building and premises on which the work was to be done, are admissible in evidence as introductory to testimony.—Stuart v. Binsse, 23 N. Y. Super. Ct. (10 Bosw.) 436.

[i] (N. Y. 1887) It is competent to permit witnesses to refer to photographs copied from an original photograph, and to testify whether or not they recognize in such photographs the likeness of a person whom they had seen on a certain occasion.—Wilcox v. Wilcox, 46 Hun, 32.

[j] (N. C. 1888) Where there had been an order of survey, which had not been executed, the county surveyor, when called as a witness as to the lines of the land in controversy, may use a map of a former survey, made by him, to explain his testimony to the jury, though the map itself is inadmissible.—Dobson v. Whisenhant, 101 N. C. 645, 8 S. E. 126.

§ 867. —— Conditions precedent.

[a] (Ala. 1873) In testifying as to a disputed boundary line, a surveyor may use a diagram to illustrate his evidence, or make it intelligible to the jury, although the diagram was not made by himself, and is not shown to contain a perfectly accurate description of the lands.—Shook v. Pate, 50 Ala. 91.

[b] (Ky. 1889) On a trial for murder a witness may use a diagram of the place where the killing occurred, which he has verified by observation and measurement.—Commonwealth v. Hourigan, 89 Ky. 305, 12 S. W. 550.

[c] (Minn. 1876) Where a witness verifies a plat as showing accurately the relative position of the property in question, he may use it on his examination, to point out the situation and location of the property in question.—Rippe v. Chicago, D. & M. R. Co., 23 Minn. 18.

[d] (Mont. 1882) A witness should not be allowed to exhibit to the jury a map to illustrate his testimony as to the reasonable cost of transporting merchandise through the locality until he is shown to have some knowledge of the country, and some means of knowing the cost.—Story v. Maclay, 4 Mont. 464, 5 Pac. 326.

[e] (N. Y. 1896) In an action for injuries caused by falling into an unguarded excavation, a model designed to represent the excavation at the time of the accident may be used merely for the purpose of enabling plaintiff to examine a witness, though there is no proof of the accuracy of the model.—Knop v. Dechart, 7 App. Div. 390, 39 N. Y. Supp. 911.

[f] (N. C. 1895) It was competent for a witness to use a diagram of the locality where the injury occurred, which he testified was a correct representation of it.—Tankard v. Roanoke R. & Lumber Co., 117 N. C. 558, 23 S. E. 46.

[g] (Tex. 1888) In trespass to try title, an expert surveyor, who was present at the survey of the lands in controversy, may use a map in explaining his testimony, which would not be clearly intelligible without it, though the map is not shown to be correct or official.—Griffith v. Rife, 72 Tex. 185, 12 S. W. 168.

11. REFRESHING MEMORY IN GENERAL.

IN GENERAL, § 868.
NECESSITY FOR REFRESHING MEMORY, § 869.
CALLING ATTENTION TO FORMER STATEMENTS BY WITNESS, § 870.
CALLING ATTENTION TO RELATED INCIDENTS, § 871.
REFRESHING MEMORY AFTER TESTIFYING, § 872.
EVIDENCE THAT WITNESS TESTIFIES OF HIS OWN KNOWLEDGE, § 873.

Leading questions and suggestions in aid of recollection, see ante, § 846.
—— *to refresh memory on redirect examination, see* post, § 996.
Refreshing memory by calling attention to testimony previously given, see post, §§ 885, 886.
—— *of impeaching witness, see* post, § 1253.
Harmless error, see "Appeal and Error," vol. 3, c. 2071, § 4142.

§ 868. In general.

[a] (Ind. 1885) A witness who has shown himself to be acquainted with the handwriting of one accused of depositing an obscene letter in the post office may, either before or at the trial, refer to other papers in his possession which he knows are in the handwriting of the accused, in order to refresh his memory.—Thomas v. State, 103 Ind. 419, 2 N. E. 808.

[b, c] (N. Y. 1890) A witness having testified that he had no recollection of the transaction, plaintiff could not, to refresh his memory, ask him when he first heard of plaintiff's claim.—Avery v. Mattice, 56 Hun, 639, 9 N. Y. Supp. 166.

[d] (Tex. 1879) The fact that a witness had made a statement on a certain point does not preclude the right to call his or her attention to facts which may refresh the memory.—Sigler v. State, 7 Tex. App. 283.

§ 869. Necessity for refreshing memory.

[a] (Kan. 1886) A witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates; but it is only when the memory needs assistance that resort may be had to these aids, and, if the witness has an independent recollection of the facts inquired about, there is no necessity nor propriety in his inspecting any writing or memorandum.—State v. Baldwin, 36 Kan. 1, 12 Pac, 318.

[b] (Minn. 1871) Permitting a witness to refresh his recollection by referring to a memorandum, without first showing by him his inability to testify independently, is not reversible error, when the occurrences in question occurred three or four years prior to the trial, and involved accounts and payments running over a year; especially so when the witness

seems fair and honest in his conduct.—Madigan v. De Graff, 17 Minn. 52 (Gil. 34).

[c] (Minn. 1873) A witness, without it appearing that he did not remember, or that his recollection needed refreshing, was allowed to inspect memoranda made by him. *Held* that, if he remembered without the memoranda, his inspection was merely unnecessary; and if he did not, he had the right of inspection, and error, if any there was, was immaterial.—Chute v. State, 19 Minn. 271 (Gil. 230).

[d] (N. Y. 1857) Where, at a trial, a witness expresses no want of recollection, nor desire to refresh his memory, counsel cannot be allowed to place in his hands memoranda relative to the matters on which he is called to testify.—Young v. Catlett, 13 N. Y. Super. Ct. (6 Duer) 437.

[e] (N. Y. 1868) In examining a witness, it is not allowable to read from the prior written statement of the witness, under pretense of refreshing his memory, when the witness has not shown any weakness of recollection.—Haack v. Fearing, 28 N. Y. Super. Ct. (5 Rob.) 528.

§ 870. Calling attention to former statements by witness.

Leading questions as to statements or suggestions previously made by witness, see ante, § 841.

[a] (Ala. 1888) A party may ask his witness, for the purpose of refreshing his memory, whether at a certain time and place he has not made certain statements inconsistent with his testimony on the stand.—White v. State, 87 Ala. 24, 5 South. 829.

[aa] (Minn. 1867) Upon a trial for polygamy the second wife, called by the state, stated that she was not married to the prisoner. *Held*, that she might properly be asked if she had not stated to others that she was so married; such question not being asked to impeach her, but to lead her to correct her testimony, or to show the purpose of the prosecution in calling her.—State v. Johnson, 12 Minn. 476 (Gil. 378), 93 Am. Dec. 241.

[b] (N. Y. 1873) Where a party calling a witness is surprised by testimony contrary to his expectation, he may interrogate him in respect to previous declarations, inconsistent with his testimony, for the purpose of probing his recollection and recalling to his mind the statements he has previously made.—Bullard v. Pearsall, 53 N. Y. 230.

[c] (Ohio, 1878) Where a witness gives testimony which takes the party calling him by surprise, such witness may be cross-examined as to contrary declarations made out of court to refresh his recollection.—State v. Carlyle, 1 Cleve. Law Rep. 339, 4 Ohio Dec. 335.

[d] (R. I. 1885) A party who is disappointed in his witness may, for the purpose of refreshing his recollection, ask him if he has not made contradictory statements.—Hildreth v. Aldrich, 15 R. I. 163, 1 Atl. 249.

§ 871. Calling attention to related incidents.

[a] (Ind. 1887) It is proper for a party, in order to refresh the recollection of his own witness, to call his attention to any pertinent circumstance or fact having relation to the subject under inquiry.—Stanley v. Stanley, 112 Ind. 143, 13 N. E. 261.

[b] (Mich. 1891) A witness, who had testified to testatrix's mental unsoundness, was asked on cross-examination if testatrix did not attend a banquet while staying with witness. As witness did not remember, counsel sought to refresh her recollection by questions relating to certain facts connected with the banquet. *Held*, that the questions were competent, considering the nature of witness' testimony.—Prentis v. Bates, 88 Mich. 567, 50 N. W. 637.

[c] (Mich. 1894) Evidence of a conversation between a party to a suit and her attorney in the absence of the other party is hearsay, and inadmissible for the purpose of refreshing the witness' recollection.—Radley v. Seider, 99 Mich. 431, 58 N. W. 366.

§ 872. Refreshing memory after testifying.

[a] (Miss. 1877) Where a witness has given an incorrect date in his testimony, he may be permitted to refer to papers to aid his memory as to dates, and may thereupon correct the error upon his being reintroduced.—Meyer v. Blakemore, 54 Miss. 570.

[b] (N. Y. 1859) A witness may refer to his cashbook to refresh his recollection; but after he has sworn positively on the subject he cannot refer to his cashbook to corroborate such testimony.—Sackett v. Spencer, 29 Barb. 180.

[c] (N. Y. 1879) A witness, after testifying to a fact from personal recollection, will not be permitted to corroborate his testimony by a written memorandum made by himself.—Wightman v. Overhiser, 8 Daly, 282.

§ 873. Evidence that witness testifies of his own knowledge.

[a] (Ind. 1889) A witness was asked: "Are you stating this from your own knowledge?" He answered: "I am stating it from my own knowledge, having refreshed my memory." He was then asked: "You state part of it from memory and part from some other source?" He answered: "Yes." *Held*, that there was no error in refusing to strike out the testimony, it sufficiently appearing that the witness was testifying from his own knowledge, after having refreshed his memory.—Marks v. Orth, 121 Ind. 10, 22 N. E. 668.

[b] (Minn. 1871) Where a question put to a witness, after he has refreshed his recollection by referring to memoranda, calls for his personal knowledge, and the answer is responsive, the prima facie presumption is that it is given of his own knowledge, independent of the writing.—Madigan v. De Graff, 17 Minn. 52 (Gil. 34).

12. REFRESHING MEMORY BY USE OF MEMORANDA AND OTHER WRITINGS.

MEMORANDA IN GENERAL, § 874.
MEMORANDA MADE BY OR IN THE PRESENCE OF WITNESS, § 875.
—— TIME OF MAKING MEMORANDA, § 876.
MEMORANDA MADE BY ANOTHER, § 877.
COPIES OF OR EXTRACTS FROM RECORDS OR MEMORANDA, § 878.
PAPERS IN LEGAL PROCEEDINGS, § 879.
BILL OF SALE, § 880.
BOOKS OF ACCOUNT AND ENTRIES THEREIN, § 881.
—— ENTRIES NOT MADE BY WITNESS, § 882.
RECORDS, § 883.
PLAT OF LAND, § 884.
TESTIMONY PREVIOUSLY GIVEN BY WITNESS, § 885.
—— DEPOSITIONS, § 886.
TESTIFYING FROM MEMORY AFTER REFRESHING MEMORY, § 887.
—— MEMORANDA MADE BY OTHERS, § 888.
TIME OF MAKING MEMORANDA, § 889.
COMPELLING WITNESS TO INSPECT WRITING TO REFRESH MEMORY, § 890.
INSPECTION OF WRITING BY ADVERSE PARTY, § 891.
ADMISSIBILITY OF WRITING AS EVIDENCE, § 892.

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Leading questions and suggestions in aid of recollection, see ante, § 846.
Necessity for using memoranda, see ante, § 869.
Referring to writing to refresh memory as to handwriting, see ante, § 868 [a].
Refreshing memory by consulting memoranda after testifying, see ante, § 872.
—— *of stenographer from notes, see* post, § 894.
Use of documents, maps, plats, diagrams, or other matters to explain testimony in general, see ante, §§ 866, 867.
Objections to use of memoranda, see "Trial," vol. 46, c. 984, § 221.

§ 874. Memoranda in general.

Right to testify from memoranda where witness has no independent recollection of facts, see ante, §§ 887, 888.

[a] (Ala. 1868) A witness, in answering questions calling for the amount of his purchases and sales, as a merchant, may be allowed to refer to memoranda for the purpose of refreshing his recollection.—Godden v. Pierson, 42 Ala. 370.

[b] (Ala. 1884) A subscribing witness to a will, the validity of which is contested, should not be allowed to read a purported copy proposed for probate, for the purpose of refreshing his memory, in the absence of evidence showing by whom the copy was made, or from whom or when procured.—Jaques v. Horton, 76 Ala. 238.

[c] (Fla. 1893) On a prosecution for maliciously burning a mill in the nighttime, a memorandum book in which the foreman of the mill kept the marks and weights of baled cotton contained in the mill house is admissible to refresh his memory in testifying as to whether a bale traced into defendant's possession was one of those in the mill at the time of the fire.—Jenkins v. State, 31 Fla. 196, 12 South. 677.

[d] (Ill. 1843) A witness, in giving testimony of the contents of a lost writing, may make use of any memorandum to refresh his memory.—Dunlap v. Berry, 5 Ill. (4 Scam.) 327, 39 Am. Dec. 413.

[e] (Ill. 1892) A witness may be allowed to refer to a memorandum of a contract to refresh his memory, and state what it is, though the memorandum is not admissible.—Kunder v. Smith, 45 Ill. App. 368.

[f] (Iowa, 1845) A witness may refer to a written instrument to refresh his memory, and to ascertain, by its inspection, if it relates to the contract then in controversy.—Remsey v. Duke, Morris, 385.

[g] (La. 1836) An expert called as a witness may refer to a report which has been set aside, to refresh his recollection of his estimate of the work done, as to a memorandum deliberately made at the time.—Riordon v. Davis, 9 La. 239, 29 Am. Dec. 442.

[h] (Minn. 1871) Allowing a witness to refresh his recollection by reference to memoranda is a question of a preliminary nature, addressed to the court, and where a witness has been allowed so to do, unless it clearly appears that the court has erred, a new trial will not be granted.—Madigan v. De Graff, 17 Minn. 52 (Gil. 34).

[i] (Minn. 1874) The manner in which a witness shall be allowed to refresh his recollection by reference to memoranda must be left to the trial court, to be exercised with reference to the circumstances of the case and the bearing of the witness.—Johnson v. Coles, 21 Minn. 108.

[j] (Minn. 1892) A witness cannot, for the purpose of refreshing his memory, refer to a writing which is not verified as correct.—Eder v. Reilly, 48 Minn. 437, 51 N. W. 226.

[k] (N. Y. 1892) Defendant proposed to prove that the engines which passed plaintiff's premises just before the injury had been examined and found in good order, but the witness could not recollect which engines he had inspected, and so defendant inquired if he had a memorandum by which he could tell. *Held*, that the exclusion of the question was error, as it is assumed that the witness had a memorandum, and could have used it to refresh his memory.—Flynn v. Manhattan Ry. Co. (Com. Pl.) 1 Misc. Rep. 188, 20 N. Y. Supp. 652.

[l] (N. C. 1886) A reversal will be had for the refusal of the trial judge to permit a witness to refresh his recollection from memoranda. Nor is the case helped by the judge's permission to put the memoranda in evidence.—Davenport v. McKee, 94 N. C. 325.

[m] (Pa. 1825) A witness who has refreshed his memory from a paper may be asked if he sold the articles mentioned in the paper.—Babb v. Clemson, 12 Serg. & R. 328.

[n] (Pa. 1863) The statement of the party insured, accompanying a report of loss, though not evidence of the extent or amount of the loss, may be used to refresh the memory of the witness.—Lycoming County Mut. Ins. Co. v. Schreffler, 44 Pa. (8 Wright) 269.

[o] (Pa. 1874) Where accounts are multitudinous, the rule as to the personal knowledge of the witness is relaxed. He must be permitted to put the items into an account and to refresh his recollections by means of other accounts and papers as to the items.—Allegheny Ins. Co. v. Hanlon, 31 Leg. Int. 372.

[p] (S. C. 1818) A witness may recur to his ledger, or any other memorandum, to assist his memory at a trial.—Corporation of Columbia v. Harrison, 2 Mill, Const. 213.

[q] (Tex. 1890) Though the witness cannot state the exact number of articles to which he is testifying, without referring to the memoranda, where he states that he can testify from his memory of the transaction that there were not less than a certain number, it is error to refuse to let him do so without producing the memoranda.—Byrnes v. Pacific Exp. Co. (App.) 15 S. W. 46.

§ 875. Memoranda made by or in the presence of witness.

[a] (U. S. 1823) A witness will be permitted to refresh his memory as to the items of an account for work and labor by the original entries only, made by himself, or by another in his presence; and although he has no distinct recollection of each particular item charged, yet if he has a distinct recollection of such work as is charged in the account generally, being done, and after having refreshed his memory, if he can swear that the work was done as charged in such account, his testimony will be competent evidence.—Jones v. Johns, Fed. Cas. No. 7,471 [2 Cranch, C. C. 426].

[b] (U. S. 1891) A witness may, when testifying, refresh his recollection by the use of a memorandum made by himself.—Kingory v. United States (C. C.) 44 Fed. 669.

[c] (U. S. 1891) Memoranda made by an officer, showing how he served process, may be referred to in order to refresh his memory in testifying as to the facts.—McClaskey v. Barr (C. C.) 45 Fed. 151.

[d] (Ala. 1848) A letter written by a witness to a person not a party to the suit, and his answer to it, may be looked at by the witness for the purpose of refreshing his memory as to the facts there stated.—Rutherford's Adm'rs v. Branch Bank at Mobile, 14 Ala. 92.

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[e] (Ariz. 1885) A witness who took the census and who testifies that from his own recollection, irrespective of the official returns, he is able to state what the accused gave him as the names and number of his family at the time he took the census, may use the official returns to refresh his memory.—United States v. Tenney, 8 Pac. 295; Same v. Kemp, Id.; Same v. Christofferson, Id.

[f] (Conn. 1887) A memorandum made by another person in the presence and at the dictation of the witness may be used to refresh the memory while testifying.—Card v. Foot, 56 Conn. 369, 15 Atl. 371, 7 Am. St. Rep. 311.

[g] (Ill. 1868) In an action to recover the purchase price of certain broom corn, plaintiff on examination produced a paper purporting to show the weights of several lots delivered, also the total weight, a part of which plaintiff had himself entered in a book which was not produced, and a part entered by another person in a book kept by him which was produced, and the entries proven by his deposition. *Held*, that as to the entries made by plaintiff the paper was a memorandum, to the accuracy of which plaintiff swore from his own knowledge, and his testimony was not objectionable on the ground that he had refreshed his memory by referring to the book and making the memorandum therefrom.—Seaverns v. Tribby, 48 Ill. 195.

[h] (Ill. 1887) Under Rev. St. 1874, c. 116, § 28, providing that where it is shown that it is not in the power of a party to produce the original of any record evidence, and the record has been destroyed, other relevant evidence may be received to establish the execution or contents thereof, a witness, in testifying to the contents of deeds, the originals and record of which cannot be produced, may refresh his recollection by reference to memoranda made by him, and known to be correct.—Bush v. Stanley, 122 Ill. 406, 13 N. E. 249.

[i] (Ill. 1888) A memorandum of deficiencies in a building made by the architect after examination may be used by him to refresh his memory.—Sanders v. Hutchinson, 26 Ill. App. 633.

[j] (Ill. 1888) To refresh his memory a witness may refer to memoranda made in his presence, and the accuracy of which he verified at the time, when the necessity for their use appears from his own testimony.—Hayden v. Hoxie, 27 Ill. App. 533.

[k] (Ind. 1854) A witness may refer to memoranda, made by him in books, to refresh his memory, without being obliged to produce the books.—Wabash & E. Canal v. Bledsoe, 5 Ind. 133.

[l] (Ky. 1885) Though the notes of evidence taken at a trial are incompetent in another trial as to what took place, they may be used by the person who took the notes to refresh his memory, yet, if he testifies, he must testify from memory and not from his notes.—Mitchell v. Robinson's Ex'r, 7 Ky. Law Rep. 98.

[m] (La. 1859) A witness may be permitted to refer to accounts or memoranda made by himself to refresh his memory.—Chiapella v. Brown, 14 La. Ann. 189.

[n] (Me. 1854) A witness may refresh his memory by reading a schedule prepared by his clerk in his presence and under his direction.—State v. Lull, 37 Me. 246.

[o] (Mich. 1885) One who has made a scale of logs can use it to aid his memory in testifying, in an action of trespass for removing them, as to the quantity taken away.—Skeels v. Starrett, 57 Mich. 350, 24 N. W. 98.

[p] (N. H. 1850) Where a witness testifies by the aid of minutes which he made on a former occasion, it is not an objection that the minutes are in pencil, and have, since they were made, been kept by the party calling him.—Stetson v. Godfrey, 20 N. H. 227.

[q] (N. C. 1849) Where a statement or memorandum was made of the terms of a contract by one who was called as a witness, though the contract was afterwards written out, and signed by the parties, it was *held* that such a memorandum could be used by the witness to refresh his recollection.—Neil v. Childs, 32 N. C. 195.

[r] (Pa. 1887) A witness may use a paper containing a list of items to refresh his memory, when he knows the entry to have been correct when he made it, even though the paper is not admissible, as an entry made in the course of business in a book of original entries.—Mead v. White, 8 Atl. 913.

[s] (Tex. 1894) A witness may refresh his memory from a statement not in his handwriting, if it was made in his presence and under his direction, so that he can say that it was correctly made.—Crystal Ice Mfg. Co. v. San Antonio Brewing Ass'n, 8 Tex. Civ. App. 1, 27 S. W. 210.

[t] (Wis. 1896) A witness, after he has testified that he heard a contract of sale made; that the vendee's wife, acting as his bookkeeper, at his direction, wrote down a memorandum of the contract as dictated by him, in the presence of both parties, and then read it over to them; that he stood close enough to see but not to read it—should be allowed to identify the memorandum, and, if he identified it, to use it to refresh his memory.—Hazer v. Streich, 92 Wis. 505, 66 N. W. 720.

§ 876. —— Time of making memoranda.

Time of making memoranda in general, see post, § 889.

[a] (U. S. 1818) Where a witness is testifying as to the testimony which a person gave on a former trial, he may refresh his memory from notes taken at the time, or from a newspaper printed by him, containing the evidence as taken down by him.—United States v. Wood, Fed. Cas. No. 16,756 [3 Wash. C. C. 440].

[b] (Cal. 1874) A witness called by the prosecution to prove statements made by the accused may, while on the stand, refresh his memory by a reference to a written memorandum made by him at the time or soon after.—People v. Cotta, 49 Cal. 166.

[c] (Cal. 1884) A witness may refresh his memory with a memorandum made by himself or under his direction at any time when the fact was fresh in his memory.—Paige v. Carter, 64 Cal. 489, 2 Pac. 260.

[d] (Cal. 1892) A witness may be permitted to refresh his memory from a writing or memorandum made by himself at the occurrence of the facts to which it relates.—Baum v. Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

[e] (Colo. 1890) A witness may refresh his memory by reference to memoranda of the dates, weights, and prices entered by himself at the times certain sales were made.—Rohrig v. Pearson, 15 Colo. 127, 24 Pac. 1083.

[f] (Ill. 1890) A witness who testifies as to the nature and extent of certain injuries to property, and the cost of repairing it, may refresh his recollection by referring to a memorandum made by himself at the time, where he testifies that he recollects the facts, but cannot state the items without referring to his memorandum.—Brown v. Galesburg Pressed Brick & Tile Co., 132 Ill. 648, 24 N. E. 522.

[g] (Ind. 1866) A witness may refresh his recollection by reference to a memorandum made by him at the time of the transaction about which he is testifying.—Prather v. Pritchard, 26 Ind. 65.

[h] (Ind. 1891) A witness may, for the purpose of refreshing his memory, refer to memoranda made by him at the time.—Sage v. State, 127 Ind. 15, 26 N. E. 667.

[i] (Kan. 1889) A witness who makes memoranda of events at the time of their occurrence, is permitted to refer, when under examination, to such memoranda, to refresh his memory.—Sanders v. Wakefield, 41 Kan. 11, 20 Pac. 518.

[j] (Ky. 1821) Where a statement of facts appeared to have been made in writing by a witness many years before the trial, it was *held* that he might use it to refresh his memory if he recognized it as his handwriting, but, on his stating that he had no recollection of the facts themselves, it was *held* that the writing was not admissible in evidence.—Calvert v. Fitzgerald, 16 Ky. (Litt. Sel. Cas.) 388.

[k] (Md. 1882) A memorandum stating what took place on the occasion of the execution of a mortgage by the witness, made by the witness 16 months after the transaction, and after legal proceedings had been instituted, is inadmissible to refresh witness' memory or for any other purpose.—Swartz v. Chickering, 58 Md. 290.

[l] (Mass. 1891) On a trial for selling pools, it is proper to allow a witness to refresh his memory from memorandum made by him on the day of the transaction.—Commonwealth v. Clancy, 154 Mass. 128, 27 N. E. 1001.

[m] (Mich. 1890) In replevin for goods sold on the ground that the statement of the buyer as to his financial condition, made to a mercantile agent, on the faith of which the sale was made, was false, the agent, in testifying, may refresh his memory, as to representations of the buyer, from a copy of a statement made by him (the agent) at the time.—Caldwell v. Bowen, 80 Mich. 382, 45 N. W. 185.

[n] (Mich. 1891) A witness, in testifying as to a statement made to him by defendant, may give the statement from his recollection, with the aid of a copy made by him at the time, though it was not read to defendant, nor signed by him.—Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790.

[o] (Mich. 1895) In an action on a fire insurance policy, plaintiff's vendor may refresh his memory as to the goods sold from a list made by him from recollection shortly before the trial.—Johnston v. Farmers' Fire Ins. Co. of York, 106 Mich. 96, 64 N. W. 5.

[p] (Miss. 1881) Where an old man, whose memory was impaired, refreshing his memory from a paper which he wrote at the time, could then recollect the facts, his testimony was properly admitted.—Cooper v. State, 59 Miss. 267.

[q] (Neb. 1892) Where a witness as to measurements testifies that the figures used by him to refresh his memory were made at the time the measurements were taken, and are correct, but that the paper on which they are written is a copy of the original, and that he has lost the original, he may use the copy.—Anderson v. Imhoff, 34 Neb. 335, 51 N. W. 854.

[r] (Neb. 1894) In an action by a shipper for goods destroyed in transit, plaintiff may refresh his memory from a memorandum prepared when he knew the same to be correct, and testify as to the value of the goods.—Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968.

[s] (N. H. 1856) A witness is properly allowed to refresh his memory by recurring to a memorandum made by himself at the time of the occurrences to which it relates, and which he knows to have been correctly made. The memorandum itself is admissible in evidence, in connection with the testimony of the witness in relation to it.—Tuttle v. Robinson, 33 N. H. 104.

[t] (N. Y. 1848) Where a witness made a memorandum of a conversation so recently after its occurrence that he knows he then recollected it perfectly, and committed it to paper faithfully, he may read it to refresh his recollection on his examination.—Kendall v. Stone, 4 N. Y. Super. Ct. (2 Sandf.) 269.

[u] (N. Y. 1886) One who estimated the quantity of coal in bins may refresh his recollection by his memorandum of the quantity, made at the time.—Nichols v. White, 41 Hun, 152.

[v] (N. Y. 1890) A memorandum of a conversation made by a party thereto at the time is not competent evidence, but such party may use it to refresh his memory, and may then testify as to what was said and done by the parties thereto.—Carradine v. Hotchkiss, 120 N. Y. 608, 24 N. E. 1020.

[w] (S. C. 1878) A witness may refresh his memory by a memorandum made by himself at the time of the transaction about which he testifies, even though such memorandum is written in characters which he alone can translate.—State v. Cardoza, 11 S. C. 195.

[x] (Tex. 1879) A witness may be permitted to refer to memoranda made by him of the circumstances of a transaction for the purpose of refreshing his memory, especially if made soon after the occurrence.—Toohig v. Elliott, 2 Posey, Unrep. Cas. 641.

[y] (Vt. 1892) On the trial of an action to establish a trust in land, a part of the price of which was paid and the balance secured to be paid by plaintiff's intestate, and the conveyance of which was made to defendants' ancestor, a witness through whom plaintiff's intestate made the payments for the land may refer to a memorandum made by him at the time to refresh his memory.—Williams v. Wager, 64 Vt. 326, 24 Atl. 765.

[z] (Wyo. 1893) In an action on a fire insurance policy, a witness who was plaintiff's bookkeeper may refresh his memory by reference to a schedule of the goods destroyed, which was made by him and plaintiff after the fire, and a year before the trial, partly from memory, and partly from duplicate invoices procured from the sellers of the goods.—Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

§ 877. Memoranda made by another.

[a] (Ark. 1894) A witness may refresh his memory from a memorandum, known to him to be correct, which is made by another person.—Bowden v. Spellman, 59 Ark. 251, 27 S. W. 602.

[b] (Colo. 1881) A writing used by a witness to refresh his memory need not necessarily be an original writing, provided that, after inspecting it, the witness can speak of the facts from his own recollection.—Lawson v. Glass, 6 Colo. 134.

[c] (Ga. 1895) A witness may refresh his memory by examining a book kept by another, the entries in which were made from memoranda furnished by the witness, and subsequently verified by him by comparison with the memoranda.—Orr v. Farmers' Alliance Warehouse & Commission Co., 97 Ga. 241, 22 S. E. 937.

[d] (La. 1857) A witness can only refer to memoranda made by himself, to refresh his memory.—Massey v. Hackett, 12 La. Ann. 54.

[e] (Me. 1847) A memorandum cannot be used in evidence to refresh the memory of a witness who did not write it, unless the paper is recognized by the witness as a correct account of the transaction.—Chamberlain v. Sands, 27 Me. (14 Shep.) 458.

[f] (Md. 1861) Memorandum need not be made by the witness; but if made at or about

the time of the occurrences, and the witness from having then seen and recognized it as containing the truth, of which, at the trial, he is still convinced, he may be examined in regard to it.—Green v. Caulk, 16 Md. 556.

[g] (Mass. 1853) A witness may use a memorandum to refresh his recollection, although it was not made by himself, if he saw the paper while the facts therein stated were fresh in his recollection, and he can say that he then knew they were correctly stated.—Coffin v. Vincent, 66 Mass. (12 Cush.) 98.

[h] (Mich. 1869) A witness may refresh his recollection by a paper purporting to have been written by his agent, and which he has acted on as authentic, and its handwriting need not be proven.—Watkins v. Wallace, 19 Mich. 57.

[i] (Mich. 1878) When a witness swears that he has a complete recollection of the facts, it makes no difference that the memoranda he uses to refresh his memory are not from his own entries.—Cameron v. Blackman, 39 Mich. 108.

[j] (Minn. 1893) It is not necessary that a memorandum used by a witness to refresh his memory should have been made by himself, but he may use a memorandum made by any one, if, after inspecting it, he can testify to the facts from his own recollection.—Culver v. Scott & Wolston Lumber Co., 53 Minn. 360, 55 N. W. 552.

[k] (Mo. 1887) A witness who has an independent recollection of the facts may, to refresh his memory, use a memorandum made by another, but not so where he has no independent knowledge of the facts.—Rose v. Rubeling, 24 Mo. App. 369.

[l] (Mo. 1887) A memorandum, known by the witness to have been correct when made, may be used to refresh his memory, although made by another person.—Taussig v. Schields, 26 Mo. App. 318.

[m] (N. M. 1885) Books or writings in the nature of memoranda can be referred to in order to refresh the memory only by the person in whose handwriting they are.—Price v. Garland, 3 N. M. (Gild.) 505, 6 Pac. 472.

[n] (N. Y. 1895) It is error to permit a witness, while testifying, to refer to a memorandum, when it does not appear that the memorandum was made by him at the time of the transaction to which it relates, or that it was a copy of such a memorandum, or that plaintiff testified from his recollection, unaided by it.—Dwight v. Cutting, 91 Hun, 38, 36 N. Y. Supp. 99.

[o] (Or. 1887) The fact that a witness on a trial for murder, to refresh his memory, read over memoranda taken by another person as to statements of the accused made before them both, when he said that he remembered the substance of said statements, does not render the evidence of said witness as to such statements incompetent, but merely affects its credibility.—State v. Moran, 15 Or. 262, 14 Pac. 419.

[p] (Pa. 1891) A witness cannot refresh his memory by referring to a letter with which he is not in any way connected.—Steele v. Wisner, 141 Pa. 63, 21 Atl. 527.

[q] (S. C. 1896) A witness may use a memorandum to refresh his memory, though not made by himself, where, after an inspection of it, his knowledge of the facts testified to by him is positive, and exists apart from the paper.—Springs v. South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

[r] (Wash. 1890) Where, in an action for the conversion of mortgaged property, the mortgagee testifies that payments whose amounts he cannot remember have been made on the mortgage, a memorandum of such payments, made by his clerk, as to the manner of making which the mortgagee is ignorant, is not such a memorandum as he may be allowed to use to refresh his memory.—Brotton v. Langert, 1 Wash. St. 227, 23 Pac. 803.

[s] (Wis. 1864) A witness, to refresh his memory, may use a memorandum not made by himself, where, after seeing it, he can recall the facts stated in it, and testify to them as matters of present recollection.—Hill v. State, 17 Wis. 675, 86 Am. Dec. 736.

§ 878. Copies of or extracts from records or memoranda.

Copies in papers in legal proceedings, see post, § 879.

Entries in books of account as copies, see post, §§ 881, 882.

[a] (U. S. 1888) A witness called to show a sale and delivery of merchandise may be permitted to look at an unproved copy of an unproved account for the purpose of refreshing his memory.—New York & Colorado Min. Syndicate & Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031.

[b] (U. S. 1807) A witness cannot refresh his memory as to conversations by reference to memoranda copied by himself from notes made by him at the times of the conversations.—United States v. Burr, Fed. Cas. No. 14,693.

[c] (Ala. 1839) The subscribing witness of a lost bond cannot be permitted to refresh his memory by reference to a sworn copy of the bond.—Evans v. Bolling, 8 Port. 546.

[d] (Ala. 1884) Where the memorandum referred to by a witness to refresh his memory is a copy, and the original is not produced upon being called for, such failure to produce it or to satisfactorily explain the use of the copy, may be considered by the jury in weighing the testimony given therefrom.—Calloway v. Varner, 77 Ala. 541, 54 Am. Rep. 78.

[e] (Ala. 1889) A witness may be permitted to refresh his memory by referring to a published article written by him from notes of a conversation held by him with defendant, and which he testifies contains the substance of what defendant said, the notes having been destroyed.—Hawes v. State, 88 Ala. 37, 7 South. 302.

[f] (Ala. 1892) A witness who has established the prima facie correctness of a book account by showing that several of the items are within his own personal knowledge, and that he has gone over the account with the person charged, and shown him the amount due, without any objection being made by the said person as to its correctness, may refresh his memory as to the amount so due by referring to a paper drawn from the book, and from which he is able to testify independently to the fact as within his memory.—Powell v. Henry, 96 Ala. 412, 11 South. 311.

[g] (Ala. 1892) A witness may refresh his memory by reference to a copy of a memorandum made by him, only when it is first shown that the copy is correct.—City of Birmingham v. McPoland, 96 Ala. 363, 11 South. 427.

[h] (Colo. 1894) In an action for wages, a witness whose duty it is to keep the time of the parties whose wages are sued for, and who has independent knowledge of the time each man worked, may refresh his memory with memoranda taken from the book in which he made the original entries concerning such facts.—Denver & R. G. R. Co. v. Wilson, 4 Colo. App. 355, 36 Pac. 67.

[i] (Ill. 1870) A witness may, under some circumstances, refresh his memory from the copy of an original memorandum; but he must be clear and explicit in his evidence that the copy

is truly transcribed from the original, and that the original was correctly made, and was true when made.—Chicago & A. R. Co. v. Adler, 56 Ill. 344.

[j] (Ill. 1883) Before the writer of a certain article can look at a printed copy thereof for the purpose of refreshing his memory as to its contents, it must appear that the original writing was lost or otherwise inaccessible.—Clifford v. Drake, 14 Ill. App. (14 Bradw.) 75.

[k] (Ill. 1884) Where the original manuscript of an alleged libelous article published in a newspaper was lost, the reporter who wrote the same from a verbal interview with the person sued might be shown the article to refresh his memory.—Clifford v. Drake, 110 Ill. 135.

[l] (Ill. 1886) In an action for the balance on a contract to build a house, plaintiff may on the stand refresh his memory by referring to a memorandum taken from his books of the items and charges.—Bonnet v. Gladfelt, 24 Ill. App. 533; affirmed Same v. Glattfeldt, 120 Ill. 166, 11 N. E. 250.

[m] (Md. 1861) A witness (a measurer of mechanical work) cannot be permitted to rely on a bill of particulars, which was a copy from the statements in his abstract book, which latter, with the results of the calculations extended, was taken from his dimension book; such paper is a copy of a copy of an original.—Green v. Caulk, 16 Md. 556.

[n] (Md. 1876) A copy of an account from the original entry was admissible to be used by witness in refreshing his memory, where he testified positively that he had a distinct recollection of the account independent of the copy.—Bullock v. Hunter, 44 Md. 416.

[o] (Md. 1896) A copy of a book of account, some of the original entries in which were not made by the witness, cannot be used to refresh the witness' memory.—Hopper v. Beck, 83 Md. 647, 34 Atl. 474.

[p] (Mass. 1881) A witness who is a newspaper reporter may be allowed for the purpose of refreshing his recollection of what was said at a particular time to look at a printed copy of his own written report of the proceedings at that time, although the absence of the written report is not accounted for.—Commonwealth v. Ford, 130 Mass. 64, 39 Am. Rep. 426.

[q] (Mich. 1883) A plaintiff, testifying in his own behalf, can refresh his recollection, where he knows the facts, by reading from his bill of particulars, when that is a duplicate of the account rendered, and on which he sues, even though it was copied by his clerk from entries in his books, as to which he cannot say, without seeing them, whether or not he made them all himself.—Hudnutt v. Comstock, 50 Mich. 596, 16 N. W. 157.

[r] (Minn. 1894) A witness cannot refresh his memory by the examination of figures transcribed by him from a book into which his foreman had copied what appeared on a tally board kept by another of plaintiff's employés.—Douglas v. Leighton, 57 Minn. 81, 58 N. W. 827.

[s] (Mo. 1886) For the purpose of refreshing his memory, a witness may use a copy of a copy without the production of the original.—Wernwag v. Chicago & A. Ry. Co., 20 Mo. App. 473.

[t] (Neb. 1878) Where a public officer is called to testify as to payments of money made to him in his official capacity by the prisoner, it is proper to permit him to refresh his recollection from extracts taken from his official records, without producing the original.—Clough v. State, 7 Neb. 320.

[tt] (N. Y. 1847) Where a written memorandum has been lost or destroyed, a witness who testifies to the general substance of its whole contents may give from memory, refreshed by extracts made by himself, portions of the memorandum, but not if he is able to give those particular extracts only.—Sizer v. Burt, 4 Denio, 426.

[u] (N. Y. 1872) A witness may refresh his memory from a copy made by himself of his memorandum, on proof that the original memorandum is lost, and items of charge for labor and services, made up from memoranda in detail previously taken daily, and at the end of the week written out by direction, and in the presence of the witness, are available as original memoranda.—Filkins v. Baker, 6 Lans. 516.

[uu] (N. Y. 1887) A certain contract was lost and plaintiff produced what he claimed to be a copy. *Held*, that it was error to refuse to permit the person who drew a contract to examine the reputed copy before testifying to his recollection of the contract which he drew.—Scott v. Slingerland, 44 Hun, 254.

[v] (N. C. 1886) Copies of recorded deeds are not the best evidence to refresh the memory of the maker of the deeds.—Jones v. Jones, 94 N. C. 111.

[vv] (Ohio, 1884) Plaintiff in a suit involving the truth of certain matters entered by him in a memorandum book, which became so worn that pending suit he copied the items into another, should not be allowed to aid his memory by using said copy while testifying.—Lovell v. Wentworth, 39 Ohio St. 614.

[w] (S. C. 1857) A witness may refresh his memory as to the contents of a paper by reading what purports to be a copy made by another, if after that he remembers.—Berry v. Jourdan, 11 Rich. Law, 67.

[ww] (Tex. 1855) A memorandum merely to assist the witness' memory need not be produced in court, and notes taken from it may be used.—Hamilton v. Rice, 15 Tex. 382.

[x] (Tex. 1890) A witness cannot refresh his memory by the use of a copy of memoranda made by him, without accounting for the absence of the original.—Byrnes v. Pacific Exp. Co. (App.) 15 S. W. 46.

[xx] (Tex. 1891) A witness cannot refresh his memory by reference to a memorandum made by his attorney at his dictation, from old letters and other memoranda.—Watson v. Miller, 82 Tex. 279, 17 S. W. 1053.

[y] (Tex. 1895) Where, in an action for an accounting, the partnership books, when offered by defendant, have been excluded, because the accounts were not properly entered therein, the defendant, on testifying that he remembered the entries, and that they were made by him, may refresh his memory by referring to memoranda taken from the book.—Faver v. Bowers (Civ. App.) 33 S. W. 131.

[yy] (Tex. 1895) A witness may refresh his memory from memoranda taken from old partnership books, on testifying that he made the entries, and knew them to be correct, though he has, on being duly notified, failed to produce such books on the trial.—Faver v. Bowers (Civ. App.) 33 S. W. 131.

[z] (Va. 1854) It was not error to allow a surveyor in testifying to refresh his memory from an extract or copy taken by him from his field notes in evidence.—Harrison v. Middleton, 11 Grat. 527.

[zz] (Wis. 1877) A witness who testifies that he made a correct written memorandum of certain facts at the time of their occurrence; that, the original being defaced, he had, before starting from home for the place of trial, made a correct copy thereof; and that such copy having also become defaced, he had caused another copy to be made thereof, which he knows to be correct—may use such second copy to

refresh his memory at the trial.—Folsom v. Apple River Log-Driving Co., 41 Wis. 602.

§ 879. Papers in legal proceedings.

Depositions, see post, § 886.

[a] (Cal. 1893) On a prosecution for forgery, a witness testifying as to the forged instrument cannot refresh his memory by reference to the copy contained in the information, which he does not, of his own knowledge, know to be correct.—People v. Munroe, 33 Pac. 776.

[b] (Cal. 1893) On a prosecution for forgery, where the prosecuting witness states that he was present when the complaint was drawn by the district attorney, that they compared the copy therein of the instrument alleged to have been forged with the original, and that such copy was correct, it is proper, if the original is in defendant's possession, and he refuses to produce it after notice so to do, to allow the witness to refresh his memory as to the original by reference to the copy in the complaint.—People v. Munroe, 33 Pac. 776.

[c] (Ill. 1855) It is proper for witnesses, testifying as to admissions made by a party, to refresh their memories by referring to a certified copy of a bill of exceptions taken at a previous trial, and having sworn that the substance of their recollection is fairly set out in such copy, to incorporate it in their depositions; it is not offered as a record, but a simple statement of facts, and therefore the fact that the admissions were made under oath does not require record evidence of the trial.—Iglehart v. Jernegan, 16 Ill. (6 Peck) 513.

[d] (Kan. 1885) An attorney, in stating what a witness, since deceased, testified to at a former trial, may refresh his recollection from a bill of exceptions, or may read from it, if he knew, when he drew it, that it stated the testimony of the deceased witness.—Solomon R. Co. v. Jones, 34 Kan. 443, 8 Pac. 730.

[e] (Md. 1809) Respondent may recur to his answer to refresh his memory as to the declarations made to him by the defendant.—Dorsey v. Gassaway, 2 Har. & J. 402, 3 Am. Dec. 557.

[f] (Mich. 1894) In replevin of a pile driver from K. and another, plaintiff claimed K. sold it to him in consideration of certain repairs, and the payment of certain claims against it, and that K. was to operate it on shares; and K. claimed that he had paid for such repairs, and the debts against it, and that he had never sold it. *Held*, that K. could use a bill of particulars filed in another action between him and plaintiff to refresh his memory as to payments made by him to plaintiff, as against an objection that such items had been adjudicated.—Avery v. Knight, 99 Mich. 311, 58 N. W. 316.

[g] (Mo. 1877) A witness called in a criminal case to rehearse the testimony of a deceased witness at a former trial may be allowed to refresh his memory by reference to the bill of exceptions taken in the former trial.—State v. Able, 65 Mo. 357.

[h] (Mo. 1879) On an issue as to the truth of a notary's certificate of acknowledgment on a printed form, such certificate should not be exhibited to the notary for the purpose of refreshing his memory as a witness.—Steffen v. Bauer, 70 Mo. 399.

[i] (Mo. 1894) A witness who made an affidavit which was filed in a suit before a justice may refresh his memory, in testifying to the contents of such affidavit, which has been lost or destroyed, by a summons shown to have contained the printed form of the affidavit in use at the time in all similar cases before such justice.—Wise v. Loring, 59 Mo. App. 269.

[j] (N. Y. 1885) A witness may use a bill of particulars to refresh his memory as to particular items, each of which he testifies he recollects apart from the paper.—Sanders v. Euling, 8 Civ. Proc. R. 166.

[k] (Tex. 1890) Where the perjury is alleged to have been committed in the grand jury room, it is not error to permit the foreman, on the trial, to read the indictment which was being investigated when the perjury is alleged to have been committed, in order to refresh his memory as to the statements made by defendant on the investigation, when the witness afterwards testifies from memory.—Sisk v. State, 28 Tex. App. 432, 13 S. W. 647.

[l] (Wash. 1860) A witness may be permitted to examine and testify from a bill of particulars attached to a complaint, which is in his own handwriting, for the purpose of refreshing his memory.—Williams v. Miller, 1 Wash. T. 88.

§ 880. Bill of sale.

[a] (Pa. 1885) A witness, who is called to swear as to certain goods, may refresh his memory by referring to a bill of sale of the goods which he had previously compared with the goods themselves.—Striker v. McMichael, 7 Leg. Int. 154.

[b] (Tex. 1889) On a prosecution for receiving stolen cattle, a witness to whom the cattle were sold may, after identifying the bill of sale given to him, refresh his memory therefrom as to the marks and brands described therein.—McFadden v. State, 28 Tex. App. 241, 14 S. W. 128.

§ 881. Books of account and entries therein.

See ante, § 874 [p].

[a] (Cal. 1854) A bookkeeper may refer to books kept by him, to refresh his memory.—Treadwell v. Wells, 4 Cal. 260.

[b] (Del. 1891) A book into which is entered an account kept on a slate is a book of original entry, and may be used to refresh the memory of a witness.—Nichols v. Vinson, 9 Houst. 274, 32 Atl. 225.

[c] (Ga. 1877) A journeyman shoemaker, working by the job, may refer to the books he has kept, as a memorandum to refresh his memory, and may swear to the correctness of his account as taken from the books, his memory being so refreshed.—Schall v. Eisner, 58 Ga. 190.

[d] (Ind. 1895) In suit on account the plaintiff may, as a witness, refresh his memory as to the items of the account by referring to entries made at the time of the transactions in his own books of account.—Wilber v. Scherer, 13 Ind. App. 428, 41 N. E. 837.

[e] (Iowa, 1859) A., having contracted to perform certain work for B., procured D. to do it for him. In a suit by A. against B. it was *held* that D., testifying in behalf of A., might refresh his memory from his books.—White v. Tucker, 9 Iowa, 100.

[f] (Iowa, 1888) Allowing a witness to use a stub checkbook, to refresh his memory, while testifying as to payments, is not error.—Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107.

[g] (Ky. 1823) A merchant's clerk, called on as a witness, ought to be allowed time, if requested, to refresh his memory by examining the daybook.—Key v. Lynn, 14 Ky. (4 Litt.) 338.

[h] (La.) Under Civ. Code, art. 2244, providing that the books of merchants cannot be given in evidence in their favor, the witnesses who made the entries in such books are not precluded from referring to such entries to refresh their memory.—(1824) Morgan v. Bickle, 2 Mart. (N. S.) 377; (1846) Kendall v. Bean, 12 Rob. 407.

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[i] (Me. 1845) A witness was called to prove the consideration of certain notes, not declared on in the suit, and the appropriation of certain payments, and produced a daybook and ledger, kept by him, and belonging to the party calling him, in order to enable him to testify with more accuracy. It appeared from him that there was also a journal kept, containing an abstract of the daybook. *Held*, that the absence of the journal would not prevent the witness from giving such testimony without its production.—Rundlett v. Small, 25 Me. (12 Shep.) 29.

[j] (Mass. 1882) An original entry made by a witness in account books kept by him of the date of the delivery of goods is competent to be used by a witness in order to refresh his memory.—Costello v. Crowell, 133 Mass. 352.

[k] (Mich. 1882) In an action by the vendee of logs to recover for a deficiency in the quantity delivered, a witness for the vendor testified to keeping a memorandum book in which she entered every night the amount delivered, as reported to her by the men in charge. *Held*, that she might use the book to refresh her recollection as to entries, and that it was not error to permit her to show the entries to the jury.—Mason v. Phelps, 48 Mich. 126, 11 N. W. 413, 837.

[l] (Mich. 1886) Contemporaneous entries in a diary and pass-book may be received and examined, to allow a witness to fix a date; the jury being properly instructed as to the portions submitted to their consideration.—Passmore v. Passmore's Estate, 60 Mich. 463, 27 N. W. 601.

[m] (Mo. 1886) Where the weighman of an elevator company weighed a car of wheat and entered the weight from the track ticket into the elevator books in the regular course of business, the presumption is, in the absence of evidence to the contrary, that it was correctly done, and such book is competent to refresh his memory as a witness to such weight.—Wernwag v. Chicago & A. Ry. Co., 20 Mo. App. 473.

[n] (Mo. 1889) While a party cannot introduce in evidence his book of entries for the purpose of establishing the correctness of his account, he may refresh his memory from such book, and then testify to the facts from his own recollection, independent of the entries.—Robertson v. Reed, 38 Mo. App. 32.

[o] (Mo. 1890) There is no error in allowing a witness to refresh his memory with an examination of entries in books and an inspection of the stubs of checks, made in the usual course of the business, in which witness was engaged, and with the conduct of which he was familiar, by those having charge of the books, and having been examined by witness prior to testifying, and found correct, they being used simply to confirm in detail an amount to which he testified directly, and being calculated only to render definite that which witness had generally testified to.—Third Nat. Bank v. Owen, 101 Mo. 558, 14 S. W. 632.

[p] (Neb. 1880) Plaintiff, a blacksmith, was in the habit of keeping his accounts for blacksmithing in small books (passbooks apparently), and, when a book was filled, carrying the unsettled accounts forward into a new book, the old one being destroyed. *Held*, in an action on an account thus kept, that he could refresh his memory from these secondary books, and his testimony that the several items of account were correct as charged, although he could not remember the dates of the several items without referring to the account, was properly received.—Murray v. Cunningham, 10 Neb. 167, 4 N. W. 819, 953.

[q] (Neb. 1889) The refusal by the trial court to let a witness refresh his memory, and testify from certain entries in a book—he being unable to testify from memory—was not erroneous, or, if erroneous, was not prejudicial error, when the entries from which it was sought to have the witness refresh his memory had already been read to the jury, and were before them as evidence.—Burlington & M. R. Co. v. Wallace, 28 Neb. 179, 44 N. W. 223.

[r] (Nev. 1877) Where a witness testifies that he has no way of fixing dates except by referring to a book of original entries made by himself, and further testifies that the entries were made at the time of the occurrence, and that the dates were correct, *held*, that he should be allowed to examine the book for the purpose of refreshing his memory, and should be allowed to testify to the dates. Such testimony is not hearsay.—McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781.

[rr] (N. H. 1886) A witness may refer to and read the items in his private cashbook as memoranda of payments made at the time of the transactions, to refresh his recollection.—Converse v. Hobbs, 64 N. H. 42, 5 Atl. 832.

[s] (N. Y. 1851) Where a witness stated that at the time a particular transaction occurred he kept a cashbook in which he regularly entered all his cash transactions, and that the same was then before him, and produced to the commissioner, and in which the amount of money received by him from one of the parties was entered by him, and gave an extract from the book, containing that entry and one immediately preceding, and another succeeding it, it was *held* that it was competent for the witness to refresh his memory by referring to and examining such entry, and that it was competent for the party to prove by him how and by what means he refreshed his memory, with a view of ascertaining the reliance to be placed upon it; but that the testimony was not evidence of the truth of the matter contained in the entry, or upon the question of fact in issue.—Morse v. Cloyes, 11 Barb. 100.

[ss] (N. Y. 1892) In an action by the assignee of a claim for goods sold and delivered, the assignor, called as a witness, may look at his books to refresh his memory as to the goods delivered.—Hartley v. Cataract Steam Engine Co., 64 Hun, 634, 19 N. Y. Supp. 121.

[t] (N. Y. 1892) Where plaintiff testified from his memory independent of the books in which the receipts of the rents testified to had been entered, the objection that his memory was refreshed by looking at such books was not well taken.—Steubing v. New York El. R. Co., 64 Hun, 639, 19 N. Y. Supp. 313.

[tt] (N. C. 1851) A witness may refresh his memory by looking at a book of entries, kept by himself, without producing the book on the trial.—State v. Cheek, 35 N. C. 114.

[u] (N. C. 1874) Where a plaintiff declares for the value of property sold, as the consideration of a note given at an administrator's sale, it is competent for the witness proving the consideration to refresh his memory from the account of sales kept by himself, and also to read the terms of the sale as they were read just before the sale commenced.—Cowles v. Hayes, 71 N. C. 230.

[uu] (Pa. 1847) Where a partner was familiar with the books of the concern, he may testify from his own recollection, so invigorated by the books, as to the amount of the advance of his copartner beyond himself in the payment of the debts of the firm, without producing the books.—West Branch Bank v. Donaldson, 6 Pa. (6 Barr) 179.

[v] (Pa. 1868) A witness stated that G. had worked for him at different times, but that he could not recollect when or how long. Afterwards an offer was made to show that the witness, having refreshed his memory by referring

to his own books and entries in his own handwriting, believed that G. worked for him between certain dates. *Held*, that it was error to reject the testimony.—Dodge v. Bache, 57 Pa. (7 P. F. Smith) 421.

[vv] (Pa. 1875) Where it appears that books of account were used as a memorandum by the witness and not as original evidence, their admission for such purpose was not error, although the books were not of a character to make them independent evidence.—Henry v. Martin, 1 Wkly. Notes Cas. 277.

[w] (Pa. 1875) Where a book of accounts is inadmissible as independent evidence by reason of the fact that the entries were not made within the proper time, and that they were not original entries, such book may be used as memorandum by the witness, as Act 1869 enables interested parties to be witnesses in their own behalf.—Barnet v. Steinbach, 1 Wkly. Notes Cas. 335.

[ww] (Pa. 1877) Although a book of original entries may be rejected in evidence because the articles were not charged at or about the time of their delivery, the plaintiff, who made the entries, may be allowed to testify that they had been delivered prior to a given date, after having refreshed his memory by an examination of the book of entries. His credibility is for the jury.—Sailer v. Domestic Sewing Mach. Co., 34 Leg. Int. 115.

[x] (Pa. 1889) A book account, copied from memoranda in a scratcher or passbook, made after the sale and delivery of the goods, and containing lumping charges, is admissible, not as a book of original entries, but to refresh the memory of the witness.—Wagonseller v. Brown, 7 Pa. Co. Ct. R. 663.

[xx] (S. C. 1818) In an action for dues to a municipal corporation the treasurer produced his ledger, which contained only aggregate sums made up from time to time of small details, but were always adjusted between the treasurer and the party. *Held*, that it was proper for witness to recur to the ledger to assist his memory.—Corporation of Columbia v. Harrison, 2 Mill, Const. 213.

[y] (S. C. 1874) Plaintiff has the same right as any other witness, on his examination as a witness on his own behalf, to refer to book entries and other memoranda to refresh his memory.—Bull v. Lambson, 5 S. C. (5 Rich.) 284.

[yy] (Tex. 1885) On the question of damages in an action for the wrongful seizure of goods, an invoice book known by witness to contain a correct description of the goods may be referred to, to refresh his memory as to their character and value.—Miller v. Jannett, 63 Tex. 82.

[z] (Wis. 1862) A witness in a hearing on a long account which covers several years may refresh his memory by referring to books and vouchers of which he knows the general correctness, although many of the entries are so indefinite that it is impossible to determine, without explanation, to what transactions they related.—Reed v. Jones, 15 Wis. 40.

[zz] (Wyo. 1873) Freight books of a railroad company may be used as memoranda to refresh the recollection of a witness as to transactions to which entries therein relate.—Martin v. Union Pac. R. Co., 1 Wyo. 143.

§ 882. —— Entries not made by witness.

[a] (U. S. 1888) In an action for the price of goods sold, plaintiffs' agent testified that when taking the order he made a memorandum of the items and prices, which, a few days afterwards, he rewrote on a ticket, from which in turn plaintiffs' order clerk entered the items in an order book. When the goods were delivered, he checked each item in the order book, and knew that it contained a true copy of the order. *Held*, that the witness could refer to the entries in the order book on trial to refresh his memory, though they were made by another person.—Flint v. Kennedy (C. C.) 33 Fed. 820.

[b] (Ala. 1878) In a prosecution for arson by burning a mill, where a former manager of the mill is testifying as to his opinion of its value, tax entries showing the assessed value, not made by the owner's direction, are not admissible to refresh his memory.—Hudson v. State, 61 Ala. 333.

[c] (Cal. 1896) Code Civ. Proc. § 2047, providing that a witness "may refresh his memory of a fact by anything written by himself or under his direction at the time when the fact occurred," authorizes the use of a bank book in which entries of deposit were made in witness' presence.—McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149.

[d] (La. 1833) A witness cannot refresh his memory by reference to books in which it does not appear that he made the entries.—Pargoud v. Guice, 6 La. 75, 25 Am. Dec. 202.

[e] (Mass. 1857) An officer of a voluntary association, who has testified to what he knows of its expenses and management, cannot, for the purpose of refreshing his recollection, be shown an account book of the association, the entries in which he did not make, and does not know who did.—Davis v. Allen, 75 Mass. (9 Gray) 322.

[f] (N. Y. 1896) In an action to recover money loaned, alleged to have been given to defendant in the form of checks, evidence as to defendant's transactions with a third person, in which defendant had made payments with plaintiff's checks, was properly stricken out; it appearing that witness had no recollection of the transaction, outside of entries in his books, which had not been made by him.—Mills v. McMullen, 4 App. Div. 27, 38 N. Y. Supp. 705.

[g] (S. C. 1894) A manager of a firm's business, as a witness, cannot refresh his memory as to an indebtedness to the firm from its account books, when he did not make the entries, or see them made, nor assure himself of their correctness when the matters were fresh in his memory.—Fritz v. Burriss, 41 S. C. 149, 19 S. E. 304.

[h] (Tex. 1885) In an action against a carrier for injury to cotton shipped to a consignee, the consignee's book of entry as to condition of cotton on receipt, the damage, and various details, may be used to refresh the memory of a witness who knew generally the facts entered therein, and that in the ordinary business of the consignee such facts were correctly entered, without calling the entry clerk to prove the correctness of his entries.—International & G. N. Ry. Co. v. Blanton, 63 Tex. 109.

§ 883. Records.

[a] (Ky. 1823) Where the existence of a record is not disputed, witnesses may refer to it for the purpose of aiding and in giving reasons for their recollection, where they prove no facts in the record to operate against the other party.—McIlvoy v. Cochran, 13 Ky. (3 Litt.) 454.

[b] (Md. 1853) Though neither the notarial record nor the original protest is introduced, and the notary is brought in to testify as to the circumstances under which protest was made and notice given, he may refresh his memory by reference to the record and the protest.—Sasscer v. Farmers' Bank, 4 Md. 409.

§ 884. Plat of land.

[a] (Ala. 1838) In trespass to try title, a plat of the land may be used by the witness, either to refresh his memory, or as a memo-

randum, if made by himself, or to make his testimony more intelligible to the jury.—Cundiff v. Orms, 7 Port. 58.

[b] (Tenn. 1843) The defendant produced a plat of survey, and asked a witness if he did not make it, to which he replied that he did. *Held*, that it was proper to permit the witness to examine the plat, so as to refresh his memory as to the time when made, and whether for plaintiff or defendant; but if he did not know when, or at whose instance, it was made, it was not evidence.—Mitchell v. Churchman's Lessee, 23 Tenn. (4 Humph.) 218.

§ 885. Testimony previously given by witness.

Calling attention to and explanation of former statements or testimony, see post, §§ 897, 898.

Inquiry as to former statements in general, see ante, § 868.

Reading testimony prior to cross-examination, see post, § 918.

Evidence at former trial or in other proceedings in general, see "Evidence," vol. 20, cc. 3531–3563, §§ 2401–2423.

[a] (U. S. 1896) It was error to permit counsel, on the ground of surprise, to call the attention of his own witness to statements made by the witness before the grand jury, ask him to refresh his recollection thereby, and inquire whether, after so doing, he did not remember the matter as formerly testified to.—Putnam v. United States, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118.

[b] (U. S. 1852) Where witnesses before a grand jury are testifying in regard to facts about which they have previously made ex parte affidavits, it is not improper for them to consult those affidavits, to refresh their recollection; nor is there any objection to their swearing that certain facts, of which they have previously made statements on paper, are true.—United States v. Reed, Fed. Cas. No. 16,134 [2 Blatchf. 435].

[c] (Ala. 1892) In a prosecution for gambling in a public house, a witness testified that he did not remember how often he had been at the house in the 12 months preceding the time in question, and seen a game played there. *Held* no error to allow the prosecuting attorney to question witness from a memorandum of his testimony before the grand jury, in order to refresh his memory in that regard.—Thompson v. State, 99 Ala. 173, 13 South. 753.

[d] (Ala. 1893) It was not error to permit plaintiff to ask his witness if he had not testified differently on a former trial, where the same is done to refresh the memory of the witness, and not to impeach him.—Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 South. 130.

[e] (D. C. 1894) As a general rule a party will not be allowed to discredit his own witness, and where a witness called by plaintiff testifies adversely to plaintiff as to a matter material to plaintiff and solely within the witness' own knowledge, it is not error to refuse to allow plaintiff, claiming surprise, and desiring to refresh the witness' memory, to interrogate him with reference to statements made on a former trial, where the witness has no adverse interest, and he was not one, such as a witness to a deed or will, and whom the law compelled plaintiff to call, and there being nothing in the record tending to cast suspicion on the witness' good faith.—Weaver v. Baltimore & O. R. Co., 22 Wash. Law Rep. 393.

[f] (Ga. 1859) The minutes of the evidence of a witness, given at the trial of a principal, cannot be read over to him at the trial of the accessory, either to refresh his memory or to discredit him.—Brown v. State, 28 Ga. 199.

[g] (Ind. 1872) It is not error for the court to permit a paper to be read to a witness, which purports to be the evidence of the witness given at a former examination, for the declared purpose of refreshing the memory of the witness, although it be read in the presence of the jury, the witness not recalling the evidence, and the jury being thereupon instructed to disregard the contents of the paper.—Harvey v. State, 40 Ind. 516.

[h] (Ind. 1892) It is proper, in order to refresh the recollection of one's own witness, to read to him extracts from evidence given by him on a previous trial, and to ask him if, having heard such passages read, he did not recollect the facts as he formerly testified.—Ehrisman v. Scott, 5 Ind. App. 596, 32 N. E. 867.

[i] (Iowa, 1880) A witness in a criminal trial may refresh his memory by an examination of the minutes of his testimony taken before the grand jury.—State v. Miller, 53 Iowa, 154, 209, 4 N. W. 900, 1083.

[j] (Iowa, 1888) A party may, on direct examination to refresh the recollection of his witness, inquire if he has not at another time testified to facts inconsistent with his present testimony.—State v. Cummins, 76 Iowa, 133, 40 N. W. 124.

[k] (Iowa, 1896) It was not error to allow plaintiff to refresh the memory of a witness, who was an employé of defendant, by reading a transcript of his evidence given on a former trial of the cause; the witness being to some extent hostile to plaintiff.—Spaulding v. Chicago, St. P. & K. C. Ry. Co., 98 Iowa, 205, 67 N. W. 227.

[l] (Ky. 1886) A prosecuting attorney who holds the written statements of a witness for the prosecution in his possession may use the same, not as evidence, but to refresh the memory of such witness on the stand, by reading from it, and asking the witness whether he had not so testified, especially if it appears that he is an unwilling witness.—Butler v. Commonwealth, 2 S. W. 228.

[m] (La. 1836) A witness cannot refer to a summary of his testimony on a former trial to revive his recollection.—Riordon v. Davis, 9 La. 239, 29 Am. Dec. 442.

[n] (Mass. 1858) Upon a criminal trial, the commonwealth cannot ask one of its witnesses to recur in his own mind to his testimony before the grand jury, and then state circumstances to which he has not testified at the trial.—Commonwealth v. Phelps, 77 Mass. (11 Gray) 73.

[o] (Mich. 1872) To permit the prosecution on a criminal trial, against the objection of the prisoner, under pretense of refreshing the recollection of a witness, to read to him while on the stand, and in the presence of the jury, his evidence given on a previous occasion, and then to ask him whether, after having heard it read, he recollected certain facts stated in it, is error.—Bashford v. People, 24 Mich. 244.

[p] (Mich. 1887) A witness may be questioned as to testimony given by him on a former trial for the purpose of refreshing his memory.—Battishill v. Humphreys, 64 Mich. 514, 38 N. W. 581.

[q] (Mich. 1892) The stenographer's notes of a witness' testimony, taken on a former trial, may be read to him to refresh his memory, though counsel announced, when he first asked to have it read, that it was for the purpose of impeaching the witness, which the court refused to allow.—Pickard v. Bryant, 92 Mich. 430, 52 N. W. 788.

[r] (Mich. 1895) It is proper, for the purpose of refreshing the memory of a witness, to call his attention to testimony given by him at a

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former trial of the same case.—People v. Palmer, 105 Mich. 568, 63 N. W. 656.

[s] (Mich. 1895) Under How. Ann. St. § 9502, providing that members of the grand jury may be required by any court to testify whether the testimony of a witness before them is different from that given before such court, it is proper for the prosecuting attorney to refresh the memories of hostile witnesses by referring to their evidence before the grand jury. —People v. O'Neill, 107 Mich. 556, 65 N. W. 540.

[t] (N. Y. 1889) The state was properly allowed, on cross-examination, to ask a witness, for the purpose of refreshing his memory, whether he had not previously sworn, before the committing magistrate and the grand jury, that defendant during the affray moved coolly across the room to deceased, and addressed her in a low and quiet tone of voice, where such testimony was not inconsistent with his former testimony.—People v. Kelly, 113 N. Y. 647, 21 N. E. 122.

[u] (N. Y. 1891) On the examination of a witness, his sworn statements on an examination supplementary to execution were brought to his attention, and he was asked if they were true, and, so far as they were important or material, he testified that they were true. *Held*, that this was not improper, as such former testimony was not itself given in evidence.—Grossman v. Walters, 58 Hun, 603, 11 N. Y. Supp. 471.

[v] (N. Y. 1891) Where a witness for the prosecution, who testified before the grand jury, manifests on the trial a disposition to favor the defendant, the prosecution may call his attention to his testimony before the grand jury to refresh his memory.—People v. Sherman, 61 Hun, 623, 16 N. Y. Supp. 782, judgment affirmed (1892) 133 N. Y. 349, 31 N. E. 107.

[w] (Ohio, 1889) A party who calls a witness in a murder case, and is taken by surprise by his unexpected and unfavorable testimony, may interrogate him in respect to declarations previously made by him in testifying at the coroner's inquest and before the grand jury, which are inconsistent with his testimony, for the purpose of refreshing his recollection, and inducing him to correct his testimony, or explain his apparent inconsistency; and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him.—Hurley v. State, 46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161.

[x] (Pa. 1883) The party calling a witness cannot refresh his memory by reading to him notes of testimony given by him in a former proceeding touching the same subject-matter.—Velott v. Lewis, 102 Pa. 326.

[y] (Tex. 1885) A witness on a criminal trial may refresh his recollection concerning a date, and may correct his testimony by a reference to his testimony on the examination.—White v. State, 18 Tex. App. 57.

§ 886. —— Depositions.

Examination after taking or use of deposition, see post, § 906.

[a] (Ala. 1884) Where a witness who cannot read is cross-examined as to her former deposition, it may be read to her.—Phoenix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31.

[b] (Ark. 1855) A witness may refresh his recollection by referring to his own deposition given before a committing magistrate.—Atkins v. State, 16 Ark. 568.

[c] (Del. 1877) Where a witness has testified at the coroner's inquest as to a conversation, with one accused of murder, on the subject of the charge, and his testimony has been reduced to writing by the coroner's clerk, the witness, on the trial, cannot use this deposition for the purpose of refreshing his memory.—State v. Rhodes, Houst. Cr. Cas. 476.

[d] (Ga. 1858) Portions of his own deposition may be read to a witness in the presence of a jury, for the purpose of refreshing his memory.—Burney v. Ball, 24 Ga. 505.

[e] (Md. 1808) Though the deposition of a witness taken before commissioners appointed to perpetuate the bounds of land was not admissible as a deposition because the authority given the commissioners was not properly executed, it was permissible for a commissioner in testifying to the declarations made by such witness to refresh his memory from the deposition.—Tolley's Lessee v. Ford, 1 Har. & J. 413.

[f] (N. H. 1849) The plaintiff introduced a witness whose deposition he had formerly taken. In his cross-examination he was inquired of as to what he had stated in the deposition. *Held*, that he might be permitted to refresh his recollection by referring to a copy of the deposition.—George v. Joy, 19 N. H. 544.

[g] (N. C. 1896) A witness, in testifying to dying declarations, who was present and heard a deposition taken of deceased immediately before the latter's death, could refresh his memory from the deposition.—State v. Finley, 118 N. C. 1161, 24 S. E. 495.

§ 887. Testifying from memory after refreshing memory.

[a] A witness may refresh his memory, but must be able, at last, to speak from a direct recollection of the fact to which he testifies.

—(Ala. 1841) Vastbinder v. Metcalf, 8 Ala. 100;

(Del. 1841) Fitzgibbon's Adm'r v. Kinney, 3 Har. 317;

(Ga. 1891) Finch v. Barclay, 87 Ga. 393, 13 S. E. 566;

(Ind. 1888) Johnson v. Culver, 116 Ind. 278, 19 N. E. 129;

(Ky. 1818) Owings v. Shannon, 8 Ky. (1 A. K. Marsh.) 188; (1823) Key v. Lynn, 14 Ky. (4 Litt.) 338; (1885) Mitchell v. Robinson's Ex'r, 7 Ky. Law Rep. 98;

(N. Y. 1830) Lawrence v. Barker, 5 Wend. 301; (1848) Green v. Brown, 3 Barb. 119;

(N. C. 1876) Howie v. Rea, 75 N. C. 326.

[b] (Ala. 1840) A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from recollection; but if he cannot so swear any further than as finding it in the book or paper, the book or paper must be produced.—Holmes v. Gayle, 1 Ala. 517.

[c] (Ala. 1874) A witness who, in the course of his duty or employment, made an entry of a transaction at the time it occurred, may testify in reference to it from his entry, although he has no personal recollection of the matter.—Cowles v. State, 50 Ala. 454.

[d] (Ala. 1879) A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when, after such examination, he can testify to the facts as matter of independent recollection, but the memorandum is not thereby made evidence. If the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matter of independent recollection, but he can nevertheless testify that, at or about the time the memorandum was made, he knew its contents, and he knew them to be correct and true, his testimony and the memorandum are both competent evidence; but if he did not know the contents of the memorandum to be true when it was made, although he saw it

made, the memorandum is not admissible evidence.—Acklen's Ex'r v. Hickman, 63 Ala. 494, 35 Am. Rep. 54.

[e] (Ala. 1888) A witness whose recollection has failed him as to the date of an offense as to which he had testified before the grand jury, may examine a written memorandum of his evidence, identified as the same taken at his examination by that body, the signature to which he recognizes as his own, for the purpose of refreshing his recollection, and from it he may fix the date, though he has no recollection of the date.—Billingslea v. State, 85 Ala. 323, 5 South. 137.

[f] (Ark. 1895) A witness may testify to transactions from memoranda made by him at the time the transactions took place on stating that they truly represent the transaction, and that he relies on such memoranda, and not on present recollection.—Woodruff v. State, 61 Ark. 157, 32 S. W. 102.

[g] (Del. 1845) A witness may refresh his memory by a letter written by him at the time, but must be able to swear from recollection as thus refreshed, and not from the paper only; much less is the letter itself evidence, though the witness is willing to swear to his belief that what the letter contained was true.—Redden v. Spruance, 4 Har. 217.

[h] (Ga. 1831) It is competent for a witness to refresh his memory by resorting to a memorandum which he had made of a fact; and, if he can then speak to the fact from his own recollection, it will be good evidence; but if, after seeing the memorandum, he cannot recollect the fact, the original memorandum itself must be produced.—Bank of South Carolina v. Brown, Dud. 62.

[i] (Ga. 1879) A merchant may testify to items of an account sued on by referring to books of original entry in which the items were entered in his own handwriting, although he may be unable to recollect them without such reference.—Schmidt v. Wambacker, 62 Ga. 321.

[ii] (Ill. 1865) A witness has no right to testify to a payment evidenced by a receipt unless he knows the fact independently of the receipt.—Keith v. Mafit, 38 Ill. 303.

[j] (Ill. 1873) A witness may refer to a paper to refresh his memory provided he can say he knows the items to be correct because they were true when made and placed in his book.—Chicago & W. Coal Co. v. Liddell, 69 Ill. 639.

[k] (Ill. 1885) The regular account books of a bank with which witness is familiar may be used by him as the basis of his testimony, and he cannot be rejected because he can testify only by their aid.—Lawrence v. Stiles, 16 Ill. App. (16 Bradw.) 489.

[l] (Ill. 1887) In order to refresh his memory, a witness may refer to a copy or memorandum of entries in his account books, and when his memory is thus refreshed, testify as to the original facts; but he cannot read from the copy.—Bonnet v. Glattfeldt, 120 Ill. 166, 11 N. E. 250, affirming Same v. Gladfeldt (1886) 24 Ill. App. 533.

[m] (Iowa, 1895) Where a witness, after identifying a memorandum, made by him as managing agent of a partner, of the amount of flour delivered to his firm, can, independently of it, recollect that the flour was delivered, but not the amount, and, after refreshing his memory by the memorandum, he is unable, independently of it, to recollect the amount, he cannot testify that the amount was that given in the memorandum.—Waite v. High, 96 Iowa, 742, 65 N. W. 397.

[mm] (Kan. 1893) A witness may refresh his recollection by reference to any memoranda, relating to the subject-matter to which his attention is directed on the stand, whether the memoranda is in such form as to be competent as independent evidence or not, and then testify, providing he then has any independent recollection of such subject-matter.—McNeely v. Duff, 50 Kan. 488, 31 Pac. 1061.

[n] (Me. 1860) A witness cannot be allowed to refresh his memory by referring to a memorandum taken from his books when he cannot testify to the fact in question beyond what is supposed to appear in the books; the books themselves should be produced.—Stanwood v. McLellan, 48 Me. 275.

[nn] (Md. 1852) A book entry is inadmissible to refresh the memory of witnesses where they expressly declare that they have no recollection of the facts but what they derive from the entry.—Lewis v. Kramer, 3 Md. 265.

[o] (Md. 1859) Where the writing is neither recognized by the witness as one which he remembers to have seen before, nor awakens his memory to the recollection of anything contained in it, but, nevertheless, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively to the fact, the testimony will be received.—Martin v. Good, 14 Md. 398, 74 Am. Dec. 545.

[oo] (Md. 1892) In an action for work in repairing a vessel, and for materials used in the work, schedules of the established prices in the hardware trade may be used by witnesses called to state the fair retail price of the materials used, it being shown that it was impossible for any one to carry the prices of all the articles in his mind.—Morris v. Columbian Iron Works & Dry Dock Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851.

[p] (Md. 1893) A witness who testifies that he does not know whether he or some other officer of the corporation transacted certain of its business, but that the entries in the corporate books were made at the time, and were correct, may refresh his memory from such books.—Billingslea v. Smith, 77 Md. 504, 26 Atl. 1077.

[pp] (Mass. 1828) Where ship timber was sold, without being scheduled or set apart from similar timber with which it was mingled, the testimony of a witness called to identify the timber, who was unable to do it except by a schedule made some months after the sale, and, even with that, having no present recollection of the articles enumerated, was rejected.—Glover v. Hunnewell, 23 Mass. (6 Pick.) 222.

[q] (Mass. 1866) The testimony of witnesses who, by looking at certain entries and checks made by them in a memorandum book, in the ordinary and regular course of business, testify to the delivery of certain goods, is admissible to the jury, although they cannot remember, as a matter of fact, the delivery; and though the contents of the books have been rejected as not competent evidence.—Dugan v. Mahoney, 93 Mass. (11 Allen) 572.

[qq] (Mich. 1885) Plaintiff cannot testify that his bill of particulars is a correct statement after he has testified that it does not refresh his memory as to items to which he cannot testify without it, and of which he has no personal knowledge.—Richmond v. Atkinson, 58 Mich. 413, 25 N. W. 328.

[r] (Minn. 1861) A memorandum is admissible as auxiliary to the evidence of the witness, not as a substitute for such testimony, and its accuracy must first be duly certified to by the witness making the same, and he must then be unable to speak from memory without its aid. A memorandum made by a witness from statements made to him by a third person, the correctness of which statements he cannot testify to, is not sufficiently verified to be admitted in aid of his testimony.—Stickney v. Bronson, 5 Minn. 215 (Gil. 172).

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[rr] (Neb. 1886) A witness who has taken memoranda of facts at about the time of the occurrence, as the testimony of a witness in a lawsuit, and who knows them to be correct, may hold such memoranda in his hand, and testify to the facts as facts, although he at the time admits that, even with the aid of the memoranda, he does not remember the occurrence of the facts.—Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731.

[s] (Nev. 1883) A witness may refresh his memory by reference to a written paper, which he may read, and then give in evidence his recollection of the facts, not the written paper. He thus testifies to the correctness of the facts set forth in the statement as read by him.—Pinschower v. Hanks, 18 Nev. 99, 1 Pac. 454.

[ss] (N. H. 1856) A witness, who has been accustomed to receive goods from time to time forwarded to him to be sold for the owner on commission, is at liberty to testify as to the amount of goods and time of receiving them, by referring to the bills received by him with the goods, which bills he compared with the goods, as received, and then knew, to be correct as to amount and dates, and which he can identify from memoranda then made by him upon them, although at the time of testifying he has no recollection of the amounts or dates, independent of the bills.—Bartlett v. Hoyt, 33 N. H. 151.

[t] (N. Y. 1838) To prove the existence of a muniment of title, evidence, by a witness, of an entry made by him from papers before him, of the existence of such a document, is admissible, although the witness' only recollection of the paper is derived from the entry.—Van Dyne v. Thayre, 19 Wend. 162.

[tt] (N. Y. 1857) A witness may testify to facts contained in a memorandum made at or about the time when the event or transaction mentioned in it took place, and which the witness swears that he knew to be correct when made, although he has totally forgotten the facts at the time of the trial.—Halsey v. Sinsebaugh, 15 N. Y. 485.

[u] (N. Y. 1873) In an action on an account, it was proper to permit a witness to refresh his memory by reading a schedule of the items furnished, and then to speak of them from his recollection thus refreshed. The schedule itself was not thereby admitted in evidence.—Bogue v. Newcomb, 1 Thomp. & C. 251.

[uu] (Pa. 1846) More than 20 years after a bond was given, the obligor and obligee had a settlement of the affairs between them, which settlement was committed to writing by a third person; by which writing it appeared that the bond was allowed, in the settlement, as due and unpaid. *Held*, that the person who committed such settlement to writing might, by the aid of such writing, testify to the acknowledgment of the bond by the obligor at such settlement, some eight years before the time of testifying, although he had no recollection of the fact aside from the writing.—Eby v. Eby's Assignee, 5 Pa. (5 Barr) 435.

[v] (R. I. 1855) Although the memory of a witness is not so refreshed by a written memorandum that he can swear from his memory to the facts contained in it, yet his testimony to those facts is admissible, if he testify that when he made the memorandum he knew it was true.—State v. Colwell, 3 R. I. 132.

[vv] (S. C. 1817) The testimony of a witness who swears positively from written memoranda, though without recalling the facts, is admissible.—Pearson v. Wightman, 1 Mill, Const. 336, 12 Am. Dec. 636; Sharpe v. Bingley, 1 Mill, Const. 373, 12 Am. Dec. 643; Haig v. Newton, 1 Mill, Const. 423.

[w] (S. C. 1845) Where a witness, of his own free will and accord, draws up a memorandum, or has it drawn up under his immediate direction at the time of the fact, or soon afterwards, for the purpose of preserving the memory of it, he may adopt its contents as his testimony; although, at the time of testifying, he recollects nothing further than that he had accurately reduced, or procured to be reduced, the whole transaction to writing.—O'Neale v. Walton, 1 Rich. Law, 234.

[ww] (S. C. 1845) If a paper, drawn by a witness, detailing facts, was drawn up weeks after the fact occurred, or if it was drawn up, or procured to be drawn up, by the party in whose favor the witness is called to testify, he cannot be allowed to testify to its contents, if he does not recollect them independently of the paper.—O'Neale v. Walton, 1 Rich. Law, 234.

[x] (Tenn. 1846) A notary's book contained an entry of protest for nonpayment, and of notice given, and the notary stated that he was in the habit of making such entries at the happening of the event. *Held*, that his belief, based upon such entry, was good evidence, and that he need not swear that he had a recollection of the protest and notice.—Bank of Tennessee v. Cowan, 26 Tenn. (7 Humph.) 70.

[xx] (Tex. 1890) Evidence of a magistrate that he made certain entries on his docket from a complaint; that he kept a correct docket; and that he knew from the entries in his handwriting that the complaint was signed by a certain person,—is admissible, though he has no personal recollection of the transaction.—Kimbrough v. State, 28 Tex. App. 367, 13 S. W. 218.

[y] (Vt. 1844) If a witness make use of a memorandum to refresh his memory in regard to a transaction of which he has a general recollection, and recollect that the memorandum was correct at the time it was made, it is not important that he should have a present recollection of all the facts detailed.—Mattocks v. Lyman, 16 Vt. 113.

[yy] (Vt. 1852) The old rule that the witness must be able to swear from memory is now pretty much exploded, and all that is now required is that the witness shall be able to state that the memorandum is correct; he may then read it.—Downer v. Rowell, 24 Vt. 343.

[z] (Vt. 1869) A memorandum, made by a witness from recollection of dates, amounts, and figures, may be referred to by him, not for the purpose of refreshing his recollection as to the correctness of the entries, but to enable him to state with accuracy details which he could not repeat without the aid of the paper.—Pinney v. Andrus, 41 Vt. 631.

[zz] (Wis. 1866) If the entries in books of account, made in the regular course of business, are not admissible in evidence, because made by mistake to a wrong name, they may be used as memoranda to refresh the memory of a witness; and if, after referring to them, he can testify whether any of the articles mentioned therein, and entered in his handwriting, were delivered to the order of defendant, he should be permitted to do so. And it is the better rule that if the witness can swear positively that the entries were made at the time according to the truth of the facts, that is sufficient to enable him to testify from the entries, although the particular facts may not remain in his memory.—Schettler v. Jones, 20 Wis. 412.

§ 888. —— Memoranda made by others.

Time of making memorandum made by a person other than the witness, see ante, § 877 [f].

—— made by or in the presence of the witness, see ante, § 876.

[a] (Ga. 1893) Though plaintiff testified generally that he remembered certain facts stated by him, and used certain books and memoranda

to refresh his memory (the memoranda being then before him), his evidence as to the numbers and destinations of certain cars, and the dates of their shipment, was inadmissible; it further appearing that he could state none of these particulars without referring to the books, or to the memoranda taken therefrom, and that the entries in the books were sometimes written by himself, and sometimes by an employé, and that while testifying plaintiff could not state which were made by himself, and which by the other.—Hematite Min. Co. v. East Tennessee, V. & G. Ry. Co., 92 Ga. 268, 18 S. E. 24.

[b] (Ga. 1895) It was proper to refuse to permit a witness, who had refreshed his memory by examining a book kept solely by another, to testify to the contents of the book, where he could not recall the items entered as independent facts.—Orr v. Farmers' Alliance Warehouse & Commission Co., 97 Ga. 241, 22 S. E. 937.

[c] (Ind. 1853) A witness may be permitted to refresh his memory by referring to a memorandum written either by himself or by another at or near the time of the occurrences; but the memorandum cannot be substituted in the stead of the witness' recollection.—Clark v. State, 4 Ind. 156.

[d] (Md. 1861) A witness cannot be asked as to the correctness of the charges in a bill not made out by himself, and which there is no evidence to show that he ever saw before the trial, and as to the time of making out of which there is no evidence, and in regard to all the items of which he has not, after examining it, a recollection.—Green v. Caulk, 16 Md. 556.

[e] (Md. 1869) In an action to recover certain claims placed in the hands of a party for collection, upon which claims he had obtained judgments before a justice of the peace, *held*, that no matter what the character of the entries of the justice of the peace was, if from an examination of them he was enabled to testify that the defendant admitted he had received the money on such judgments, his testimony could not properly be excluded, although independent of such entries he had no distinct recollection of the fact.—Spiker v. Nyedegger, 30 Md. 315.

[f] (Neb. 1891) Loan registers and collection registers, used by a firm to keep track of its loans and collections, may be used by a member of the firm, in testifying, as memoranda to refresh his memory, though such registers were not kept by himself, if, after seeing the entries therein, he remembers the facts, and can testify to them of his own recollection.—Labaree v. Klosterman, 33 Neb. 150, 49 N. W. 1102.

[g] (N. H. 1855) A witness may refer to a written memorandum or to entries in a book, whether made by himself or others, to refresh his memory, provided that, after inspecting them, he can testify to the facts from recollection.—Huckins v. People's Mut. Fire Ins. Co., 31 N. H. (11 Fost.) 238.

[h] (N. Y. 1851) If a witness, after refreshing his memory by looking at extracts in his hands from the books of a firm of which he was a member, which he may do, is able to swear positively to the facts, the evidence is competent, without the production of the books. And it matters not whether the entries were made by the witness or another person.—Howland v. Sheriff of Queen's County, 7 N. Y. Super. Ct. (5 Sandf.) 219.

[i] (N. Y. 1852) A witness may assist his memory by looking at any written instrument, memorandum, or entry in a book, written by himself or others, but he can testify only according to his recollection.—Huff v. Bennett, 6 N. Y. (2 Seld.) 337.

[j] (N. Y. 1864) A witness may use an entry made by himself or any other person, or a copy of an entry, if on reading it he can testify that he then recollects the fact to which the entry relates.—Marcly v. Shults, 29 N. Y. 346.

[k] (N. Y. 1887) A witness may, to refresh his memory, use any memoranda, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to the fact of his own knowledge; the memoranda themselves not being in evidence.—Hussey v. Culver, 7 N. Y. St. Rep. 427.

[l] (N. Y. 1892) Plaintiff's "credit man" cannot testify to a sale and delivery of goods from information gained from the "reference book" of plaintiff's concern, from the written order of a salesman, and from entries in plaintiff's ledger, which was not a book of original entries, and was not kept by the witness.—Rothschild v. Porter (City Ct. N. Y.) 19 N. Y. Supp. 177.

[m] (Pa. 1884) One who has forgotten whether, several years before, he served a certain notice or not, and who has forgotten whether he testified on a previous trial that he served the notice, cannot testify that if the judge's notes—which asserted that he so testified—were correct, and if he so testified, he had served the notice.—Reed v. Orton, 105 Pa. 294.

[n] (S. C. 1881) A witness may refer to an account furnished him by his factors to refresh his memory if such examination enables him to testify from his own recollection.—Bank of Charleston Nat. Banking Ass'n v. Zorn, 14 S. C. 444, 37 Am. Rep. 733.

[o] (S. C. 1881) Where a surgeon referred to the contemporary hospital records to refresh his memory and then testified without producing the records, his evidence was admissible, though the entries in the records were not made by him.—State v. Collins, 15 S. C. 373, 40 Am. Rep. 697.

[p] (Va. 1854) A witness may refresh his memory by looking at a paper, whether written by himself or another, but must speak from his recollection.—Harrison v. Middleton, 11 Grat. 527.

§ 889. Time of making memoranda.

Memoranda made by or in the presence of witness, see ante, § 876.

[a] (U. S. 1896) Statements taken down as testimony before the grand jury, over four months after the occurrences to which they relate, could not be used for the purpose of refreshing witness' memory.—Putnam v. United States, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118.

[b] (Ala. 1891) It is error to permit a witness, against the objection of the adverse party, to refresh his memory by the use of a memorandum made some time before the trial, but long after the date of the transaction to which it referred.—Howell v. Carden, 99 Ala. 100, 10 South. 640.

[c] (Cal. 1884) A witness may, in testifying to statements made by a party, refresh his memory from written memoranda made at the time the statements were made.—People v. Le Roy, 65 Cal. 613, 4 Pac. 649.

[d] (Cal. 1885) A witness cannot refresh his memory from an affidavit previously sworn to and subscribed by him ex parte, unless it be shown that the affidavit was written by him, or under his direction, at the time the facts occurred, or immediately thereafter, or at some other time, when the facts were fresh in his memory, and that he knew the same were correctly stated in the affidavit.—Morris v. Lachman, 68 Cal. 109, 8 Pac. 799.

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[e] (Colo. 1881) A writing used by a witness to refresh his memory need not necessarily be an original writing, provided that after inspecting it the witness can speak of the facts from his own recollection. As to the time when such writing must have been made, no precise rule can be laid down.—Lawson v. Glass, 6 Colo. 134.

[f] (Fla. 1896) Witnesses are permitted to refresh their memories by the use of written instruments, memoranda, or entries in books made contemporaneously with the transactions to which they relate.—Adams v. Internal Imp. Fund, 37 Fla. 266, 20 South. 266.

[g] (La. 1857) In cases requiring proof of dates of delivery of a great variety of articles, etc., a memorandum, made at the time, may be referred to by a witness, because of the difficulty, and often impossibility, of making the proof with certainty, without such reference.—Davidson v. De Lallande, 12 La. Ann. 826.

[h] (Me. 1843) A witness may refresh his recollection from minutes made at the time of the transaction.—Welcome v. Batchelder, 23 Me. (10 Shep.) 85.

[i] (Mo. 1886) A person present at an auction sale may, on testifying as to the price of goods sold, use memoranda made at the time to refresh his memory.—Austin v. Boyd, 23 Mo. App. 317.

[j] (Mo. 1887) A witness may use memoranda, as to measurements of work done by him, although the measurements are made long after the completion of the work.—Ahern v. Boyce, 26 Mo. App. 558.

[k] (Mo. 1891) In an action on a fire insurance policy, plaintiff, in testifying as to articles lost, may use a memorandum taken three days after the fire, but before anything had been disturbed.—Stavinow v. Home Ins. Co., 43 Mo. App. 513.

[l] (Neb. 1888) Memoranda to refresh the memory of a witness must have been made up recently after the fact in regard to which he testifies. Memoranda prepared by the attorneys of the witness several months after the occurrence of the facts testified to, such memoranda being prepared from other evidence in possession of the witness, are not admissible to refresh his memory.—Schuyler Nat. Bank v. Bollong, 24 Neb. 825, 40 N. W. 413.

[m] (Neb. 1890) A witness should not refresh his memory with a memorandum made months after the time of the transaction testified to.—Weston v. Brown, 30 Neb. 609, 46 N. W. 826.

[n] (Neb.) A memorandum which, it appears, was prepared at the time of the fact in question or soon afterwards, which the witness knew to be correct at the time it was made, may be used by the witness to refresh his memory.—(1894) Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968; (1896) City of Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996.

[o] (N. H. 1846) A contemporaneous memorandum is not admissible to prove a fact not material to the issue; but a witness may use the paper if it will refresh his memory.—Wolfborough v. Alton, 18 N. H. 185.

[p] (N. J. 1886) If a conductor of a railroad train be sworn, he may use a written statement made at the time of an accident under consideration, as to how it occurred, to refresh his memory.—North Hudson County R. Co. v. May, 48 N. J. Law (19 Vroom) 401, 5 Atl. 276.

[q] (Or. 1868) A witness, cross-examined as to former statements which were reduced to writing when made, may be allowed to refresh the memory by inspecting the memorandum.—State v. Taylor, 3 Or. 10.

[r] (Pa. 1866) It is always competent for a witness to refresh his memory by memoranda made at the time of the transaction of which he speaks.—Selover v. Rexford's Ex'r, 52 Pa. (2 P. F. Smith) 308.

[s] (Wash. 1894) A memorandum of the contents of a trunk, made from an inspection seven months after the same was deposited for storage, and after the sale thereof for storage charges, cannot be used by a witness to refresh his memory as to the contents of the trunk and the value thereof at the time they were deposited for storage.—Bergman v. Shoudy, 9 Wash. 331, 37 Pac. 453.

§ 890. Compelling witness to inspect writing to refresh memory.

[a] (Mass. 1838) A witness being sworn to tell the whole truth, he ought to do what is reasonable to enable him to perform that duty faithfully and sincerely, according to the spirit of his oath; and he may lawfully be required to look at memoranda or papers within his power, to aid his recollection. Thus, where the counsel on one side, being called by the adverse party to testify what took place at a former trial, which he did not recollect particularly, was required to look at his minutes, then lying before him, to aid his recollection, it was *held* that such requisition was a question addressed to the discretion of the judge at the trial.—Chapin v. Lapham, 37 Mass. (20 Pick.) 467.

[b] (N. C. 1894) A witness, either on direct or cross-examination, may be compelled to inspect a writing which is present in court, if it is in his own handwriting, or there is reason to believe that, by reading it, his memory may be refreshed.—State v. Staton, 114 N. C. 813, 19 S. E. 96.

§ 891. Inspection of writing by adverse party.

Inspection of writing used in examination of witness, see post, § 896.

[a] (Iowa, 1871) The introduction of an account book to refresh the memory of a witness entitles the opposite party, on the cross-examination, to inspect its contents.—McKivitt v. Cone, 30 Iowa, 455.

[b] (Iowa, 1875) Where a witness has no independent recollection of the facts about which he is questioned, after reference to the entries in a book, although he may recollect that the contents were correct at the time he saw them, the writing itself must be produced, that the other party may cross-examine respecting it. But where no attempt is made to base a cross-examination upon the entry, and it is not required to be produced for that purpose, its absence works no prejudice.—Adae v. Zangs, 41 Iowa, 536.

[c] (Mass. 1866) If a witness produces any writing to assist his memory, he may be compelled to submit it to the inspection of the opposite party, to enable him to see whether it is a proper memorandum for the purpose; but he is only bound to show such parts of it as he consults to aid his memory, or such as relate to the subject of his testimony.—Commonwealth v. Haley, 95 Mass. (13 Allen) 587.

[d] (Mich. 1876) The opposing counsel have a right to see a memorandum which a witness uses to refresh his memory. And the error of refusing to show it is not cured by an offer to submit it, made next day; the counsel has the right to see it at the time.—Duncan v. Seeley, 34 Mich. 369.

[e] (Mich. 1890) Where a witness who has assisted in examining defendant's books testifies from a written memorandum, and states that, without it, he could not give the exact figures concerning defendant's financial condition, that being the question in dispute, the

opposing counsel has a right to inspect the writing for the purposes of cross-examination.—Cortland Mfg. Co. v. Platt, 83 Mich. 419, 47 N. W. 330.

[f] (Minn. 1873) Where a witness is allowed to inspect a paper or writing, for the purpose of refreshing his recollection, the opposing party has a right, for the purpose of cross-examination, to inspect such paper.—Chute v. State, 19 Minn. 271 (Gil. 230).

[g] (N. Y. 1889) In an action to set aside a deed made by plaintiff's father to her mother in 1881, on the ground that he was mentally incapable of contracting, plaintiff's husband testified that he first called at the father's house on November 26, 1880, and that the father was then an imbecile. On cross-examination he stated that his memory was very fresh upon the subject, and then repeated the date of his first visit as November 20, 1880. He said that he marked the date at the time in a book or diary, which he produced, and which he said he only kept for a few days, and he claimed that it contained entries as to events happening prior to November 20th. *Held*, that the court erred in holding that defendant's counsel could not examine the book, except as to the single entry relating to the witness' first visit. Counsel should have been allowed to inspect the whole book.—Konba v. Horacek, 53 Hun, 636, 6 N. Y. Supp. 250.

§ 892. Admissibility of writing as evidence.

See ante, §§ 876 [s], 881 [k], 887 [d].

Admissibility of writings on cross-examination as to writings, see post, § 961.

Introduction of writings in evidence on redirect examination, see post, § 998.

Permission to put memoranda in evidence as curing error in refusing to permit use by witness to refresh memory, see ante, § 874 [l].

Reading of memorandum by witness to jury, see post, § 898.

[a] (U. S. 1855) Letters and memoranda of a witness who was engaged in experiments according to suggestions by the inventor, describing appliances, processes, and results, are not admissible as evidence per se, but only for the purpose of refreshing the witness' recollection.—Jones v. Wetherill, Fed. Cas. No. 7,508 [1 MacArthur, Pat. Cas. 409].

[b] (Ala. 1848) A letter written by a witness to a person not a party to the suit, and his answer to it, may be looked to by the witness for the purpose of refreshing his memory as to the facts there stated, but the letters themselves cannot be introduced as instruments of evidence.—Rutherford's Adm'rs v. Branch Bank at Mobile, 14 Ala. 92.

[c] (Cal. 1892) A witness may be permitted to refresh his memory from a writing or memorandum made by himself at the occurrence of the facts to which it relates, but the memorandum is not competent evidence to prove the facts stated in itself.—Baum v. Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

[d] (Del. 1845) A witness may refresh his memory by a letter written by him at the time, but must be able to swear from recollection as thus refreshed, and not from the paper only; much less is the letter itself evidence, though the witness is willing to swear to his belief that what the letter contained was true.—Redden v. Spruance, 4 Har. 217.

[e] (Ill. 1877) A witness may refer to a memorandum made by himself to refresh his memory, but the memorandum itself is not admissible except where the witness at the time of testifying has no recollection of what took place further than that he actively reduced the whole transaction to writing.—Kent v. Mason, 1 Ill. App. (1 Bradw.) 466.

[f] (Mass. 1882) At the trial of an indictment for manslaughter, a witness for defendant was allowed, in answer to a question put by the government, to refresh his memory from a report made by him of defendant's statements at the inquest; and defendant thereupon, without putting any question to the witness, asked to have so much of the report as related to the inquiry of the government read to the jury, but the judge excluded it. *Held*, that defendant had no ground of exception.—Commonwealth v. Jeffs, 132 Mass. 5.

[g] (Mich. 1890) A witness who had examined defendant's books testified from certain memoranda as to his financial condition at the time of a certain purchase, which was the question in the action. Defendant's counsel asked for the memoranda, and later certain figures were furnished him, but he refused to admit that they were the memoranda used by the witness, whereupon the court ordered that they be marked as an exhibit, to be printed with the record in case the cause should be taken to the supreme court, but not to be read in evidence. *Held*, that this was error, but was not prejudicial to defendant.—Cortland Mfg. Co. v. Platt, 83 Mich. 419, 47 N. W. 330.

[h] (N. H. 1849) A writing, made by a witness at the time of a transaction, for the purpose of stating truly its particulars, is evidence of what it contains, although the witness has forgotten the facts and circumstances.—Seavy v. Dearborn, 19 N. H. 351.

[i] (N. H. 1855) The memorandum of a transaction, reduced to writing at the time or immediately after the occurrence of the events it recites, is admissible in evidence, in connection with the testimony of the witness showing the transaction, if the witness will testify that he had no doubt that the facts stated in the memorandum were true, and that he should have sworn to them from recollection a short time afterwards.—Webster v. Clark, 30 N. H. (10 Fost.) 245.

[j] (N. Y. 1858) A memorandum made at the time of the occurrence of events testified of is admissible, on being recognized by the witness as his own and made at the time, though he is unable, after refreshing his recollection, to testify from memory as to the occurrences.—Russell v. Hudson River R. Co., 17 N. Y. 134.

[k] (Pa. 1850) Where book entries were referred to and embodied in the deposition of a witness, who was testifying to an agreement to sell certain goods, for the purpose of showing the identity of the goods, and the witness testified from his own recollection refreshed by the books, they were *held* to be admissible for that purpose.—Fitler v. Eyre, 14 Pa. (2 Harris) 392.

[l] (Pa. 1886) Refusing to permit memoranda used by a witness to refresh his recollection, but not offered in evidence, to be exhibited to the jury, by way of cross-examination, for the purpose of showing interlineations and alterations, is not error.—Newman v. Commonwealth, 7 Atl. 132.

13. TESTIMONY FROM MEMORANDA OR OTHER WRITINGS.

IN GENERAL, § 893.
TESTIMONY OF STENOGRAPHER FROM NOTES, § 894.
REQUIRING PRODUCTION OF PAPERS, § 895.
INSPECTION BY ADVERSE PARTY OF WRITING USED IN EXAMINATION OF WITNESS, § 896.

Examination as to writings on redirect examination, see post, § 999.

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§ 893. In general.

[a] (U. S. 1892) In an action by one insurance company against another, plaintiff alleged that, through the fraud of an agent employed by both companies, it had paid large amounts on marine losses which defendant ought to have paid; that the fraud was effected by shifting the risks after knowledge of disaster—in some cases by reinsuring with plaintiff risks originally insured by defendant, in others by substituting plaintiff for defendant as the original insurer, and in still others by concealing reinsurance effected by defendant upon risks originally insured by plaintiff, thus throwing the whole burden of the loss upon plaintiff. The dates when reinsurance was effected nowhere appeared on the books, and could only be fixed by the position of the reinsurance entries, with relation to other entries which were dated. *Held*, that it was competent, for this purpose, for a witness to testify from entries made by himself, although such entries disclosed other fraudulent reinsurances.—Continental Ins. Co. v. Insurance Co. of Pennsylvania, 51 Fed. 884, 2 C. C. A. 535, 1 U. S. App. 201.

[b] (Ala. 1860) A witness who has made a memorandum of facts presently upon their occurrence, and who does not remember the facts, but is able to swear that he knew the memorandum to be correct when he made it, may read the memorandum as part of his evidence to the jury.—Mims v. Sturdevant, 36 Ala. 636.

[c] (Ala. 1885) It is error to permit an alleged copy of a lost deed to be read to a witness, that the witness may testify in regard to the contents of the original, and whether the copy corresponds with witness' recollection of the original.—Singer Mfg. Co. v. Riley, 80 Ala. 314.

[d] (Ga. 1890) Where a witness under cross-examination had acted, not upon reading a letter, but upon hearing it read, it was enough to allow him to refer to the letter to refresh his memory as to what he had heard read, without permitting him to read aloud to the jury, and without permitting cross-examining counsel to read from the letter in the hearing of the jury.—Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

[e] (Mich. 1875) A witness who has produced and identified a memorandum which is itself admissible in evidence may be permitted to testify from it, and such testimony is not open to the objection that the memorandum itself should be read to the jury. Where the witness merely repeats its contents, it is not material that counsel should read it, rather than the witness.—Raynor v. Norton, 31 Mich. 210.

[f] (Mich. 1878) Where a bill of particulars of goods sold contains many items, it is discretionary to let the plaintiff take it to answer the question whether it was a correct list.—Cool v. Snover, 38 Mich. 562.

[g] (Mich. 1879) The quantity of logs delivered to defendants by a boom company cannot be proved by a witness who, without personal knowledge, undertakes to state the quantity as given him by the company's tally.—Hopkins v. Sanford, 41 Mich. 243, 2 N. W. 39.

[h] (Mich. 1890) In replevin for goods sold on the ground that the statement of the buyer as to his financial condition, made to a mercantile agent, on the faith of which the sale was made, was false, the agent, in testifying, may refresh his memory, as to representations of the buyer, from a copy of a statement made by him (the agent) at the time; but where he testifies that he does not remember the figures given him by the buyer, but merely that he went to him and got the statement, he cannot read the copy in evidence.—Caldwell v. Bowen, 80 Mich. 382, 45 N. W. 185.

[i] (Mo. 1885) Where a witness has admitted a writing to be his, he cannot properly be asked as to statements such as the counsel may suggest are contained in it; but the writing itself should be held in evidence.—State v. Matthews, 88 Mo. 121.

[j] (N. H. 1851) A witness, while testifying by a memorandum of debts and assets, stated that one item had been altered after the memorandum was made, on the information of another person. *Held*, that the evidence was admissible as to the items which the witness knew had not been altered.—Blodgett v. Webster, 24 N. H. (4 Fost.) 91.

[k] (N. Y. 1857) The minutes of the testimony of a living witness, taken on a former trial by counsel, who swears that he has no doubt of their correctness, but has no recollection thereof independent of the minutes, may be read by him to the jury as evidence.—Halsey v. Sinsebaugh, 15 N. Y. 485.

[l] (N. Y. 1859) Where depositions of witnesses before a coroner's jury are introduced to contradict them before the jury, it is competent to allow the coroner's clerk, after testifying that he had taken down the evidence of each witness correctly, that he had read it over to the witness, and that such witness had signed his or her name to the written deposition, to state the evidence of each witness from the deposition itself. He is not obliged to state it from his recollection as refreshed from perusing these papers.—Stephens v. People, 19 N. Y. 549.

[m] (N. Y. 1868) In an action for materials furnished, it is proper to ask the witness to produce the book containing his original entries of the items, and read the same, it being subsequently shown that he was unable to state them from memory, and that the articles were delivered.—Philbin v. Patrick, 3 Abb. Dec. 605, 6 Abb. Prac. (N. S.) 284.

[n] (N. Y. 1876) A witness cannot read from a memorandum as testimony, even when made by himself. He can refresh his recollection by looking at the writing, but he must then testify from his recollection.—Wilde v. Hexter, 50 Barb. 448.

[o] (N. Y. 1879) Plaintiff testified to having seen an account book kept by one deceased in his possession before his death. *Held*, that he might properly testify as to an entry that he then read in the handwriting of deceased.—Carroll v. Davis, 9 Abb. N. C. 60.

[p] (N. Y. 1879) In a prosecution for forgery of a note, it is error to permit a witness to testify from a memorandum as to the date of indorsement, when the memorandum was not made at the time.—Palmer v. People, 19 Hun, 372.

[q] (N. Y. 1882) A defendant may properly be permitted to state from his account book the items of his account against plaintiff, where he states that he knows that the several articles stated by him in detail and appearing in the book were delivered to plaintiff, and that the entries when made were correct.—Raux v. Brand, 90 N. Y. 309.

[r] (N. Y. 1886) A witness when questioned concerning facts cannot refuse to answer except by referring to an official report which he has made.—Murray v. Great Western Ins. Co., 39 Hun, 581.

[s] (N. Y. 1889) It is proper to allow a witness testifying from a memorandum to explain ambiguous items in it.—Daniels v. Smith, 54 Hun, 639, 8 N. Y. Supp. 128.

[t] (N. Y. 1890) In an action for services, it is competent for plaintiff's foreman to testify from a book kept by plaintiff's bookkeeper as to the number of hours spent on the work by the various men, when the witness testifies that

the entries were made under his directions, and that he furnished the proper material therefor in the shape of time slips actually within his personal knowledge, and signed by him after due inspection.—Lamberty v. Roberts, 56 Hun, 644, 9 N. Y. Supp. 607.

[u] (N. C. 1842) It is competent for a party under the "book-debt law" to swear to the price as well as to the delivery of the articles stated in the account.—Colbert v. Piercy, 25 N. C. 77.

[v] (Pa. 1846) A witness may state the number of days on which men were employed, from a book kept by himself, in which he knows he correctly entered the days they were at work, about the time at which the work was done.—Heart v. Hummel, 3 Pa. (3 Barr) 414.

[w] (Pa. 1866) There is no error in allowing a witness who has testified to the value of a number of articles in the aggregate to read to the jury a bill of the items as estimated by him.—King v. Faber, 51 Pa. (1 P. F. Smith) 387.

[x] (Tex. 1880) Where a witness states that his testimony is from books and papers, without stating their character, nor by whom they were copied, and their accuracy, the testimony is inadmissible.—Texas & P. R. Co. v. Parrish, 1 White & W. Civ. Cas. Ct. App. § 942.

[y] (Tex. 1894) Testimony that the stipulations of a contract, though not remembered by the witness, were the same as those on a block of printed forms from which it had been taken, is inadmissible, unless it is shown that he compared the contract form with those in the block.—International & G. N. R. Co. v. Startz (Civ. App.) 27 S. W. 759.

[z] (Tex. 1895) In an action for damages for breach of contract to supply ice, when plaintiff stated that he knew a detailed statement of items of damages in the petition to be correct, it was proper to allow him, while on the stand, to inspect the petition.—Waco Ice & Refrigerating Co. v. Wiggins (Civ. App.) 32 S. W. 58.

§ 894. Testimony of stenographer from notes.

Stenographers' notes or transcript as evidence of inconsistent statements, see post, § 1253.

[a] (Cal. 1886) When a reporter is called to testify to evidence given by a witness in another trial, it is proper to allow him to read his notes taken at that trial, to refresh his memory.—Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811.

[b] (Cal. 1894) Under Code Civ. Proc. § 2047, allowing a witness to refresh his memory as to a fact by anything written by himself at the time the fact occurred, where a party examined before trial failed to sign his deposition, the stenographer who took the evidence may refresh his recollection from his transcript of the notes, and testify as to the statements made by such party.—Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444.

[c] (Fla. 1889) Where a stenographer stated that he did not know that he had taken down the exact words of a witness, but thought he had got down substantially what the witness stated, the court properly permitted him to refresh his memory by the notes, and to testify therefrom.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[d] (Ill. 1889) When a shorthand reporter is examined as to the testimony of a witness at a former trial, he should first be asked if a certain question was put, and, if he answers that it was, he should then be asked what reply was made.—Anglo-American Packing & Provision Co. v. Baier, 31 Ill. App. 653.

[e] (Minn. 1895) Where a stenographer is called to testify as to the evidence of a deceased witness on a prior hearing, he may use his notes to refresh his memory.—State v. George, 60 Minn. 503, 63 N. W. 100.

[f] (Neb. 1891) A witness who has taken shorthand notes of certain testimony at a former trial is competent to testify to the facts in evidence from her own recollection, while refreshing her memory from her notes, if she states that she does remember the testimony that the witness gave on the former trial.—Small v. Poffenbarger, 32 Neb. 234, 49 N. W. 337.

[g] (S. C. 1892) For the purpose of testing the accuracy of a witness' testimony, after calling his attention to his testimony on the same subject in another case, giving time, place, and what he then said, it was proper to allow the stenographer to read the former testimony; there being no question as to the accuracy of the stenographer.—Sherard v. Richmond & D. R. Co., 35 S. C. 467, 14 S. E. 952.

§ 895. Requiring production of papers.

See ante, § 875 [k].

Necessity for production of writings on cross-examination as to writings, see post, § 960.

Production of books of account used to refresh memory, see ante, § 881.

—— *of record used to refresh memory, see* ante, § 883.

Use of copies to refresh memory without producing original, see ante, § 878.

[a] (Ala. 1840) A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from recollection; but if he cannot so swear any further than as finding it in the book or paper, the book or paper must be produced.—Holmes v. Gayle, 1 Ala. 517.

[b] (Ga. 1831) It is competent for a witness to refresh his memory by resorting to a memorandum which he had made of a fact; if he can then speak to the fact from his own recollection, it will be good evidence; but if, after seeing the memorandum, he cannot recollect the fact, the original memorandum itself must be produced.—Bank of South Carolina v. Brown, Dud. 62.

[c] (Me. 1850) Where the quantity of lumber is in question, though the witness at first testifies from his recollection of the scale bill, yet, if he has knowledge of the quantity, irrespective of the scale bill, he may testify to the quantity without the production of such bill.—Mudge v. Pierce, 32 Me. 165.

[d] (Mass. 1866) Requiring a witness to produce a memorandum which is not in court, and which he has not been summoned to produce, is a matter within the discretion of the court.—Commonwealth v. Lannan, 95 Mass. (13 Allen) 563.

[e] (N. H. 1846) A witness having ascertained facts from an examination of books kept by him, is competent to testify thereto without a production of the books.—Hall v. Ray, 18 N. H. 126.

[f] (N. Y. 1859) One party to an action cannot call, as a matter of right, for the production of papers, the execution of which the other party has proved upon an examination of a witness de bene esse.—Edmonstone v. Hartshorn, 19 N. Y. 9.

[g] (Ohio, 1838) Under 2 Chase's Laws, p. 1295, providing that in all actions where any claim of defense is founded on book accounts of not more than 18 months standing, in which is drawn in question the validity or amount of any such book account, the court may examine the party, under oath, touching the validity of such account, where the items charged are such as generally constitute the subject

of book accounts, the quantity, quality, and delivery of the articles may be proved by the oath of the party claiming by virtue of the book account, but the book in which the original entries were made must be produced, otherwise the oath of the party will be rejected.—Cram v. Spear, 8 Ohio (8 Ham.) 494.

§ 896. Inspection by adverse party of writing used in examination of witness.

Inspection of writing used to refresh memory, see ante, § 891.

[a] (U. S. 1887) The exhibition of a paper to a witness on the stand entitles the opposite party to an inspection of it.—Arnold v. Chesebrough (C. C.) 30 Fed. 145.

[b] (U. S. 1887) Where only the signature attached to a paper is exhibited to the witness, that fact does not entitle the opposite party to inspect the paper containing the signature. —Arnold v. Chesebrough (C. C.) 30 Fed. 145.

[c] (U. S. 1891) The fact that counsel in cross-examination hands the witness documents for identification does not give opposing counsel the right to see them. When the same are not offered in evidence, or the contents gone into, there is no ground for inspection.—Calderon v. O'Donahue (C. C.) 47 Fed. 39.

[d] (Ala. 1890) Counsel cannot show plaintiff, while on the witness stand, a paper, and ask him if he signed it, unless it is to be offered in evidence; and if it is to be offered in evidence it is error to refuse to show it to plaintiff's counsel when the question is asked.—Richmond & D. R. Co. v. Jones, 92 Ala. 218, 9 South. 276.

[e] (Ind. 1884) Counsel are not entitled to the inspection of letters submitted to show that they were written by their client, until offered in evidence.—Houser v. State, 93 Ind. 228.

[f] (Mass. 1862) The simple verification of a signature by a witness does not entitle the adverse party to see the document or to cross-examine the witness upon it, until it is offered in evidence.—Stiles v. Allen, 87 Mass. (5 Allen) 320.

[g] (N. J. 1890) Where a paper is shown to a witness solely for the purpose of identifying the handwriting, and it nowhere appears that he became acquainted with the contents thereof, the opposing party is not thereby entitled to an inspection of it.—Rice v. Rice (Ch.) 19 Atl. 736.

[h] (N. Y. 1842) Plaintiff, in examining a witness, produced and used before the examiner a list or memorandum of witnesses, and a copy thereof was marked by the examiner as an exhibit. *Held*, that the original paper was an exhibit, at least for the purposes of the examination; and that defendant was entitled to an inspection thereof.—Commercial Bank of Buffalo v. Bank of State of New York, 4 Hill, 516.

[i] (N. Y. 1870) A witness, on cross-examination, may be compelled by the referee to produce and submit to the inspection of counsel a memorandum from which he has been testifying, on the direct examination.—Tibbetts v. Sternberg, 66 Barb. 201.

14. CALLING ATTENTION TO AND EXPLANATION OF FORMER STATEMENTS OR TESTIMONY.

CALLING ATTENTION TO FORMER STATEMENTS OR TESTIMONY, § 897.
EXPLANATION OF FORMER STATEMENTS OR TESTIMONY, § 898.

Explanation of former testimony on recalling witness, see post, § 900.

Refreshing memory by use of testimony previously given by witness, see ante, §§ 885, 886.

§ 897. Calling attention to former statements or testimony.

[a] (Mass. 1846) A witness cannot be allowed, for the purpose of strengthening his testimony, to state, on his examination in chief, that he had previously communicated to others the same facts to which he has testified, or other particular facts.—Deshon v. Merchants' Ins. Co., 52 Mass. (11 Metc.) 199.

[b] (Mich. 1874) In a trial for larceny from the person, a prosecuting witness, who identifies a bank bill found on the person of the defendant, may testify to the fact of having previously described the bill to a detective.—People v. Morrigan, 29 Mich. 4.

[c] (Wash. 1894) A state's witness at the first trial was not called by the state in the second trial, but was called by defendant, who asked him if, after the first trial, one concerned in the prosecution had found fault with his testimony. *Held*, that the question was improper. —State v. Coella, 8 Wash. 512, 36 Pac. 474.

§ 898. Explanation of former statements or testimony.

[a] (U. S. 1869) When it appears from the evidence that the accused has made a false statement about the circumstances of the commission of a crime charged, he may show that he had good reason to believe at the time the statement was true.—United States v. Randall, Fed. Cas. No. 16,118 [Deady, 524].

[b] (Ala. 1845) It is not improper to permit the parties to ask a witness whether he intended to convey to the jury a specified impression by what he had previously stated.—Hogan v. Reynolds, 8 Ala. 59.

[c] (Ala. 1894) On trial for burglary, a witness positively identified defendant as the man whom he saw enter the building, but stated that, when defendant, with others, was placed before him for identification, he said that he was not quite satisfied that defendant was the man. *Held*, that it was proper to allow him to explain by stating that he had agreed, with those who were with him when the identification was made, that, when he found the right man, he would say that he was not quite satisfied, and that, after saying it, he winked at them.—Henry v. State, 107 Ala. 22, 19 South. 23.

[d] (Ark. 1856) The application of a witness to explain his testimony after it has been given in, is addressed to the discretion of the court.—Lindsay v. Wayland, 17 Ark. 385.

[dd] (Ga. 1887) A witness, whose examination continued two days, was allowed, on the second day, to explain his testimony given the first. *Held* no error. It was for the jury to note the correction or contradiction, and weigh it all as a part of his credibility as a witness. —Pulliam v. Cantrell, 77 Ga. 563, 3 S. E. 280.

[e] (Me. 1837) Where testimony, drawn out by one party, is ruled out of the case, the other party will not be allowed to draw out explanations of that testimony.—Polleys v. Ocean Ins. Co., 14 Me. (2 Shep.) 141.

[f] (Neb. 1887) A trial court will always allow a witness to explain an error, mistake, or oversight in his testimony, when he requests to do so before leaving the stand. At what point of time, is a matter of discretion with the court.—Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 295.

[g] (Tex. 1893) For the purpose of showing in a trial for rape why a witness stated that he did not identify defendant as the guilty

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party on the morning following the rape, when brought into defendant's presence, although he knew defendant as the guilty one, it is permissible for such witness to testify that he had been told that if he identified defendant he would be placed under bond for his appearance, or, in default of bond, he would have to lie in jail, and that, being poor and unable to give bond, he had declined to identify defendant to prevent going to jail.—Bruce v. State, 31 Tex. Cr. R. 590, 21 S. W. 681.

15. RECALLING WITNESSES.

RIGHT TO RECALL IN GENERAL, § 899.
EXPLANATION OF FORMER TESTIMONY, § 900.
CORRECTION OF FORMER TESTIMONY, § 901.
RESTATEMENT OF FORMER TESTIMONY, § 902.
—— TO SETTLE DISAGREEMENT AS TO FORMER TESTIMONY, § 903.
SCOPE OF EXAMINATION IN GENERAL, § 904.
EXAMINATION AS TO NEW MATTER, § 905.

Cross-examination and re-examination, see post, §§ 907–1007.
Discretion of court as to recalling witness, see ante, § 797.
Recalling contradicting witness, see post, § 1279.
—— *witness for examination by court, see* ante, § 857.
—— *witness for purpose of impeachment, see* post, § 1109.
Redirect examination, see post, §§ 994–1005.
Re-examination by jury, see post, § 907 [d].
Absence of or failure to recall as ground for motion to strike out evidence, see "Trial," vol. 46, cc. 993, 994, § 229.
Objections first made on appeal to recalling witness, see "Appeal and Error," vol. 2, cc. 1754, 1755, § 1289.

§ 899. Right to recall in general.

[a] (U. S. 1835) A witness may not be re-examined except as to new matter.—Collins v. Johnson, Fed. Cas. No. 3,015a [Hemp. 279].

[b] (U. S. 1859) It is irregular and suspicious to call a witness twice to the same point, and cannot be allowed except for cause shown.—Hill v. Dunklee, Fed. Cas. No. 6,489 [1 MacArthur, Pat. Cas. 475].

[c] (Ill. 1886) Where a witness can give no definite reply to a question while on the stand, it is not error to refuse to allow him to be recalled, after the lapse of a day or more, to make an additional statement in regard to that point.—Bonnet v. Gladfelt, 24 Ill. App. 533, affirmed Same v. Glattfeldt (1887) 120 Ill. 166, 11 N. E. 250.

[d] (Ind. 1885) There is no available error in refusing permission to recall a witness to testify to matters about which he has already testified.—Morehouse v. Heath, 99 Ind. 509.

[e] (Iowa, 1859) A witness cannot be recalled for the purpose of preparing a bill of exceptions.—State v. Ruhl, 8 Iowa (8 Clarke) 447.

[f] (La. 1878) A witness in a criminal case may be recalled even after he has been examined and cross-examined.—State v. Baker, 30 La. Ann. 1134.

[g] (Mo. 1858) After plaintiff in an action against the indorsers of a note has closed his testimony, it is not error to permit him to recall a witness to show the character of the notice given to the indorsers.—Johnston v. Mason, 27 Mo. 511.

[h] (Mo. 1895) The state may recall a witness after he has once testified in the case.—State v. Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

[i] (N. J. 1857) The second examination of a witness, unauthorized by an order of court, must be disregarded.—Hanson v. First Presbyterian Church, 11 N. J. Eq. (3 Stockt.) 441.

[j] (N. Y. 1846) Where the examination of a witness is apparently closed, and an adjournment has taken place, and another witness has been examined, the first witness cannot be recalled by the party who first called him, and examined anew on the same subject; nor can a party reserve the right so to recall a witness, without the consent of the adverse party, unless so ordered for cause shown.—Ordronaux v. Helie, 3 Sandf. Ch. 512.

§ 900. Explanation of former testimony.

Calling attention to and explanation of former statements or testimony in general, see ante, §§ 897, 898.
Discretion of court, see ante, § 797.

[a, b] (Mass. 1895) Where defendant's witnesses had testified that a car was going at the usual rate of speed at the time plaintiff was injured, it was not error to recall a witness, and permit him to testify what that rate was.—Robbins v. Springfield St. Ry. Co., 165 Mass. 30, 42 N. E. 334.

[c] (Mo. 1886) Where a witness for the state was cross-examined as to whether he had not on former occasions made contradictory statements, and the defense called witnesses to prove such statements, it was competent for the state to recall their witness to give his version of the statements attributed to him.—State v. Reed, 89 Mo. 168, 1 S. W. 225.

[d] (N. Y. 1851) A party will not be allowed to recall a witness to explain his testimony, where the witness testified to the same fact in the same way both upon his direct and cross-examination, especially after the witness has conferred with the counsel of the party who called him.—Meakim v. Anderson, 11 Barb. 215.

§ 901. Correction of former testimony.

Discretion of court, see ante, § 797.

[a] (Ga. 1853) Where a witness, through forgetfulness, or inadvertence, misstates a fact, and, upon reflection, discovers the mistake, and seeks to rectify it, the court will not deny him the privilege.—Walker v. Walker, 14 Ga. 242.

[b] (Ga. 1856) A witness may be recalled to correct any previous errors in his testimony.—Jesse v. State, 20 Ga. 156.

[c] (La. 1868) A witness may be recalled and permitted to correct his testimony after having left the witness stand, where the correction is to be made on a fact as to which he was not cross-examined and as to which the court, the clerk, and the counsel disagreed as to whether it had been taken down correctly.—Dunn v. Pipes, 20 La. Ann. 276.

[d] (Mass. 1871) Testimony by a plaintiff on re-examination, that he was mistaken in his answers to interrogatories, relative to an essential date, filed in the case, and that, as soon as he discovered his mistake, he informed his counsel, in order that it might be corrected, is admissible, although he had not asked leave to amend his answers.—Blake v. Stoddard, 107 Mass. 111.

[e] (Mich. 1892) Plaintiff, who testified through an interpreter, was told by his counsel during a recess of the court that he (the plaintiff) had stated his case differently from what he had told him (the counsel). Plaintiff contended that the interpreter had misunderstood him, or that the stenographer had reported him incorrectly. *Held*, that it was not error to permit plaintiff to take the stand and correct his testimony.—Erickson v. Milwaukee, L. S. & W. Ry. Co., 93 Mich. 414, 53 N. W. 393.

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[f] (Mo, 1879) A witness having sworn that certain property was worth $2,000, he cannot be recalled for the purpose of swearing that it was at the same time worth only $300. The court will not knowingly permit a witness to perjure himself.—State, to Use of Binbeutel, v. Nauert, 6 Mo. App. 596.

[g] (N. H. 1862) A witness who has testified that a paper produced by him is a copy of a notice sent to an indorser may, at the instance of the party calling him, correct his testimony, by stating in respect to the direction that it is not a copy.—Moses v. Ela, 43 N. H. 557, 82 Am. Dec. 175.

[h] (N. J. 1892) Where a witness in her direct examination denies all knowledge of any fact or circumstance which tends to prove the particular allegation on which the party calling her rests, but afterwards confesses that she testified falsely, or suppressed the truth, and signifies her willingness to make reparation, the party examining her will, upon motion, be permitted to recall her for the purpose of further examination; and, if it appear that the party had no knowledge of what the witness knew until she makes this confession, the order will be sustained upon the ground of newly-discovered evidence.—Rice v. Rice (Ch.) 23 Atl. 946.

[i] (S. C. 1886) Where a prosecuting witness, upon being recalled, testified that he made a mistake in his former testimony relative to a material point, the refusal of the court to correct his testimony was error.—State v. Mays, 24 S. C. 190.

[j] (Tenn. 1895) The trial court may allow a witness to go on the stand a second time to correct a former statement.—Che okee Packet Co. v. Hilson, 95 Tenn. (11 Pickle) 1, 31 S. W. 737.

§ 902. Restatement of former testimony.

Discretion of court, see ante, § 797.

Repetition of questions in general, see ante, §§ 827, 828.

[a] (Ala. 1884) Refusal to allow a witness to be recalled and re-examined as to matters concerning which he has already testified is not error.—Phoenix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31.

[b] (Mo. 1851) If the object in recalling a witness be that he may merely reaffirm his former statements, the court may well refuse to allow his recall.—Atchison v. The Dr. Franklin, 14 Mo. 63.

[c] (N. Y. 1847) A witness will not be permitted to be recalled merely to reiterate his testimony.—Hughes v. Mulvey, 3 N. Y. Super. Ct. (1 Sandf.) 92.

§ 903. —— To settle disagreement as to former testimony.

[a] (Ga. 1860) To allow a witness to be recalled, and to restate a point in his testimony about which the counsel differ in their recollection, is a dangerous practice, and should be allowed, if at all, with great caution, and never with a witness whose fairness lies under any grounds of suspicion.—Bigelow v. Young, 30 Ga. 121.

[b] (Iowa, 1859) A party cannot claim the privilege, as a matter of right, to recall a witness, either for the purpose of preparing a bill of exceptions, or for the purpose of impeaching the witness, or to settle the question as to what he did testify to when previously on the stand.—State v. Ruhl, 8 Iowa (8 Clarke) 447.

[c] (Tex. 1875) Under Code Cr. Proc. art. 615, relative to the recalling of a witness when the jury shall disagree as to his testimony, the jury should indicate to the court the statement of the witness concerning which they disagree, and the witness should then be brought upon the stand and directed to deliver his testimony in respect to that particular point, and no other; and the court should instruct him to make his statements as nearly as he can in the language used upon his original examination.—Campbell v. State, 42 Tex. 591.

[d] (Va. 1893) It was not error to recall a witness and settle a dispute between counsel as to what such witness had said.—Snodgrass v. Commonwealth, 89 Va. 679, 17 S. E. 238.

§ 904. Scope of examination in general.

[a] (U. S. 1871) Where a party obtains leave in the court of claims to re-examine his witnesses on a specified point, he cannot re-examine them on a second point as to which they have been previously interrogated, even though the case has been remanded for further evidence on the second point. He must call new witnesses.—Sevier v. United States, 7 Ct. Cl. 387.

§ 905. Examination as to new matter.

Discretion of court, see ante, § 797.

[a] (U. S. 1835) Witness may not be re-examined, except as to new matter.—Collins v. Johnson, Fed. Cas. No. 3,015a [1 Hemp. 279].

[b] (Ga. 1859) Where a party asks to recall a witness who has been once examined, on the ground that he has since learned that he could prove a material fact by the witness, which he did not know of before, the court ought not, on a mere general objection by the other side, to refuse permission to recall.—Bone v. Ingram, 27 Ga. 382.

[c] (Mass. 1850) In a capital case, the court directed that each witness, when first called, should be fully examined to the extent of his knowledge on all points of inquiry, and not be examined in part only, at one stage of the trial, with a view to being afterwards recalled on other points.—Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711.

[d] (Minn. 1871) Where a witness, on cross-examination, denies having made certain statements out of court, time and place being specified, and testimony contradicting him is introduced, he may be afterwards recalled by the opposite party, and further examined as to such matter.—Jaspers v. Lano, 17 Minn. 296 (Gil. 273).

[e] (Miss. 1888) The rule that a witness cannot be recalled after having been once on the stand does not apply where he is recalled for different testimony, the occasion for which has arisen since his former examination.—Mississippi & T. R. Co. v. Gill, 66 Miss. 39, 5 South. 393.

[f] (Va. 1885) It is not error to allow a re-examination of a witness whose deposition has been taken, as to a single point to which, by the inadvertence of counsel, the attention of the witness was not previously called.—Carter v. Edmonds, 80 Va. 58.

16. EXAMINATION AFTER TAKING OR USE OF DEPOSITION.

§ 906. In general.

[a] (U. S. 1831) If the deposition of a witness who is attending in court is read without objection, he may be examined in chief by the party who read his deposition.—Whitney v. Emmett, Fed. Cas. No. 17,585 [Baldw. 303].

[b] (Del. 1847) A witness whose deposition has been read may be afterwards called to testify as to matters not embraced in his deposition, though included in the issues.—Hatfield v. Perry, 4 Har. 463.

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[c] (Ill. 1868) The rule that the opposite party may call as his own witness one whose deposition has been taken, does not apply where he has neglected to cross-examine the deponent at the taking of the deposition.—Trustees of Illinois & M. Canal v. Adler, 49 Ill. 311.

[d] (Mass. 1860) Where the presiding judge has admitted a deposition instead of the oral testimony of the witness, under St. 1839, c. 107, § 1, no exception lies to the restriction of any subsequent examination of the witness to such facts as would tend to rebut the evidence of the party calling him.—Hodgkins v. Pearson, 82 Mass. (16 Gray) 384.

[e] (Mich. 1894) Where a witness has made a deposition, in which she avers that she cannot tell the place of her seduction, and the deposition has been admitted in evidence, the question whether she, in the deposition, made such an averment, was properly excluded by the court.—People v. Keefer, 103 Mich. 83, 61 N. W. 338.

[f] (Mo. 1881) Where, by agreement, the deposition of a witness was read as his testimony, the witness could not afterwards be introduced as a witness.—State v. Kring, 74 Mo. 612.

[g] (N. Y. 1882) Though plaintiff has examined defendant as a witness out of court prior to the trial under the Code, he is not precluded from calling her as a witness in the trial if he has not used her first examination, or if he wishes to examine her on additional facts, or on some inadvertently omitted.—Berdell v. Berdell, 27 Hun, 24, 63 How. Prac. 339.

[h] (Tenn. 1850) Under Acts 1819, c. 189, § 3, allowing the adverse party to examine deponents who are present in court when their depositions are put in evidence, the witnesses still remain the witnesses of the party taking their depositions, when the adverse party introduces them for personal examination in open court.—Ford v. Ford, 30 Tenn. (11 Humph.) 89.

[i] (Wis. 1861) Where a deposition, taken on the ground that the witness resided more than 30 miles from the place of trial, is used when the witness is present in court, the opposite party may examine the witness orally.—Thayer v. Gallup, 13 Wis. 539.

(B) CROSS-EXAMINATION AND RE-EXAMINATION.

1. IN GENERAL, §§ 907-922.
2. CONTROL AND DISCRETION OF COURT, §§ 923-930.
3. SCOPE AND EXTENT OF CROSS-EXAMINATION IN GENERAL, §§ 931-948.
4. LIMITATION OF CROSS-EXAMINATION TO SUBJECTS OF DIRECT EXAMINATION, §§ 949-954.
5. CROSS-EXAMINATION AS TO IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS, §§ 955-957.
6. CROSS-EXAMINATION AS TO WRITINGS, §§ 958-962.
7. CROSS-EXAMINATION AS TO FRAUD, §§ 963, 964.
8. CROSS-EXAMINATION OF WITNESS TO CHARACTER OF PARTY OR WITNESS, §§ 965, 966.
9. CROSS-EXAMINATION OF PARTY IN GENERAL, §§ 967-975.
10. EXAMINATION OF ADVERSE PARTY AS ON CROSS-EXAMINATION, §§ 976-978.
11. CROSS-EXAMINATION OF ACCUSED IN CRIMINAL PROSECUTIONS, §§ 979-984.
12. CROSS-EXAMINATION OF ACCOMPLICES AND CO-DEFENDANTS IN CRIMINAL PROSECUTIONS, §§ 985, 986.
13. QUESTIONS ON CROSS-EXAMINATION, §§ 987-993.
14. REDIRECT EXAMINATION, §§ 994-1005.
15. RECROSS-EXAMINATION AND RECALLING WITNESS FOR CROSS-EXAMINATION, §§ 1006, 1007.

Cross-examination as to impeaching evidence, see post, § 1159.
—— *as to inconsistent statements in general, see* post, §§ 1228–1232.
—— *for purpose of impeachment, see* post, §§ 1135–1149.
—— *of witnesses to sustain character of witness or to impeach impeaching witness, see* post, § 1173.
—— *of witness giving incriminating testimony, see* post, § 1035.
—— *to discredit or test reliability of witness, see* post, §§ 1104–1108.
—— *to show interest or bias and re-examination, see* post, §§ 1192–1199.
Recalling witnesses before cross-examination, see ante, §§ 899–905.
Right of cross-examiner to contradict answers elicited on cross-examination, see post, § 1275.
Cross-examination and re-examination as to opinion evidence, see "Evidence," vol. 20, cc. 3334–3337, §§ 2306, 2307.
—— *of experts, see* "Evidence," vol. 20, cc. 3490–3494, § 2379.
Cross-examination of expert as to handwriting, see "Evidence," vol. 20, cc. 3514–3516, § 2391.
—— *of plaintiff on hearing of motion to dissolve attachment, see* "Attachment," vol. 5, cc. 1010, 1011, §§ 881, 882.
Harmless error, see "Appeal and Error," vol. 3, cc. 2072, 2073, § 4145.
In equity, see "Equity," vol. 19, cc. 1237, 1238, § 737.
In taking deposition, see "Depositions," vol. 16, cc. 1099–1108, §§ 142–145.
Objections in trial court to cross-examination, see "Appeal and Error," vol. 2, c. 1754, § 1288.

1. IN GENERAL.

RIGHT TO CROSS-EXAMINE AND RE-EXAMINE IN GENERAL, § 907.
ORDER AND COURSE OF CROSS-EXAMINATION, § 908.
STATEMENT OF OBJECT OF CROSS-EXAMINATION, § 909.
PERSONS WHO MAY CROSS-EXAMINE, § 910.
CROSS-EXAMINATION BY COURT, § 911.
ATTENDANCE OF WITNESS FOR CROSS-EXAMINATION IN GENERAL, § 912.
EFFECT OF REFUSAL OR FAILURE TO SUBMIT TO CROSS-EXAMINATION, § 913.
ILLNESS OR DEATH OF WITNESS BEFORE CROSS-EXAMINATION, § 914.
WITNESS SWORN BUT NOT EXAMINED, § 915.
FRIVOLOUS OBJECTIONS TO CROSS-EXAMINATION, § 916.
CROSS-EXAMINATION AFTER USE OF DEPOSITION OR AFFIDAVIT, § 917.
READING TESTIMONY PRIOR TO CROSS-EXAMINATION, § 918.
ANSWERS, § 919.
WITHDRAWAL OF OR OBJECTION TO INCOMPETENT EVIDENCE, § 920.
EFFECT OF CROSS-EXAMINATION OR TESTIMONY, § 921.
CURING ERROR IN CROSS-EXAMINATION, § 922.

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§ 907. Right to cross-examine and re-examine in general.

Right to cross-examine wife, see ante, § 140.

—— *to examine adverse party as on cross-examination, see* post, § 976.

[a] (Ala. 1852) On trial of a motion to enter satisfaction of a judgment, plaintiff is entitled to cross-examine all witnesses whose testimony is offered against him to prove the fact of payment.—Bruce v. Barnes, 20 Ala. 219.

[b] (Ark. 1853) On a writ of inquiry of damages before a jury after a judgment by default on demurrer sustained to a plea in abatement, the defendant may cross-examine the witnesses introduced to establish the amount of damages sustained.—Thompson v. Haislip, 14 Ark. 220.

[c] (Cal. 1890) The fact that defendant has not objected to the examination in chief of one of plaintiff's witnesses out of the proper order does not deprive defendant of the right to cross-examine the witness.—Graham v. Larimer, 83 Cal. 173, 23 Pac. 286.

[d] (Ky. 1865) It is permissible for a jury after retirement to come into court to inquire what a witness had testified to, or what he had said in any part of his testimony, and then no cross-examination would be proper. In some rare cases, the jury may be allowed, at the discretion of the court, to re-examine a witness, after retirement, respecting a fact not before testified to, when probable injustice would be unreasonably done without it; but then cross-examination would be a clear and equal right.—Thompson v. Poston, 62 Ky. (1 Duv.) 389.

[e] (La. 1888) Where third persons have intervened in an action, and are opposed to both plaintiff and defendant, who have some points of interest in common against the interveners, plaintiff and defendant have full right to cross-examine the intervener's witnesses.—Succession of Townsend, 40 La. Ann. 66, 3 South. 488.

[f] (Mass. 1876) Under the rule that a nolle prosequi cannot be entered during the trial without the consent of the defendant, the government cannot, by an offer to enter the same, or consent to a verdict for the defendant upon one count upon which a witness has testified, prevent the defendant from cross-examining him upon that count, for the purpose of afterwards contradicting his testimony.—Commonwealth v. Scott, 121 Mass. 33.

[g] (Miss. 1856) An examination in chief of a witness by one party carries with it the right to a cross-examination by the adverse party; and there is nothing in the nature of an investigation, in regard to an application for a change of venue, to authorize the court in disregarding this rule.—Mask v. State, 32 Miss. 405.

[h] (N. J. 1832) If a party avails himself of a witness, whom he, and not his adversary, can exclude, he cannot prevent his adversary from examining him.—Newcomb v. Downman, 13 N. J. Law (1 J. S. Green) 135.

[i] (N. Y. 1824) A witness introduced by a party and sworn generally, who is interested to testify against him, may be cross-examined in support of the rights of the opposite party; and the party calling him cannot question either his competency or credibility.—Jackson v. Varick, 7 Cow. 238, affirmed Varick v. Jackson (1828) 2 Wend. 166, 19 Am. Dec. 571.

[j] (N. Y. 1828) One who has omitted to file an affidavit of merits when an inquest is taken against him in a cause out of its regular order on the calendar has nevertheless the right to cross-examine plaintiff's witnesses.—Willis v. Green, 1 Wend. 78.

[k] (N. Y. 1845) The party against whom a paper is produced cannot insist that the person producing it shall be sworn as a witness for the other party, in order to give the adverse party a right to cross-examine.—Aikin v. Martin, 11 Paige, 499.

§ 908. Order and course of cross-examination.

Manner of conducting cross-examination as to writings, see post, § 962.

[a] (Idaho, 1887) It is a general rule that a defendant should not open the defense by a cross-examination of plaintiff's witnesses, but the application of this rule must rest largely in the sound discretion of the trial court.—Hopkins v. Utah Northern Ry. Co., 2 Idaho (Hasb.) 300, 13 Pac. 343.

[b] (Minn. 1891) A party cannot introduce a part of his own case in chief by cross-examination of his opponent's witnesses.—Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598.

[c] (N. Y. 1896) Where a witness has become confused in cross-examination, and given incorrect answers as to matters not in dispute, it is proper to excuse him from the stand for a time.—Weldon v. Third Ave. R. Co., 3 App. Div. 370, 38 N. Y. Supp. 206.

[d] (Pa. 1827) A party cannot cross-examine the witnesses of the opposite side before opening his cause to the jury.—Ellmaker v. Buckley, 16 Serg. & R. 72.

[e] (Pa. 1838) Where, on the trial of an issue to determine the validity of a will, one of the subscribing witnesses called by plaintiff to prove its execution testified on cross-examination that he heard of there having been a former will, a question further on such cross-examination as to what he had heard plaintiff say had become of that will, or whether it was destroyed, was properly disallowed, defendant not having opened his case, and the court not knowing the ground on which defendant intended to rely.—Browne v. Molliston, 3 Whart. 129.

[f] (S. C. 1892) Where several persons are tried jointly for murder, one of them may be required to cross-examine the witnesses for the state in advance of the cross-examination by the other defendants, and also to put up the witnesses for his defense in advance of their witnesses.—State v. Howard, 35 S. C. 197, 14 S. E. 481.

[g] (S. D. 1893) A defendant, who has not opened his case, may introduce it by cross-examination, when he merely aims to disprove by the witness the case made by the latter.—Wendt v. Chicago, St. P., M. & O. Ry. Co., 4 S. D. 476, 57 N. W. 226.

§ 909. Statement of object of cross-examination.

[a] (Ind.) On cross-examination, counsel need not state what it is expected to elicit from the witness.—(1877) Harness v. State, 57 Ind. 1; (1885) Hyland v. Milner, 99 Ind. 308.

[b] (La. 1893) On cross-examination of an accused upon matters which cannot legitimately be asked in rebuttal, but which may be asked in order to impeach a witness, the state's attorney should announce the object of the questions, and offer to restrict the effect of the testimony.—State v. Kennon, 45 La. Ann. 1192, 14 South. 187.

§ 910. Persons who may cross-examine.

Examination by a party, see ante, § 790.

[a] (Ga. 1853) A witness was fully cross-examined by the prisoner's counsel, and then permission was refused for the prisoner to examine him himself. *Held*, that this was not a violation of the constitutional right of defense

by himself, his counsel, or both.—Roberts v. State, 14 Ga. 18.

[b] (Mass. 1890) An accused testifying in his own behalf may be cross-examined by the counsel for other defendants jointly indicted with him upon all matters material to their clients in addition to the cross-examination of the district attorney.—Commonwealth v. Mullen, 150 Mass. 394, 23 N. E. 51.

[c] (Mich. 1891) Under circuit court rule No. 63, providing that "one counsel on each side shall examine witnesses," it was proper to refuse associate counsel the privilege of cross-examining a witness who had been recalled. —Cook v. Standard Life & Accident Ins. Co., 86 Mich. 554, 49 N. W. 474.

[d] (Mo. 1874) The rule of court forbidding more than one counsel on either side to examine witnesses does not preclude either of the separate counsel of two defendants in a criminal trial requiring different defenses from cross-examining the witnesses.—State v. Bryant, 55 Mo. 75.

[e] (Mont. 1893) Where several defendants are tried together for crime, and each has separate counsel, it is error to limit the cross-examination of the witnesses of the prosecution to one of the counsel for the defense.—State v. Davis, 13 Mont. 384, 34 Pac. 182.

[f] (S. C. 1882) On an indictment against three persons, containing two counts, first for riot, and second for rescue, the judge may require one counsel to conduct the cross-examination for all the defendants alone.—State v. Sims, 16 S. C. 486.

§ 911. Cross-examination by court.

Examination by court, see ante, §§ 852–857.

[a] (Ala. 1895) That the court, having, on the cross-examination of defendant's witness, asked a question, withdrew it, cannot be complained of by plaintiff.—Brown v. Louisville & N. R. Co., 111 Ala. 275, 19 South. 1001.

[b] (N. Y. 1875) Where, in a prosecution for crime, defendant took the stand in his own behalf, it is proper for the court to interrogate him to test the truth of his direct testimony. —Gill v. People, 5 Thomp. & C. 308.

[c] (Pa. 1881) The court may interpose during cross-examination and question a witness so as to give him an opportunity for explanation.—Bickel v. Philadelphia Wood Pav. Co., 2 Walk. 150.

§ 912. Attendance of witness for cross-examination in general.

Compelling attendance of adverse party for examination as on cross-examination, see post, § 977.

Discretion of court to suspend trial until witness can be brought in for cross-examination, see ante, § 792 [p].

Punishment for departure or absence during trial, see ante, § 41.

[a] (N. J. 1880) A party to a suit may allow his witness to depart after cross-examination, and the other party cannot demand that the witness be detained to be examined regarding new matter.—Wells v. Wells, 33 N. J. Eq. (6 Stew.) 4.

[b] (N. Y. 1856) During the trial plaintiff's counsel, before dismissing a witness from the stand, publicly inquired of the counsel for defendants whether any of the facts testified to by this witness would be controverted during the trial. The counsel replied that they should introduce no evidence on the points on which he had been examined, and did not reserve the right of cross-examination. *Held* not to be the duty of plaintiff's counsel to detain the witness for further examination by defendants.—Sheffield v. Rochester & S. R. Co., 21 Barb. 339.

[c] (N. Y. 1873) A witness for plaintiff was examined and cross-examined. At the close of the cross-examination defendant's attorney gave notice to the witness and plaintiff's attorney that he wished to further cross-examine the next day and desired the witness present at that time. The trial then continued, and other witnesses were examined. *Held*, that plaintiff was not bound to produce the witness on the following day, for further cross-examination.—Burden v. Pratt, 1 Thomp. & C. 554.

[d] (Pa. 1880) A witness is not in default for failing to attend for further cross-examination, when his attendance has not been requested.—In re Hook's Estate, 13 Phila. 390.

§ 913. Effect of refusal or failure to submit to cross-examination.

Effect of refusal to answer on cross-examination as to inconsistent statements, see post, § 1232.

[a] (Ga. 1880) Where a party to a suit testifies in his own behalf, and refuses to fully answer a cross-interrogatory, his whole testimony will be stricken out.—Howard v. Chamberlin, 64 Ga. 684.

[b] (Mich. 1879) Where the chief party in interest in an action is a witness in his own behalf, and seeks to evade cross-examination, such of his testimony in his own favor as demands explanation should be disregarded.—Heath v. Waters, 40 Mich. 457.

[c] (N. Y. 1815) Where a plaintiff's witness is in part examined, and then the cause is adjourned on account of his sickness, it is the duty of the plaintiff to produce the witness again at the day, or show some reason why the witness is not there; otherwise, the evidence given on his unfinished examination may be rejected.—Clements v. Benjamin, 12 Johns. 299.

§ 914. Illness or death of witness before cross-examination.

[a] (Md. 1892) Where one party to a contract has testified to his recollection of the matter involved, and the other party, after testifying, dies suddenly before cross-examination, such testimony is nevertheless admissible, in a court of equity, under a statute putting both parties to a contract on a plane of mutuality, and declaring that in case of death the testimony of the survivor shall not be received.—Scott v. McCann, 76 Md. 47, 24 Atl. 536.

[b] (Mich. 1880) Where the cross-examination of a witness is delayed at the request of the party calling him, in order to accommodate another witness who wished to go away, and the first witness dies before he can be cross-examined, it is proper to strike out his testimony in chief.—Sperry v. Moore's Estate, 42 Mich. 353, 4 N. W. 13.

[c] (N. Y. 1841) Evidence obtained in a direct examination is not admissible, where the witness dies before there is an opportunity for a cross-examination. — Kissam v. Forrest, 25 Wend. 651, reversed Forrest v. Kissam (1844) 7 Hill, 463.

[d] (N. Y. 1869) Where one of the parties to an action has lost the opportunity to cross-examine a witness of the opposite party by reason of illness of the witness, the direct examination of such witness should be stricken out. The right of cross-examination becomes absolute upon the close of the direct examination, and if either party is to suffer by the death or incapacity of a witness to be cross-examined, it should be the one calling him.—Cole v. People, 2 Lans. 370, affirmed People v. Cole (1871) 43 N. Y. 508.

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[e] (N. Y. 1871) For the court upon a criminal trial to suffer any evidence given by a witness on direct examination for the people to go to the jury, where by sudden illness or by death of such witness, or other cause without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination, is error.—People v. Cole, 43 N. Y. 508, affirming Cole v. People (1869) 2 Lans. 370.

[f] (Pa. 1880) The plaintiff in an equity proceeding was examined in chief before a master, and his testimony reduced to writing. An opportunity was afforded defendant to cross-examine, but he did not avail himself of it, and, before doing so, died. A motion was made to strike out the evidence. *Held*, that it was competent and properly admitted, the right to cross-examine having been waived.—Appeal of Hay, 91 Pa. 265.

§ 915. Witness sworn but not examined.

[a] (Ala. 1869) Defendant's witnesses were put apart for examination at the instance of plaintiff, and defendant concluded his evidence without calling one of the witnesses sworn by him. *Held*, that the court should not have allowed the plaintiff to cross-examine him as the witness of the defendant.—Toole v. Nichol, 43 Ala. 406.

[b] (Ark. 1854) Where the state has summoned a witness, and he has been sworn but not examined, the prisoner has no right to cross-examine him as to the whole case.—Austin v. State, 14 Ark. 555.

[c] (Ga. 1857) If a witness is called and sworn, the other party may cross-examine him, whether examined in chief or not, unless he was sworn by mistake, or stopped by the court after an immaterial question.—Aiken v. Cato, 23 Ga. 154.

[d] (Ga. 1858) After a witness has been called and sworn, the other party has a right to cross-examine him, though the party calling him did not examine him.—Lunday v. Thomas, 26 Ga. 537.

§ 916. Frivolous objections to cross-examination.

[a] (Mo. 1893) Where a witness on cross-examination evades a legitimate question, adverse counsel should not be permitted to interpose frivolous objections to rapid cross-examination, thereby affording the witness opportunity to fabricate replies.—State v. Duncan, 116 Mo. 288, 22 S. W. 699.

§ 917. Cross-examination after use of deposition or affidavit.

[a] (Ind. 1896) Where a statute provides for affidavits, and makes them prima facie evidence of the facts therein stated, but does not provide for a cross-examination of the affiant, such cross-examination cannot be allowed.—Mode v. Beasley, 143 Ind. 306, 42 N. E. 727.

[b] (N. H. 1872) Where a witness' deposition has been taken, he cannot be cross-examined in reference to it, unless it has been introduced in evidence previous to his being called; and even then he will not be permitted to do more than make an explanation in regard to it.—Haines v. Republic Fire Ins. Co., 52 N. H. 467.

§ 918. Reading testimony prior to cross-examination.

Refreshing memory by use of testimony previously given by witness, see ante, §§ 885, 886.

[a] (N. J. 1870) A witness should not be allowed to have his direct testimony read to him before the cross-examination is commenced. Such an irregularity, although not sufficient to justify the suppression of the evidence, must have the effect of almost totally destroying the credibility of the witness.—Derby v. Derby, 21 N. J. Eq. (6 C. E. Green) 36.

§ 919. Answers.

Answers in examination in chief, see ante, §§ 858–867.

—— *to cross-examination of questions tending to subject witness to criminal prosecutions, see* post, §§ 1034, 1035.

[a] (Cal. 1895) Where prosecutrix on the trial of her father for rape, was asked on cross-examination whether she heard her mother say anything "bad" to her father, and answered that she called him a certain name "when he hit her," it was not error to refuse to strike out the answer, as the testimony would have been admissible on redirect examination to show the circumstances under which the language was used.—People v. Fultz, 109 Cal. 258, 41 Pac. 1040.

[aa] (Ga. 1855) A witness, on his cross-examination, may answer by referring to his previous answers to the direct questions.—Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

[b] (La. 1844) A witness, on cross-examination, may state what, though not directly questioned thereto, he might be asked in chief.—Cross v. Police Jury, 7 Rob. 121.

[bb] (Mich. 1878) To a question asked a witness on cross-examination, "What did he say to that?" an answer that the witness could not say what the party replied to it, but that it appeared to be all satisfactory, and he assented to it, is irresponsive, and contains a mere inference of the witness.—McCreery v. Green, 38 Mich. 172.

[c] (Mo. 1893) Where a witness on cross-examination avoids replying, and parries a question by asking others, he may be pressed for an answer.—State v. Duncan, 116 Mo. 288, 22 S. W. 699.

[d] (Vt. 1871) The fact that a witness, in answer to a proper interrogatory on cross-examination, goes further than the question called for, and states facts which would not have been a proper subject of inquiry, affords no ground for exception.—Streeter v. Evans, 44 Vt. 27.

§ 920. Withdrawal of or objection to incompetent evidence.

[a] (D. C. 1875) A witness can only be cross-examined in regard to matters connected with the direct examination; but where the witness is a party to the suit, and is questioned, on cross-examination, in regard to a fact not touched upon in his examination in chief, and his answer thereto is in his own favor, the court will not disturb the verdict on account of the admission of such question.—Cramer v. Cullinane, 2 MacArthur, 197.

[b] (Ind. 1855) Where a party, in the cross-examination of a witness, calls out testimony, on new topics, which is prejudicial to himself, he cannot object to such evidence as inadmissible, either at the trial or afterward.—Wright v. Gaff, 6 Ind. 416.

[c] (Mich. 1890) Where a witness, on cross-examination, acknowledges that she made a certain remark at the time the deed was signed, and on being asked why she made this remark, answers that a third person told her so, it is not error to refuse to strike out her answer.—Dikeman v. Arnold, 83 Mich. 218, 47 N. W. 113.

[d] (Tex. 1877) If on cross-examination of a state's witness defendant elicits incompetent testimony, he is not entitled to have it withdrawn from the jury.—Kelly v. State, 1 Tex. App. 628.

[e] (Vt. 1894) Where, on a cross-examination of the defendant's witness, the plaintiff was

permitted to ask certain questions to which defendants excepted, and the exceptions do not show that the questions were not strictly cross-examination on such matter opened up by defendants in their examination of the witness, it will be presumed on appeal that such was the case, and that the court properly permitted the questions for that reason.—Houston v. Brush, 66 Vt. 331, 29 Atl. 380.

§ 921. Effect of cross-examination or testimony.

Waiver of objections made to reception of evidence by cross-examination of witnesses, see "Trial," vol. 46, cc. 929–931, § 182.

[a] (Mass. 1885) The admission of immaterial evidence on cross-examination is not ground for exception.—Jennings v. Whitehead & Atherton Mach. Co., 138 Mass. 594.

[b] (Mich. 1873) All testimony elicited on cross-examination, consisting, as it does, of facts which, though relating to the direct examination, may have been omitted or concealed in that examination, or facts tending to contradict, explain or modify such facts, or to rebut or modify some inference which might otherwise be drawn from them, must in the nature of things constitute a part of the evidence given in chief; and both alike and together must, therefore, be treated as evidence given on the part of the party calling the witness.—Wilson v. Wagar, 26 Mich. 452.

[c] (Mich. 1877) Evidence given on cross-examination is to be regarded as testimony on the part of the party calling the witness, and not of the party cross-examining.—Schratz v. Schratz, 35 Mich. 485.

[d] (N. H. 1825) If a party, who supports his book of accounts by his oath, according to the practice in New Hampshire, be cross-examined, it does not make him a witness in chief.—Eastman v. Moulton, 3 N. H. 156.

§ 922. Curing error in cross-examination.

[a] (Ga. 1856) It is error to refuse a party the privilege of cross-examining his opponent's witnesses, on matters material to the issue; and the error is not cured by the fact that such party subsequently called the same witnesses, and examined them in chief.—White v. Dinkins, 19 Ga. 285.

[b] (Ill. 1896) It was not reversible error to direct a witness to stand aside because the questions put to him were not proper on cross-examination, where the witness was recalled and examined on behalf of appellant.—McDonald v. Fairbanks, Morse & Co., 161 Ill. 124, 43 N. E. 783.

[c] (Ind. 1889) Where a witness for the state has been allowed to answer an hypothetical question based on the view of the evidence taken by the prosecution, it is error to disallow cross-examination based on defendant's view of what the evidence has established; but such error is cured by defendant's calling the witness in his own behalf, and proving the matters which would have been shown by the cross-examination.—Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725.

[d] (Mich. 1872) Upon the cross-examination of the defendant in a criminal case he cannot be asked questions that relate to matters outside of the statement made by him. And if such questions are allowed, the error is not cured by an instruction to the prisoner that he might decline to answer at his option.—Gale v. People, 26 Mich. 157.

[e] (Mich. 1893) In an action for breach of contract to deliver sheep, sheared or not, at buyer's option, plaintiff having ordered them sheared, defendant in his own behalf testified as to the amount of wool shorn. *Held*, that he could not object to being cross-examined as to the price he got for said wool, when the court charged that the measure of damages was the difference between the contract price of the sheep and their market price at place of delivery.—Aulls v. Young, 98 Mich. 231, 57 N. W. 119.

[f] (S. C. 1890) Where defendant was entitled to have a contract read in evidence on plaintiff's cross-examination, error in refusing it is not cured by subsequently permitting the defendant to read the contract in evidence as a part of its testimony.—Willoughby v. Northeastern R. Co., 32 S. C. 410, 11 S. E. 339.

[g] (S. C. 1892) A defendant in a criminal prosecution is not confined in the cross-examination of the state's witnesses to matters brought out in their examination in chief, but may interrogate them for the purpose of contradicting another witness, who has previously been examined; and if this right is denied him, the error is not cured by the fact that he afterwards makes the witnesses his own, and causes them to be examined on his own behalf.—State v. Howard, 35 S. C. 197, 14 S. E. 481.

[h] (Vt. 1894) Where, on a trial for rape, a question to prosecutrix on cross-examination is improperly excluded, the error is not cured by an offer to allow defendant to examine her on the same subject when introducing his evidence.—State v. Hollenbeck, 67 Vt. 34, 30 Atl. 696.

[i] (Vt. 1894) Where, on a trial for rape, defendant duly excepted to the exclusion of a question to prosecutrix on cross-examination as to whether, about the time of the alleged offense, she had intercourse with another man, he will not be deprived of his exception because later in the trial the state recalled prosecutrix, and offered to allow her to be cross-examined on the subject.—State v. Hollenbeck, 67 Vt. 34, 30 Atl. 696.

2. CONTROL AND DISCRETION OF COURT.

CONDUCT AND EXTENT OF CROSS-EXAMINATION IN GENERAL, § 923.
CROSS-EXAMINATION OF PARTY, § 924.
—— ACCUSED IN CRIMINAL PROSECUTIONS, § 925.
IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS, § 926.
LEADING QUESTIONS ON CROSS-EXAMINATION, § 927.
REPETITION OF QUESTION IN THE SAME OR ANOTHER FORM, § 928.
STRIKING OUT ANSWER, § 929.
RECALLING WITNESS AND RE-EXAMINATION, § 930.

Discretion of court in direct examination, see ante, §§ 792–797.

§ 923. Conduct and extent of cross-examination in general.

See ante, § 908 [a].

[a] The extent of cross-examination is largely in the discretion of the court.
—(Cal. 1870) Brumagim v. Bradshaw, 39 Cal 24;
(Ind. 1895) Gilliland v. State, 13 Ind. App 651, 42 N. E. 238; (1896) Payne v. Gold bach, 14 Ind. App. 100, 42 N. E. 642;
(Iowa, 1895) Bailey v. Bailey, 94 Iowa, 598 63 N. W. 341;
(Kan. 1891) Hamilton v. Miller, 46 Kan. 486 26 Pac. 1030;
(Mass. 1873) Commonwealth v. Lyden, 113 Mass. 452; (1875) Wallace v. Taunton St. Ry. Co., 119 Mass. 91; (1878) Blackington v. Johnson, 126 Mass. 21;

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(Minn. 1877) Gardner v. Kellogg, 23 Minn. 463;

(N. Y. 1887) Ellis v. Purvis, 10 N. Y. St. Rep. 628.

[b] Questions propounded to a witness, on his cross-examination, merely to ascertain the names of persons whom a party may desire to call as witnesses to disprove the case of the opposite party, may be excluded, in the discretion of the presiding judge.
—(U. S. 1876) Storm v. United States, 94 U. S. 76, 24 L. Ed. 42;

(D. C. 1892) United States v. Cross, 20 D. C. 365.

[c] (Ala. 1856) In the exercise of its discretionary control over the progress of the trial, the court cannot postpone the cross-examination of the plaintiff's witness against the wishes of the defendant, until after the plaintiff has made out a prima facie case and closed.—Fralick v. Presley, 29 Ala. 457, 65 Am. Dec. 413.

[d] (Ala. 1860) When a witness has betrayed bias, partiality, or corruption, the conduct of the cross-examination will be left to the discretion of the presiding judge.—In re Carmichael, 36 Ala. 514.

[e] (Cal. 1868) Where both sides of a case are founded in part on the same or cognate facts, it is impossible to adhere strictly to the general rule that a cross-examination will be allowed as to the facts elicited on the direct, without violating the rule that a party who has not yet opened his own case cannot be allowed to introduce it by a cross-examination of the witness of his adversary, and in such case the application of the rules must be left to the discretion of the judge, whose rulings will not be reviewed.—Thornton v. Hook, 36 Cal. 223.

[f] (Cal. 1893) The extent of cross-examination to test the knowledge, judgment, or bias of a witness is within the discretion of the trial court.—City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

[g] (Cal. 1895) It is no abuse of discretion for the court to excuse a witness from testifying further on cross-examination, where much time had been taken up on one point, and counsel did not ask permission to examine further on other matters.—Sandell v. Sherman, 107 Cal. 391, 40 Pac. 493.

[h] (Conn. 1870) In an action of debt, plaintiff relied on the past insolvency of defendant to overcome the presumption of payment arising from lapse of time, and defendant testified in his own behalf that for 20 years prior to the commencement of the suit he had been solvent. *Held*, that a ruling allowing defendant on cross-examination to testify as to whether he had paid the debt is discretionary, and not appealable.—Chapman v. Loomis, 36 Conn. 459.

[i] (Conn. 1895) In a murder case, in which deceased's dying declaration was admitted in evidence, deceased's wife testified, for the state, simply as to what took place just before and after the killing, and to deceased's belief that he was about to die at the time he made the statement. *Held*, that it was within the court's discretion not to permit defendant, on cross-examination of the wife, to inquire into deceased's habit in regard to drink and his condition on the day of the killing.—State v. McGowan, 66 Conn. 392, 34 Atl. 99.

[j] (Ill. 1860) The court may examine a witness after the parties have finished, and may, at its discretion, allow a cross-examination thereupon.—Foreman v. Baldwin, 24 Ill. (14 Peck) 298.

[k] (Ill. 1888) It is within the discretion of the court to confine the cross-examination of witnesses within reasonable limits.—Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598, affirming (1888) 27 Ill. App. 17.

[l] (Ill. 1889) In an action to recover against a railroad company damages for the doubling of its tracks, etc., adjacent to plaintiff's hotel, plaintiff's witnesses testified that there had been a general increase of values in the city in property similarly situated to that of plaintiff's hotel. *Held*, that it was discretionary with the court to permit such witnesses to be asked, on cross-examination, whether the location of defendant's railroad shops in the city, and the passenger depot near the hotel, and the employment of a large number of hands, had not benefited the hotel, and whether plaintiff derived any special benefit from defendant, for the purpose of testing the witnesses' knowledge on the subject.—McCarty v. Chicago, B. & Q. R. Co., 34 Ill. App. 273.

[m] (Mass. 1851) When a witness is called to prove the signature of a deed, it is within the discretion of the presiding judge to allow the adverse party, who has not yet opened his case, to cross-examine the witness immediately on the whole case, or to require him to wait and recall the witness, after having opened his case.—Burke v. Miller, 61 Mass. (7 Cush.) 547.

[n] (Mass. 1863) The extent to which a cross-examination shall extend, where no competent evidence is excluded, must be left to the discretion of the judge or officer presiding at the trial.—Rand v. Inhabitants of Newton, 88 Mass. (6 Allen) 38.

[o] (Mass. 1873) The extent to which a witness may be cross-examined on otherwise immaterial facts, to show his bias or test his credibility, is ordinarily a matter of discretion, to the exercise of which no exception lies.—Commonwealth v. Lyden, 113 Mass. 452.

[p] (Mass. 1873) It is discretionary with the trial court as to whether a party shall be permitted to examine a witness upon a paper used by him to refresh his memory before it has been so used by the witness or whether he shall be required to wait for that purpose until the general cross-examination.—Commonwealth v. Burke, 114 Mass. 261.

[q] (Mass. 1888) In an action to recover a payment made to a bank in fraud of the insolvent law, it appeared that the whole transaction of the preference was between the insolvent and the president and cashier, who were called as witnesses for plaintiff. *Held*, that these facts afforded the strongest ground for the exercise of judicial discretion in permitting plaintiff to ask them questions in the nature of cross-examination.—South Danvers Nat. Bank v. Jackman, 14 N. E. 517.

[r] (Mich. 1882) A trial judge may exercise a discretion in excluding questions on cross-examination asked for the purpose of embarrassing the witness, and to involve him in contradiction from want of self-possession.—People v. Becker, 48 Mich. 43, 11 N. W. 779.

[s] (Mich. 1894) Where the facts brought out on the direct examination of the witnesses have been fully covered by the cross-examination, it is not error to refuse to permit further cross-examination, where counsel fails to state what he expects to prove.—People v. Kindra, 102 Mich. 147, 60 N. W. 458.

[t] (Minn. 1892) The court may, in its discretion, refuse to allow a cross-examination to be unreasonably extended.—Hamilton v. Hulett, 51 Minn. 208, 53 N. W. 364.

[u] (N. Y. 1858) The nature and extent of the questions that may properly be put to a witness by way of cross-examination depend much upon the circumstances of each case and rest

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largely in sound judicial discretion.—Fry v. Bennett, 16 N. Y. Super. Ct. (3 Bosw.) 200.

[uu] (N. Y. 1867) Upon an issue as to the genuineness of defendant's signature, several papers were shown to him in such manner that he could only see the signatures, and he was asked if the signatures were his. Then the whole of the papers were shown him, and he was asked the same questions. *Held*, that it lay in the discretion of the court to allow such a method of cross-examination.—Hardy v. Norton, 66 Barb. 527.

[v] (N. Y. 1874) Where a witness had been cross-examined at great length on a variety of collateral matters, the court was justified, on the asking of a totally irrelevant question, in closing the cross-examination.—McGuire v. People, 48 How. Prac. 517.

[vv] (N. Y. 1891) Although the cross-examination of a witness is a matter largely within the discretion of the trial judge, it is error for him to interpose arbitrarily and stop the cross-examination of a witness, which is being conducted by counsel within proper bounds.—In re Mason, 60 Hun, 46, 14 N. Y. Supp. 434.

[w] (Or. 1886) In a murder case, great latitude should be allowed on cross-examination, especially where the witness is a Chinaman, since experience has convinced every one that Chinese witnesses are apt to be actuated by motives that are not honest.—State v. Mah Jim, 13 Or. 235, 10 Pac. 306.

[x] (Pa.) The allowing of the new matter to be brought out on cross-examination is a subject addressing itself to the sound discretion of the court, and hence is not reviewable.—(1869) Jackson v. Litch, 62 Pa. (12 P. F. Smith) 451; (1880) Bickel v. Philadelphia Wood Pav. Co., 2 Walk. 150.

[xx] (Pa. 1893) In an action against a borough for diverting the surface water from a street onto the adjoining lot by gutters in the street, where a witness testified to the condition of the street, and the effect the gutters had, it was not an abuse of discretion to allow the witness on cross-examination to state that the gutters were constructed by defendant.—Bohan v. Borough of Avoca, 154 Pa. 404, 26 Atl. 604, 32 Wkly. Notes Cas. 212.

[y] (Tenn. 1883) It is within the discretion of the trial judge to require counsel, in cross-examining witnesses, to write the answers of each witness, and read it over to him, to see if it is correct.—Jones v. State, 79 Tenn. (11 Lea) 468.

[yy] (Tenn. 1883) It is not an abuse of discretion for the judge to compel counsel to proceed more slowly with a cross-examination, and to animadvert, in the pesence of the jury, to the harsh and peremptory manner of counsel with a young female witness.—Carroll v. State, 79 Tenn. (11 Lea) 480.

[z] (Tex. 1879) The extent to which the feelings and motives of a witness may be probed on cross-examination rests in the discretion of the trial court.—Stevens v. State, 7 Tex. App. 89.

[zz] (Wis. 1885) Where, in an action by the assignee of a partnership to recover goods attached by individual creditors, one of the partners, for the purpose of showing a knowledge of the partnership by the attaching creditors, has testified as to the filling of receipts given by them, and has already been recross-examined in relation thereto, and there is no intimation that further cross-examination is proposed in relation to the same receipts, it is discretionary with the court to terminate it; testimony in regard to any other receipts being purely defensive, and having but a remote bearing, at most.—McNair v. Rewey, 62 Wis. 167, 22 N. W. 339.

§ 924. Cross-examination of party.

Cross-examination of party in general, see post, §§ 967–975.

[a] (Iowa, 1888) In an action on a note, where the defense was forgery, defendant asked plaintiff on cross-examination, as to the consideration, how the amount was determined, and when the note was presented. These matters had not been testified to in chief. *Held*, that though the questions might properly have been allowed, as being within the issue of bad faith, their exclusion was in the discretion of the court, and, the record not containing all the evidence, the ruling cannot be said to be erroneous.—Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107.

[b] (Mich. 1886) It is not error to allow counsel to inquire into the antecedents of a defendant, when on the witness stand in his own behalf, the length to which such inquiries may go being in the discretion of the trial judge.—McBride v. Wallace, 62 Mich. 451, 29 N. W. 75.

[c] (N. Y. 1869) Where a party, on his direct examination, as a witness on his own behalf, testifies to another transaction, which is not strictly within the issues to be tried, but calculated to throw light upon them, the extent of his cross-examination as to such other transaction rests in the sound discretion of the justice presiding at the trial.—Hay v. Douglas, 8 Abb. Prac. (N. S.) 217.

[d] (N. Y. 1892) In an action for the price of goods which defendant had refused to accept, as not conforming to the sample on which the sale was made, it is within the discretion of the court to permit questions to be put to defendant on his cross-examination concerning similar difficulties in which his firm has become involved by his rejection of purchases as not up to sample.—Doyle v. Beaupre, 63 Hun, 624, 17 N. Y. Supp. 287.

[e] (Wis. 1883) Though, when the witness is a party to the action, the court may probably, in its discretion, allow a broader range of cross-examination than in ordinary cases, such latitude is not a right of the adverse party; and, in an action for the breach of a contract of employment by the discharge of plaintiff, the incompetency and disobedience of plaintiff, and the fact that after his discharge he might have earned more than he admits he did, are matters purely defensive; and, while it may not be error to permit them to be shown on the cross-examination of plaintiff, it is not error to refuse such permission.—Norris v. Cargill, 57 Wis. 251, 15 N. W. 148.

[f] (Wis. 1894) A refusal to allow defendant to show, on cross-examination of plaintiff, that the action was being prosecuted under a champertous agreement, is in the discretion of the court.—Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101.

§ 925. —— Accused in criminal prosecutions.

Cross-examination of accused in criminal prosecutions, see post, §§ 979–984.

[a] (Cal. 1892) The trial court has not such a discretion with regard to the extent and scope of the cross-examination of defendant in a criminal case as it is permitted to exercise in the examination of other witnesses.—People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

[b] (N. J. 1887) When a defendant in a criminal trial becomes a witness in his own behalf, it is in the discretion of the court to allow him to be cross-examined on the whole case as to pertinent facts not touched upon in the direct examination, and the exercise of such authority is not reviewable on error.—Disque v. State, 49 N. J. Law (20 Vroom) 249, 8 Atl. 281.

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[c] (N. Y. 1886) How far the cross-examination of a prisoner, when a witness in his own behalf, may be carried in regard to his history and mode of life is necessarily very much in the discretion of the court.—People v. Clark, 102 N. Y. 735, 8 N. E. 38.

§ 926. Irrelevant, collateral, or immaterial matters.

[a] It is in the discretion of the court trying a case to say how far irrelevant questions may be asked of a witness on cross-examination.

—(D. C. 1889) United States v. Eliason, 7 Mackey, 104;
(Me. 1853) Rumsey v. Bragg, 35 Me. 116;
(Pa. 1843) Clark v. Trinity Church, 5 Watts & S. 266.

[b] It is discretionary with the trial judge as to the extent to which he will permit cross-examination relating to collateral matters.

—(Me. 1885) State v. Rollins, 77 Me. 380;
(Mass. 1865) Prescott v. Ward, 92 Mass. (10 Allen) 203;
(Mo. 1862) Adriance v. Arnot, 31 Mo. 471;
(N. Y. 1866) La Beau v. People, 34 N. Y. 223.

[c] The extent to which immaterial matters may be inquired into upon cross-examination rests in the sound discretion of the court in which the witness is being examined.

—(Mass. 1865) Prescott v. Ward, 92 Mass. (10 Allen) 203;
(Ohio, 1889) Village of Shelby v. Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606.

[d] (Ga. 1876) When even a party is under cross-examination, the court may exercise a sound discretion in requiring counsel to make the relevancy of his questions apparent.—City Bank of Macon v. Kent, 57 Ga. 283.

[e] (Mo. 1892) A question put to a party on cross-examination as to whether he had not upbraided one of his witnesses for having lost the verdict at a former trial is properly excluded by the court in the exercise of its discretionary right to curtail cross-examination on collateral matters.—Dunn v. Altman, 50 Mo. App. 231.

[f] (Wis. 1894) Where defendant has cross-examined plaintiff, to the extent of 3½ typewritten pages, for the purpose of showing that mental weakness assumed by him was merely a sham, it is not an abuse of discretion to refuse to permit defendant's counsel to ask him other questions as to collateral statements made by him to other persons.—Spear v. Sweeney, 88 Wis. 545, 60 N. W. 1060.

§ 927. Leading questions on cross-examination.

See post, § 930 [r].

Discretion of court as to leading questions on direct examination, see ante, § 795.

Right to ask leading questions on cross-examination in general, see post, § 989.

[a] (U. S. 1896) Where there are two defendants, each making separate defenses, or where each is endeavoring to cast the fault upon the other, it is not error if the trial judge, in the exercise of his discretion, shall disallow leading questions propounded by one defendant in the cross-examination of plaintiff's witnesses, when objected to by the other defendant.—Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, 20 C. C. A. 596, 43 U. S. App. 408.

[b] (Mass. 1835) On cross-examination of a witness, the court may, in its discretion, permit leading questions to be put, although relating to matters not inquired of upon the direct examination.—Moody v. Rowell, 34 Mass. (17 Pick.) 490, 28 Am. Dec. 317.

[c] (Mich. 1895) It is within the discretion of the court to permit the prosecutor, on cross-examination of a particeps criminis of the defendant, to ask a leading queston.—People v. Considine, 105 Mich. 149, 63 N. W. 196.

[d] (Ohio, 1853) When a cross-examination is extended to topics disconnected with the particular facts disclosed in the direct examination, leading questions to the witness may be proper, according to circumstances, and the control of this must rest with the court.—Legg v. Drake, 1 Ohio St. 286.

§ 928. Repetition of question in the same or another form.

Discretion of court as to repetition of questions on direct examination, see ante, § 796.

Repetition of questions on cross-examination and questions calling for repetition of answers, see post, § 990.

[a] (Dak. 1887) In an action of claim and delivery by a vendee of goods against an attaching creditor of the vendor, the plaintiff in his affidavit valued the goods at $1,500. He paid $800 for the goods. The attaching creditor claimed that the sale of the vendor was fraudulent. Plaintiff, on his cross-examination, testified that the goods were worth to him, in connection with his other business $1,200 to $1,500. Subsequently, on his cross-examination, he was asked: "If you swore then [in the affidavit] that the actual value of said property * * * was $1,500, was that statement true or false?" An objection to the question was sustained. *Held* no error, as that point having already been testified to on the cross-examination, it was in the discretion of the court to disallow the question in another form.—Young v. Harris, 4 Dak. 367, 32 N. W. 97.

[b] (Iowa, 1887) Where defendant was given the fullest chance to cross-examine the prosecuting witness, it was not error to refuse the admission of questions covering ground already covered by the testimony.—State v. Ward, 73 Iowa, 532, 35 N. W. 617.

[c] (Neb. 1893) A presiding judge is vested with judicial discretion as to limiting the cross-examination of a witness; and where the same question has been three times propounded it is not error to prohibit a like question to be again asked, under penalty of forbidding further cross-examination.—Jones v. Stevens, 36 Neb. 849, 55 N. W. 251.

[d] (N. Y. 1896) It was not an abuse of discretion to restrict the cross-examination of the witness, where all the questions excluded had been answered several times.—Foster v. Tanenbaum, 2 App. Div. 168, 37 N. Y. Supp. 722.

[e] (Tex. 1888) It is within the discretion of the court to require counsel to cease cross-examining a witness upon a matter about which the witness has answered fully several times.—Gulf, C. & S. F. Ry. Co. v. Pool, 70 Tex. 713, 8 S. W. 535.

§ 929. Striking out answer.

[a] (Cal. 1894) In an action for damages for the diversion of water, where a witness has testified only as to the condition of ditches and flumes, and the work required to clear them, and not as to the amount of the damage, the action of the trial court in striking out an answer of the witness, "Yes, sir, I have," given in response to a question by defendant's counsel as to whether the witness has stated all the damages, is within its discretion.—Bennett v. Morris, 37 Pac. 929.

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§ 930. Recalling witness and re-examination.

Discretion of court as to recalling witness on direct examination, see ante, § 797.

Recross-examination and recalling witnesses for cross-examination, see post, §§ 1006, 1007.

Redirect examination, see post, §§ 994–1005.

[a] The matter of permitting a party who has cross-examined a witness to recall him, in order to make a further cross-examination, rests in the discretion of the court.
—(Ala. 1877) Morningstar v. State, 59 Ala. 30;
(Cal. 1875) People v. Keith, 50 Cal. 137;
(N. C. 1845) State v. Hoppiss, 27 N. C. 406.

[b] (Ala. 1871) The court may, under a sound discretion, allow a witness to be called back for re-examination, but cannot compel either party to call back his witness, unless he choose to do so.—Barker v. Bell, 46 Ala. 216.

[c] (Ga. 1890) On a redirect examination in an action for personal injuries, it was within the discretion of the court to admit evidence as to the manner in which the accident occurred, although not in rebuttal.—Augusta & S. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706.

[d] (Ga. 1890) It is within the discretion of the court to arrest a recital by counsel, on re-examination of a witness, of his understanding of the evidence given by the witness on cross-examination as preliminary to having the witness explain his testimony.—Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

[e] (Ill. 1891) Allowing a witness to testify on redirect examination as to matters not referred to either in the direct or cross-examination is a matter within the discretion of the trial court.—City of Springfield v. Dalbey, 139 Ill. 34, 28 N. E. 860.

[f] (Ind. 1890) Defendant, in an action for a commission for the sale of land, had testified that he did not authorize plaintiffs, in the month of September, to sell the land, and that he did not then have the title to it. On rebuttal, he was asked if in September he expected the land, and the court refused to permit him to answer. *Held* not error, it being in the discretion of the court to limit the examination.—Lockwood v. Rose, 125 Ind. 588, 25 N. E. 710.

[g] (Ind. 1896) The refusal to permit a re-examination of a witness on a matter to which he has already testified is within the discretion of the trial court.—Pigg v. State, 145 Ind. 560, 43 N. E. 309.

[h] (Iowa, 1887) Where the accused testifies in his own behalf, it is within the sound discretion of the court to recall him, after he has left the stand, for further cross-examination.—State v. Johnson, 72 Iowa, 393, 34 N. W. 177.

[i] (Iowa, 1888) The trial court may, in its discretion, refuse to allow counsel to recall a witness for cross-examination.—Fowler v. Town of Strawberry Hill, 74 Iowa, 644, 38 N. W. 521.

[j] (Iowa, 1895) It was not an abuse of discretion that a witness of plaintiff, who was excused without cross-examination, was recalled, after plaintiff rested, for cross-examination.—Chapman v. James, 96 Iowa, 233, 64 N. W. 795.

[k] (Md. 1890) It is in the discretion of a trial court to allow the introduction into redirect examination of matter omitted in the examination in chief.—Blake v. Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

[l] (Mass. 1854) Where a witness is called only to prove the execution of an instrument, and cross-examined generally by the other party, the party calling him has not a right to cross-examine him upon the new matter upon which he was examined by the other party, unless allowed by the court in its discretion to do so, and cannot except to the ruling of the court that as a matter of law he has no right so to cross-examine him.—Beal v. Nichols, 68 Mass. (2 Gray) 262.

[m] (Minn. 1878) Where a witness has been examined, cross-examined, and dismissed, he can be recalled for further cross-examination only by leave of court, and the court may, in its discretion, regulate the manner and extent of such further cross-examination.—Cummings v. Taylor, 24 Minn. 429.

[n] (Mo. 1843) After the cross-examination has closed, the court in its discretion may permit either party to examine the witness as to new matter.—Brown v. Burrus, 8 Mo. 26.

[o] (Mo. 1891) In an action against the estate of a deceased maker of a note, where a witness for the defense, on redirect examination, was asked the value of certain property for the purpose of showing what interest certain witnesses for the plaintiff had in the suit, and the witness and other witnesses had been fully examined before with reference to the same transaction and what property it embraced, there was no error in refusing to hear further evidence, the extent to which such examination might be carried being within the sound discretion of the court.—Stillwell v. Patton, 108 Mo. 352, 18 S. W. 1075.

[p] (Neb. 1879) The enforcement of the rule that the re-examination of a witness should be limited to the points arising out of the cross-examination rests entirely in the discretion of the trial court.—Schlenker v. State, 9 Neb. 241, 1 N. W. 857.

[q] (N. Y. 1887) Where a witness has been examined upon a point in his direct examination, and is not cross-examined as to such point, it is discretionary with the trial court to permit further testimony on the point by the same witness on redirect examination.—Manufacturers' & Traders' Bank v. Koch, 105 N. Y. 630, 12 N. E. 9.

[r] (N. Y. 1891) In an action by the owners of a mill to restrain the owner of a mill on the same stream from a wrongful use of the water, a witness for plaintiffs having been cross-examined as to the manner in which the mills were used by the common grantor of the parties while he was the owner of both, it was in the discretion of the court to permit plaintiffs to ask the witness a leading question as to whether the water at that time was not used in such manner at the upper mill as to enable it to be used for running both mills.—Hoyt v. Cline, 61 Hun, 619, 15 N. Y. Supp. 337.

[s] (Pa. 1868) The examination of a witness in surrebuttal is within the discretion of the judge trying the case.—Koenig v. Bauer, 57 Pa. (7 P. F. Smith) 168.

[t] (Tenn. 1891) In an action for seduction and breach of promise of marriage, the admission of testimony by plaintiff, on re-examination, as to acts of sexual intercourse with defendant subsequent to those testified to on original examination, was not an abuse of discretion, where the sole objection was that the testimony was original matter.—Graham v. McReynolds, 90 Tenn. (6 Pickle) 673, 18 S. W. 272.

[u] (Vt. 1866) When a witness has returned to the stand to correct his testimony upon a single point, there is no error in refusing to permit him to be recross-examined, except on that point. The matter is entirely within the discretion of the court below.—Thornton's Ex'rs v. Thornton's Heirs, 39 Vt. 122.

[v] (Va. 1848) Whether a state's witness, who has been examined and cross-examined, may be re-examined by the state as to new facts

unconnected with the former examination and cross-examination, is a matter resting in the discretion of the court.—Howel v. Commonwealth, 5 Grat. 664.

3. SCOPE AND EXTENT OF CROSS-EXAMINATION IN GENERAL.

IN GENERAL, § 931.
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STATEMENTS AND AFFIDAVITS BY WITNESS OR OTHERS, § 940.
CONVERSATIONS BETWEEN WITNESS AND OTHERS, § 941.
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—— *of redirect examination in general, see* post, § 997.

Scope and manner of examination of adverse party as on cross-examination, see post, § 978.

—— *of cross-examination for purpose of laying foundation for proof of inconsistent statements, see* post, § 1237.

§ 931. In general.

[a] (U. S. 1877) In an action by contractors against a railroad company upon a construction contract, it is proper to ask the secretary of the company, upon cross-examination by the plaintiff, as to whether the witness did not recollect that after a specified date a "batch of suits" was brought against plaintiff wherein the company was garnished, where it appears that the general object of the cross-examination was to show the active participation of the defendant in efforts to prevent the plaintiffs from receiving their pay under the contract, and where it further appears that the special object of the question was, not to show the contents of the writs, but that the company instituted suits, and that they were brought after a certain date.—Lee v. New Haven, M. & W. R. Co., Fed. Cas. No. 8,197.

[b] (Ala. 1845) Where one partner had been introduced as a witness to support a deed of assignment conveying the partnership property, and had sworn that the deed was fairly made and for the payment of the partnership debts, he may be asked, on the cross-examination, whether one of the debts provided for in the deed was not a debt created by himself for the purpose of raising money to put into the partnership.—Peake v. Stout, 8 Ala. 647.

[c] (Ala. 1887) In an action for the price paid for a mare sold to plaintiff as sound, and alleged to be unsound, it is admissible to ask plaintiff on cross-examination what work the mare had done while in his hands, and it is not error to permit him to answer the question, "Did you treat the mare well or ill?" subject to having the details of the treatment called out on cross-examination.—Whitworth v. Thomas, 83 Ala. 308, 3 South. 781, 3 Am. St. Rep. 725.

[cc] (Cal. 1859) Very great range should be allowed to cross-examination, and much left to the discretion of counsel.—Jackson v. Feather River & G. Water Co., 14 Cal. 18.

[d] (Colo. 1890) The admission by defendant, on cross-examination, of the existence of prejudice against plaintiff, does not preclude an inquiry into the extent of such ill feeling.—Stewart v. Kindel, 15 Colo. 539, 25 Pac. 990.

[dd] (Conn. 1893) In an action for the price of glass bulbs for incandescent lamps supplied to manufacturers of such lamps, defendants alleged that most of the bulbs supplied after a certain date were defective, and that by reason thereof their business and reputation had been damaged. Plaintiff denied the defect, and alleged that, if defendants' business had fallen off, it was due to other causes, partly to an infringement suit begun by Edison against defendants. Defendants' manager testified to the loss of business, and, on cross-examination, that no injunction had issued against them. *Held*, that he could be asked whether suit had been begun and an injunction applied for.—Thill v. Perkins Electric Lamp Co., 63 Conn. 478, 29 Atl. 13.

[e] (Fla. 1895) A witness cannot be cross-examined on evidence that has been stricken out.—Jones v. State, 35 Fla. 289, 17 South. 284.

[ee] (Ill. 1892) It is proper to cross-examine a witness as to his antecedents, but undue prolixity will be prevented.—Toledo, St. L. & K. C. R. Co. v. Bailey, 43 Ill. App. 292.

[f] (Ind. 1878) A witness for the contestants of a will, who has testified in chief, without objection, that testator's sister, who was without means and for whom testator made no provision, had removed to another state to live with her brother at his request, may be asked on cross-examination whether the brother is not regarded as a very wealthy man.—Coryell v. Stone, 62 Ind. 307.

[ff] (Ind. 1891) In an action for personal injuries caused by plaintiff, a customer in defendant's store, falling through a trapdoor in front of the counter, where defendants have attempted to prove by a witness that it would be impracticable to put a railing around the trapdoor, it is proper to ask the witness on cross-examination whether the trapdoor could not have been placed back of the counter.—Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. 555.

[g] (Ind. 1893) There is no impropriety in an inquiry on cross-examination as to whether the witness understood the meaning of a question put to her on her examination in chief.—Pence v. Waugh, 135 Ind. 148, 34 N. E. 860.

[gg] (Iowa, 1859) Where, on the trial of a party charged with stealing a horse, a witness states that he is possessed of the signs and tokens by which horse thieves are known and recognized by each other, it is not error for the court to refuse to compel the witness to disclose the said signs and tokens.—State v. Wilson, 8 Iowa (8 Clarke) 407.

[h] (Iowa, 1888) In an action for personal injuries caused by the backing of defendant's train in response to a signal from an unknown person, the conductor having testified that while standing on the depot platform he heard

the bell ring, and it caused him to turn and face the engine, it is error to permit him to state, on cross-examination by plaintiff, that the ringing of the bell surprised him, and that he was not expecting it; such evidence having a tendency to show that the act was unusual and surprising, and therefore tending to show negligence.—Gadbois v. Chicago, M. & St. P. R. Co., 75 Iowa, 530, 39 N. W. 871.

[hh] (Iowa, 1889) Plaintiff was a laborer employed by the defendant corporation in its stone quarries, and was injured by a defective appliance connected with a tramcar on which he attempted to ride down an incline. *Held* that, on cross-examination of plaintiff, it was error to exclude inquiry as to whether he did not know and had not been advised of the danger of riding on the car.—Wilson v. Dunreath Red Stone Quarry Co., 77 Iowa, 429, 42 N. W. 360, 14 Am. St. Rep. 304.

[i] (Iowa, 1890) It was error to allow plaintiff, on cross-examination, to be asked whether she were willing that physicians who had treated her for 15 years before the injury should disclose her communications to them as to her condition of health.—McConnell v. City of Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778.

[ii] (Iowa, 1891) A witness testified to plaintiff's possession, about two years before, of four watches; that she had disposed of two and retained two, one of which was lost from the trunk. On the cross-examination the witness was asked to state the difference between the watch lost and the other watches. *Held*, that an objection to the question was properly sustained.—Davis v. Chicago, R. I. & P. Ry. Co., 49 N. W. 77, 83 Iowa, 744.

[j] (Kan. 1883) On the question of the quantum of damages recoverable, where the testimony consists mostly of expressions of opinion, great latitude of cross-examination is permissible.—Central Branch U. P. R. Co. v. Andrews, 30 Kan. 590, 2 Pac. 677.

[jj] (La. 1841) A witness, once admitted, may be cross-examined and give evidence in favor of, as well as against, his interest on the points to which he is called to testify.—Hart v. New Orleans & C. R. Co., 1 Rob. 178, 36 Am. Dec. 689.

[k] (Me. 1878) Where a witness for the plaintiff in a libel suit has testified as to threats made by the defendant in his presence, it is competent to ask him on cross-examination whether he really thought that the defendant intended to execute such threats.—Stacy v. Portland Pub. Co., 68 Me. 279.

[kk] (Mass. 1854) Allowing one of several defendants, jointly indicted and tried together, to draw out, by cross-examination of one of the witnesses for the commonwealth, facts pertinent to his defense, though injurious to the other defendants, is no ground of exception by them.—Commonwealth v. Robinson, 67 Mass. (1 Gray) 555.

[l] (Mass. 1882) In suit against a city for injuries received by falling over a gas pipe which projected above the sidewalk, a witness for defendant, who was present at the time of the accident and made a measurement of the pipe, testified that he had been in the employ of a gas company for several years, and that he had charge of this particular pipe. *Held*, that defendant had no ground of exception to the admission of a question, on cross-examination, as to what became of the pipe; the judge ruling that plaintiff was only entitled to the evidence to show what had become of the pipe, and to explain his failure to produce more accurate measurements of its height above the ground.—Donnelly v. City of Fall River, 132 Mass. 299.

[ll] (Mass. 1896) On a trial for robbery, a witness who, in testifying as to an alibi, has stated that he thought of defendant when his attention was called to the robbery, the day after it occurred, may be asked on cross-examination whether he then associated defendant with the robbery.—Commonwealth v. Flynn, 165 Mass. 153, 42 N. E. 562.

[m] (Mich. 1868) In an action against a railroad company for an injury, a witness for the plaintiff, on cross-examination, testified that he had made a written statement about the accident. He was then asked, "Would you recognize a copy of the statement, if it was read over to you?" *Held*, that the question was not proper cross-examination.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

[mm] (Mich. 1868) Where, in an action against a railroad company for an injury caused by an engine, a witness testified to seeing the accident from a point near the platform of the station, it was proper, on cross-examination, to ask him what obstructions were there to prevent seeing the train from the point where the injured party crossed the track, as well as from the platform, since a witness may be cross-examined as to any facts having a tendency to affect or qualify the evidence he has given in chief, whether or not it points to the same circumstances about which he has testified.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

[n] (Mich. 1885) A witness, who has testified that he thought the man he saw at a certain place was defendant, may be asked on cross-examination if there is any doubt existing in his mind that the man seen was defendant.—People v. Wallin, 55 Mich. 497, 22 N. W. 15.

[nn] (Mich. 1888) In an action for slander, where plaintiff has testified that there had been divorce proceedings between himself and his wife, defendant's daughter, and that defendant was hostile towards him on that account, it is proper to ask him, on cross-examination, if he had not been compelled to pay $500 for the support of the child of such marriage, and if he had not threatened to get it back.—Hitchcock v. Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

[o] (Mich. 1891) Where a witness for plaintiff testified that there had been no payments or credits on the mortgage in suit, it was proper for defendant to ask him on cross-examination what he knew, if anything, about a former suit for the same debt.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315, 49 N. W. 37.

[oo] (Mich. 1891) In an action against two persons for money alleged to have been loaned them as partners, it being a theory of the purchasing partner that, when he and the retiring partner went into business, the latter had no money, and that a portion of the money sued for was borrowed by him to pay the money borrowed by him with which to go into business, and he having been sworn on behalf of plaintiff, and there being nothing in the books to show for what it was used, and no testimony that any of it was used for the benefit of the firm, it was proper to allow the purchasing partner a liberal cross-examination of the witness and to ask him if he did not know at the time he went into business that he had no money for that purpose.—Coller v. Porter, 88 Mich. 549, 50 N. W. 658.

[p] (Mich. 1895) In an action for the death of a railroad employé while performing work outside his employment, under the alleged orders of defendant's roadmaster, the latter may be asked on cross-examination whether he directed deceased to do the work.—Walker v. Lake Shore & M. S. Ry. Co., 104 Mich. 606, 62 N. W. 1032.

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[ee] (Ill. 1892) It is proper to cross-examine a witness as to his antecedents, but undue prolixity will be prevented.—Toledo, St. L. & K. C. R. Co. v. Bailey, 43 Ill. App. 292.

[f] (Ind. 1878) A witness for the contestants of a will, who has testified in chief, without objection, that testator's sister, who was without means and for whom testator made no provision, had removed to another state to live with her brother at his request, may be asked on cross-examination whether the brother is not regarded as a very wealthy man.—Coryell v. Stone, 62 Ind. 307.

[ff] (Ind. 1891) In an action for personal injuries caused by plaintiff, a customer in defendant's store, falling through a trapdoor in front of the counter, where defendants have attempted to prove by a witness that it would be impracticable to put a railing around the trapdoor, it is proper to ask the witness on cross-examination whether the trapdoor could not have been placed back of the counter.—Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. 555.

[g] (Ind. 1893) There is no impropriety in an inquiry on cross-examination as to whether the witness understood the meaning of a question put to her on her examination in chief.—Pence v. Waugh, 135 Ind. 148, 34 N. E. 860.

[gg] (Iowa, 1859) Where, on the trial of a party charged with stealing a horse, a witness states that he is possessed of the signs and tokens by which horse thieves are known and recognized by each other, it is not error for the court to refuse to compel the witness to disclose the said signs and tokens.—State v. Wilson, 8 Iowa (8 Clarke) 407.

[h] (Iowa, 1888) In an action for personal injuries caused by the backing of defendant's train in response to a signal from an unknown person, the conductor having testified that while standing on the depot platform he heard

the bell ring, and it caused him to turn and face the engine, it is error to permit him to state, on cross-examination by plaintiff, that the ringing of the bell surprised him, and that he was not expecting it; such evidence having a tendency to show that the act was unusual and surprising, and therefore tending to show negligence.—Gadbois v. Chicago, M. & St. P. R. Co., 75 Iowa, 530, 39 N. W. 871.

[hh] (Iowa, 1889) Plaintiff was a laborer employed by the defendant corporation in its stone quarries, and was injured by a defective appliance connected with a tramcar on which he attempted to ride down an incline. *Held* that, on cross-examination of plaintiff, it was error to exclude inquiry as to whether he did not know and had not been advised of the danger of riding on the car.—Wilson v. Dunreath Red Stone Quarry Co., 77 Iowa, 429, 42 N. W. 360, 14 Am. St. Rep. 304.

[i] (Iowa, 1890) It was error to allow plaintiff, on cross-examination, to be asked whether she were willing that physicians who had treated her for 15 years before the injury should disclose her communications to them as to her condition of health.—McConnell v. City of Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778.

[ii] (Iowa, 1891) A witness testified to plaintiff's possession, about two years before, of four watches; that she had disposed of two and retained two, one of which was lost from the trunk. On the cross-examination the witness was asked to state the difference between the watch lost and the other watches. *Held*, that an objection to the question was properly sustained.—Davis v. Chicago, R. I. & P. Ry. Co., 49 N. W. 77, 83 Iowa, 744.

[j] (Kan. 1883) On the question of the quantum of damages recoverable, where the testimony consists mostly of expressions of opinion, great latitude of cross-examination is permissible.—Central Branch U. P. R. Co. v. Andrews, 30 Kan. 590, 2 Pac. 677.

[jj] (La. 1841) A witness, once admitted, may be cross-examined and give evidence in favor of, as well as against, his interest on the points to which he is called to testify.—Hart v. New Orleans & C. R. Co., 1 Rob. 178, 36 Am. Dec. 689.

[k] (Me. 1878) Where a witness for the plaintiff in a libel suit has testified as to threats made by the defendant in his presence, it is competent to ask him on cross-examination whether he really thought that the defendant intended to execute such threats.—Stacy v. Portland Pub. Co., 68 Me. 279.

[kk] (Mass. 1854) Allowing one of several defendants, jointly indicted and tried together, to draw out, by cross-examination of one of the witnesses for the commonwealth, facts pertinent to his defense, though injurious to the other defendants, is no ground of exception by them.—Commonwealth v. Robinson, 67 Mass. (1 Gray) 555.

[l] (Mass. 1882) In suit against a city for injuries received by falling over a gas pipe which projected above the sidewalk, a witness for defendant, who was present at the time of the accident and made a measurement of the pipe, testified that he had been in the employ of a gas company for several years, and that he had charge of this particular pipe. *Held*, that defendant had no ground of exception to the admission of a question, on cross-examination, as to what became of the pipe; the judge ruling that plaintiff was only entitled to the evidence to show what had become of the pipe, and to explain his failure to produce more accurate measurements of its height above the ground.—Donnelly v. City of Fall River, 132 Mass. 299.

[ll] (Mass. 1896) On a trial for robbery, a witness who, in testifying as to an alibi, has stated that he thought of defendant when his attention was called to the robbery, the day after it occurred, may be asked on cross-examination whether he then associated defendant with the robbery.—Commonwealth v. Flynn, 165 Mass. 153, 42 N. E. 562.

[m] (Mich. 1868) In an action against a railroad company for an injury, a witness for the plaintiff, on cross-examination, testified that he had made a written statement about the accident. He was then asked, "Would you recognize a copy of the statement, if it was read over to you?" *Held*, that the question was not proper cross-examination.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

[mm] (Mich. 1868) Where, in an action against a railroad company for an injury caused by an engine, a witness testified to seeing the accident from a point near the platform of the station, it was proper, on cross-examination, to ask him what obstructions were there to prevent seeing the train from the point where the injured party crossed the track, as well as from the platform, since a witness may be cross-examined as to any facts having a tendency to affect or qualify the evidence he has given in chief, whether or not it points to the same circumstances about which he has testified.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

[n] (Mich. 1885) A witness, who has testified that he thought the man he saw at a certain place was defendant, may be asked on cross-examination if there is any doubt existing in his mind that the man seen was defendant.—People v. Wallin, 55 Mich. 497, 22 N. W. 15.

[nn] (Mich. 1888) In an action for slander, where plaintiff has testified that there had been divorce proceedings between himself and his wife, defendant's daughter, and that defendant was hostile towards him on that account, it is proper to ask him, on cross-examination, if he had not been compelled to pay $500 for the support of the child of such marriage, and if he had not threatened to get it back.—Hitchcock v. Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

[o] (Mich. 1891) Where a witness for plaintiff testified that there had been no payments or credits on the mortgage in suit, it was proper for defendant to ask him on cross-examination what he knew, if anything, about a former suit for the same debt.—Hamilton Provident & Loan Soc. v. Northwood, 86 Mich. 315, 49 N. W. 37.

[oo] (Mich. 1891) In an action against two persons for money alleged to have been loaned them as partners, it being a theory of the purchasing partner that, when he and the retiring partner went into business, the latter had no money, and that a portion of the money sued for was borrowed by him to pay the money borrowed by him with which to go into business, and he having been sworn on behalf of plaintiff, and there being nothing in the books to show for what it was used, and no testimony that any of it was used for the benefit of the firm, it was proper to allow the purchasing partner a liberal cross-examination of the witness and to ask him if he did not know at the time he went into business that he had no money for that purpose.—Coller v. Porter, 88 Mich. 549, 50 N. W. 658.

[p] (Mich. 1895) In an action for the death of a railroad employé while performing work outside his employment, under the alleged orders of defendant's roadmaster, the latter may be asked on cross-examination whether he directed deceased to do the work.—Walker v. Lake Shore & M. S. Ry. Co., 104 Mich. 606, 62 N. W. 1032.

[pp] (Mich. 1895) Defendant, in an action for lumber sold, involving the issue whether plaintiff and K. were partners, died pending an ap-

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peal from the justice to the circuit court. At the trial in the latter court, the justice (a witness for plaintiff) testified that deceased testified before him that he knew that the lumber belonged to plaintiff, and that he had made plaintiff payments on it. *Held*, that on cross-examination it was proper to allow the witness to state that deceased testified that he had paid the entire bill for building the house, that he let the entire job—work and materials—to K., and supposed plaintiff was in partnership with him.—Reiser v. Portere, 106 Mich. 102, 63 N. W. 1041.

[q] (Minn. 1896) It is error to refuse to permit a witness to be cross-examined on a material point.—Lynch v. Free, 64 Minn. 277, 66 N. W. 973.

[qq] (Miss. 1888) In an action for ejection from a train, defendant contended that plaintiff did not produce his ticket within a reasonable time when requested, that he had sold his ticket to another, and that he refused to pay his fare. Plaintiff testified that he had not sold or given away his ticket on the train, and that he had it after he left the train. *Held*, that plaintiff was properly asked, on cross-examination, what became of his ticket.—Louisville & N. R. Co. v. Maybin, 66 Miss. 83, 5 South. 401.

[r] (N. H. 1858) Where, in assumpsit on a warranty for an alleged unsoundness of a horse sold, plaintiff's witness has testified, on direct examination, that he heard the horse cough, and asked defendant if he had not got the heaves, or a heave cough, it is competent for defendant to ask the witness whether he ever saw anything about the horse that indicated the heaves.—Spear v. Richardson, 37 N. H. 23.

[rr] (N. Y. 1864) A witness cannot be required to put a question to a person in court to elicit information; e. g., as to the full name of a person of which she professes to be ignorant.—Wehrkamp v. Willet, 4 Abb. Dec. 548.

[s] (N. Y. 1889) It having been suggested that the property was stolen, it was proper, on cross-examination of the person who had charge of it, to ask him if any effort had been made to trace out the theft.—Williamson v. New York, N. H. & H. R. Co., 56 N. Y. Super. Ct. (24 Jones & S.) 508, 4 N. Y. Supp. 834.

[ss] (N. Y. 1889) In an action to recover for legal services rendered to defendant's testator, plaintiff offered no evidence of his cause of action, claiming that it stood admitted by the pleadings. Defendants set up a note as a counterclaim, and produced a witness to prove its consideration. *Held*, that the court properly refused to permit plaintiff to ask the witness on cross-examination if he knew who was testator's legal adviser; plaintiff having neither announced an intention to abandon his position nor stated how the answer to the question would tend to show that he had rendered the services sued for.—Moissen v. Kloster, 114 N. Y. 638, 21 N. E. 1050.

[t] (N. Y. 1891) In an action for personal injuries caused by a defective highway, defendant set up in defense want of funds in the hands of the commissioners for repairs, and a commissioner called by defendant testified on the subject of such funds. *Held* not error to permit on cross-examination, the question: "Did the board, in the spring of 1889, call for the appropriation money to be voted at town-meeting?"—Clapper v. Town of Waterford, 62 Hun, 170, 16 N. Y. Supp. 640, judgment reversed (1892) 131 N. Y. 382, 30 N. E. 240.

[tt] (N. Y. 1892) Defendant's foreman having merely stated that it was his "understanding" that he was told to use the "elevators," rather than one only, it was permissible to ask him on cross-examination if he did not understand the direction to refer to the freight elevator.—Ferris v. Aldrich, 64 Hun, 639, 19 N. Y. Supp. 353.

[u] (Or. 1886) In a criminal prosecution, it was proper to ask a witness on cross-examination: "Have you, since the murder of that man, participated in a meeting of the Masonic lodge, in which his murder was discussed, and at which time you laid the plans and discussed the means by which you could secure the accused's conviction? And did you not at the same meeting threaten with vengeance any man who was a member of that body who would assist in any way the accused to establish his innocence?" Such questions had a direct tendency to show the witness' feeling, and on a cross-examination in a capital case great latitude must be allowed.—State v. Mah Jim, 13 Or. 235, 10 Pac. 306.

[uu] (Pa. 1869) Every proper question calculated to show the bias of a witness, or his capacity or intelligence, or the want of it, is admissible.—Yeager v. Weaver, 1 Leg. Gaz. 156.

[v] (Pa. 1885) It is the purpose of cross-examinations to show how the testimony in chief tallies with other facts and circumstances connected with the fact stated.—Commonwealth v. Burke, 3 Lanc. Law Rev. 138.

[vv] (Pa. 1891) In an action against an insurance company to recover the amount of a loss by fire, the question was as to whether a contract of insurance had been renewed; and it appeared that, after the fire, an agent of defendant received from plaintiff a check for the premium, which he retained for two weeks without objection. *Held* that, the agent having testified that there was no agreement of insurance, it was not exceeding the limits of proper cross-examination to ask him whether he would not have insisted upon the payment of the check if no fire had occurred.—Long v. North British & Mercantile Ins. Co., 137 Pa. 335, 20 Atl. 1014, 21 Am. St. Rep. 879.

[w] (Tex. 1887) In an action between persons claiming under different attachments, where appellee has alleged that plaintiffs in the writ under which appellants claim had notice of the prior levy, and appellants have called the attorney for such plaintiffs, who testifies that he wrote the levy and return on the prior writ, and that at that time the return only described a "storehouse and lots," whereas now the numbers of the lots had been interlined, he may testify on cross-examination that he knew at the time the property intended to be seized, and its proper description.—Riordan v. Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

[ww] (Tex. 1888) In an action on a note given for sheep, which defendant claimed were infected, he testified that a large number of them had died. *Held* proper to ask him, on cross-examination, how many of the sheep he had sold to a third person.—Labbe v. Corbett (Sup.) 6 S. W. 812.

[x] (Tex. 1896) Where the prosecuting witness was permitted to testify that he thought defendant shot him because of his having been a witness in a certain case, it was error to refuse to permit defendant to cross-examine the witness as to whether defendant was a party to or connected with such case.—Plew v. State (Cr. App.) 35 S. W. 366.

[xx] (Vt. 1868) In an action against a railroad company, where the condition of its track at the time of an accident was in issue, defendant, to contradict the testimony of plaintiff's witness as to its condition both before and after the accident, introduced a witness who could testify only as to its condition after the accident. *Held*, that it was competent for plaintiff to show, upon the cross-examination of one of defendant's witnesses, that a section foreman of defendant, within knowledge and reach, was with plaintiff's witness on both occasions when he saw the track, and to argue, from defendant's

neglect to call him, that the testimony was true.—Beattie v. Grand Trunk Ry. Co., 41 Vt. 275.

[y] (Vt. 1888) Where defendant's bail in behalf of defendant has testified that, when he bailed him, he advised defendant to go away to escape a civil suit, and that he then believed he would come back, there is no error in allowing the inquiry, on cross-examination, as to what he thought about defendant's coming back after he had got a bench warrant for him, though its materiality is not apparent.—State v. Flint, 60 Vt. 304, 14 Atl. 178.

[yy] (Vt. 1889) On cross-examination, the question whether at a former trial the witness testified to "all the particulars of what transpired," is properly excluded.—Bridgman v. Corey's Estate, 62 Vt. 1, 20 Atl. 273.

[z] (Vt. 1894) Where plaintiffs claimed a certain line as the boundary between their land and that of defendant, plaintiffs may bring out, by cross-examination of defendant, in order to show that they had made claim of title up to such line, that defendant knew that they so claimed, though plaintiffs had previously put in testimony on the same point.—Swerdferger v. Hopkins, 67 Vt. 136, 31 Atl. 153.

[zz] (Wis. 1878) In a suit by heirs to avoid irregular executors' sales of their ancestor's lands, it is proper to exclude the testimony on cross-examination of one of the heirs, who executed a release and quitclaim of the property sold, as to what he would have done at the time of the release if he had supposed that the sale could be avoided.—O'Dell v. Rogers, 44 Wis. 136.

§ 932. Knowledge or source of information.

Value of property, see post, § 945.

[a] (Ala. 1884) On a trial for murder, one who was present at the killing, and who has testified that he did not hear a certain remark made by deceased as he rode up to the place where defendants were, may be asked on cross-examination, "Were you in a position where you could have heard?"—Tenney v. State, 77 Ala. 33.

[b] (Ala. 1888) A witness having stated on re-examination that a hog killed and cleaned at the house of the alleged thief was the stolen hog, was properly asked, on cross-examination, as to how he knew it was the stolen hog.—Tate v. State, 86 Ala. 33, 5 South. 575.

[c] (Cal. 1889) By Code Civ. Proc. § 2048, a witness may be asked, on cross-examination, as to any matter bearing directly or indirectly on any portion of his testimony in chief. In an action involving the right to water between upper and lower riparian owners, a witness for plaintiff testified, concerning the stream in controversy, that he knew where it crossed a certain lane. *Held*, that he might be asked if it was not from the fact that the creek did cross at that point, and washed sand on plaintiff's land, that the controversy between him and defendants arose, as the question tends as well to test the witness' knowledge as to the facts stated by him on direct examination, as also his credibility.—Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846.

[d] (Ind. 1885) It is competent for the cross-examining counsel to ask a medical witness what method he pursued in making an examination of an injured person, and also to ask questions for the purpose of testing the knowledge and skill of the witness.—Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

[e] (Ind. 1892) Plaintiff and defendant were partners. Plaintiff sold his interest in their business to defendaut. In an action for the balance due on such sale defendant alleged that plaintiff, whose business it was to state an account, omitted in such statement an indebtedness of the firm. In the deposition of plaintiff it was asked him on cross-examination how he ascertained the indebtedness of the firm, and he answered that it was ascertained from the firm books. *Held*, that such question was not within the bounds of legitimate cross-examination.—Christie v. Henley, 5 Ind. App. 59, 31 N. E. 579.

[f] (Mich. 1894) In an action of trespass for having unlawful carnal knowledge of plaintiff (defendant's servant) without her consent, where defendant's wife testified that plaintiff, while a member of the family, had morning sickness, it was competent to ask her, as affecting her credibility, at what stage of pregnancy morning sickness occurred.—Hart v. Walker, 100 Mich. 406, 59 N. W. 174.

[g] (N. Y. 1893) In an action for defendant's refusal to accept the bust of a person which he ordered, on the ground that it is not a good likeness, where a witness has testified that it is a good likeness, it is proper, on cross-examination, for the purpose of testing his knowledge, to hand him a picture, and ask him if it is a picture of such person.—Schwartz v. Wood, 67 Hun, 648, 21 N. Y. Supp. 1053.

[h] (Vt. 1888) A witness having testified that he heard a team pass a house where he was stopping on the night of the previous attempt to fire the building, and the evidence having showed that the team passed when he was with a certain other person, it was competent to ask witness, to test his accuracy, whether this was the only night on which he heard a team pass.—State v. Ward, 61 Vt. 153, 17 Atl. 483.

§ 933. Drawing out whole of transaction or conversation.

Cross-examination of party, see post, § 968 [c, d].
Drawing out whole of transaction or conversation on redirect examination, see post, § 1002.
Right to show whole statement in order to sustain witness or rebut evidence of inconsistent statements, see post, § 1263.

[a] Where, on direct examination, a portion of a conversation is drawn out, the other party, on cross-examination, is entitled to have the whole conversation detailed.
—(Cal. 1866) People v. Strong, 30 Cal. 151;
(Ga. 1881) Betts v. State, 66 Ga. 508;
(Ind. 1872) Metzer v. State, 39 Ind. 596;
(Iowa, 1859) Gaddis v. Lord, 10 Iowa, 141;
(Mich. 1880) Lichtenburg v. Mair, 43 Mich. 387, 5 N. W. 455;
(Neb. 1888) Campbell v. Holland, 22 Neb. 587, 35 N. W. 871.

[b] (U. S. 1892) In an action on a life policy excluding from the risks assumed the death of assured by his own hand, sane or insane, where the defense was suicide, defendant's secretary, as a witness for defendant, testified that he understood from plaintiff's agent, when the proofs of loss were submitted, that deceased met his death by inflicting a pistol shot, and was asked on cross-examination if he had not stated at such time that, if it depended upon him, the loss should be paid without delay. *Held*, that the question was relevant, as calling for a portion of the conversation, part of which the witness had given.—Home Ben. Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160, affirming Sargent v. Home Ben. Ass'n (C. C. 1888) 35 Fed. 771.

[c] (Ala. 1851) Where part of a transaction has been elicited from a witness on the direct examination, the opposite party has the right, on the cross-examination, to inquire into all the facts and circumstances connected with it, although they might not be admissible as inde-

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pendent testimony.—Lanier v. Branch Bank at Montgomery, 18 Ala. 625.

[d] (Fla. 1891) In a prosecution for trespass for destroying plaintiff's ginhouse, plaintiff claimed that defendant hired a third person to burn the gin. Defendant, on cross-examination of a witness, asked him whether such third person owed him anything, and whether he had not told such third person that, if he would pay him a certain sum and burn the gin, the witness would give him a certain sum. Such witness was examined in chief as to conversations between him and such third person in reference to the burning of the gin, and with reference to what defendant had said to such third person regarding the same. *Held*, that such cross-examination was proper, as the defendant was entitled to a full exposure of the entire conversations relating to the subject.—Williams v. Dickenson, 28 Fla. 90, 9 South. 847.

[e] (Ga. 1879) Where a witness, who was an administrator, testifies to some facts touching his administration, he may, on cross-examination, be fully questioned in regard thereto.—Barker v. Blount, 63 Ga. 423.

[f] (Ind. 1877) One who has testified on his direct examination to testimony given by a witness on a former trial may be asked, on cross-examination, to state the whole of such testimony; and the court should not require the cross-examining counsel to state what he expects to prove by this question.—Harness v. State, 57 Ind. 1.

[g] (Ind. 1883) A witness, testifying that another witness had on another trial testified to certain facts, may be cross-examined as to what other facts the witness testified to on the former trial.—Carey v. Richmond, 92 Ind. 259.

[h] (Mich. 1862) The object of cross-examination is to elicit the whole truth of transactions supposed to have been partially explained; and any question tending to fill up designed or accidental omissions of the witness are proper.—Chandler v. Allison, 10 Mich. 460.

[i] (Mich. 1862) No one can be compelled to make his adversary's witness his own, in order to fill up or explain a transaction already partially explained by him.—Chandler v. Allison, 10 Mich. 460.

[j] (Mich. 1868) When a party places a witness on the stand to testify to facts which tend to support his side of the issue, and questions him concerning such facts, it is the right of the opposite party, on cross-examination, to go as fully into the subject as may be necessary to draw from the witness all he may know about the transaction concerning which he has testified, and to put before the jury any pertinent facts which will have a tendency to controvert the testimony which has been given by the witness in favor of the party calling him.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

[k] (Mich. 1875) In an action against a railway company for negligently transporting hay, whereby it became wet and damaged, in which evidence of its condition at a distant port, from which it was shipped by vessel to the place of delivery to defendant, is admitted as evidence of its condition at the port of delivery, it is proper, on cross-examination, to inquire into the mode of transhipment, the manner of its storage, the weather, and the condition of the hay upon its arrival.—Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251.

[l] (Mich. 1895) Where, in a trial for bribery, the testimony of a state's witness showed that he had instigated another to advise defendant to sell his vote, and had then concealed himself with officers for the purpose of detecting the same, defendant could cross-examine as to witness' connection with the case, and the names of all who were concerned in the alleged detection.—People v. Liphardt, 105 Mich. 80, 62 N. W. 1022.

[m] (Mo. 1884) Where a married woman testifies to what occurred before the notary who took her acknowledgment to a deed, it is competent to cross-examine her as to all that occurred in reference to the matter.—Drew v. Arnold, 85 Mo. 128.

[n] (Neb. 1884) On cross-examination of a witness who was present and an active participant in the main transaction involved in a cause on trial, and about which he testifies, the cross-examining counsel should be permitted to inquire into all the relevant surrounding facts and circumstances which form a part of the transaction.—Fossbinder v. Svitak, 16 Neb. 499, 20 N. W. 866.

[o] (N. Y. 1895) In an action by an executor to recover money delivered to defendant by testator for certain purposes, plaintiff testified that he demanded that defendant account for the money, and that defendant admitted that testator had delivered the money to him. *Held*, that it was proper to permit defendant, on cross-examination of plaintiff, to bring out the balance of the conversation, to the effect that defendant also related the circumstances of the delivery of the money given him by testator, and what testator directed him to do with it.—Todd v. Vaughan, 90 Hun, 70, 35 N. Y. Supp. 457.

[p] (Pa. 1827) Where, in an action of debt on a sealed note, plaintiff desired to show an agreement by defendants that the note was to be drawn payable with interest, and that payments made on account were appropriated to the interest, but such evidence was not admissible, the plaintiff could not, by cross-examination of a witness for the defendant, elicit such agreement, though it was a part of the conversation of which the witness had given evidence.—Reichart v. Beidleman, 17 Serg. & R. 41.

[q] (Tex. 1877) On trial for theft of a gelding, the state proved that, subsequent to the theft, the animal was sold by defendant to a witness from whom the owner subsequently made reclamation, and that thereupon the witness informed defendant of the claim thus set up to the animal, and a part of the conversation which then ensued between witness and defendant was elicited by the state. *Held*, that defendant was entitled on cross-examination to have the witness state the remainder of the conversation.—Massey v. State, 1 Tex. App. 563.

[r] (Tex. 1888) Defendant's witness, deceased's attending physician, in answer to a question why he thought, several hours after the injury, that deceased was not mortally wounded, gave a part of a conversation with deceased at that time relating to the shooting. *Held*, that the state, on cross-examination, was not entitled to the whole conversation and the statements made by deceased, the conversation not being called for by defendant's question.—Irby v. State, 25 Tex. App. 203, 7 S. W. 705.

[s] (Tex. 1891) In an action for damages for refusal to allow plaintiff to build a house for defendant, according to a contract, there was evidence that the parties had abandoned the original contract, and entered into a new one, and plaintiff was permitted to testify in regard to the proposed new contract. *Held*, that it was error to refuse to allow defendant, by cross-examination and by other testimony, to show all that was said and done relative to the new contract.—Yarborough v. Davis (Sup.) 15 S. W. 713.

§ 934. Time of occurrence or condition.

Limitation of cross-examination to subject of direct examination, see post, § 951.

[a] (Conn. 1888) A legatee called by contestant testified that he and another legatee ar-

ranged that one of them should always be in the house with testatrix when their uncle was there; that their uncle had procured an indorsement from her without their knowledge, and they did not intend that he should get any more. *Held* that, on cross-examination, witness might be asked, for the purpose of refreshing his memory, and of proving that the arrangement was made 10 years before the will, and in the lifetime of testatrix's husband, whether he did not know that the uncle had procured indorsements from testatrix's husband to the latter's loss.—Appeal of Dale, 57 Conn. 127, 17 Atl. 757.

[b] (Neb. 1889) In a bastardy proceeding complaining witness testified that defendant had sexual intercourse with her on a day named. Defendant, while testifying in his own behalf, denied that he had intercourse with her on that day. *Held*, that any question relating to the situation of plaintiff and defendant while together on that day, or about that time, was proper on cross-examination.—Planck v. Bishop, 26 Neb. 589, 42 N. W. 723.

[c] (Neb. 1891) Where complainant in a bastardy proceeding has testified that she was unmarried at the beginning of the action, it is proper to prove, on cross-examination, any fact or circumstance tending to show that she was married when the suit was instituted.—Olson v. Peterson, 33 Neb. 358, 50 N. W. 155.

[d] (Tex. 1858) Where it is necessary to prove the time of the indorsement of a note, and plaintiff swears on his voir dire that only he and the defendant know the time, the defendant's counsel can cross-examine him as to his means of proving the time by some one else.—Johnson v. Ward, 21 Tex. 475.

§ 935. Truth of direct testimony.

[a] (Ala. 1888) Where a witness testified that he had built a certain house, he was properly asked, on cross-examination, if he did not know that another person built that house.—Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 6 South. 143, 4 L. R. A. 848.

[b] (Ala. 1889) It is improper to ask a witness if a certain portion of his testimony is as truthful as the balance.—Rains v. State, 88 Ala. 91, 7 South. 315.

[c] (Iowa, 1888) A witness, asked, on cross-examination, in language hardly proper, whether his testimony was not false, resented the question. He was then asked whether certain statements made by him were not false. *Held*, that the court, to prevent unseemly scenes between counsel and witness, properly sustained an objection to the latter question, and stopped the course of the examination.—Baldwin v. St. Louis, K. & N. W. Ry. Co., 75 Iowa, 297, 39 N. W. 507, 9 Am. St. Rep. 479.

[d] (Mich. 1891) In a criminal case defendant's wife testified that she was present when the alleged crime was committed, and the prosecuting attorney thereupon asked her: "Is it not a fact that you were not there at all?" "Has this been written out?" "Is it not a fact that you and your husband have concocted the whole story?" "You have been a witness for your husband in every lawsuit he has had, have you not?" *Held*, that such questions were improper, as reflecting on the character of the witness.—People v. Cahoon, 88 Mich. 456, 50 N. W. 384.

[e] (Neb. 1880) The answer of a witness on his direct examination, however positive it may be, does not preclude the adverse party, upon cross-examination, from requiring him to deny or reaffirm his previous statement, or from stating the circumstances connected therewith which tend to disprove it.—Stanton County v. Canfield, 10 Neb. 389, 6 N. W. 466.

[f] (N. Y. 1894) It is not competent to ask the witness on cross-examination whether certain testimony given by him was true.—Frankel v. Wolf (Com. Pl.) 7 Misc. Rep. 190, 27 N. Y. Supp. 328.

[g] (Ohio, 1863) Where a witness in his examination in chief testifies to the existence of a material fact, which, when established, is conclusive between the parties, questions which call upon the witness to reaffirm, qualify, or deny his statement in chief as to the existence of such fact are within the just limits of a cross-examination, and it is error to exclude them.—Phillips v. Elwell, 14 Ohio St. 240, 84 Am. Dec. 373.

[h] (Wash. 1895) When, in a prosecution for murder, a witness, in testifying as to the beginning of the difficulty between defendant and deceased, uses very loose language, it is error to refuse to permit him on cross-examination to be asked whether he is testifying by guess or by what he knows.—State v. Rutten, 13 Wash. 203, 43 Pac. 30.

§ 936. Facts inconsistent with testimony.

Cross-examination as to irrelevant, collateral, or immaterial matters in general, see post, §§ 955–957.

—— *of accused in criminal prosecutions as to facts inconsistent with testimony, see* post, § 981.

—— *of party as to facts inconsistent with testimony, see* post, § 969.

Inconsistent statements by witness in general, see post, §§ 1209–1266.

[a] (Ala. 1889) Where defendant, on the trial of a claim of exemption, testified that he had invested about $3,000 in lands, it was competent for plaintiff to ask him on cross-examination, for the purpose of testing the truth of his explanation, where the lands were located, and whether any deeds were executed for them.—Davis v. Hays, 89 Ala. 563, 8 South. 131.

[b] (Ala. 1893) In an action for wrongful attachment, where there is evidence that there was a conspiracy between plaintiff and another to defraud creditors by false transfers or sales shortly before the attachment, such other, a witness for plaintiff, having testified that plaintiff's credit at a bank, of which witness was a member, was good before the attachment, and after the attachment was destroyed, it is proper for defendant to ask on cross-examination if plaintiff had not been refused credit at the bank just prior to the attachment.—Little v. Lichkoff, 98 Ala. 321, 12 South. 429.

[c] (Cal. 1896) Unless apparently done in bad faith, for the sole purpose of prejudicing him with the jury, a defendant, when on the stand as a witness in his own behalf, may properly be asked by the prosecution in cross-examination questions which, if answered in the affirmative, will tend to impeach statements made in his direct examination.—People v. Foo, 112 Cal. 17, 44 Pac. 453.

[d] (Colo. 1891) In an action on a note purporting to have been made by defendant and one S., defendant pleaded nonexecution, and it appeared that his name had been signed by S. S. testified that defendant authorized him to sign his name, and on his cross-examination defendant's attorney asked him whether, shortly before his arrest for forging defendant's name to various notes, he did not ask defendant to receive money for him, and apply it on the notes, so as to avoid an exposure, and whether he did not on account of the exposure threaten suicide, etc. *Held*, that the questions should have been allowed, though the witness had testified as to some of the facts sought to be brought out.—Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698.

[e] (Colo. 1893) In an action for personal injuries resulting from an electric shock caused

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by contact with defendant's street car while alighting therefrom, it was proper to ask a witness, who testified that electricity could not be transmitted to a trail car in such quantities as to cause personal injuries, whether the metal railings around all defendant's cars were not blistered by leakage of electricity; and the question is not objectionable for not being limited to the car by which plaintiff was injured, and to the time of the accident, when the witness testified that he did not know of the injury till the day after it happened, nor what car caused it.—Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

[f] (Ill. 1884) Where a railroad agent has testified that $33 was the schedule rate per car for freight between certain points, he may be asked on cross-examination whether the company had ever received that amount for a car of freight between said points.—Black v. Wabash, St. L. & P. Ry. Co., 111 Ill. 351, 53 Am. Rep. 628.

[g] (Ill. 1889) Where the surviving member of a firm denied the execution of an acceptance on examination in chief, it is proper to ask him, on cross-examination, by way of impeachment, as to whether the firm's bank had ever, to his knowledge, made payments to the payee of the acceptance on account of the drawer.—Bruner v. Nisbett, 31 Ill. App. 517.

[h] (Ill. 1895) Where a physician, on his direct examination, testified as to the value of services while attending smallpox patients, it is not reversible error to allow him, on cross-examination, in reply to the question, "Would you take a case like that out there in the pest house for twice the regular charges?" to state that he would not take such a case outside his family patients at any figure, as it was presented as going to the witness' credibility.—Winnebago County v. City of Rockford, 61 Ill. App. 656.

[i] (Kan. 1888) In an action against a railroad for personal injury, where the issue was whether the train dispatcher was negligent in giving an order to a conductor to meet another train composed of two sections, and to establish the negligence of the train dispatcher the conductor testified that, until he saw the second section of the train he had orders to meet, he had no knowledge that said section was on the road, *held*, that on cross-examination it was competent to ask him if he understood the signals carried by the first section; if, by those signals, he knew there was a second section following, which had the right to the road; and if he had the right to leave the station in the face of the signals carried by the first section.—Hannibal & St. J. R. Co. v. Kanaley, 39 Kan. 1, 17 Pac. 324.

[j] (Mass. 1896) Where a witness, testifying to the value of his farm, testified as to other farms in the vicinity, their improvements, and that it was a good neighborhood, it was proper to permit counsel, on cross-examination, to show that the house nearest his own was so occupied as to affect the neighborhood unfavorably, as a place of residence.—Buck v. City of Boston, 165 Mass. 509, 43 N. E. 496.

[k] (Mich. 1866) In an action of trespass on the case, based on a special agreement, a witness in his direct examination had stated that he had delivered to the defendants all of certain notes, etc., which he had agreed by his contract to deliver. His testimony was to prove the performance of the condition of the contract. *Held*, that the defendants could cross-examine him to show that his statement in the first examination was incorrect, and that he had not delivered as he contracted to.—Thompson v. Richards, 14 Mich. 172.

[l] (Mich. 1884) Where, in an action for personal injuries, a physician testifies that, when he examined plaintiff after the accident, there was no sign of any hurt, he may be cross-examined as to what plaintiff said when, on touching him, the physician asked him if he felt pain.—Joslin v. Grand Rapids Ice & Coal Co., 53 Mich. 322, 19 N. W. 17.

[m] (Mich. 1892) In an action by a purchaser of goods against a foreign manufacturer, for failure to deliver them at the time specified in the contract of sale, defendant's managing agent, who has testified that the order was not filled for lack of manufacturing capacity, and that he was unwilling to extend credit to the purchaser, may be cross-examined with a view of showing that the failure to fill the order was due to the fact that defendant had entered into a combination with other manufacturers not to sell goods to American houses for a certain time.—Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

[n] (Minn. 1883) In an action against a railway company for an injury alleged to have been caused by running a train at too great a speed, one of the brakemen on the train testified that, at the place where the accident occurred, the train was running about as fast as it could go, and that trains generally went slowly there. *Held*, that it was proper to ask him, on cross-examination, if it was not customary on trains on which he was employed to run with considerable speed at that point to overcome the grade.—Ransier v. Minneapolis & St. L. Ry. Co., 30 Minn. 215, 14 N. W. 883.

[o] (Mo. 1894) In cross-examining a witness to show that he was at a certain place other than that testified to by him, it is error to ask him if he was at such place, attending a divorce for adultery, the object being merely to get a discreditable matter before the jury.—Ephland v. Missouri Pac. Ry. Co., 57 Mo. App. 147.

[p] (N. Y. 1862) Where plaintiff testified, on direct examination in an action for falsely warranting the soundness of a horse, that the horse was worth but $125 when he bought him, and would have been worth $500 if he were as warranted, the defendant on cross-examination may impeach such testimony by showing that he sold the horse in less than three months after he bought him for $400, which was the amount paid; there being no pretense of any change in the horse from the time of his purchase to the time of sale by plaintiff.—Springsteed v. Lawson, 14 Abb. Prac. 328; Springstead v. Same, 23 How. Prac. 302.

[q] (N. Y. 1877) The general rule that, when general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation, is subject to the exception that, when a witness testifies as to general reputation of a physician as to skill, he may be asked, on cross-examination, in order to lessen the effect of his testimony as to general reputation, or to show a bias in favor of the party calling him, whether he has not heard reports tending to contradict the purport and effect of his testimony.—Carpenter v. Blake, 10 Hun, 358.

[r] (N. Y. 1877) A scow partially loaded with cattle belonging to plaintiff, while being towed by defendant's tug, was partially swamped, and some of the cattle lost. In an action for damages plaintiff's evidence tended to prove that the injury was caused by the improper speed of the tug. Defendant gave evidence showing that it resulted solely from the unsafe condition and improper management of the scow. Plaintiff proved by the owner of the scow that she was capable of carrying a heavier load than she had at the time, and that there was no difficulty in towing her at a safe speed, and that she had frequently been towed since the accident. *Held*, that it was proper on cross-examination to ask the witness how many times the scow had been sunk by accident, as qualifying the witness' testimony on the direct examination, and also discrediting him.—Baird v. Daly, 68 N. Y. 547.

[s] (N. Y. 1890) In an action for the rent of a barn, where defendants claimed damages by reason of plaintiff's misrepresentations as to its custom, a witness for plaintiff, on his direct examination, was permitted to testify that he had leased the barn for the previous year, and that he considered it was worth the rent he paid for it. *Held*, that it was competent for defendants to show upon cross-examination that in a certain other year he had lost on the rent of the barn.—Fonda v. Lape, 56 Hun, 639, 8 N. Y. Supp. 792.

[t] (N. Y. 1890) At the trial of an action for labor and material in constructing stairs in a building owned by defendant, a witness called by plaintiff to prove his employment by defendant, which was denied, and who was employed in some work on the premises for defendant, was asked on his cross-examination whether he was not a contractor for the entire job. *Held*, that the question was improperly excluded, as an answer in the affirmative would have tended to discredit the witness' statement that plaintiff was employed by defendant to put up the stairs.—Hardy v. Main, 56 Hun, 221, 9 N. Y. Supp. 253.

[u] (N. C. 1881) A witness for defendant, sued on a note, whose testimony supports the allegation of the answer that it was obtained by fraudulent representations that a debt of a third person, sold to defendant and constituting the consideration for the note sued on, had been prosecuted to judgment, when it was only secured by a note, may be asked in cross-examination whether defendant did not on the same day purchase another and wholly unsecured note of such third person.—Gilmer v. Hanks, 84 N. C. 317.

[v] (N. C. 1883) Where, in ejectment, fraud in a deed is alleged, and a witness denies knowledge of the insolvency of the grantor, he may be asked, to discredit his testimony, whether the grantor was not commonly believed by his neighbors to be insolvent.—Perry v. Jackson, 88 N. C. 103.

[w] (S. C. 1831) A witness, on cross-examination, may be asked irrelevant questions, with a view of obtaining from him inconsistent and contradictory answers for the purpose of impeaching or destroying his credit.—Jones v. McNeil, 2 Bailey, 466.

[x] (Tex. 1892) In an action for damages to land from the overflow of a river, caused by a railroad embankment, a witness having testified that the land was practically worthless after the overflow, it was proper, as a test of his credibility, to inquire as to the price of certain adjacent lands, sold by him about two years after the overflow.—Gulf, C. & S. F. Ry. Co. v. Hepner, 83 Tex. 136, 18 S. W. 441.

[y] (Tex. 1895) On cross-examination, it is proper to ask witness a question to prove that he may have been mistaken as to his having heard a bell ring, as he testified.—Gulf, C. & S. F. Ry. Co. v. Younger, 10 Tex. Civ. App. 141, 29 S. W. 948.

[z] (Wis. 1888) In an action on an agreement to support an indigent relative, one defendant, a brother of the indigent person, testified that the agreement was made with his father, who was a codefendant, and not with either of the other defendants. *Held*, that the witness was properly asked on cross-examination if his father had not distributed his property among his children, as if he (witness) had received a portion of his father's estate he would have been more likely to assume the alleged obligation.—Kenyon v. Kenyon, 72 Wis. 234, 39 N. W. 361.

§ 937. Conduct inconsistent with testimony.

[a] (Ind. 1890) In an action on a building contract for extra work ordered by the architect, where the architect testifies, on direct examination, that he made no contract with the plaintiff, it is proper to ask him, on cross-examination, if he did not order different columns from those called for in the plans, and whether plaintiff put in such different columns, and whether he had been paid therefor.—Gibson County Com'rs v. Motherwell Iron & Steel Co., 123 Ind. 364, 24 N. E. 115.

[b] (Iowa, 1892) Where the conductor of a train testified that he did not employ plaintiff as a brakeman, testimony on his cross-examination that he gave plaintiff 25 cents to buy his breakfast is admissible as relating to the question of employment.—Fox v. Chicago, St. P. & K. C. Ry. Co., 86 Iowa, 368, 53 N. W. 259, 17 L. R. A. 289.

[c] (Mass. 1859) In an action for an injury to the plaintiff's property by the defendant while in his service, the plaintiff, if a witness in his own behalf, may be asked on cross-examination whether he did not settle with the defendant for his services during the period in question without making any claim for the alleged injury.—Miller v. Stevens, 79 Mass. (13 Gray) 282.

[d] (Mass. 1861) If, in an action by an assignee of an insolvent to recover the value of property illegally conveyed by him, an attorney at law, called by the defendant, has testified in chief that he introduced the insolvent to the defendant by a letter of introduction in which he highly recommended his credit and character, and that he had acted as counsel for the insolvent for some time and did not suspect his insolvency, it may be shown, by way of cross-examination, that he has presented to the assignees a bill against the insolvent for professional advice in business matters at various times shortly before his failure, and before the date of his letter of introduction, and the bill itself may be introduced in evidence as a part of the cross-examination.—Tapley v. Forbes, 84 Mass. (2 Allen) 20.

[e] (Mich. 1896) On a trial for assault, a witness for defendant testified that he witnessed the assault, which was made by one M., and not by defendant. *Held*, that it was competent to show, on cross-examination to discredit the witness, that he was present at the preliminary examination of M. and the defendant, and heard M. testify that he did not commit the assault, and permitted M. to be discharged and defendant bound over without disclosing his knowledge.—People v. Wirth, 108 Mich. 307, 66 N. W. 41.

[f] (Neb. 1882) In an action for deceit in the sale of real estate, when plaintiff has testified as to the unprofitableness of the business, it is proper to ask him on cross-examination if he had not advertised the property for sale as commanding large profits as a railroad eating house.—Markel v. Moudy, 13 Neb. 322, 14 N. W. 409.

[g] (Neb. 1882) Where a witness testifies that real estate is of a certain value, it is competent to show by him on cross-examination that he had written a policy of insurance on the property at a much higher figure.—Markel v. Moudy, 13 Neb. 322, 14 N. W. 409.

[h] (Pa. 1896) In an action for damages to property resulting from the alleged wrongful eviction of plaintiff from leased premises, where the issue was whether plaintiff or his father was the lessee, and the father had testified that he had taken a lease which was afterwards canceled, and an oral lease made with the plaintiff, it was proper to show on cross-examination that the father had insured the property on the leased premises in his own name.—Dosch v. Diem, 176 Pa. 603, 35 Atl. 207, 38 Wkly. Notes Cas. 533.

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[i] (R. I. 1885) In an action for personal injuries against a town, charging negligence in leaving a hitching post so as to render the highway dangerous, a surveyor of the highway called by defendant testified that the situation of the post was not such as to make the highway unsafe. On his cross-examination he testified that he had ordered the post removed. *Held* not error, since the object of the testimony was to discredit the witness by showing that his conduct was inconsistent with his evidence on his direct examination.—Yeaw v. Williams, 15 R. I. 20, 23 Atl. 33.

[j] (R. I. 1888) On indictment for keeping a place for the illegal sale of liquors, and for the resort of disorderly persons, a witness who testified to the good character of the place, and that he saw no intemperate, idle, noisy, dissolute, or disorderly persons, nor knew of any disturbances there, may be asked, on cross-examination, whether he drank liquors or whisky there.—State v. Brady, 16 R. I. 51, 12 Atl. 238.

[k] (Tex. 1896) In an action for death of a person, caused by explosion of the boiler of a locomotive, it was proper to allow a person who had testified to the good condition of the boiler and flues to be asked, on cross-examination, if after plaintiff's attorney had asked him not to do so, he did not ship them to another place.—Tyler S. E. Ry. Co. v. Rasberry, 13 Tex. Civ. App. 185, 34 S. W. 794.

[l] (Wis. 1859) In proving the contents of a lost note in an appeal case, the counsel, who had tried the case for the defendants below, had testified that he then saw a material alteration, sufficient to avoid the note. The question whether, at the previous trial, he had objected to the note being offered in evidence, was allowed to be put, in order to raise the discrediting inference that he did not then notice any such alteration.—Conkey v. Post, 7 Wis. 131.

[m] (Wis. 1890) In a prosecution for murder committed in pursuance of a conspiracy, it was proper for the state, on cross-examination of one of the alleged conspirators, to ask him if he attended the funeral of the deceased, his neighbor, as a negative answer would tend to discredit his testimony.—Holtz v. State, 76 Wis. 99, 44 N. W. 1107.

§ 938. Financial condition.

[a] (U. S. 1845) Where a witness, in his direct examination, had testified that a certain person was reputed to be a man of large property, counsel were permitted, in cross-examination, to ask in what such property was reputed to consist.—United States v. Flowery, Fed. Cas. No. 15,122 [1 Spr. 109].

[b] (Mich. 1886) In trover for machinery and tools taken by a sheriff under a writ of attachment as the property of another, the embarrassed condition of defendant in attachment is a material circumstance, and may be shown on cross-examination of plaintiff's witnesses.—Adams v. Kellogg, 63 Mich. 105, 29 N. W. 679.

§ 939. Similar facts and circumstances.

[a] (U. S. 1895) One who is alleged to have caused a loss by the negligent doing of certain work, and who testifies, in an action for such loss, that he did the work properly, and in the same manner that he did similar work at another place, may be cross-examined as to the way in which he did such other work, and contradicted by showing that he did it negligently.—Southern Bell Telephone & Telegraph Co. v. Watts, 66 Fed. 460, 13 C. C. A. 579, 25 U. S. App. 214.

[b] (Ala. 1893) Where, in an action by a brakeman for injuries received while coupling cars, defendant has asked questions tending to show that a piece of board, used by plaintiff in an unsuccessful attempt to make the coupling, was not a suitable one, plaintiff may ask a witness on cross-examination what kind of sticks defendant furnished its employés, for the purpose of showing that the one attempted to be used was as good.—Richmond & D. R. Co. v. Hissong, 97 Ala. 187, 13 South. 209.

[c] (Conn. 1875) When the date of a transaction is in issue, the court may allow examination and cross-examination of witnesses as to dates of other transactions not in themselves material, but so connected with that in dispute as to enable witnesses to fix the latter.—Harris v. Rosenberg, 43 Conn. 227.

[d] (Me. 1855) One called as a witness in an action on a warranty of soundness in a horse, but not as an expert, was asked on cross-examination, after having testified to appearances he had noticed in the horse, if he had not noticed such appearances in other horses which had been driven hard. *Held*, that the testimony from him as to other horses was inadmissible.—Moulton v. Scruton, 39 Me. 287.

[e] (Mass. 1892) On appeal to the county commissioners from an assessment of lands, the erroneous admission of evidence as to the selling price of numerous other tracts not similarly situated cannot be justified on the ground that it was elicited on cross-examination of witnesses who had testified in chief as to the value of the lands in question, and that it tended to show the reasons on which their opinions were based.—Haven v. Essex County, 155 Mass. 467, 29 N. E. 1083.

[f] (Mich. 1895) In an action for injuries from a dog bite, a witness for plaintiff, who testified that the dog had once chased him about defendant's store till defendant quieted it, could not be cross-examined as to whether he did not know that boys used to play with the dog, and get it to chase them, he testifying that he had not been present while boys were playing with the dog.—Kennett v. Engle, 105 Mich. 693, 63 N. W. 1009.

[g] (Miss. 1856) A witness may properly be cross-examined as to confessions by defendant to third parties, which he asserts having heard, of a similar character to those made by the defendant to himself. It is therefore error in the court to refuse a cross-examination.—Dick v. State, 30 Miss. 631.

[h] (N. H. 1858) In assumpsit on a warranty for the alleged unsoundness of a horse sold, it is competent for the defendant, on cross-examination of a witness, who has testified that the horse had a cough for about two years in the foddering season, when kept on hay, to inquire whether other horses, owned and kept by the witness, and appearing well and free from disease, would not cough when kept on hay in the winter, as this horse did.—Spear v. Richardson, 37 N. H. 23.

[i] (N. J. 1895) Where a plaintiff had testified that defendant's cattle had committed several trespasses, and injured his crops, it was proper to ask him on cross-examination whether, during the period covering these trespasses, the cattle of other persons had not also trespassed, and injured his crops.—Green v. Skoqvist, 57 N. J. Law (28 Vroom) 617, 31 Atl. 228.

[j] (N. Y. 1888) When defendant's foreman has testified as to the way in which he fixed the hoisting machine by which plaintiff was injured, and that he had so fixed the machine in another brewery where he worked, it is competent to ask him, on cross-examination, what sort of a machine they had in the brewery where he worked before.—Radman v. Haberstro, 49 Hun, 605, 1 N. Y. Supp. 561, judgment affirmed (1890) 119 N. Y. 659, 23 N. E. 1150.

[k] (Tex. 1895) Where an issue of competency is raised, involving the care of defendant's car inspector, who testified that one of

his reasons for knowing that he inspected the car in question was that he invariably performed that duty before the car left L., a question on cross-examination, whether he performed that duty at different times within five months subsequent to the day in question, was proper, both to show omissions of duty and to test his memory.—Cunningham v. Austin & N. W. Ry. Co., 88 Tex. 534, 31 S. W. 629.

[i] (Tex. 1896) In a prosecution for playing cards at a public place, it is error to permit the state to prove by a witness for defendant, on cross-examination, that defendant has been convicted of gambling, in the same court, on a former occasion.—Goldstein v. State (Cr. App.) 35 S. W. 289.

§ 940. Statements and affidavits by witness or others.

Cross-examination of party, see post, §§ 968–973.

—— *as to statements inconsistent with testimony, see* post, § 969.

Irrelevant statement, see post, § 956 [1].

[a] (U. S. 1896) A witness who testified that he had done a particular act was asked, on cross-examination, whether at a particular time and place he had not said that he had not done it. After answering this question, he was asked if, on the same occasion, his wife had not stated that he had not done it. *Held*, that this question was properly excluded, since his failure to do the act could not be proved, as an independent fact, by the wife's declarations; and that, if the intention was to contradict the witness, or lay the foundation for impeaching his testimony, the court should have been distinctly so informed.—McDowell v. United States, 74 Fed. 403, 20 C. C. A. 476, 42 U. S. App. 1.

[b] (Cal. 1889) By Code Civ. Proc. § 2048, a witness may be asked, on cross-examination, as to any matter bearing directly or indirectly on any portion of his testimony in chief. *Held*, in an action involving the right to water between upper and lower riparian owners, that a witness who states that plaintiff's grantor claimed half the water of the creek may be asked if said grantor did not tell witness that he had sold the water to one of the defendants, as the question bears on the character and extent of plaintiff's predecessor's interest to the water in dispute.—Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846.

[c] (Cal. 1892) In an action involving the question whether a sale was fraudulent, a witness having testified in chief that he never heard the vendor, during a certain time, make any statement as to the ownership of the property, it was proper to ask him, on cross-examination, if the vendor did not, in a particular conversation during that time, tell him the horses belonged to plaintiff.—Freeman v. Hensley, 30 Pac. 792.

[d] (Dak. 1882) A witness for the prosecution in a murder case testified in rebuttal that a certain witness for defendant had told him that he arrived at the place where the crime was committed about five days thereafter, which defendant's witness had denied. *Held*, that it was error to refuse to allow the witness for the prosecution, on cross-examination, to state whether defendant's witness had not told him in the same conversation that he was present at the murder, and detailed the facts of the killing as he saw them.—United States v. Knowlton, 3 Dak. 58, 13 N. W. 573.

[e] (Ill. 1884) Where defendant's agent has testified to certain declarations made by him to the plaintiff when the latter signed the contract in controversy, he may be asked on cross-examination whether he told plaintiff at the time what the contract was.—Black v. Wabash, St. L. & P. Ry. Co., 111 Ill. 351, 53 Am. Rep. 628.

[f] (Ill. 1892) In an action against a wrecking company for the alleged negligent death of an employé, where an employé of and stockholder in said company is called by plaintiff to testify against his interest, he may, on cross-examination, be asked what deceased said when about to take the step which resulted in his death, since that was a part of the res gestæ.—Dunham Towing & Wrecking Co. v. Christiansen, 44 Ill. App. 523.

[g] (Ill. 1893) Where one of the charges of negligence is that the conductor did not stop the car in time, and he has testified on direct examination that he applied the brake as quickly as he could, and did all he could to stop the car, it is proper to ask him on cross-examination whether he had not stated that he forgot to put on the brake, and that he could have stopped the car if he had not lost his head; and, such cross-examination being pertinent to the issues, the answers of the witness thereto are not conclusive.—Central Ry. Co. v. Allmon, 147 Ill. 471, 35 N. E. 725, affirming (1892) 45 Ill. App. 389.

[h] (Ind. 1891) A defendant, accused as accessory before the fact, has not the right, on the cross-examination of a coroner who held an inquest over the murdered body, and before whom accused made a statement on oath, reduced to writing and signed by him, and certified by the coroner, to inquire whether the statements of the accused were all reduced to writing, since, the statements being authenticated by the coroner and being identified by him, they were properly admitted in evidence.—Sage v. State, 127 Ind. 15, 26 N. E. 667.

[i] (Iowa, 1880) In an action to recover specific personal property, cross-examination as to whether the plaintiff had not told a certain person that the property belonged to the defendant, to which the reply was that he had not, is not prejudicial to the plaintiff, although it may have been improper.—Osborn v. Ratliff, 53 Iowa, 748, 5 N. W. 746.

[j] (Iowa, 1888) In an action for the price of some bucks sold, defendant pleaded breach of warranty, in that the bucks were diseased, and introduced a witness to prove the disease. On cross-examination he was asked if he had not made statements in a letter implying that the disease was the result of change of climate after the sale, and if he did not think, when he wrote the letter, that that was the cause. *Held* competent and relevant.—Bothwell v. Farwell, 74 Iowa, 324, 37 N. W. 392.

[k] (Iowa, 1896) A witness jointly indicted with defendant for rape having testified that prosecutrix not only consented to the intercourse, but virtually seduced witness and defendant, he could be asked on cross-examination whether he did not ask a certain person, shortly before the alleged rape, if he could not inform witness and defendant where they could obtain sexual intercourse, as it was legitimate cross-examination.—State v. Philpot, 97 Iowa, 365, 66 N. W. 730.

[l] (Me. 1861) On the trial of a person indicted for making and uttering a forged deposition to procure a divorce by the respondent from his wife, no exceptions lie to the refusal of the presiding judge to allow the respondent, on cross-examination of the person whose signature to the deposition is alleged to be forged, to ask whether the statements in the deposition are not true.—State v. Kimball, 50 Me. 409.

[m] (Mich. 1887) In an action to recover the costs, expenses, and damages sustained by an evicted tenant in taking an appeal in an action of ejectment, the plaintiff claiming that he had taken such appeal relying on the promise of defendant to pay such costs, expenses, and dam-

ages, the commissioner before whom said action of ejectment was tried testified that he advised this defendant that he was responsible to plaintiff if evicted. *Held* that, on cross-examination, it was proper to examine him in full as to the circumstances under which such advice was given.—Cummerford v. Paulus, 66 Mich. 648, 33 N. W. 741.

[n] (Mich. 1891) In an action for personal injuries, caused by a collision at a railroad crossing, it is competent, on cross-examination of witness for plaintiff, to ask him whether plaintiff, the evening after the accident, did not say that he had seen the engine before it struck him.—Thomas v. Chicago & G. T. Ry. Co., 86 Mich. 496, 49 N. W. 547.

[o] (Mich. 1892) In replevin for property seized under an attachment, the attachment creditor testified that when he talked with the debtor and wife, about a week before the attachment, he did not tell them how much the debtor owed him, because he did not know; and that he had never figured out such indebtedness at all. He was asked on cross-examination if he did not swear in the affidavit of attachment that the debtor owed him $100, as near as he could estimate; and that, if he never did any figuring on the account, how he came to swear to the affidavit? On objection, counsel said: "I will not insist upon the question. Both statements are before the jury." *Held*, that counsel could ask these questions, and, when objected to, could withdraw them; and that, since the bill of particulars and the statement of the attachment creditor were both in evidence, the remark of counsel was true.—Daniels v. Weeks, 90 Mich. 190, 51 N. W. 273.

[p] (Mo. 1884) In an action involving the validity of a deed, the wife of a grantor testified that at the time of taking her acknowledgment the notary did not acquaint her with the contents of the deed. *Held*, that it was competent to ask her on cross-examination whether, at the time of taking such acknowledgment, she was acquainted with the contents of the deed and had so informed the notary.—Drew v. Arnold, 85 Mo. 128.

[q] (Mo. 1890) In an action attacking a fraudulent conveyance, it is proper to ask, on cross-examination, the husband and agent of the grantee if he had not said that "this was not the first sale he had had attacked as a 'humbug sale.' "—Meyberg v. Jacobs, 40 Mo. App. 128.

[r] (N. Y. 1893) Where defendant's counsel drew from a witness a statement that one S. said that "he came from defendant," the prosecutor was properly permitted to ask what language S. used to convey the idea that "he came from defendant."—People v. Johnson, 140 N. Y. 350, 35 N. E. 604.

[s] (N. C. 1871) A witness cannot be asked, on cross-examination, whether he made the same statement before the grand jury as on his examination in chief at the trial, when the object of such question is not to lay a foundation for impeaching the credibility of the witness.—State v. Parker, 65 N. C. 453.

[t] (S. C. 1891) It was not prejudicial error to ask a witness for the defense, on cross-examination, whether he had not told a person named that when he heard the report of the gun he knew the deceased was dead, when the question was answered in the negative.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[u] (Vt. 1889) Where a witness for defendant testifies as to certain statements made by plaintiff's agent, it is not proper cross-examination to question him as to statements made by the agent in favor of his principal after the expiration of the business of the agency.—Cushman v. Somers, 62 Vt. 132, 20 Atl. 320, 22 Am. St. Rep. 92.

§ 941. Conversations between witness and others.

Inquiry on cross-examination as to conversation between witness and another person to discredit or test reliability of witness, see post, § 1107.

Limitation of cross-examination to subject of direct examination, see post, § 952.

[a] (Ill. 1883) A party suing in a representative capacity cannot, by a misuse of his right of cross-examination, call out conversations of the adverse party, and then cut the latter off from the right of giving his version of such conversations, by claiming that the witness who testified to them was the witness of the adverse party.—Stevens v. Brown, 12 Ill. App. (12 Bradw.) 619.

[b] (Iowa, 1889) Two persons, jointly indicted with defendant for murder, having had no communication with each other, gave the same account of the killing at the time of their arrest. *Held*, that a refusal to allow defendant to ask one of such persons whether he did not have a private conversation with the other at a place named, two or three days after the murder, was proper, as the question was not proper cross-examination.—State v. Munchrath, 78 Iowa, 268, 43 N. W. 211.

[c] (Iowa, 1892) Defendant, indicted for stealing flax belonging to two persons, admitted the taking, claimed that his brother, from whom it was taken, owed him, and that he took it with his consent, and that he had no knowledge of the interest of any one else in the property. The brother testified to the ownership of the property; that it was taken; and that he sued out a warrant for defendant; and on cross-examination he stated that he owed defendant, and had told him he would pay him out of the flax—either let him have the flax or the money. *Held*, that though it was material to explain why defendant's brother sued out the warrant, defendant should have done so by calling his brother as his own witness, and it was not error to exclude his answer as to whether at the time of the taking he remembered the conversation, the matter not being strictly cross-examination.—State v. Larson, 85 Iowa, 659, 52 N. W. 539.

§ 942. Particular facts included in general statement by witness.

[a] (Ala. 1893) Where the evidence in an action against a railroad company for negligently killing plaintiff's mules showed that the mules were appraised in plaintiff's presence, but not at his demand, and that the appraisement was not in writing, as required by Acts 1888–89, p. 808, and did not show what was said or done by any one at the time, it was proper to refuse to allow defendant to ask plaintiff, on cross-examination, "What were the mules appraised at?" —Birmingham Mineral R. Co. v. Harris, 98 Ala. 326, 13 South. 377.

[b] (Cal. 1893) Where a life insurance agent was called to testify that the mortuary tables in an encyclopedia are in general use, and was not asked on his examination in chief to whom the tables applied, but stated on cross-examination that they applied only to insurable persons, it was not proper cross-examination to ask him "what insurable persons are."—Townsend v. Briggs, 32 Pac. 307.

[c] (Ill. 1886) When the defendant claimed to have made a payment with funds received from a certain person, who testified that he had given the defendant such funds, the plaintiff may interrogate that person as to when and how he received such money.—Bressler v. People, 117 Ill. 422, 8 N. E. 62.

[d] (Ill. 1896) On a prosecution of Chinese for robbery, there was evidence that defendants,

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on the day before the robbery, came to complainant and demanded $50 as taxes for a Chinese club. A witness for defendants testified as to the objects of the club on his cross-examination. *Held* proper to permit him to be asked if there was not a "fan-tan" gambling apparatus in the club rooms, and also a "bung-loo" apparatus, and appliances for opium smoking, where he denied that there was anything of the kind.—Goon Bow v. People, 160 Ill. 438, 43 N. E. 593.

[e] (Ind. 1885) On cross-examination, counsel may enter into details. It is error to compel them to stop with a mere general statement.—Hyland v. Milner, 99 Ind. 308.

[f] (Iowa, 1890) Where a witness testifies, on direct examination in a murder case, as to the purchase of a revolver by defendant, it is proper to ask him on cross-examination to whom the purchase was charged in his books.—State v. Row, 81 Iowa, 138, 46 N. W. 872.

[g] (Kan. 1881) In an action of replevin, plaintiff, in support of his title, introduced the testimony of a witness who declared himself to have been, on the day of the levy, in possession of the goods as plaintiff's agent. To weaken the presumption of title flowing from such possession, defendant, on cross-examination, sought to inquire into the length of time that such possession had continued, and the circumstances under which it had originated. *Held*, that these inquiries were within the limits of a cross-examination.—Blake v. Powell, 26 Kan. 320.

[h] (Md. 1873) In an action for malicious prosecution in having the plaintiff indicted on a charge of obtaining stocks under false pretenses, a lawyer testified, in rebuttal of the presumption of malice, that, with all the facts laid before him, he had advised the defendant that the plaintiff had been guilty of obtaining them under false pretenses. *Held*, that the cross-question, "What were the facts upon which that advice was based?" was proper to test the good faith of the defendant as to the extent of the disclosure.—Cooper v. Utterbach, 37 Md. 282.

[i] (Md. 1894) A policy provided for submission to appraisers, in case of disagreement, and that, if the appraisers properly performed their duties, their award was binding. After the policy and other evidence touching the fire and plaintiffs' loss were admitted, a witness for plaintiffs stated that defendant and plaintiffs agreed to enter into an appraisement of the loss. *Held*, that it was error not to permit such witness, on cross-examination, to identify certain papers as such agreement, and the award of the appraisers.—Caledonian Ins. Co. of Scotland v. Traub, 80 Md. 214, 30 Atl. 904.

[j] (Mich. 1883) Where, on the prosecution of the mortgagor of a chattel for secretly removing it without paying a note thereby secured, he testified that the note was paid, and that it was included in a settlement, which was denied by the mortgagee, it was permissible to ask the latter on cross-examination as to the particulars of the settlement.—People v. Long, 50 Mich. 249, 15 N. W. 105.

[k] (Minn. 1885) At the trial of an action for personal injuries a medical witness for defendant testified that plaintiff would recover permanently from the injuries, except a slight lameness. *Held*, that on cross-examination it was proper to ask him whether the injury was likely to produce and be followed by specified diseases, in order to ascertain what the witness meant by permanent recovery.—Kelly v. Erie Telegraph & Telephone Co., 34 Minn. 321, 25 N. W. 706.

[l] (Mo. 1863) In an action of forcible entry and detainer, the sheriff testified that he held possession of the premises and delivered the possession to the complainant. *Held*, that the defendant could, on cross-examination, inquire into the facts and circumstances on which the statement was based, with the view of showing the character of the possession.—Coates v. Hopkins, 34 Mo. 135.

[m] (N. Y. 1889) In an action for injuries received by plaintiff by being thrown from defendant's car, where the driver had testified for defendant that he was taking his car down as he usually did, plaintiff was properly allowed to ask him if he usually walked his horse across J. street, and also to cross-examine him on his schedule time.—Murray v. Brooklyn City R. Co. (City Ct. Brook.) 7 N. Y. Supp. 900.

[n] (N. Y. 1891) A witness for plaintiff testified that she was a passenger in the same car, sitting next to plaintiff, and was thrown off the seat by the collision, and some person fell on her, and she was bruised. *Held*, that she could not be asked, on cross-examination, whether she was not bruised on the side next to plaintiff, as bearing on the nature and extent of plaintiff's injuries; there being no proof that plaintiff was the person who fell on her.—Wynn v. Central Park, N. & E. R. R. Co. (Com. Pl.) 14 N. Y. Supp. 172, judgment reversed (1892) 133 N. Y. 575, 30 N. E. 721.

[o] (Or. 1889) Where defendant called a witness who gave evidence material to the defense, and testified, on cross-examination, that he gave money himself to assist the defense, and procured money from others for the same purpose, it was not competent, either on the cross-examination of the same witness, or by making him the state's witness, to prove the names of the particular persons, who were not witnesses in the case, who contributed money, or that they were saloon keepers or gamblers.—State v. Olds, 18 Or. 440, 22 Pac. 940.

[p] (Or. 1894) In an action for money alleged to have been collected by defendant as plaintiff's agent, after defendant testified to having given the money to plaintiff's husband for her, the husband testified that the money received by him from defendant was not on plaintiff's account, but was money due him on account of a partnership existing between himself and defendant, and collections made by defendant, as receiver and otherwise, on accounts due witness and one A. as partners. On cross-examination the husband was asked to state "what partnership existed between witness and defendant, and between witness and A., when it was, its nature and business, when defendant was receiver, for what this money was collected by defendant, and when." *Held*, that it was error to exclude the answer to such question.—Sayres v. Allen, 25 Or. 211, 35 Pac. 254.

[q] (Pa. 1895) The court may refuse to compel a witness, on cross-examination in an action for slander, to disclose the names of women whom he has testified that he has met at plaintiff's house for purposes of illicit intercourse, where the purpose of the cross-examination is merely to prepare the way for calling the women in rebuttal, and the women are at the time leading respectable lives.—Naguszewski v. Kampa (Com. Pl.) 8 Kulp, 164.

[r] (Tex. 1895) One party having introduced evidence that a certain person signed a paper without reading it, the other party is entitled to question him as to the circumstances under which he signed it, and why he did not read it.—White Sewing Mach. Co. v. Hicks (Civ. App.) 33 S. W. 137.

§ 943. Cross-examination on voluntary statements by witness.

[a] (Cal. 1892) The fact that a witness, on an indictment for the larceny of cattle, makes voluntary statements as to the acts of defendant with reference to certain other cattle, does not give defendant the right to cross-examine on such matters.—People v. French, 95 Cal. 371, 30 Pac. 567.

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[b] (Ind. 1891) Where, in an action against a county for injuries occasioned by the breaking down of a bridge, one of plaintiff's witnesses volunteers the statement that parties living in the neighborhood thought the bridge unsafe, and complained of it, and plaintiff does not have the statement stricken out, defendant may cross-examine the witness with reference to the statement volunteered.—Apple v. Marion County Com'rs, 127 Ind. 553, 27 N. E. 166.

[c] (Kan. 1896) Where a voluntary statement is made by a witness upon immaterial matter, though such statement is not objected to, it is not error for the court to refuse to permit a cross-examination with regard to the matter referred to therein.—Cone v. Smyth, 3 Kan. App. 607, 45 Pac. 247.

[d] (Ky. 1892) Upon trial for assault with a dangerous weapon, the accused, after he had been examined by his counsel and directed to take his seat, announced to the jury that he was a peaceable citizen and had no idea of shooting the prosecuting witness, whereupon the state's attorney asked him whether he had had trouble with many other neighbors. *Held* that, although this method of cross-examination was improper, yet, as the defendant had placed his character as a peaceable man in issue, the error was not sufficient to reverse the judgment.—Taylor v. Commonwealth, 18 S. W. 852.

[e] (Mo. 1891) Where defendant in his cross-examination volunteers the statement that he went away, it is proper to allow him to be asked when he went away.—State v. Adams, 108 Mo. 208, 18 S. W. 1000.

[f] (Wis. 1882) Where an improper statement by a witness as to what was said by another witness on a former trial is made of his own motion, and not called out by the party in whose behalf he appears, the adverse party is not entitled to cross-examine on that subject.—Brusberg v. Milwaukee, L. S. & W. Ry. Co., 55 Wis. 106, 12 N. W. 416.

§ 944. Sale, consideration, and related circumstances.

[a] (Ind. 1868) Where the validity of a deed from a father to his son was in issue between heirs, and the son testified that on taking the deed he had given his father a bond for $1,500, conditioned that such part thereof as should not be paid at the father's death should not be enforced, which was kept by the father until his death, it was *held* proper to show on cross-examination that the actual consideration of the conveyance was an agreement of the son to maintain the father during his life, whereof the bond was intended as a security.—Huckleberry v. Riddle, 29 Ind. 454.

[b] (Kan. 1889) In an action against a sheriff for the value of goods seized by him under an attachment and sold, plaintiff claimed to have bought the goods from the debtor prior to the levy of attachment, and to have paid for the same by the execution and delivery to the insolvent debtor of two notes, signed by himself, one for $1,100 and the other for $1,200, and that the $1,100 note was delivered to parties who had indorsed for the insolvent debtors as collateral security for such indorsements. *Held*, that it is error for the trial court, when one of such persons was on the witness stand, to refuse to permit the attorney for the sheriff to ask him if the note was paid, and how paid, and by whom paid; and it is also error to refuse to make the purchaser answer questions as to whether or not there was also an understanding between him and the insolvent debtor that, if he lost this suit, he would not have to pay the $1,200 note, and as to whether the $1,200 note was paid, or was to be paid.—De Ford v. Orvis, 42 Kan. 302, 21 Pac. 1105.

[c] (Mich. 1873) In assumpsit for goods sold and delivered, where a witness on direct examination testified to a sale of the articles without any agreement as to the price, it may be shown on cross-examination that they were furnished by virtue of a special contract.—Wilson v. Wagar, 26 Mich. 452.

[d] (Mich. 1876) In an action for services by plaintiff in purchasing and shipping sheep for defendants, where a witness had given evidence tending to show the purchase by plaintiff from him of certain specified sheep for defendants, it was error on cross-examination to exclude inquiry as to who paid him for such sheep.—Parker v. Grinnell, 34 Mich. 199.

[e] (Mich. 1878) In an action against a married woman for goods claimed to have been sold her to be used in business, she and her husband may properly be cross-examined concerning their habit of purchasing goods and doing business.—Altman v. Young, 38 Mich. 410.

[f, g] (Minn. 1873) Where a witness testifies as to the sale and delivery of a reaper, for the price of which the action was brought, on cross-examination it may be shown that notes were given therefor, and such notes may be introduced in evidence.—McCormick v. Miller, 19 Minn. 443 (Gil. 384).

[h] (Pa. 1853) Where, in case of an alleged conveyance of land, a witness has been examined as to acts of ownership by the grantor after the conveyance, it is competent to cross-examine him as to acts of ownership by the grantee over the same land.—Covanhovan v. Hart, 21 Pa. (9 Harris) 495, 60 Am. Dec. 57.

[i] (Utah, 1877) On the issue whether certain personal property had been purchased by defendant, it is proper, on cross-examination, to ask a witness, who has testified to making such sale, whether the mode or manner of making it was the one usually adopted by him.—Burton v. Winsor Utah Silver Min. Co., 2 Utah, 240.

[j] (Wis. 1891) In replevin against a sheriff who had seized property which is claimed by plaintiff under two bills of sale from one M., one of the attorneys for M. and a witness to one of the bills of sale was asked by defendant, "What was the consideration of the bill of sale?" *Held*, that this was a proper question.—Weadock v. Kennedy, 80 Wis. 449, 50 N. W. 393.

§ 945. Value of property.

Facts inconsistent with testimony as to value, see ante, § 936.

[a] (Ala. 1872) A witness, called, without objection, to prove the value of the hire of certain slaves in 1863 in lawful money, from facts in evidence, and his general knowledge of such matters, after stating his estimate, was asked on cross-examination how he arrived at his opinion. The court sustained an objection to the question. *Held* not error, because the question was too indefinite.—Booker v. Adkins, 48 Ala. 529.

[b] (Iowa, 1889) In an action to recover damages for a breach of contract for the sale of land, where witnesses have testified as to the value of the land at the time the contract should have been performed, it is proper to ask them, on cross-examination, the value of the land at the time of trial, to test the worth of their opinions.—Damon v. Weston, 77 Iowa, 259, 42 N. W. 187.

[c] (Iowa, 1896) In an action for the use of land and for trespass by such use it is proper to allow plaintiff to ask witnesses testifying on cross-examination to the rental value of the land what the value of the land is.—Jenks v. Lansing Lumber Co., 97 Iowa, 342, 66 N. W. 231.

[d] (Kan. 1872) Where a witness on his examination in chief has given his opinion with regard to the value of certain land, he may afterwards be cross-examined in full with regard

to his reasons for such opinion. Great latitude should generally be allowed on cross-examination.—Missouri, K. & T. Ry. Co. v. Haines, 10 Kan. 439.

[e] (Kan. 1872) On cross-examination a question is proper which enables the jury to see on what basis the witness has made his estimates of value, or which connects the general estimates of value and damages with the particular premises and injury.—Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. 477.

[f] (Minn. 1888) Where the company's witnesses had stated their opinion of the difference in value of a farm before and after a right of way was taken across it, it was proper, on cross-examination, in order to test the value of their opinions, to ask if in their judgment it would make any difference that the owner had no right to cross the right of way.—Sigafoos v. Minneapolis, L. & M. Ry. Co., 39 Minn. 8, 38 N. W. 627.

[g] (N. Y. 1893) In an action by a lessee to restrain the operation of an elevated railroad in front of the premises and for damages, where a former tenant of the property in question, called as a witness by plaintiff, testified on cross-examination that the road increased his business, it was error to exclude, on the ground that it was immaterial, the question, "How much rent more, in your opinion, was it worth on account of the road being there?"—Odell v. Metropolitan El. R. Co. (Super. N. Y.) 3 Misc. Rep. 335, 22 N. Y. Supp. 737.

[h] (N. Y. 1893) In an action on a policy of marine insurance, a witness who has testified for defendant company as to the condition of the vessel when purchased by him after the stranding, and the amount expended by him for repairs, to show that it could not be regarded as a constructive total loss, may, on cross-examination, be required to state the amount received by him on its resale.—Murray v. Great Western Ins. Co., 72 Hun, 282, 25 N. Y. Supp. 414, judgment affirmed (1895) 147 N. Y. 711, 42 N. E. 724.

[i] (Pa. 1892) Where a witness for plaintiff put a value on plaintiff's farm, it was proper for defendant to ask him, for the purpose of testing his knowledge and fairness, if he did not know of sales of farms in the same vicinity at a much less price than he put on plaintiff's land.—Lentz v. Carnegie Bros. & Co., 145 Pa. 612, 23 Atl. 219, 27 Am. St. Rep. 717, 29 Wkly. Notes Cas. 292.

[j] (Tex. 1895) Where a witness has testified as to the reasonable value of separate tracts of land, he may be cross-examined for the purpose of testing his intelligence, and the worth of his testimony as to the value of the whole number of tracts when sold in bulk.—Dittman v. Weiss (Civ. App.) 31 S. W. 67.

§ 946. Consideration for note.

Cross-examination based on testimony as to execution and amount due, see post, § 954.

[a] (Cal. 1890) Where plaintiff's indorser has testified that he took the note sued on in good faith, and for value, it is error to refuse permission to cross-examine him as to whether he knew that the consideration for the note was illegal at the time he bought it, and whether at that time he did not know that the maker had warned all persons in a newspaper notice from purchasing it, on account of its illegality.—Graham v. Larimer, 83 Cal. 173, 23 Pac. 286.

[b] (Or. 1895) Where plaintiff testifies that a note and mortgage executed by S. were given him for work performed for S., defendant, who contends that they were without consideration, should be allowed to ask him, on cross-examination, when he commenced work, when he quit, what time he worked between those dates, what wages he was to receive, and how much he had been paid above the amount covered by the note.—Maxwell v. Bolles, 28 Or. 1, 41 Pac. 661.

[c] (Or. 1896) While the indorsement of a note by the payee imports a consideration, and the holder may rest on the presumption until evidence of the illegality of the note is produced, yet if, where such illegality is pleaded, he testifies in chief that he gave a consideration for the note, such testimony is material to the issues made, and the defendant is entitled to cross-examine in regard to the consideration.—Kenny v. Walker, 29 Or. 41, 44 Pac. 501.

[d] (Pa. 1879) Where the indorser of a note has been notified that he will be required to prove the consideration paid by him for the note, and he takes the stand to prove that he is a bona fide holder, it is proper, on cross-examination, to ask such questions as will tend to discover whether he knew that the note was originally obtained without proper consideration.—Moore v. Hershey, 90 Pa. 196.

§ 947. Ownership or interest in property.

[a] (Ala. 1845) Plaintiffs claimed title under their grandfather, who purchased the slave in question in 1833 at a sale under execution against the estate of their father. In 1839 the father made a deed of trust, embracing the slave, to a trustee, to secure the trustee and others for liabilities incurred and to be incurred as the sureties of the grantor, with a power of sale to reimburse them for advances. In 1841 the trustee sold the slave to defendant. *Held*, that it was competent for defendant to ask the father, who was examined as a witness for plaintiff, the following questions, viz.: If the trustee, at a time and place designated, did not ask him, in the presence of a third party, if there were other liens than the trust deed on the slave. If there were not other liens on the slave when the above inquiry was made. If he did not, after the trust sale in 1841, in the presence of certain persons, admit that he owed the trustee a balance of $1,500.—McBride v. Thompson, 8 Ala. 650.

[b] (Ala. 1881) A witness who testifies to the fact of ownership of personalty may be cross-examined with respect to the particular facts constituting the basis of the claim of ownership.—Daffron v. Crump, 69 Ala. 77.

[bb] (Cal. 1888) Where the answer admits plaintiff's ownership of the note sued on, and the bill of exceptions recites that it is proved that the note was executed by defendant, and indorsed and delivered to plaintiff before suit, refusal to allow defendant to cross-examine plaintiff to show by him that he is not the owner of the note is not error.—Braly v. Henry, 77 Cal. 324, 19 Pac. 529.

[c] (Iowa, 1883) A witness who has testified to owning land may, for the purpose of testing his truth and accuracy, be asked on cross-examination how he acquired ownership.—Wallace v. Wallace, 62 Iowa, 651, 17 N. W. 905.

[d] (Neb. 1880) In replevin by a wife of property levied upon as the property of her husband she testified on her direct examination that she owned the property. *Held*, that on her cross-examination she could be asked how much money she had at the time of her marriage, and who worked the farm that she claimed.—Koch v. Rhodes, 10 Neb. 445, 6 N. W. 767.

[e] (Wash. 1894) Where, in an action by a husband alone for injuries to his land, he testifies on cross-examination that he purchased the land with his separate money, it is not error to refuse to permit him to be further cross-examined as to his ownership.—Koch v. Sackman-Phillips Inv. Co., 9 Wash. 405, 37 Pac. 703.

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§ 948. Reasons for action testified to by witness.

[a] (U. S. 1895) A witness who testified on direct examination that he knew who put in a railroad crossing, and when the same was put in, could be interrogated on cross-examination as to how the crossing came to be put in.—Reynolds v. Great Northern Ry. Co., 69 Fed. 808, 16 C. C. A. 435, 32 U. S. App. 577.

[b] (Ala. 1857) A witness for defendant, having testified to what took place at an interview between the parties at plaintiff's house, may be asked, on cross-examination, how he happened to go with the defendant to plaintiff's house.—Thomason v. Dill, 30 Ala. 444.

[c] (Cal. 1891) On a trial for murder, where a witness for the prosecution testifies that shortly after the shooting he went to the scene of the homicide, and took his rifle with him, and that he was sorry defendant got into the trouble, it is proper, in order to show the state of the witness' mind, to ask him, on cross-examination, why he took his rifle, and if he expressed his sorrow by going towards the house with a rifle.—People v. Thomson, 92 Cal. 506, 28 Pac. 589.

[d] (Cal. 1892) Where it was attempted to show by a witness that he was induced to leave home to avoid testifying, defendant had a right to ask him, on cross-examination, if the true reason why he left home at that time was not on account of his father.—People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[e] (Cal. 1895) On a prosecution for rape of one who lived with defendant and his wife, prosecutrix having testified that the wife went out and left her alone in the house with defendant, and that she was afraid of him, she could be asked why she did not go out with the wife.—People v. Knight, 43 Pac. 6.

[f] (Ind. 1878) On a will contest on the ground of testamentary incapacity and undue influence, the scrivener of the will, who testifies as to the manner in which it was procured to be drawn and executed, and that he voluntarily returned it to testatrix, who had left it in the possession of the witness, may be asked on cross-examination his reasons for returning it, and what he said to testatrix as to making the will.—Coffman v. Reeves, 62 Ind. 334.

[g] (Mass. 1855) It is no ground of exception that the presiding judge refused to allow a witness, who had testified that he had formerly been known by another name, to be asked on cross-examination why he had then given that as his name.—Commonwealth v. Quin, 71 Mass. (5 Gray) 478.

[h] (Mich. 1884) In an action against a newspaper company for publishing a libel charging plaintiff with murder, it was permissible to ask the managing editor on cross-examination what was the object of the publication, whether the newspapers had any feeling against plaintiff, and whether he personally believed the publications to be true, when he had testified on his examination in chief that he had had conversations with the reporter and city editor before the articles were published.—Peoples v. Detroit Post & Tribune Co., 54 Mich. 457, 20 N. W. 528.

[i] (N. Y. 1845) Where a witness for the plaintiffs proved a demand of the defendant and his refusal to pay over certain moneys, it was *held* that the defendant had a right to ask the witness what reason he gave for his refusal.—Bennett v. Burch, 1 Denio, 141.

[j] (Or. 1896) Where a witness was asked, on direct examination, as to the whereabouts of a certain receipt, to show the nonproduction of the same by defendant after it had been notified to produce it, so as to permit secondary evidence of its contents, the witness could not state, on cross-examination, how the receipt came to be given to defendant.—Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 43 Pac. 719.

[k] (Pa. 1892) On a question as to whether a judgment note is a forgery, examination of an almanac by the owner of said note, or by some one for her, on the very day it purported to have been signed, in order to fix the day of the week, is unusual, at least, and cross-examination, therefore, demanding why the examination had been made, is proper.—Thomas v. Miller, 151 Pa. 482, 25 Atl. 127, 31 Wkly. Notes. Cas. 177.

4. LIMITATION OF CROSS-EXAMINATION TO SUBJECTS OF DIRECT EXAMINATION.

IN GENERAL, § 949.
LIMITATION AS TO PARTICULAR SUBJECTS OF INQUIRY, § 950.
—— TIME OF OCCURRENCE OR CONDITION, § 951.
—— PRIOR CONVERSATIONS OR STATEMENTS, § 952.
—— INTRODUCTION OF MATTERS IN DEFENSE OR REBUTTAL IN GENERAL, § 953.
—— CROSS-EXAMINATION AS TO CONSIDERATION BASED ON TESTIMONY AS TO EXECUTION AND AMOUNT DUE, § 954.

Limitation of cross-examination of accused in criminal prosecutions to subjects of direct examination, see post, § 982.

—— *of one's own witness as to inconsistent statements to matters subject of direct examination, see* post, § 1217.

Limitation to subjects of direct examination on cross-examination of party, see post, § 971.

Right to contradict testimony of one's own witness cross-examined as to matter not subject of direct examination, see post, § 1270.

§ 949. In general.

[a] The right to cross-examine is limited to matters stated by the witness in his direct examination.

—(U. S. 1863) Houghton v. Jones, 68 U. S. (1 Wall.) 702, 17 L. Ed. 503;

(Cal. 1855) Landsberger v. Gorham, 5 Cal. 450; (1864) Aitken v. Mendenhall, 25 Cal. 212; (1867) People v. Miller, 33 Cal. 99; (1892) In re Westerfield's Estate, 96 Cal. 113, 30 Pac. 1104; Smith v. Westerfield, Id.; (1895) People v. Denby, 108 Cal. 54, 40 Pac. 1051;

(Colo. 1892) Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130;

(Conn. 1881) State v. Smith, 49 Conn. 376;

(Fla. 1891) Adams v. State, 28 Fla. 511, 10 South. 106; (1892) Tischler v. Apple, 30 Fla. 132, 11 South. 273;

(Ill. 1864) Stafford v. Fargo, 35 Ill. 481; (1864) Chicago & R. I. R. Co. v. Northern Illinois Coal & Iron Co., 36 Ill. 60; (1872) Bell v. Prewitt, 62 Ill. 361; (1879) Lloyd v. Thompson, 5 Ill. App. (5 Bradw.) 90; (1881) Waller v. Carter, 8 Ill. App. (8 Bradw.) 511; (1883) Stevens v. Brown, 12 Ill. App. (12 Bradw.) 619; (1886) Swenk v. People, 20 Ill. App. (20 Bradw.) 111;

(Ind. 1859) Patton v. Hamilton, 12 Ind. 256; (1859) Dearmond v. Dearmond, Id. 455; (1863) City of Aurora v. Cobb, 21 Ind. 492; (1883) Wood v. State, 92 Ind. 269; (1885) Higham v. Vanosdol, 101 Ind. 160; (1887) Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. 463; (1889) Wabash Printing & Publishing Co. v. Crumrine, 123 Ind. 89, 21 N. E. 904; (1892) Chandler v. Beal, 132 Ind. 596, 32 N. E. 597;

(Iowa, 1857) Cokely v. State, 4 Iowa (4 Clarke) 477; (1890) Linden v. Green, 81 Iowa, 365, 46 N. W. 1108; (1891) Halley v. Gregg, 82 Iowa, 622, 48 N. W. 974; (1893) Butler v. Chicago, B. & Q. R. Co., 87 Iowa, 206, 54 N. W. 208; (1893) Hall v. Rankin, 87 Iowa, 261, 54 N. W. 217; (1895) Kelly v. Stone, 94 Iowa, 316, 62 N. W. 842; (1895) State v. Judiesch, 96 Iowa, 249, 65 N. W. 157;

(Kan. 1885) Maier v. Randolph, 33 Kan. 340, 6 Pac. 625;

(La. 1888) State v. Wright, 40 La. Ann. 589, 4 South. 486; (1893) State v. Taylor, 45 La. Ann. 1303, 14 South. 26;

(Md. 1879) Griffith v. Diffenderffer, 50 Md. 466;

(Mich. 1856) People v. Horton, 4 Mich. 67;

(Minn. 1858) Beaulieu v. Parsons, 2 Minn. 37 (Gil. 26);

(Neb. 1882) Boggs v. Thompson, 13 Neb. 403, 14 N. W. 393;

(Pa. 1843) Floyd v. Bovard, 6 Watts & S. 75; (1851) Mitchell v. Welch, 17 Pa. (5 Harris) 339, 55 Am. Dec. 557; (1894) Leedom v. Leedom, 160 Pa. 273, 28 Atl. 1024; (1894) Denniston v. Philadelphia Co., 161 Pa. 41, 28 Atl. 1007, 34 Wkly. Notes Cas. 285;

(Tex. 1884) Washington v. State, 17 Tex. App. 197;

(Wis. 1863) Congar v. Galena & C. U. R. Co., 17 Wis. 477.

CONTRA, see

(Ala. 1856) Fralick v. Presley, 29 Ala. 457, 65 Am. Dec. 413;

(Ga. 1855) Dawson v. Callaway, 18 Ga. 573;

(La. 1811) Durnford v. Clark, 1 Mart. (O. S.) 201; (1857) Davidson v. De Lallande, 12 La. Ann. 826; (1881) King v. Atkins, 33 La. Ann. 1057;

(Mich. 1890) Ireland v. Cincinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426;

(Miss. 1856) Mask v. State, 32 Miss. 405;

(Mo. 1843) Brown v. Burrus, 8 Mo. 26; (1875) State v. Sayers, 58 Mo. 585; (1889) Jones v. Roberts, 37 Mo. App. 163;

(N. Y. 1829) Fulton Bank v. Stafford, 2 Wend. 483;

(S. C. 1882) Kibler v. McIlwain, 16 S. C. 550;

(Tex. 1895) Roberts v. Miller (Civ. App.) 30 S. W. 381.

[b] (U. S. 1840) If a party wishes to examine a witness of the opposite side with regard to new matter not introduced by the opposite party, he must make the witness his own by introducing him in a subsequent part of the cause.—Philadelphia & T. R. Co. v. Stimpson, 39 U. S. (14 Pet.) 448, 10 L. Ed. 535.

[c] (Ga. 1895) Under Code, § 3864, preserving the right to cross-examine, a witness may be cross-examined as to all material matters in the case, though he was called merely in rebuttal, and had not on direct examination testified to the particular facts sought to be elicited on the cross-examination.—News Pub. Co. v. Butler, 95 Ga. 559, 22 S. E. 282.

[d] (Ind. 1886) The cross-examination must be confined to the subject of the direct examination, but this rule does not restrict the cross-examining counsel to the specific matters asked for on the direct examination.—Boyle v. State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

[e] (Ind. 1887) In an action to recover property alleged to have been obtained by fraud, plaintiff had on direct examination opened the whole subject of defendant's fraud, and his financial condition. *Held*, that the cross-examination was not confined to the line followed by the direct examination, but might include any phase of the subject.—Vogel v. Harris, 112 Ind. 494, 14 N. E. 385.

[f] (Ind. 1895) A court reporter who testifies as to certain testimony given by defendant on a former trial cannot be cross-examined as to other testimony of defendant, which is in no way explanatory of that given on direct examination.—Siberry v. State, 149 Ind. 684, 39 N. E. 936.

[g] (Ind. 1896) Where a general subject has been opened up on the original examination, the cross-examination is not limited to matters particularly brought out by the original examination, but may extend to all phases of the subject so opened up.—Gemmill v. State, 16 Ind. App. 154, 43 N. E. 909.

[h] (Kan. 1872) A witness cannot on cross-examination be questioned with regard to a matter which does not tend to impeach, rebut, explain, modify, or in any manner qualify anything that he has testified to on his examination in chief.—Sumner v. Blair, 9 Kan. 521.

[i] (Kan. 1887) On cross-examination of a witness he cannot be questioned upon a matter not examined on in chief, except where such questions tend to show interest, bias, or prejudice, or to explain, modify, or qualify former statements.—Lawder v. Henderson, 36 Kan. 754, 14 Pac. 164.

[j] (La. 1880) It is error to restrict the counsel of the accused, in his cross-examination of a witness for the state, to the matters brought out on the direct examination.—State v. Thomas, 32 La. Ann. 349.

[k] (La. 1893) Witness for defendant cannot be cross-examined as to matters not testified to by him on direct examination, though these facts had been testified to by several witnesses on both sides, and the testimony was only cumulative.—State v. Taylor, 45 La. Ann. 1303, 14 South. 26.

[l] (Me. 1873) Although, according to practice in this state, the cross-examination of a witness is not confined to matters inquired of in the examination in chief, an exception to a ruling limiting it to such matters will not be sustained, where it is evident that the excepting party was not prejudiced by the ruling.—Inhabitants of Falmouth v. Inhabitants of Windham, 63 Me. 44.

[m] (Mich. 1861) On cross-examination, the questioning party should not go into an affirmative or independent case, or examine the witness on the merits, but should confine himself to controverting the prima facie case, which the direct evidence tends to prove; and the rule for cross-examination of witnesses, that a party has no right to cross-examine as to matters not connected with any subject mentioned in the examination in chief, is affirmed.—Campau v. Dewey, 9 Mich. 381.

[n] (Mich. 1876) The cross-examination of a witness cannot properly be confined strictly to the precise subjects called to his attention in his direct examination, but should be allowed to extend to any matter not foreign to the subject-matter of such examination, and tending to limit, explain, or modify the same.—Haynes v. Ledyard, 33 Mich. 319.

[o] (Mo. 1840) If a witness is sworn and gives some evidence, however formal and unimportant, he may be cross-examined in relation to all matters involved in the issue.—Page v. Kankey, 6 Mo. 433.

[p] (Mo. 1885) Where the state introduces a witness and examines him, defendant may cross-examine him as to all matters involved in the case, no matter how formal or unimportant the examination in chief may have been.—State v. Brady, 87 Mo. 142.

[q] (Mo. 1892) A witness called to prove any fact may be cross-examined on the whole case;

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and the court's refusal to allow cross-examination on any point except that given in chief is presumably prejudicial, since the party may so have been deterred from cross-examining other adverse witnesses, and he cannot be obliged to make the attempt, and save an exception in each case.—Walter v. Hoeffner, 51 Mo. App. 46.

[r] (Mont. 1893) In an action by a servant for personal injuries resulting from the incompetency of H., a coservant, plaintiff called H. as a witness, stating that "the witness would refer to the time and place plaintiff fell, for the purpose of fixing the time and place of other events in connection with the case, and does not wish to make the witness his witness as to the acts he was doing at the immediate time of the fall." H. then testified to facts connected with plaintiff's fall. *Held* proper to allow H. to be cross-examined as to the entire case.—Jorgenson v. Butte & Montana Commercial Co., 13 Mont. 288, 34 Pac. 37.

[s] (Neb.) A party desiring to examine opponent's witness on new matter must make the witness his own.—(1882) Boggs v. Thompson, 13 Neb. 403, 14 N. W. 393; (1894) Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538.

[t] (N. J. 1878) Where hearsay evidence, competent as to one of the contestants of a will, is admitted, its admission will not justify his cross-examination upon other hearsay matters relating to another contestant.—In re Lewis' Will, 29 N. J. Eq. (2 Stew.) 279.

[u] (N. C. 1890) Unless, in the discretion of the court, at the close of the state's evidence, the state is restricted to one of the transactions shown by it and tending to prove the offense charged, the solicitor, on cross-examination of defendant's witness, can bring out any other transaction within the statute of limitations tending to prove the charge.—State v. Allen, 107 N. C. 805, 11 S. E. 1016.

[v] (N. D. 1896) The rule that the cross-examination of a witness, except as to matters affecting credibility, must be confined to the subjects to which the direct examination was addressed, does not limit the cross-examination to the particular facts to which the witness testified on direct examination, but a subject once opened may be exhausted.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[w] (Pa. 1865) Although the rules of evidence require that the inquiry on subjects introduced on cross-examination should be restricted to the extent of the examination, and that no party should be allowed by his own declarations to make evidence for himself, they are not to be strained so as to dissever occurrences clearly allied to each other, or to exclude declarations that are fairly part of the res gestæ.—Rhodes v. Commonwealth, 48 Pa. (12 Wright) 396.

[x] (Pa. 1866) Cross-examination should be limited to what has been directly testified to by the witness, but injury must be shown to have resulted from undue latitude, or judgment will not be reversed on that account.—Helser v. McGrath, 52 Pa. (2 P. F. Smith) 531.

[y] (S. C. 1892) A defendant in a criminal prosecution is not confined in the cross-examination of the state's witnesses to matters brought out in their examination in chief, but may interrogate them for the purpose of contradicting another witness, who has previously been examined; and if this right is denied him the error is not cured by the fact that he afterwards makes the witnesses his own, and causes them to be examined on his own behalf.—State v. Howard, 35 S. C. 197, 14 S. E. 481.

[z] (S. C. 1894) Where a decedent's representatives have introduced a witness on the subject of transactions with decedent, he may be cross-examined as to the entire matter.—Brown v. Foster, 41 S. C. 118, 19 S. E. 299.

[xx] (S. D. 1893) A cross-examining cannot go beyond the subject-matter of the examination in chief, except to show bias, or to lay a foundation for impeachment.—Wendt v. Chicago, St. P., M. & O. Ry. Co., 4 S. D. 476, 57 N. W. 226.

§ 950. Limitation as to particular subjects of inquiry.

[a] (Ala. 1893) In an action against a railroad company for the death of a brakeman, where the conductor testifies that he was informed by decedent before the accident that the brakes were out of repair, he may testify on cross-examination that it was not his duty to repair brakes, and that they were at no place, after he received such information, and before the accident, where the brakes could have been repaired.—Perdue v. Louisville & N. R. Co., 100 Ala. 535, 14 South. 366.

[b] (Cal. 1890) Where a director of a corporation which unlawfully appropriated water has testified, on his direct examination, that the corporation had used the water without interruption, it is error to exclude a question asked on cross-examination as to whether or not he had received notice from his agent that the diversion of the water had been interrupted.—Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523.

[c] (Cal. 1891) In an action for personal injuries, it is competent for defendant to ask plaintiff, on cross-examination, whether she called a doctor on the night of the accident; she having testified in her own behalf as to her injuries, and the pain she suffered.—McFadden v. Santa Ana, O. & T. St. Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252.

[d] (Cal. 1895) A witness who, on suit for divorce for nonsupport for a year prior to the action, testifies that he has supported the plaintiff during the time, cannot on cross-examination be questioned regarding separate property of the plaintiff of which he has had charge.—Terrill v. Terrill, 109 Cal. 413, 42 Pac. 187.

[e] (Cal. 1895) Where, on a prosecution for rape, prosecutrix testified that she was 7 years of age when she came to the state, and that at the time of trial she was 10 years of age, and on cross-examination stated that she did not know when she came to the state, she could be asked by defendant what she gave as her age to her school teacher after coming to the state.—People v. Knight, 43 Pac. 6.

[f] (Colo. 1892) In an action against one of two partners interested in the sale of a mine to recover compensation for services rendered, payable in event of a sale thereof, employment of plaintiff and a partnership were questions directly put in issue on the pleadings. The other partner, called on behalf of plaintiff, proved plaintiff's employment, and the compensation payable, and in cross-examination gave evidence of receipt by him from defendant of his share of proceeds of said sale. *Held*, that the admission of this evidence on cross-examination, although objectionable, tended to establish existence of partnership, and was admissible.—Osbiston v. Kaufman, 1 Colo. App. 333, 29 Pac. 748.

[g] (Conn. 1880) A defendant, for the purpose of proving his own insanity, introduced evidence that his sister had been insane. The counsel for the state, against defendant's objection, was allowed to inquire what caused her insanity, in order to show that it was not hereditary. *Held* to be no error.—State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

[h] (Fla. 1882) In a murder case, where it appeared that deceased was shot by defendant in a scuffle, it was error not to permit a witness, testifying to the scuffle and the shooting, to be cross-examined as to whether he noticed any marks of violence about the person of de-

fendant, though the witness did not testify as to any such marks on the direct examination. —Savage v. State, 18 Fla. 909.

[hh] (Ill. 1882) When a witness is called simply to prove handwriting, he cannot be cross-examined as to other matters.—Hurlbut v. Meeker, 104 Ill. 541.

[i] (Ill. 1885) In an action against a railroad company to recover for personal injuries, the duty of section men and foremen of the track to avoid and prevent accidents is proper matter for cross-examination, upon direct testimony that it is each section man's duty to look after himself.—Pittsburgh, C. & St. L. Ry. Co. v. McGrath, 115 Ill. 172, 3 N. E. 439.

[ii] (Ill. 1891) In an action against a city for injuries caused by the defective condition of a walk, a witness for plaintiff who has testified to seeing plaintiff fall, but not as to the condition of the walk, cannot be asked on cross-examination as to such condition.—City of Mt. Vernon v. Brooks, 39 Ill. App. 426.

[j] (Ind. 1891) In an action for damages for injuries to a passenger, it being contended by plaintiff that the train at the time of the accident was being run at a great and unusual rate of speed, a witness called by plaintiff testified that he was near the track immediately before the accident, and that his attention was directed to the speed of the train. On cross-examination, defendant asked him to state what the speed of the train was with reference to the speed ordinarily run there by the trains. *Held*, that the question was properly excluded, on the ground that it was not cross-examination, and for the further reason that there was no evidence that the witness had observed the speed of other trains at the same place.—Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860.

[jj] (Ind. 1893) In a murder case, it is not error not to permit defendant to prove, by cross-examination of the state's witnesses, that deceased had the reputation of being a strong, quarrelsome man, ready to fight at any time, where such reputation is not referred to in their evidence in chief, especially where, under the theory on which the case is tried, such evidence is immaterial.—Davidson v. State, 135 Ind. 254, 34 N. E. 972.

[k] (Iowa, 1880) In an action for injuries caused to plaintiff's leg by a defective sidewalk, her husband, on cross-examination, stated the circumstances of an injury to plaintiff's leg by falling on certain stairs, and said that the hired girl got breakfast for him on a certain morning after this injury. No reference was made to this injury on the examination in chief. *Held*, that a further question as to the name of the hired girl was properly excluded.—Garlick v. City of Pella, 53 Iowa, 646, 6 N. W. 3.

[kk] (Iowa, 1881) In a proceeding to determine whether or not attached property is exempt, it is not proper cross-examination to ask a witness if the owner had not waived the provisions of the law exempting the property when the matters have not been touched upon in the examination in chief.—Pellersells v. Allen, 56 Iowa, 717, 10 N. W. 261.

[l] (Iowa, 1887) Witnesses testified, on direct examination, as to occurrences in a bank and at their home, and it appeared that they were also at a lawyer's office, and that at these places business connected with the subject in controversy was transacted. *Held*, that cross-examination as to what occurred at the lawyer's office, which was not touched upon in the direct examination, was properly refused.—Krager v. Pierce, 73 Iowa, 359, 35 N. W. 477.

[ll] (Iowa, 1889) In an action on a note, where a witness has testified that he saw defendant sign the note, it is improper to ask him, on cross-examination, if he had any other transaction with defendant on the same day, and his answer to such question is properly stricken out. — McCormick Harvesting Mach. Co. v. Jacobson, 77 Iowa, 582, 42 N. W. 499.

[m] (Iowa, 1894) On a trial for forging an indorsement on a draft, where the cashier of the bank, who sold it, was asked for the facts of purchase, the court properly refused to allow defendant to show by him, on cross-examination, that, a week after purchasing the draft, the buyer ordered payment stopped, when the witness had not been interrogated in that regard in his examination in chief.—State v. Farrington, 90 Iowa, 673, 57 N. W. 606.

[mm] (Kan. 1890) In an action against a city for personal injuries caused by a defective sidewalk, a question on cross-examination as to whether the street, at the place where the accident occurred, was not lighter than elsewhere, is properly excluded when there was nothing said in regard to light in the direct examination of the witness.—City of Atchison v. Rose, 43 Kan. 605, 23 Pac. 561.

[n] (La. 1889) When the witness of the accused has been questioned as to the physical power and prowess of the deceased, questions by the state on cross-examination, relative to like qualities of the accused, are germane and responsive to the subject-matter of the examination in chief.—State v. Johnson, 41 La. Ann. 1076, 6 South. 802.

[nn] (Mass. 1854) In an action against an alleged inhabitant of a town to recover taxes, one of the assessors of the town, called by defendant, having been excluded from testifying that the defendant gave him notice that he was going to remove from the town, it was error to allow him to state on the cross-examination that he had not, in a certain conversation, acknowledged that he had been given such notice, since, not having testified to the fact, he could not make statements about the fact.—Cole v. Inhabitants of Cheshire, 67 Mass. (1 Gray) 441.

[o] (Mass. 1877) On an issue as to whether an insured vessel was lost by inherent weakness or a peril insured against, a witness, called by plaintiff to prove that the vessel was seaworthy when she left port, cannot be cross-examined as to the age of the vessel by the defendant, upon whose admission of her seaworthiness plaintiff waived examination of the witness.—Swift v. Union Mut. Marine Ins. Co., 122 Mass. 573.

[p] (Mich. 1861) In ejectment for land reserved by a treaty, a witness on direct examination was not asked any question as to either of certain individuals, and he did not mention them in his testimony. He was asked to whom individual reservations were made at the treaty, and the answer made no mention of one O.; but on his cross-examination he stated that O. got the land at the treaty. *Held*, that the court erred in refusing to let the defendant's counsel ask such witness on his cross-examination whether O. was related to an individual not mentioned in his direct examination, on the ground that it was irrelevant to the subject-matter of the direct examination.—Compau v. Dewey, 9 Mich. 381.

[pp] (Mich. 1861) The issue being upon the identity of an Indian claiming an interest in reserved land, and the plaintiff having interrogated his witnesses as to the names and relationship of a number of the reservees, the questions, "Was this O. any relation to T.?" and "What band did her mother belong to when she was born?" were *held* to be competent on cross-examination.—Campau v. Dewey, 9 Mich. 381.

[ppp] (Mich. 1872) In replevin, the questions whether plaintiff had sold other property to bring himself down to the exemptions, or

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[i] (Kan. 1895) In replevin by a wife to recover property seized by a creditor of the husband, where the husband testified for plaintiff only as to the demand and the bringing of suit, he could not be cross-examined as to previous statements made by him concerning the property.—Butler v. Cooper, 3 Kan. App. 145, 42 Pac. 839.

[j] (Mass. 1855) On the trial of an action of tort for filling up and obstructing a brook, a witness, who has testified that he filled up the brook by orders of defendant, cannot be asked by defendant, on cross-examination, whether defendant, at the time of giving such orders, did not tell the witness that plaintiff had dug it out.—Ashley v. Wolcott, 69 Mass. (3 Gray) 571.

[k] (Mass. 1877) In a suit by an administratrix for an injury, resulting in the death of her intestate, sustained by falling through a platform in defendant's foundry, a witness, who testifies that deceased, as he and the witness were proceeding to deceased's house in a hack, stated that a fellow servant was to blame for the accident, but does not testify concerning the condition of the platform, cannot be asked on cross-examination whether he did not state in the presence of others, after helping deceased into the house, "that the platform had not been safe for six weeks previously."—Boyle v. Mowry, 122 Mass. 251.

[l] (Mich. 1887) In an action of trespass against defendants for inciting men to go upon the premises of plaintiff, a question asked of a witness on cross-examination by defendant's counsel, as to what defendant said to a meeting of men about observing the law, held properly excluded, as plaintiff had given no evidence in regard to the meeting.—Webber v. Barry, 66 Mich. 127, 33 N. W. 289, 11 Am. St. Rep. 466.

[m] (N. Y. 1860) Cross-examination of a witness as to a conversation had by him must be limited to that particular subject of the conversation which was brought out on the direct examination, and the whole conversation cannot be elicited.—Greaton v. Smith, 1 Daly, 380.

[n] (N. Y. 1881) Where a witness in a criminal case has testified to a conversation with the prisoner, he may not be asked on cross-examination relative to statements made by the prisoner in another and entirely different conversation.—Moett v. People, 85 N. Y. 373.

[o] (N. Y. 1896) Where plaintiff in an action on an insurance policy covering mortgaged goods called defendant's agent who had issued the policy, merely to prove the authority of the agent, it is not proper cross-examination for defendant to ask the agent if he did not tell plaintiff that he would have to take his chances as to the validity of the policy.—McGuire v. Hartford Fire Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300.

[p] (N. C. 1891) On a prosecution for larceny, a witness for the state testified that on one occasion there was a two-dollar bill in the cash drawer when he went to dinner; that defendant was the only clerk left in the store; and that when witness returned the bill was gone. It was not shown that defendant was charged with taking the bill. *Held*, that a question, on cross-examination, as to whether, on witness' return to the store, he asked defendant what had become of the bill, and what his reply was, was properly ruled out.—State v. Rhyne, 109 N. C. 794, 13 S. E. 943.

[q] (Pa. 1844) A subscribing witness was called by plaintiff to establish the execution of articles of agreement. *Held*, that defendant might ask the witness what was said at the time of the execution of such articles.—Markley v. Swartzlander, 8 Watts & S. 172.

[r] (Tex. 1873) On a trial for murder, the declarations of the defendant, made at the time of the killing, to the deceased, charging him with having insulted the wife of defendant, are not admissible in evidence for the defendant on cross-examination, as part of the res gestæ, in the absence of direct testimony that such insult was given.—Bassham v. State, 38 Tex. 622.

[s] (Tex. 1893) On trial for arson, where defendant's wife was sworn on his behalf, it was error to allow the question, on cross-examination, "Did you not, on the night of the fire, after it had broken out, state you had a presentiment that something was going to happen?" the matter not being raised on direct examination.—Bluman v. State, 33 Tex. Cr. R. 43, 21 S. W. 1027, 26 S. W. 75.

§ 953. —— Introduction of matters in defense or rebuttal in general.

[a] A party cannot make out his case by introducing new matter on cross-examination.
—(Ga. 1859) Brown v. State, 28 Ga. 199;
(Minn. 1887) Sterling v. Bock, 37 Minn. 29, 32 N. W. 865;
(Mo. 1841) Rucker v. Eddings, 7 Mo. 115;
(N. J. 1857) Donnelly v. State, 26 N. J. Law (2 Dutch.) 463, affirmed (1857) Id. 601;
(Pa. 1841) Castor v. Bavington, 2 Watts & S. 505.

[b] (Ariz. 1874) In ejectment for a mining claim, plaintiffs' grantor, who has testified in chief that she located the claim, may be cross-examined as to whether or not she then knew of defendants' prior location of the premises, and whether or not she had removed their notice of location, as such cross-examination is not calling out new matters of defense, but is simply showing that the title is not in plaintiffs, but in defendants.—Rush v. French, 1 Ariz. 99, 25 Pac. 816.

[c] (Ariz. 1874) In ejectment for a mining claim, plaintiffs, after testifying in chief as to their purchase of the claim from the second locator, may be cross-examined as to their knowledge, at the time of their purchase, of defendants' prior location, of its record, and of the fact that defendants had done work on the claim, as these facts all go to prove title in defendants, in direct denial of plaintiffs' allegation that the title is in them.—Rush v. French, 1 Ariz. 99, 25 Pac. 816.

[d] (Cal. 1855) Where the plaintiff set up his right to the property by virtue of a conveyance, which was shown to be a mortgage, it was *held* that the defendant, on cross-examination, may show that the mortgage has been satisfied.—Chenery v. Palmer, 5 Cal. 131.

[e] (Cal. 1859) The question was whether by defendant's negligence plaintiff's land had been flowed. Plaintiff's witness stated that on one occasion he saw a great deal of water come over defendant's dam. *Held*, that it was not proving a defense, but denying the apparent meaning of plaintiff's proof, and therefore competent, on cross-examination, to ask that witness "whose water it was that he saw coming over the flume."—Jackson v. Feather River & G. Water Co., 14 Cal. 18.

[f] (Cal. 1859) It is always competent on cross-examination to disprove the case made by the witness' examination in chief.—Jackson v. Feather River & G. Water Co., 14 Cal. 18.

[g] (Cal. 1895) In an action on a note for the price of a harvester, a subsequent contract pleaded by defendant in avoidance, whereby the payees were to extend the time of payment until the next harvest, and put the machine in working order, cannot be shown on plaintiff's cross-examination.—Haines v. Snedigar, 110 Cal. 18, 42 Pac. 462.

[h] (Ga. 1873) Where two factors' liens are foreclosed on the same property, one of which

is founded on a lien contracted orally, on motion to subject money in the sheriff's hands raised by the sale of the property, and the affidavit of the creditor foreclosing the oral lien does not disclose the date thereof, and he offers himself as a witness to prove his lien to be older than that of the other creditor, the latter may cross-examine him and show, if he can, that the latter contract did not create a lien.—Franklin v. Norton, 47 Ga. 643.

[i] (Ill. 1887) On the trial of an action against a railway company for loss of goods, plaintiff, after defendant had closed its case, called in rebuttal the contracting agent of defendant, and who had already testified in behalf of defendant, and showed him a duplicate of the bill of lading, merely for the purpose of refreshing his memory as to the date and place of shipment. Thereupon, on cross-examination, defendant offered to show by the bill of lading that the risks of injury during transportation were especially excepted to and assumed to be borne by the shippers, and that the same was known to the agent of plaintiff who made the contract for shipment. *Held* that, as this was a new theory, which had neither been set up by the pleadings, nor suggested in any of the evidence thus far introduced, the subject was not proper cross-examination, and the offer was properly refused.—Erie & Pacific Despatch v. Stanley, 123 Ill. 158, 14 N. E. 212, affirming 22 Ill. App. 459.

[j] (Ind. 1847) An action of assumpsit for work and labor, etc., was commenced in the circuit court, the plaintiff claiming $1,500 damages. The pleas were the general issue, the statute of limitations, and a set-off. The plaintiff, on the trial, proved by a witness the performance of service for the defendant by feeding and taking care of the latter's cattle. *Held*, that the defendant might, on cross-examination, ask the witness whether, at the time of said service, the plaintiff was not using the cattle for his own benefit.—Dayton v. Hall, 8 Blackf. 556.

[k] (Ind. 1884) In a suit for bastardy, inquiries of the relatrix as to the color of the child's hair and eyes are not admissible on cross-examination, being evidence of an affirmative nature.—Hull v. State, 93 Ind. 128.

[l] (Ind. 1887) Though, in an action for damages, the burden of proving facts in mitigation is on defendant, plaintiff cannot be cross-examined as to those facts, unless the matter has been gone into on the direct examination.—Cincinnati, I., St. L. & C. Ry. Co. v. Lutes, 112 Ind. 276, 14 N. E. 706.

[m] (Ind. 1888) In an action on a guardian's bond, it is not competent to show by plaintiff's witness on cross-examination that defendant did not execute the bond.—Britton v. State, 115 Ind. 55, 17 N. E. 254.

[n] (Iowa, 1888) Plaintiff's husband testified on her behalf that the hay destroyed belonged to his wife. *Held* that, having testified on cross-examination that he stacked the hay for plaintiff; that he worked for her for his board, clothes, and spending money—it was proper to refuse to permit defendant to ask him the terms and conditions of the contract, though defendant had pleaded that plaintiff was not the real party in interest. Such evidence was part of defendant's case, which could not be introduced by cross-examination.—Bullis v. Chicago, M. & St. P. Ry. Co., 76 Iowa, 680, 39 N. W. 245.

[o] (Mich. 1878) An architect, suing for the value of some plans, showed that he had delivered them, at defendant's request, to a third person, who swore that defendant had sent him for them. *Held* that, on the cross-examination of this witness, the question whether the defendant had not demanded the plans of him, and he had refused on the ground that he owned them, was properly excluded, as neither impeaching nor tending to show, as against the plaintiff, that he had really bought the plans.—French v. O'Connor, 39 Mich. 106.

[p] (Nev. 1872) Although, under the rules for cross-examination as followed by American courts, a defendant cannot, on cross-examination, draw out proof of "new matter," all such particular facts may be elicited as tend to disprove the essential or ultimate facts in the plaintiff's case, which the direct examination tended to prove.—Ferguson v. Rutherford, 7 Nev. 385.

[q] (N. Y. 1830) On an inquest at the circuit court, the defendant may cross-examine the plaintiff's witnesses, to overthrow what has been testified to on the direct examination; but he cannot, by the plaintiff's witnesses, establish a defense defeating a right to recover.—Hartness v. Boyd, 5 Wend. 563.

[r] (N. Y. 1891) In an action on a note, wherein the defense was the statute of limitations, plaintiff called defendant as a witness. On cross-examination of defendant, his counsel asked him whether he had made the last payment indorsed on the note, and whether he had made any payment to any person after a certain date to be applied on the note in question. *Held*, that answers to these questions were properly excluded, on the ground that they related to matters not inquired into on the direct examination.—Briggs v. Gardner, 60 Hun, 543, 15 N. Y. Supp. 335, 21 Civ. Proc. R. 42.

[s] (Pa. 1851) In an action against a sheriff for an alleged wrongful levy and sale, where the sheriff has given evidence to show that the sale of the property in dispute to plaintiff shortly before the judgment on which the levy was made was fraudulent, evidence to show that plaintiff assumed or paid the debts of the seller in pursuance of the contract of sale, while proper in rebuttal, cannot be brought out by cross-examination.—Helfrich v. Stem, 17 Pa. (5 Harris) 143.

[t] (Pa. 1851) It is not error to refuse to permit defendant to introduce his defense by cross-examination of plaintiff's witness as to a matter to which the witness had not been examined.—Mitchell v. Welch, 17 Pa. (5 Harris) 339, 55 Am. Dec. 557.

[u] (Pa. 1862) Where, upon the trial, the commissioner, appointed by agreement to report the quantity of coal mined by defendant, had produced and identified his report, having been called for that purpose only, he could have been cross-examined by the defendant as to its identity, but not as to the basis on which it was made; to obtain evidence of the contents of the paper, the defendant should have called the witness in chief.—Tiley v. Moyers, 43 Pa. (7 Wright) 404.

[v] (Pa. 1880) In a suit for injuries received by falling into an excavation, defendant on cross-examination cannot properly ask the plaintiff whether she had not agreed to waive her right to damages for a consideration, as a party will not be permitted to lead out new matter constituting his own case on cross-examination.—Monongahela Water Co. v. Stewartson, 96 Pa. 436.

[w] (Pa. 1883) In an action for the price of coal, wherein plaintiff's witness had testified as to the amount of coal mined, *held*, that he could not be asked on cross-examination whether the coal had been paid for, as this was new matter pertinent to the defense.—Hughes v. Westmoreland Coal Co., 104 Pa. 207.

[x] (Pa. 1890) In an action for damages for running over plaintiff's intestate at a crossing, there was evidence that a foreman of a gang of workmen made gestures in the direction of deceased when he was driving towards the track. *Held*, that the omission of plaintiff's

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witnesses, when testifying in chief, to mention the gestures of the foreman did not make them new matter of defense, and they might be brought out on cross-examination.—McNeal v. Pittsburgh & W. Ry. Co., 131 Pa. 184, 18 Atl. 1026, 25 Wkly. Notes Cas. 181.

[y] (Pa. 1896) In an action for the death of plaintiff's decedent in a collision at a railway crossing, plaintiff examined his witnesses as to the location of the track with respect to the road along which decedent was passing and surrounding objects, and as to whether the night was dark, for the purpose of showing that the crossing was dangerous. *Held*, that defendant, on cross-examination, could bring out the fact that the train was plainly visible from the place where it became decedent's duty to look for approaching trains, so as to entitle it to a nonsuit on the ground that decedent failed in such duty.—Sullivan v. New York, L. E. & W. R. Co., 175 Pa. 361, 34 Atl. 798.

[yy] (S. C. 1890) In trespass for entering and taking iron rails which defendant had leased to plaintiff, defendant alleged a license to enter and take them upon condition broken under the contract. Plaintiff on cross-examination admitted her signature to the agreement, and that she claimed under it. *Held*, that defendant could establish its defense by cross-examination of plaintiff's witnesses.—Willoughby v. Northeastern R. Co., 32 S. C. 410, 11 S. E. 339.

[z] (Wis. 1884) Plaintiff proved his ownership of a note in suit by assignment. Defendant offered no evidence on the subject, but when plaintiff was testifying in rebuttal upon other matters attempted to show by cross-examination that plaintiff was not the owner, but was attempting to collect the note by collusion with others. *Held* not proper cross-examination.—Parker v. Kelly, 61 Wis. 552, 21 N. W. 539.

[zz] (Wis. 1893) In an action by one claiming to have been ejected from defendant's train, defendant claimed that the son of plaintiff, and not plaintiff, had been ejected. *Held*, that it was error not to allow defendant to cross-examine the son as to whether he had had any trouble with defendant's conductor, what he had said to the conductor, whether he had been put off the train, and whether, during the few minutes prior thereto, he had not been engaged in a conversation or wrangle with the conductor.—Washburn v. Chicago, St. P., M. & O. Ry. Co., 84 Wis. 251, 54 N. W. 504.

§ 954. —— Cross-examination as to consideration based on testimony as to execution and amount due.

[a] (Cal. 1882) One calling a witness to testify merely to the execution of a bill of sale may object to the witness being interrogated, on cross-examination, as to the consideration of the bill of sale.—McFadden v. Mitchell, 61 Cal. 148.

[b] (Ill. 1895) Where a witness testifies as to the amount due on a note, he cannot be cross-examined as to the consideration thereof.—Evans v. Murphy Varnish Co., 59 Ill. App. 87.

[c] (Iowa, 1883) Where plaintiff, in an action against an estate on a note, has testified that it was signed by the decedent, he may be cross-examined as to the consideration on which the note was based, as touching remotely upon the question whether the note was in fact signed by the decedent; also as to why, when, and where the note was signed.—Glenn v. Gleason, 61 Iowa, 28, 15 N. W. 659.

[d] (Minn. 1875) Upon an issue as to the execution of a note, a witness testifying as to its execution may be cross-examined as to all the circumstances connected therewith, including the alleged consideration, and defendant may, for impeachment, contradict him as to every point sworn to by him.—Lamprey v. Munch, 21 Minn. 379.

[e] (S. D. 1895) A witness called by plaintiff in an action on a note, who testified solely to the execution of the note, could not be cross-examined as to the consideration of the note, failure of which was pleaded in defense.—First Nat. Bank v. Smith, 8 S. D. 101, 65 N. W. 439.

[f] (Wis. 1885) Where a note sued on is alleged to be a forgery, and the payee testifies, in behalf of the holder, that defendant executed the note in her presence, she cannot be cross-examined by defendant to show that the note was without consideration.—Youmans v. Carney, 62 Wis. 580, 23 N. W. 20.

5. CROSS-EXAMINATION AS TO IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS.

IN GENERAL, § 955.
PARTICULAR MATTERS AS SUBJECTS OF CROSS-EXAMINATION, § 956.
CROSS-EXAMINATION AS TO IMMATERIAL TESTIMONY IN CHIEF, § 957.

Cross-examination of party as to irrelevant, collateral, or immaterial matters, see post, § 972.
Discretion of court as to cross-examination on irrelevant, collateral, or immaterial matters, see ante, § 926.
Irrelevant, collateral, or immaterial matters on redirect examination, see post, § 1004.

§ 955. In general.

[a] (U. S. 1853) Impertinent inquiries in examining a witness, having no bearing upon the case, should not be allowed.—Day v. Boston Belting Co., Fed. Cas. No. 3,673.

[b] (Ala. 1857) A witness may be asked, on cross-examination, questions which would not be relevant or pertinent on his examination in chief.—Winter v. Burt, 31 Ala. 33.

[c] (Ill. 1891) A witness should not be interrogated upon cross-examination as to a matter upon which a party in interest bases no claim, or one which calls for an argumentative reply.—Truesdale Mfg. Co. v. Hoyle, 39 Ill. App. 532.

[d] (La. 1836) Much latitude is allowed on cross-examination which may extend to points irrelevant.—Hall v. The Chieftain, 9 La. 318.

[e] (La. 1885) A subject-matter, although not strictly pertinent, which has been opened up on examination in chief, may be pursued by the other side on cross-examination.—State v. Melton, 37 La. Ann. 77.

[f] (Me. 1838) Improper or irrelevant testimony cannot become admissible merely by being introduced by the cross-examination of a witness.—Norton v. Valentine, 15 Me. (3 Shep.) 36.

[g] (Me. 1842) On the trial of an indictment for a criminal offense, the presiding judge is not obliged to permit the introduction, even on cross-examination, of a collateral fact which may occasion a new and distinct issue.—State v. Whittier, 21 Me. (8 Shep.) 341, 38 Am. Dec. 272.

[h] (Mass. 1889) Where defendant's witness is asked, on cross-examination, as to the value of plaintiff's real estate, as to which he had not testified in chief, plaintiff cannot cross-examine him on collateral matters to show that his opinion was of no value.—Roberts v. City of Boston, 149 Mass. 346, 21 N. E. 668.

[i] (Mich. 1872) On cross-examination, a question calculated to draw out a fact which may be rendered material by further evidence is competent, although not accompanied by an offer to introduce such other evidence.—O'Donnell v. Segar, 25 Mich. 367.

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[j] (S. C. 1831) A witness cannot, on his cross-examination, be asked irrelevant questions, with a view of calling other witnesses to contradict his answers; but he may be asked irrelevant questions with a view of obtaining from him inconsistent and contradictory answers, and of thus impeaching or destroying his credit.—Jones v. McNeil, 2 Bailey, 466.

[k] (Tex. 1884) The rule that only such evidence as is material to the matter in issue shall be introduced governs both in direct examination and cross-examination; but it is not applied with the same strictness in cross-examination as in the examination in chief.—Evansich v. Gulf, C. & S. F. R. Co., 61 Tex. 24.

§ 956. Particular matters as subjects of cross-examination.

[a] (Ala. 1890) In an action against a railroad company for personal injuries caused by a low bridge, cross-examination of different railroad officials, who have testified as to the use and usefulness of whipping straps as signals, as to whether or not they had adopted whipping straps as warning signals after being mulcted in consequence of injuries by low bridges, is incompetent, as it multiplies the issues, and has a tendency to mislead the jury.—Louisville & N. R. Co. v. Hall, 91 Ala. 112, 8 South. 371, 24 Am. St. Rep. 863.

[b] (Ala. 1891) In a criminal case, on the cross-examination of a witness for the state, where it is not proposed to show that he has been before examined in the case, or in any case connected with or resembling it, it is not error to exclude a question as to how many times he has been a witness in court.—Mitchell v. State, 94 Ala. 68, 10 South. 518.

[c] (Ala. 1893) On the trial of a prosecution for the larceny of a sum of money, the witness, M., one of the parties from whom the money was alleged to have been stolen, after she had testified in chief that she had money of her own, was asked on cross-examination, "Where did you keep the money that belonged to yourself?" *Held*, that the question, being as to irrelevant and immaterial matters, was properly excluded.—Martin v. State, 104 Ala. 71, 16 South. 82.

[d] (Ga. 1884) In a prosecution for using obscene language in the presence of a female, her husband being the prosecutor, she cannot be asked if the prosecutor had not offered to stop the prosecution if the accused would pay a sum of money.—Howard v. State, 73 Ga. 88.

[e] (Ind. 1881) A witness in a trial for murder, who has testified about dressing the wounds of deceased, cannot be asked on cross-examination whether one of the surgeons who dressed the wound was drunk, as it was improper on a cross-examination to enter into such a collateral matter affecting not the witness himself, but another person.—Batten v. State, 80 Ind. 394.

[f] (Ind. 1882) On the question of the utility of a proposed highway as affected by the actual condition of another highway not far distant as testified to by a witness, it is not proper on cross-examination to ask him questions relating to the causes of its defective condition, and why it has been so poorly worked.—Hagaman v. Moore, 84 Ind. 496.

[g] (Iowa, 1871) Plaintiff alleged that he had paid defendant $500 on account, but that on final settlement the payment was by mistake counted as $50, and on trial plaintiff produced his bookkeeper, who testified that the mistake occurred in copying the item from the book to a separate piece of paper in making a statement of plaintiff's account, and this item was exhibited to the jury. *Held*, that defendant's counsel was entitled, on cross-examination, to ask the witness questions as to the other items of charge and credit in the account with a view of showing that the books were improperly kept, and that if properly kept would show a balance due defendant.—Upton v. Knoll, 32 Iowa, 121.

[h] (Iowa, 1895) Where a witness on a trial for rape testified that the prosecutrix came to his house, and stated that she had been raped, questions as to whether she came to his house one evening to get in, when the marshal drove her away, and as to whether she had stayed there several nights, were not within the scope of cross-examination.—State v. Case, 96 Iowa, 264, 65 N. W. 149.

[i] (Iowa, 1895) On cross-examination by defendant's counsel of one jointly indicted with defendant, it was proper to exclude a question as to whether the witness thought it would benefit him to tell "that stuff."—State v. Weems, 96 Iowa, 426, 65 N. W. 387.

[j] (La. 1890) In proof of an alibi, a witness testified that on the evening before the commission of the crime the accused crossed his ferry and recrossed the next morning. *Held*, that he could be cross-examined as to other ferries and their distance from the place of the killing.—State v. McFarlain, 42 La. Ann. 803, 8 South. 600.

[k] (Mass. 1872) In an action on an award determining the amount to be paid annually for flowing land, one of the arbitrators testified, without objection, that they estimated the damages caused by flowing in summer only. *Held*, that no exception lay to the refusal of the judge to allow him to be asked on cross-examination why he did not so specify in the award, if the bill of exceptions did not show that the question was material.—Wood v. Willis, 110 Mass. 454.

[l] (Mich. 1863) Where in an action of divorce evidence is given to establish adultery at the time stated, and the alleged particeps criminis denies its commission, he cannot be asked on cross-examination if he had not stated the year before the alleged offense that he had had illicit intercourse with the party charged, for the inquiry does not relate to any matter in issue.—Dunn v. Dunn, 11 Mich. 284.

[m] (Mich. 1888) In a suit on a note by the indorsee of the payee, defendant alleged that it was obtained by fraud, and plaintiff knew of it, and showed that other notes were fraudulently obtained and passed to third persons before due. *Held*, that plaintiff could not show, on cross-examination, the reputable character of the third persons.—Mace v. Kennedy, 68 Mich. 389, 36 N. W. 187.

[n] (Mich. 1889) In an action for the value of land which plaintiffs allege defendant agreed to exchange for land conveyed by them, where the person who made the abstract for the land covered by plaintiff's deed has testified as a witness for defendant that there is no record of a patent from the government for the land, he may be cross-examined as to why he made the abstract showing title from the government, and where he obtained his information.—Dikeman v. Arnold, 78 Mich. 455, 44 N. W. 407.

[o] (Mich. 1894) In a trial for burglary, the defense being an alibi, where it appears that the police were warned that the crime was to be committed, it is proper to restrict the cross-examination of the state's witnesses, as to the source of the information, to matters bearing on the question of whether defendant was present at the commission of the burglary.—People v. Laird, 102 Mich. 135, 60 N. W. 457.

[p] (Mich. 1895) Whether or not the county attorney prepared the bail bond of a witness who has testified that he is under arrest, and is out on bail, is immaterial.—People v. Considine, 105 Mich. 149, 63 N. W. 196.

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[q] (Mo. 1888) In a prosecution for murder a question to a witness, who was a member of the criminal society to which defendant belonged, and was present at a meeting of it before the murder, and who has fully detailed his connection with the case, whether he has employed counsel, is properly excluded as immaterial.—State v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

[r] (Mo. 1892) When plaintiff has forced a trial by admitting that defendant's absent witness would swear to the facts set out in the affidavit for continuance, only such statements of fact can be read to the jury, and plaintiff cannot cross-examine affiant as to matters concerning the diligence used to procure the witness' attendance.—Osborn v. Emery, 51 Mo. App. 408.

[s] (N. Y. 1873) It was not permissible to ask a witness on cross-examination whether witnesses had been called to swear they would not believe him on oath.—Burvee v. People, 1 Thomp. & C. 289.

[t] (Or. 1885) A witness cannot be interrogated as to the mode by which his attendance as a witness was procured.—Hurst v. Burnside, 12 Or. 520, 8 Pac. 888.

[u] (Tex. 1880) The body of the deceased was found by certain persons who were not produced as witnesses on the trial for the homicide, and there was no evidence that defendant made any effort to have them produced. On cross-examination of one of the state's witnesses, defendant's counsel inquired what had become of these persons, and why they were not produced. *Held*, that an objection to this question was properly sustained.—Rye v. State, 8 Tex. App. 153.

[v] (Tex. 1889) After certain state witnesses had testified, on cross-examination, that they had not been paid by D. to testify in this case, they were asked if at the time of taking their depositions in a civil suit, at which time he told them they would be called as witnesses in this case, he had not paid them money, though he owed them nothing at the time. *Held*, that such evidence was irrelevant, and was properly excluded.—O'Connor v. State, 28 Tex. App. 288, 13 S. W. 14.

§ 957. Cross-examination as to immaterial testimony in chief.

[a] (Mich. 1895) Where plaintiff has offered testimony tending to corroborate a witness of his on a certain matter, it is error to refuse to permit the witness to be cross-examined in regard thereto, on the ground that the testimony is immaterial and irrelevant.—Valin v. McKerreghan, 104 Mich. 213, 62 N. W. 340.

[b] (Wis. 1857) Where one party introduces immaterial testimony, the other party may cross-examine the witness as to the same.—Ketchingman v. State, 6 Wis. 426.

6. CROSS-EXAMINATION AS TO WRITINGS.

IN GENERAL, § 958.
CAPACITY OF PERSON EXECUTING WRITING, § 959.
NECESSITY FOR PRODUCTION OF WRITINGS, § 960.
ADMISSIBILITY OF WRITINGS, § 961.
MANNER OF CONDUCTING CROSS-EXAMINATION, § 962.

Consideration for note, see ante, § 946.
Cross-examination as to consideration based on testimony as to execution and amount due, see ante, § 954.
—— *as to fraud, see* post, § 963, 964.
—— *of party as to writings, see* post, § 973.

§ 958. In general.

[a] (Cal. 1872) On a criminal prosecution, the district attorney asked a witness on cross-examination if he had signed a verdict as a member of the coroner's jury. The verdict was produced and read to the witness as part of the question, and it appeared that it was to the effect that the killing by the prisoner was done with malice. Before witness answered the question the verdict inquired of was placed in his hands, and he was permitted to read and examine it. *Held*, that such cross-examination was not improper on the ground that it was irrelevant and inadmissible, and as an effort to prove the contents of a written record by parol.—People v. Donovan, 43 Cal. 162.

[b] (Cal. 1886) A question put in cross-examination as to a "side-line monument," not mentioned in the examination in chief, to a witness examined upon a certain map in evidence, is not responsive to such examination in chief.—Anderson v. Black, 70 Cal. 226, 11 Pac. 700.

[c] (Ind. 1892) Where a letter, identified by a witness, is to be put in evidence, a cross-examination of the witness, based on the letter, is proper before it is put in evidence.—Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. App. 415, 31 N. E. 838.

[d] (Md. 1861) Where a witness has testified for the plaintiff in reference to entries of measurements in his book, the defendant may cross-examine the witness in reference to these entries and the headings of the same, for all the purposes of the defense; the entire account, though composed of many items, is, in the eye of the law, but one memorandum and one entry, and the defendant is entitled to the whole of it.—Green v. Caulk, 16 Md. 556.

[e] (Md. 1881) Where in an action on a note, a witness has testified in chief as to his knowledge of defendant's handwriting, has examined the note, and has proved that it was in the handwriting of the defendant, he can upon cross-examination be asked "when he first saw the note," and "who showed him the note."—Herrick v. Swomley, 56 Md. 439.

[f] (Md. 1896) Plaintiff, in a creditors' bill against her deceased father's widow to set aside conveyances by him to defendant, alleged an indebtedness to plaintiff on a single bill for $26,500 purporting to have been executed by deceased by making his mark, and to have been witnessed by plaintiff's husband. The husband testified for plaintiff as to the execution of the instrument. *Held*, that it was not error to permit such witness to be cross-examined as to who were present and what was said by deceased at the time the paper was executed.—Duttera v. Babylon, 83 Md. 536, 35 Atl. 64.

[g] (Mass. 1883) In an action against a corporation for inducing plaintiff to purchase stock by false representations as to the solvency of the company, defendant introduced as a witness its treasurer, who produced his cashbook, and testified that he showed it to plaintiff before the sale. *Held*, that it was competent to cross-examine the witness for the purpose of showing that the book did not contain a correct statement of the affairs of the corporation.—Teague v. Irwin, 134 Mass. 303.

[h] (Mich. 1885) In an action on an assigned obligation, the assignee, if called as a witness for plaintiff, may properly be cross-examined as to any material fact affecting the execution of the paper.—Bulen v. Granger, 58 Mich. 274, 25 N. W. 188.

[i] (Mich. 1893) In an action on a note which the indorser claimed had been raised from $500 to $3,500, he testified that sufficient spaces were left before the figures "500," and the words "five hundred," in the body of the note, for the insertion of the figure "3" and the word "thirty," respectively. *Held*, that it was competent

to ask him why he did not put marks in such spaces to prevent their being filled, if he did not know that it was ordinarily done, and if he cared whether it was left in such condition that it could be changed; such question being within the range of legitimate cross-examination.—Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904.

[j] (Minn. 1893) It is improper, on cross-examination, to ask a witness as to the contents of a written instrument not in evidence; but if the party cross-examining desire to show the contents, and cross-examine upon them, he should, if the instrument be admitted, introduce it, and make it part of his cross-examination.—O'Riley v. Clampet, 53 Minn. 539, 55 N. W. 740.

[k] (Neb. 1896) Where, in an action on a bill or note, a witness is examined with respect to the genuineness of the signature alone, he should not on cross-examination be required to state his opinion touching collateral or incidental matters based upon a comparison of the disputed signature with others.—Norfolk Nat. Bank v. Job, 48 Neb. 774, 67 N. W. 781.

[l] (N. M. 1891) In an action for a balance due from a contractor to a subcontractor, the latter, as a witness, consulted a copy of an original memorandum to refresh his memory as to the amount due. No effort was made to show that the paper was not a copy of the original, nor was there any dispute as to the amount due, but simply whether defendant was liable on an order given by plaintiff to a third party. *Held*, that defendant was not entitled to cross-examine as to the memorandum.—Ford v. McGarvey, 6 N. M. 222, 27 Pac. 415.

[m] (N. M. 1892) Where a witness in an action for the breach of a contract, the execution of which defendant claims was never authorized by him, testified that defendant wrote him several letters, in which defendant expressed the desire to have his name stricken from the contract, it was error not to permit cross-examination as to the reason, if any, given in the letters for such wish.—Kirchner v. Laughlin, 6 N. M. 300, 28 Pac. 505.

[n] (N. C. 1895) In an action to set aside a deed to land claimed by plaintiff under a will of the alleged grantor, plaintiff claimed that such deed was a forgery. *Held*, that it was not error to require the grantee and her husband (who had testified as to the execution of the deed), on cross-examination, to state whether the signatures to such will and codicil were not the genuine signatures of testator and the alleged grantor in such deed.—Kornegay v. Kornegay, 117 N. C. 242, 23 S. E. 257.

[o] (Ohio, 1886) Where it is sought to show the rejection of a claim against an estate, and the evidence of claimant shows a presentation of the claim to the administrator, its retention by him for examination, and that it was afterwards returned with no indorsement thereon and no verbal message, but with a letter which a witness for claimant stated was a rejection, the court should permit the administrator to cross-examine the witness as to such letter, or to introduce it in evidence on the cross-examination, or afterwards when he came to the introduction of his own evidence.—Yager v. Greiss, 1 Ohio Cir. Ct. R. 531.

[p] (Ohio, 1890) The rule excluding oral testimony of the contents of a deed does not, on cross-examination of a witness, prevent inquiry as to his motives and purposes in procuring it.—Boyle v. State, 6 Ohio Cir. Ct. R. 163.

[q] (Pa. 1841) If a witness be asked a question respecting a certain transaction, the opposite party, before the question is answered, may inquire and know whether such transaction is in writing; for, if so, the witness cannot be allowed to testify on the subject.—Rice v. Bixler, 1 Watts & S. 445.

[r] (Pa. 1848) Where a witness is called to prove a written contract, defendant may prove, by his cross-examination, circumstances occurring at the time which rebut a legal presumption otherwise arising from the written contract.—Bank v. Fordyce, 9 Pa. (9 Barr) 275, 49 Am. Dec. 561.

[s] (Pa. 1894) Witnesses who have testified as to the correctness of a map put in evidence by plaintiff, and as to the location of certain objects marked on it, may be cross-examined as to other points and distances on it.—Derk v. Northern Cent. Ry. Co., 164 Pa. 243, 30 Atl. 231.

[t] (Vt. 1888) In an action to charge one as a silent partner, where it is contended that the effect of a certain written agreement was to dissolve a partnership existing between the parties, and one of the partners testifies that all the parties continued liable on contracts entered into in the name of the firm, notwithstanding the written agreement, it is proper to ask him, on cross-examination, what he understood the relations of the parties to be after the execution of the agreement.—Currier v. Robinson's Estate, 61 Vt. 196, 18 Atl. 147.

[u] (Vt. 1888) It is also competent, on the cross-examination of such partner, to show that other claims against the firm, for which defendant was liable, if for any, had only been partly paid, though defendant was financially responsible, and to show the conduct of the witness as a member of the firm in reference to other claims against it.—Currier v. Robinson's Estate, 61 Vt. 196, 18 Atl. 147.

§ 959. Capacity of person executing writing.

[a] (Ill. 1867) On a bill seeking to set aside a will on the ground of undue influence, where a witness has expressed a decided opinion as to the mental capacity of the testator, it is proper, on cross-examination, to inquire as to business transactions with the testator, occurring at about the time his opinion of the mental capacity of the testator had reference to, and as to how the testator at that time conducted himself.—Roe v. Taylor, 45 Ill. 485.

[b] (Ind. 1871) A witness testified to facts tending to show the insanity of a testator before the execution of his will and about the time the witness made a proposition to purchase land from the testator. *Held*, that it was within the limits of cross-examination to allow the witness to be asked, "If your proposition to purchase the land adjoining you from the testator had been accepted by him, would you have taken a conveyance from him?"—Rush v. Megee, 36 Ind. 69.

[c] (Ind. 1893) In a will contest, a witness who testifies to certain facts, on which he bases his opinion that testator, an aged man, was of unsound mind, may be cross-examined as to whether it is not his belief that old men, as a rule, are of unsound mind, because of a failure of memory.—Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

[d] (Ind. 1893) Where a contract entered into between testator and his grandson forms a part of the facts on which the witness bases his opinion as to testator's unsoundness of mind, it is proper to ask him on cross-examination whether he regarded the contract as a reasonable or an unreasonable transaction.—Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

[e] (Ind. 1893) The good faith of a witness who has testified as to testator's unsoundness of mind may be tested on cross-examination by a question as to whether he considered testator of unsound mind at the time of certain business transactions between them.—Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

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[f] (Md. 1872) In ejectment, where the defendant claims under a will, a witness having stated that a testator had not such knowledge of his property and relations as to make a proper and intelligent distribution of his property, it is competent on cross-examination to question him as to his opinion of the propriety and intelligence of the several dispositions of the will; and the proper course to pursue in eliciting this opinion is not to hand him the will to construe, but to read to him the several dispositions, and question him in relation to them.—Waters v. Waters, 35 Md. 531.

[g] (N. Y. 1889) Where a subscribing witness, a layman, has testified to the formal execution of a will, and that he does not know whether testator was of sound mind, it is not proper, on cross-examination, to ask him, for the purpose of testing his credibility or intelligence, whether he thinks testator had mind sufficient to give the specific directions contained in the will as to the disposition of certain property.—In re McCarthy, 55 Hun, 7, 8 N. Y. Supp. 578.

§ 960. Necessity for production of writings.

Requiring production of papers used in direct examination, see ante, § 895.

[a] (Ga. 1892) Where plaintiff was permitted, in testifying about the time trains were due, to refresh his memory from a time card, which was his own, and which he did not put in evidence, it was proper to refuse to require him, on cross-examination, to read parts thereof.—Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853; Owen v. Chattanooga, R. & C. R. Co., Id.

[b] (N. J. 1880) A party cannot demand that the witness of the other party be required to produce documents to be used in the support of his case, unless such documents become necessary on the legitimate cross-examination of the witness.—Wells v. Wells, 33 N. J. Eq. (6 Stew.) 4.

[c] (N. Y. 1804) Where a defendant cross-examines a plaintiff's witness, he makes him his own; and parol testimony of a deed or will cannot be given by such witness, without notice to produce the instrument.—Jackson v. Son, 2 Caines, 178.

[d] (N. C. 1887) Where a witness is examined in his direct examination as to an affidavit made by him, he may be questioned on cross-examination as to whether he swore that its contents were true, without a production of the document itself.—Harris v. Terry, 98 N. C. 131, 3 S. E. 745.

§ 961. Admissibility of writings.

See ante, §§ 937 [d], 958 [o].

Admissibility of writing as evidence in direct examination used in refreshing memory of witness, see ante, § 892.

[a] (Cal. 1895) The state, after showing diligent effort to find an absent witness, offered the deposition of the witness, taken on the preliminary hearing. On cross examination, defendant produced a photograph of the absent witness, and offered it to the jury for inspection. *Held*, that the exclusion of the photograph was proper.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[b] (Ill. 1875) Although the books of defendant may be proper and competent evidence for the purpose of rebutting the testimony of plaintiff, if offered at the proper time, they cannot be given in evidence, on the cross-examination of plaintiff, as a part of such cross-examination; and, if so offered in evidence, it is proper to exclude them.—Peru Coal Co. v. Merrick, 79 Ill. 112.

[c] (Ill. 1887) Where a witness, on direct examination, stated the contents of a letter to the jury, the original letter may be introduced in evidence on cross-examination.—Chicago & E. R. Co. v. Holland, 122 Ill. 461, 13 N. E. 145.

[d] (Iowa, 1888) In an action on a note, to which there is a counterclaim for rents collected by plaintiff for defendant, where defendant testifies, on his direct examination, that plaintiff has not paid over to him any rent since 1879, and that the last settlement he had with plaintiff was in 1882, a written statement of rents received and money paid out, which defendant admits he received from plaintiff, and covering time from 1881 to 1883, relates to the matter testified to by defendant, and is properly admitted on cross-examination.—Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107.

[e] (Iowa, 1889) Defendant's soliciting agent, who took plaintiff's application for insurance, having testified for plaintiff that he had blank policies furnished him by defendant, may testify, on cross-examination, that a blank policy made an exhibit to the answer is of the form of defendant's blanks, and the exhibit may then be admitted in evidence.—Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373.

[f] (Kan. 1876) A city engineer was introduced as a witness by plaintiff, for the purpose of proving that an apportionment of a special tax, made by his predecessor, was incorrect; and his examination in chief disclosed that he had made subsequent apportionment of the same tax. *Held*, that it was not substantial error to permit the defendant, on cross-examination, to introduce the second apportionment.—Casey v. City of Leavenworth, 17 Kan. 189.

[g] (Me. 1872) Exceptions will not lie to the admission of a written memorandum of a conversation which the witness has detailed on direct examination, when such memorandum is elicited and introduced on cross-examination.—Brooks v. Goss, 61 Me. 307.

[h] (Me. 1872) In an action of trespass to recover for timber cut from mortgaged land, defendants justified the removal of the timber by virtue of an alleged parol license from the deceased mortgagee, and called a witness who testified to two conversations in the course of which such license was given. On cross-examination witness added that she had made a memorandum of these conversations at the time each occurred, and produced them, and they were offered in evidence by the plaintiffs. *Held*, that they were properly received as tests of the witness' recollection and of the degree of credibility to be attached to her testimony.—Brooks v. Goss, 61 Me. 307.

[i] (Minn. 1865) Where depositions had not been referred to in the examination in chief, and were not any part of the record offered by the plaintiff, and the plaintiff was not required to offer them in evidence, they cannot be produced in cross-examination.—Chapman v. Dodd, 10 Minn. 350 (Gil. 277).

[j] (N. Y. 1887) Where a witness referred to the record of the police court, and professed ignorance as to the result of a charge, the record was admissible as a part of his cross-examination, where it was used to enable him to refresh his memory by showing facts which he had either forgotten, or was unwilling to tell, and was not used for the purpose of contradicting him.—Laserowitsch v. Reiman, 6 N. Y. St. Rep. 246.

[k] (N. Y. 1895) In an action by a brakeman to recover for injuries received in coupling cars, it being alleged that the couplings were defective, a rule of defendant company that conductors, "with the help of their men," must know their cars are in a safe condition, is not irrelevant, as relating solely to conductors, but is admissible in connection with plaintiff's cross-

examination.—Joyce v. Rome, W. & O. R. Co., 92 Hun, 107, 36 N. Y. Supp. 731.

[l] (Ohio, 1890) Where, on the trial of an indictment for the forgery of a will, a witness for the state testified that shortly before the date of the instrument in question, in conversation with the alleged testatrix, he read to her a portion of a letter written to him by a third person, having reference to a proposed testamentary disposition of her property, defendant is not entitled, on cross-examination, to have read to the jury a certain other portion of the same letter, unless he consents that the entire letter may be read.—Corbett v. State, 5 Ohio Cir. Ct. R. 155.

[m] (S. C. 1889) In an action against a sheriff for an alleged wrongful seizure of property, the warrant and papers under which the sheriff acted may be put in evidence on the cross-examination of plaintiff's witness.—Owens v. Gentry, 30 S. C. 490, 9 S. E. 525.

§ 962. Manner of conducting cross-examination.

Order and course of examination in general, see ante, § 908.

[a] (Conn. 1878) In the courts of this country—though not in England—the rule requiring counsel to show a witness a letter for recognition, before cross-examining as to the contents, applies where the witness is a party.—Morford v. Peck, 46 Conn. 380.

[b] (Ill. 1892) Where a witness has testified to the genuineness of a signature, it is proper, on cross-examination, to show him other admittedly genuine signatures of the party, and to ask him whether he based his opinion on said genuine signatures, and whether the spelling of these signatures was not different from that of the contested one.—Bevan v. Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679, reversing (1891) 39 Ill. App. 577.

[c] (Ky. 1880) On an issue as to whether a county judge had signed certain bonds, he was produced as a witness to prove his handwriting, and on cross-examination he was shown a number of signatures of his own name, some genuine and others imitated, and was required to point out the genuine. *Held*, that this was an unfair test.—Loving v. Warren County, 1 Ky. Law Rep. 340.

[d] (Mass. 1838) On the trial of an indictment for forgery, a paper was handed to a witness, on cross-examination, with all the writing but the signature concealed, and the witness was asked whether the signature was his. *Held*, that the witness was not bound to answer without first seeing the contents of the paper.—Commonwealth v. Whitney, Thacher, Cr. Cas. 588.

[e] (Mich. 1871) On the trial of an action on an insurance policy, plaintiff denied his signature to the application produced by defendants as the one upon which the policy issued. On cross-examination counsel for defendant presented witness a paper folded so as to show only the name of plaintiff, and asked if the signature was his. *Held*, that witness could not be compelled to answer unless he was permitted to examine the paper to which the signature was appended.—North American Fire Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638.

[f] (N. Y. 1888) Where defendant introduces one of the parties whose name is signed in the note, as a witness to show that she wrote the name alleged to have been forged, and that defendant wrote her name by her authority, she may be required, on cross-examination, to write her own name and that alleged to have been forged, and the signatures may be submitted to the jury for comparison as a test of her veracity.—People v. De Kroyft, 49 Hun, 71, 1 N. Y. Supp. 692.

7. CROSS-EXAMINATION AS TO FRAUD.

IN GENERAL, § 963.
PARTICULAR MATTERS AS SUBJECTS OF CROSS-EXAMINATION, § 964.

Cross-examination of party as to fraud, see post, § 970.

§ 963. In general.

[a] (Idaho, 1893) Where a transfer of personal property is alleged to have been made for the purpose of defrauding, delaying, or hindering creditors, and facts appear in the evidence which have a strong tendency to sustain such allegation, much latitude is allowed in the examination of the parties to the transfer, and others in any wise connected with the affair.—Ferbrache v. Martin, 3 Idaho (Hasb.) 573, 32 Pac. 252.

[b] (Ill. 1886) In attachment proceedings, where a third party interpleads, claiming the property attached, and the charge is that the transaction between the debtor and the claimant was one in fraud of creditors, the rule is liberal in allowing a full examination of parties to such alleged fraud, when they appear as witnesses.—Hollenback v. Todd, 119 Ill. 543, 8 N. E. 829.

[c] (Iowa, 1895) Where, in an action against a sheriff, for attached property, by a purchaser before levy of the writ, defendant alleges fraud in the sale as a defense, and the original owner, as plaintiff's witness, gives evidence to prove the bona fides of the sale, it is proper to allow a full cross-examination as to the transaction, as bearing on its bona fides.—Klotz v. James, 96 Iowa, 1, 64 N. W. 648, 59 Am. St. Rep. 348.

[d] (Mich. 1876) A wide latitude of examination should be allowed to one cross-examining a witness who was a participant in an alleged fraud.—Anderson v. Walter, 34 Mich. 113.

[e] (Mich. 1876) Where one of the parties to an alleged fraudulent transaction is on the stand, a wide latitude of cross-examination should be allowed.—Jacobson v. Metzger, 35 Mich. 103.

[f] (Minn. 1895) It is reversible error, in an action to set aside a transfer as in fraud of creditors, not to permit an extensive cross-examination.—Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108.

[g] (Minn. 1896) Great latitude should be allowed in the cross-examination of the immediate parties to an alleged fraudulent transaction, and it is error to refuse to allow any such cross-examination having a reasonable tendency to throw light on the transaction, though the inquiry is as to matters not touched in the direct examination.—Cohen v. Goldberg, 65 Minn. 473, 67 N. W. 1149.

§ 964. Particular matters as subjects of cross-examination.

[a] (Ill. 1894) Where the issue is whether a certain note and judgment on it by confession were fraudulent as to creditors, and the maker testifies in behalf of the payee, in effect, that the transaction was bona fide, it is competent to show, by cross-examination of such witness, that he had admitted that he owed such payee nothing.—Silvis v. Oltmann, 53 Ill. App. 392.

[b] (Iowa, 1895) Where the vendor in an alleged fraudulent bill of sale was examined by plaintiff vendee as to his execution thereof, and as to the property described therein and its value, it was proper to permit, on cross-examination, inquiries as to who was present when the bill of sale was made, the consideration for the sale, the disposition made of the vendor of the funds received therefrom, and whether at the same time he deeded land to the vendee.—Chapman v. James, 96 Iowa, 233, 64 N. W. 795.

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[c] (Md. 1866) Where the defendant had been examined by the claimant in attachment proceedings to identify the goods taken under the writ, as part of a stock sold by him to the claimant under a bill of sale, and afterwards, the claimant objecting, he was examined by the plaintiffs as to the manner of payment of the consideration, his connection with the goods, etc., for the purpose of showing fraud, it was *held* that this cross-examination was competent.—Howard v. Oppenheimer, 25 Md. 350.

[d] (Mich. 1883) A wife replevied, as her own, property that had been seized on execution against her husband, and on the trial called her husband to show that it belonged to her. *Held* proper to cross-examine him as to his own use of the property, and of its proceeds, and also as to his business, what he did with his earnings, and where his wife got her money to pay for the property in suit; such questions tending to discredit witness, or to show ownership in him.—Gavigan v. Scott, 51 Mich. 373, 16 N. W. 769.

[e] (Mich. 1884) In an action wherein the bona fides of a transfer of goods by an insolvent is involved, the insolvent may be fully cross-examined as to his insolvency.—Berger v. Clippert, 53 Mich. 468, 19 N. W. 149.

[f] (Mich. 1892) Where defendant attacked a sale of a stock of goods by a firm as fraudulent, and a member of the firm was examined by plaintiff as to the sale and change of possession, on cross-examination the witness may be interrogated as to various dealings between the firm and its members and their relatives; and it was error to rule that such facts must be shown by direct proof.—Pickard v. Bryant, 92 Mich. 430, 52 N. W. 788.

[g] (Mich. 1892) In an action by a wife to replevy goods levied on to satisfy an execution against her husband, which goods she claims under a bill of sale from him, executed after judgment, but before levy, the husband testified that such bill of sale was given to secure a debt due her for money borrowed 25 years ago; and other evidence showed that no note was ever given or any account kept of such indebtedness, and no demand ever made for the principal or interest. *Held*, that it was proper, on cross-examination of the husband, to show what property he has owned since such indebtedness originated, what the profits of his business have been, and his wife's knowledge, from time to time, of his business ventures and investments.—Miller v. Hanley, 94 Mich. 253, 53 N. W. 962.

[h] (Mich. 1892) When a judgment debtor undertakes to convey his property to his wife in payment of a loan made by her to him 37 years before, and it appears that no account of the debt was kept, no evidence thereof given, and no interest or principal paid or requested, the financial condition of both parties for the entire period is a proper subject for inquiry, and the greatest latitude of cross-examination should be allowed the judgment creditor in replevin by the wife to recover the property taken under execution against the husband.—Miller v. Hanley, 94 Mich. 253, 53 N. W. 962.

[i] (N. Y. 1863) After the testimony of a witness has disclosed facts sufficient to require the submission to the jury of the question of fraudulent intent in an assignment made by such witness to the plaintiffs, which question is in issue, he may be asked, on cross-examination by the plaintiffs, whether the act was done with fraudulent intent.—Persse & Brooks Paper Works v. Willett, 24 N. Y. Super. Ct. (1 Rob.) 131.

[j] (N. Y. 1863) Where the good faith of an assignment to the plaintiffs is in issue, a witness who testifies that he was superintendent of the assignor's business during a period extending beyond the time of the transfer may be asked, on cross-examination by the plaintiffs, whether he was superintendent under them after the transfer.—Persse & Brooks Paper Works v. Willett, 24 N. Y. Super. Ct. (1 Rob.) 131.

[k] (N. Y. 1891) In replevin for goods alleged to have been procured by W., defendant's assignor, with intent not to pay for them, it appeared that within two months of his assignment W., who was then insolvent, wrote plaintiffs that no one had any special claim upon him; that he was good beyond question. Upon direct examination, W. testified to facts designed to acquit him of any imputation of fraud. *Held*, that it was proper to ask him, on cross-examination, whether, when he wrote the letter, he intended that plaintiffs should understand that he was financially responsible.—Dobson v. Warner, 58 Hun, 602, 11 N. Y. Supp. 760, judgment affirmed (1891) 128 N. Y. 649, 29 N. E. 147.

8. CROSS-EXAMINATION OF WITNESS TO CHARACTER OF PARTY OR WITNESS.

IN GENERAL, § 965.
QUESTIONS AS TO PARTICULAR REPORTS HEARD BY WITNESS, § 966.

§ 965. In general.

[a] (Ala. 1867) It is not error, in the trial of a person accused of the murder of his wife, to refuse to allow the prisoner to ask a witness for the state on cross-examination, who has testified in proof of character that defendant's kindness to his wife was just like that of other husbands, whether he (the witness) knew of any other husband in the neighborhood who milked the cows for his wife.—Hall v. State, 40 Ala. 698.

[b] (Ill. 1890) Where witnesses who testify as to the defendant's good character are asked on cross-examination whether they have not heard of his committing a certain assault, it is proper to exclude evidence as to the details of such assault as pertaining to a collateral issue.—Aneals v. People, 134 Ill. 401, 25 N. E. 1022.

[c] (Mass. 1858) A witness who has testified that the reputation of another witness for truth is good cannot be asked, on cross-examination, what was the reputation of that witness for integrity.—Quinsigamond Bank v. Hobbs, 77 Mass. (11 Gray) 250.

[d] (Mo. 1894) A witness testifying as to defendant's character is not exempt from cross-examination concerning contradictory statements made by him to the prosecuting attorney before the grand jury.—State v. Smith, 125 Mo. 2, 28 S. W. 181.

[e] (N. H. 1863) Where in a prosecution for rape the defendant introduced evidence of his reputation for morality as well as chastity, it was competent on cross-examination for the prosecution to inquire as to his reputation for selling liquor without license.—State v. Knapp, 45 N. H. 148.

[f] (Pa. 1861) Where the testimony of a witness for the plaintiff was assailed by witnesses on the part of the defendant, on the ground of her mental incompetency, who detailed facts and expressed opinions as to it, questions on the part of the plaintiff in cross-examination, the object of which was to draw from them an opinion as to her competency, are competent.—Bricker v. Lightner's Ex'r, 40 Pa. (4 Wright) 199.

[g] (S. C. 1891) A witness for the defense, who testifies that defendant is of a peaceable character, may be asked, on cross-examination, if he knows of certain particular acts of violence committed by defendant, for the purpose

of showing that he gives defendant a character inconsistent with that inferable from facts known to him.—State v. Merriman, 34 S. C. 16, 12 S. E. 619; Id., 34 S. C. 576, 13 S. E. 328.

§ 966. Questions as to particular reports heard by witness.

[a] (Ala. 1889) Where a witness on his examination in chief has testified that he had never heard anything against defendant, he can be asked, on cross-examination, if he had heard that defendant had worn "stripes."—Holmes v. State, 88 Ala. 26, 7 South. 193, 16 Am. St. Rep. 17.

[b] (Ala. 1893) A witness who testifies to the good character of defendant may be asked on cross-examination, for the purpose of affecting his credibility, and not for the purpose of affecting the character of defendant, whether or not he heard of certain offenses charged against defendant before the trial.—Smith v. State, 103 Ala. 57, 15 South. 866.

[c] (Cal. 1893) On the cross-examination of witnesses testifying to defendant's good disposition it was proper to ask them if they had heard of defendant's prior conviction of murder, and of his having drawn his pistol on different persons.—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[d] (Ga. 1887) Upon cross-examination a witness was asked the following questions bearing upon the character of a party: "He was found a defaulter of public funds to the amount of about $9,000, wasn't it, doctor?" and, "Did you ever hear that Arthur had been found a defaulter to the amount of $9,000?" *Held*, that the questions were properly disallowed, not being within the sanction of Code, § 3874, providing that "the opinions of single witnesses cannot be inquired of on either side, except upon cross-examination, in seeking for the extent and foundation of the witness' knowledge." The questions quoted were not for the purpose of ascertaining the extent and foundation of witness' knowledge, but were an effort to prove conviction of a crime by hearsay. Such conviction can be shown only by the record.—Pulliam v. Cantrell, 77 Ga. 563, 3 S. E. 280.

[e] (Ind. 1878) A witness who has testified to the good reputation of a party to the action may properly be asked on cross-examination whether, on a previous trial, he has not heard the neighbors of such party testify that his reputation was bad.—Hutts v. Hutts, 62 Ind. 240.

[f] (Ind. 1888) Where a witness called for defendant testified that the reputation of the plaintiff for chastity was bad, it is competent to ask the witness, on cross-examination, what he had heard that defendant had said to others on that subject.—Binford v. Young, 115 Ind. 174, 16 N. E. 142.

[g] (Ind. 1892) A witness who testifies in behalf of the accused that the latter's character is good so far as he knows, may, for the purpose of testing his credibility, be asked, on cross-examination, whether he has heard that the accused has been arrested on various charges, and may testify that the accused has been convicted of shooting a turkey.—Randall v. State, 132 Ind. 539, 32 N. E. 305.

[h] (La. 1896) On the cross-examination of witnesses, to prove the good character of the accused for peace and quietness, they may be asked if they had not heard particular acts of violence imputed to the accused.—State v. Pain, 48 La. Ann. 311, 19 South. 138.

[i] (Mo. 1891) A witness for defendant, on a trial for the larceny of a cow, having testified that defendant's general reputation for honesty was good, was asked on cross-examination if he had not heard of defendant's having been indicted for the larceny of other cattle, and that defendant had been charged with violating the revenue laws by selling whisky without a license. *Held* that, although such evidence would not have been admissible for the purpose of rebutting defendant's evidence of good character, it was admissible in cross-examination to determine the credibility of the witness and the sources from which his knowledge was obtained.—State v. Crow, 107 Mo. 341, 17 S. W. 745.

[j] (Neb. 1895) It was proper, on cross-examination of a witness testifying in reference to defendant's character, to ask whether he had heard certain reports tending to contradict his testimony on direct examination.—Basye v. State, 45 Neb. 261, 63 N. W. 811.

[k] (N. Y. 1891) A witness, having testified to the good general reputation of a party before a certain date, was allowed on cross-examination to testify that he had heard at that time stories derogatory to such party. *Held*, that a refusal to allow him to speak as to such stories subsequent to that time was proper, that being no part of a cross-examination.—Morrison v. Press Pub. Co., 59 N. Y. Super. Ct. (27 Jones & S.) 216, 14 N. Y. Supp. 131, judgment affirmed (1892) 133 N. Y. 538, 30 N. E. 1148.

9. CROSS-EXAMINATION OF PARTY IN GENERAL.

IN GENERAL, § 967.
PARTICULAR SUBJECTS OF INQUIRY, § 968.
—— FACTS INCONSISTENT WITH TESTIMONY, § 969.
—— FRAUD, § 970.
—— LIMITATION TO SUBJECTS OF DIRECT EXAMINATION, § 971.
—— IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS, § 972.
—— WRITINGS, § 973.
TESTIMONY INCONSISTENT WITH PLEADINGS, § 974.
CROSS-EXAMINATION OF PARTY EXAMINED AS A WITNESS BY ADVERSE PARTY, § 975.

Consideration of note, § 946 [b].
Discretion of court as to cross-examination of party, see ante, § 924.
Ownership or interest in property, see ante, § 947.
Voluntary statements, see ante, § 943.

§ 967. In general.

[a] (Ala. 1890) Under Code, § 2818, providing that the answers to interrogatories, duly sworn to before and certified by a proper officer, are evidence in the cause when offered by the party taking them, it is competent, on cross-examination of plaintiff, testifying in his own behalf, to question him on material matters in regard to which he had testified in a deposition previously taken under the statute, though such deposition has not been offered in evidence.—Marx v. Leinkauff, 93 Ala. 453, 9 South. 818.

[b] (Colo. 1890) Where defendant testifies to a conversation with plaintiff, which discredits the latter's testimony, the refusal to permit defendant to be fully cross-examined as to such conversation is error.—Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985.

[c] (Ill. 1884) Rev. St. 1874, § 25, provides that "if plaintiff * * * will state on oath upon the trial that he claims title through a common source with defendant, it shall be sufficient for him to show title from such common source, unless defendant * * * will deny on oath that he claims title through such source." *Held*, that defendant could not, on his denial, be subject to cross-examination.—Thatcher v. Olmstead, 110 Ill. 26.

[d] (Ind. 1889) Code, § 509, providing that "a party to an action may be examined as a wit-

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ness," gives also the right of cross-examination.—Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752.

[e] (Iowa, 1891) After a party to an action has been fully cross-examined, it is not error to restrict it as to questions relating to immaterial matters, or those which have been covered by previous inquiries.—Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906.

[f] (N. Y. 1853) When a party supports his own motion by his own affidavit, he may be brought before the court to be cross-examined, and if he refuses to answer any questions, the court may strike out his testimony.—Meyer v. Lent, 16 Barb. 538.

[g] (Or. 1893) Where plaintiff, in an action on contract, discloses on his examination in chief only so much of the transaction as leaves an inference of the contract's legality, it is proper for defendant to bring out, on cross-examination, the remaining facts and circumstances under which the contract arose, and which show its illegality.—Ah Doon v. Smith, 25 Or. 89, 34 Pac. 1093.

[h] (S. C. 1832) Where plaintiff becomes the witness to prove his book entries, in an action for goods sold, he can be cross-examined by defendant.—Clough v. Little, 3 Rich. Law, 353.

§ 968. Particular subjects of inquiry.

[a] (Ala. 1894) In an action to recover for breach of a contract to sell and deliver certain produce at a fixed time and place, defendant may ask the plaintiff, as a witness on his own behalf, at what price he sold similar produce at the time and place named for the delivery.—Buist v. Guice, 105 Ala. 518, 16 South. 915.

[b] (Cal. 1881) When the question is whether a transaction amounts to payment of a note, and the plaintiff admits that he received it after maturity under circumstances of suspicion, he may be cross-examined as to all collateral facts capable of affording any reasonable inference of payment.—Moran v. Abbey, 58 Cal. 163.

[c, d] (Cal. 1886) When a witness, who is a party to the suit, has stated, on his examination in chief, a part of what he said at a certain time and place, it is competent to have him state, on cross-examination, all he said on that occasion.—Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811.

[e] (Ill. 1881) In an action by a broker to recover a margin from a customer, where the merchandise purchased has been sold by the broker at a loss, the plaintiff may be required to testify on cross-examination as to the particulars of the transaction of purchase.—Oldershaw v. Knowles, 101 Ill. 117, affirming (1880) 6 Ill. App. (6 Bradw.) 325.

[f] (Iowa, 1895) Where plaintiff sues for services rendered under a contract made on a specified date, cross-examination as to the exact date of his first conversation with defendant, which he states occurred during the preceding year, is properly excluded.—Kelly v. Stone, 94 Iowa, 316, 62 N. W. 842.

[g] (Kan. 1882) In an action for negligence, plaintiff testified in his own behalf that he was a farmer. *Held*, upon cross-examination, that it was allowable to ask him how much land he owned.—Field v. Davis, 27 Kan. 400.

[h] (Mass. 1858) In an action upon an agreement, the defendant was asked on cross-examination if he did not understand the plaintiff as meaning and intending to do all that was necessary on his part, and answered that he supposed the plaintiff meant to make a sure thing of it, and to do all that was necessary for him to do. *Held*, that the question and answer were admissible.—McIntyre v. Park, 77 Mass. (11 Gray) 102, 71 Am. Dec. 690.

[i] (Mass. 1861) A party to an action for breach of warranty, testifying in his own behalf, cannot be asked on cross-examination if the adverse party made certain declarations to him after the transaction was completed; such cross-examination being incompetent because by it defendant sought to put in evidence his own declarations.—Carlton v. Pierce, 83 Mass. (1 Allen) 26.

[j] (Mich. 1885) Where a contract sued upon is not admitted by defendant, it is error to refuse to allow plaintiff to be cross-examined, before he leaves the witness stand, to show the unreasonableness of the contract, or that it could not have been carried out by either party.—Petrie v. Lane, 58 Mich. 527, 25 N. W. 504.

[k] (Mich. 1886) In an action by a traveling salesman against his employer for expenses in going to the city where his employer was located, it appeared that, by his contract, plaintiff was to be allowed "funds for his traveling expenses." Plaintiff testified, without contradiction, that his samples were to be looked after by him personally; that, as long as they were in his possession, he was obliged to go where they did; and that he had no orders to send them in by express. *Held*, that a question on cross-examination whether plaintiff might not as well have sent the articles in by express as to have taken them in himself was properly excluded.—Lamb v. Henderson, 63 Mich. 302, 29 N. W. 732.

[l] (Mich. 1887) In an action by one partner against his copartner on the common counts, where defendant on different trials had made conflicting statements concerning the existence of the copartnership, it was proper, on cross-examination of defendant, to ask whether there was any reason why he should not form a copartnership with plaintiff, it appearing that defendant had been in the business of the partnership before, and had leased it, agreeing not to engage in it for some years.—Miner v. Lorman, 66 Mich. 530, 33 N. W. 866.

[m] (Mich. 1889) The plaintiff, in proving damages sustained by reason of the prosecution, having shown that he had subpœnaed witnesses, and the amount that he had paid them, the defendant has the right, upon cross-examination, to ask what he paid to any one of them.—Thurston v. Wright, 77 Mich. 96, 43 N. W. 860.

[n] (Mich. 1890) Defendant having testified that he had promised to pay the note sued on if plaintiff would discount it, he was properly asked how much he had offered to pay for it.—Steers v. Holmes, 79 Mich. 430, 44 N. W. 922.

[o] (Mich. 1890) In an action for assault and battery and malicious prosecution, it is not error to allow defendant to be cross-examined fully in regard to his former relations with plaintiff.—Peterson v. Toner, 80 Mich. 350, 45 N. W. 346.

[p] (Mich. 1892) In an action to recover damages for personal injuries caused by the bite of a dog, it is error to permit plaintiff's counsel, in his cross-examination of defendant, to inquire into defendant's disposition of his property pending the suit.—French v. Wilkinson, 93 Mich. 322, 53 N. W. 530.

[q] (Mich. 1893) In an action for services, it is error to require defendant to state on cross-examination that plaintiffs were depending on their labor for their living.—Curren v. Ampersee, 96 Mich. 553, 56 N. W. 87.

[qq] (Minn. 1886) In an action by F. against a sheriff for an alleged wrongful seizure of wheat, the sheriff justified under a writ of attachment against J., the brother of F. F. testified that he bought the wheat of his sister; that she lived with J., their brother; that she had bought the land of J.; and that J. had rais-

ed the wheat for her. *Held*, that defendant was entitled, on cross-examination, to inquire fully into the consideration and circumstances of the alleged sale.—Homberger v. Brandenberg, 35 Minn. 401, 29 N. W. 123.

[qqq] (Minn. 1894) A party to an action may be questioned on cross-examination as to a statement made by him when a witness before a grand jury, when such statement is not merely impeaching, but the admission of a fact material in the case.—Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138.

[rr] (Mo. 1890) Plaintiff in ejectment who claims under a deed conveying the land by metes and bounds cannot be cross-examined as to whether or not he purchased by the acre.—Bell v. Jamison, 102 Mo. 71, 14 S. W. 714.

[rr] (Neb. 1887) In an action against one who had been a witness in a former suit against a third party on the same cause of action, defendant may be cross-examined as to his testimony in the former suit.—Lamb v. Briggs, 22 Neb. 138, 34 N. W. 217.

[ss] (Neb. 1887) In an action for malicious prosecution it was claimed by defendant, who was a constable, that he had sufficient cause for making the complaint against plaintiff, charging him with the crime of burglary—his information being the confession of a youth whom he had previously arrested for the same crime, which confession was voluntarily given, and by which he implicated plaintiff as being a confederate and accomplice; these facts being testified to by defendant. On his cross-examination he was asked if, prior to the confession, and while the youth was in custody, he did not, in the hearing of the party under arrest, tell another constable to take him to jail, and by the time he had lain there long enough he would confess, or language to that effect. Objection was made and the objection sustained. *Held* error.—Dorsey v. Clapp, 22 Neb. 564, 35 N. W. 389.

[ss] (Neb. 1888) In replevin by the assignee of the property, where plaintiff is called to prove the assignment, he may be cross-examined as to the character of the assignment, and as to whether the avails of the action are to be paid to the assignor.—Grimes v. Cannell, 23 Neb. 187, 36 N. W. 479.

[tt] (N. Y. 1877) In an action for meal and middlings delivered to third persons, plaintiff claimed that such third persons were carrying on a distillery as defendant's agents, and sought to establish it by proof of defendant's acts and apparent relations with such third persons, such as his stocking the distillery, disposing of the products, furnishing money and credits, claiming to own the property, etc. *Held*, that it was not error to permit plaintiff to be asked on cross-examination whether his circumstances were such that he had been in need of money during the time that he had permitted the alleged account to run.—McDougall v. Hess, 68 N. Y. 620.

[tt] (N. Y. 1890) In an action for money which plaintiff alleged he had loaned to defendant to promote an election at which they were both candidates, upon his redirect examination defendant testified that there was a treasurer holding the funds for disbursement at the election. Upon cross-examination he was asked to give the name of the treasurer. *Held* properly excluded, there being no claim that plaintiff had himself delivered the money to the treasurer.—Avery v. Mattice, 56 Hun, 639, 9 N. Y. Supp. 106, judgment affirmed (1892) 132 N. Y. 601, 30 N. E. 1152.

[uu] (N. Y. 1894) In an action for commissions for procuring a sale of land to defendant it is error to permit defendant to be asked on cross-examination what profits he finally made on resale of the land procured for him by plaintiff, as such question tends to prejudice the jury.—Dodge v. Weill, 81 Hun, 113, 30 N. Y. Supp. 681.

[uu] (N. C. 1842) Where a party takes his oath under the "book debt" law, it is competent for the opposite party to cross-examine him, both as to the articles and the price charged, with a view to contradict or discredit him, as he might do with regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause.—Colbert v. Piercy, 25 N. C. 77.

[vv] (N. C. 1894) Where a plaintiff testifies in his own behalf, it is error to ask him, on cross-examination, whether the question at issue had not been tried before in that action, and found against him by the jury, since the former verdict should not be considered by the jury.—Grubbs v. Stevenson, 114 N. C. 277, 19 S. E. 643.

[vv] (Ohio, 1860) At whatever stage of the trial a party offers himself as a witness, he may, on cross-examination, be interrogated as to admissions or communications made to his counsel, and they may be proved by the attorney, either as evidence in chief, or for the purpose of impeachment.—King v. Barrett, 11 Ohio St. 261.

[ww] (Pa. 1873) In an action by a superintendent against a corporation for his wrongful dismissal, he, being called as a witness, may be cross-examined as to whether he faithfully performed his duties.—Henderson v. Hydraulic Works, 9 Phila. 100.

[ww] (Pa. 1893) In an action for personal injuries, defendant cannot complain because plaintiff's counsel is allowed to ask her why she did not have a physician to attend her after she was injured, when defendant's counsel had previously asked her questions on the same subject.—Feather v. City of Reading, 155 Pa. 187, 26 Atl. 212.

[xx] (S. C. 1894) Plaintiff testified to a transaction between him and defendant in the purchase and sale, on joint account, of a certain gold mine; and no objection was made until he was about to disclose the division made of the profits. *Held*, that it was not error to permit defendant to testify on cross-examination as to such transaction.—Willis v. Hammond, 41 S. C. 153, 19 S. E. 310.

[xx] (Tex. 1888) In an action by an administrator d. b. n. against an executor for alleged conversion of assets of the estate, where defendant has testified in his own behalf, in chief, to the employment by him of attorneys for the estate, and the payment of their fee, and claimed a credit therefor, plaintiff may cross-examine him as to the necessity of such employment of attorneys, the reasonableness of the contract, and the amount of the retainer agreed on.—Grothaus v. Witte, 72 Tex. 124, 11 S. W. 1032.

[yy] (Tex. 1891) In partition, where plaintiffs contend that a certain deed through which defendant claimed was simulated and passed no title, plaintiffs cannot, in cross-examining defendant, require him to state whether he claims under this deed or some other.—Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763.

[yy] (Tex. 1896) Where, in an action for personal injuries, several physicians, whose testimony and credibility are unimpeached, testify to the extent of the injuries, and the court has refused to order the examination of the person injured, by physicians appointed by the court, it is not reversible error to refuse to allow plaintiff to be questioned as to his willingness to permit the examination.—Gulf, C. & S. F. Ry. Co. v. Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793.

[zz] (Vt. 1894) On an issue whether the sum charged for serving a writ was more than the legal fee, it was proper to require defendant to

answer on cross-examination whether he knew any reason why the fee as charged was not correct.—Hamilton v. Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

[zz] (Wis. 1896) In an action by a physician for services there was no dispute as to the number of his visits or items of charges. Plaintiff testified as to the value of his services, the nature of his treatment, and that they were worth the amount charged. *Held*, that it was not error to refuse to permit defendant to cross-examine him as to the amount charged for particular visits, and what they were worth, where the court offered to permit defendant to examine him as to what he had done, and show that his services were not worth anything.—Wurdeman v. Barnes, 92 Wis. 206, 66 N. W. 111.

§ 969. —— Facts inconsistent with testimony.

Cross-examination of witness as to facts inconsistent with testimony in general, see ante, § 936.

[a] (U. S. 1884) In an action by a passenger against a carrier, for injuries sustained through the negligence of defendant's servant, defendant, in order to prove that plaintiff was a trespasser, may ask plaintiff, on cross-examination, if he did not refuse to pay his fare or leave the coach, when plaintiff has testified that he was rightfully in the coach as a passenger under the usual conditions.—Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62.

[b] (Ala. 1887) Refusal to allow plaintiff, who had testified that the land, as incumbered by the grantor, was worth but ten cents per acre, to be asked, on cross-examination, if he had not been offered one dollar per acre for it, is reversible error.—Clark v. Zeigler, 85 Ala. 154, 4 South. 669.

[c] (Conn. 1896) On a trial for arson there was evidence that defendant had been carrying on a clandestine correspondence, under an assumed name, with a woman, and that the night before the fire he had taken from his office, subsequently burned, a picture of the woman, and mailed it to himself, under such assumed name. *Held*, that defendant having denied that he mailed the picture or was conducting clandestine correspondence, it was competent to show, on cross-examination, that he had traveled with the woman under an assumed name, and as her husband.—State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227.

[d] (Ga. 1886) In an action on a note, where defendant pleads non est factum, it is not error to refuse to permit plaintiff to ask defendant, on cross-examination, if he did not authorize the person who signed the note sued on to sign certain other notes, the object of the question not being apparent, and defendant having already testified that he never gave such authority at any time.—Etheridge v. Hobbs, 77 Ga. 531, 3 S. E. 251.

[e] (Ind. 1896) Where, in an action to recover money alleged to have been paid under duress, plaintiff testifies that the money was paid under duress, she may be asked, on cross-examination, if she had not stated that she owed the money paid to defendant, and intended to pay the same.—Stanley v. Dunn, 143 Ind. 495, 42 N. E. 908.

[f] (Iowa, 1895) Where plaintiff, a physician, claimed that he lost his practice by being rendered unable to attend to it, in consequence of an injury sustained through defendant's negligence, it was proper to show on cross-examination that he lost his practice through immoral conduct.—Hood v. Chicago & N. W. Ry. Co., 95 Iowa, 331, 64 N. W. 261.

[g] (Mass. 1887) In a prosecution of two defendants for maintaining a liquor nuisance, where one testifies that he had no connection with the establishment during the time covered by the complaint, it is proper to cross-examine him as to his relations thereto prior to that time, for the purpose of contradicting his testimony in chief.—Commonwealth v. Clark, 145 Mass. 251, 13 N. E. 888.

[h] (Mass. 1896) In an action on notes given for a subscription to the stock of a corporation, the principal assets of which were patents on signaling apparatus, defendant testified that the stock and patents were worthless. *Held*, that it was not error to permit defendant, on cross-examination, to be asked whether he had not expressed a preference for said corporation over another concern engaged in the same business, in which defendant was interested, and whether he did not know that a certain city had made offers for the apparatus of said corporation, which were not filled.—Watts v. Stevenson, 165 Mass. 518, 43 N. E. 497.

[i] (Mich. 1865) Where a woman brought trover against the mortgagee of a horse sold without her authority by her husband, and testified that she never sold the horse, nor authorized her husband to sell him, and, if she had her rights, the horse would still have been in her possession, it was *held* that the question on cross-examination whether at any time between the sale on chattel mortgage and the removal of the horse she notified the purchaser that the horse was hers was legitimate.—Dann v. Cudney, 13 Mich. 239, 87 Am. Dec. 755.

[j] (Mich. 1893) Where defendant testifies that a building in controversy was worth $400 or $500, it is not error to require him to state on cross-examination that he only paid $85 for it.—Curren v. Ampersee, 96 Mich. 553, 56 N. W. 87.

[k] (Minn. 1893) In an action to recover property levied on as that of another, it is proper, on cross-examination, to question plaintiff in regard to his admissions to third parties, touching the ownership of the property in controversy.—Olson v. Swensen, 53 Minn. 516, 55 N. W. 596.

[l] (N. Y. 1867) Where, in an action to recover damages for the conversion of property, plaintiff testified on his own behalf as to the value of the articles, it was *held* to be competent on cross-examination to prove the price paid for the same at two business sales previous to the commencement of the action.—Wells v. Kelsey, 37 N. Y. 143, 4 Abb. Prac. (N. S.) 243.

[m] (N. Y. 1872) When part of the case or defense is based on the state of mind, at a certain time, of a party to the action, who becomes a witness on the trial, it is pertinent and proper that he should state (in answer to leading questions from the opposite party) what was his declaration as to his state of mind at a subsequent time, in reference to a subject alleged by him to have induced that former state of mind which was essential to his cause of action.—Livingston v. Keech, 34 N. Y. Super. Ct. (2 Jones & S.) 547.

[n] (N. Y. 1886) In an action for breach of a contract to employ plaintiff in a theatrical company, where the employment of plaintiff for a stated period is denied by defendant, it is competent, on the question of defendant's credibility, to show on his cross-examination that he had employed other members of the company for a stated period, as claimed by plaintiff he had employed her, and that such other members had recovered their compensation.—Praeger v. Mestayer, 54 N. Y. Super. Ct. (22 Jones & S.) 100.

[o] (N. Y. 1888) On cross-examination of defendant in an action for wages, where the evidence of the parties conflicted as to whether plaintiff was to receive $2.75 or $2.50 per day,

it was proper to ask, "Have you paid any other men who worked on the job more than $2.50 per day?" to test the sincerity of the witness as to whether the understanding was that plaintiff should receive $2.50 or $2.75.—Richards v. Derrick, 49 Hun, 610, 2 N. Y. Supp. 31.

[p] (N. Y. 1889) Where, in a suit to recover for legal services, defendant had testified that he had told plaintiffs that one W. had contracted to pay all the expenses of a certain suit, in which plaintiffs had been engaged, and the expenses of which were in litigation, it was proper cross-examination to ask defendant if he had not paid other claims like the one in suit.—Stanley v. Pickhardt, 57 N. Y. Super. Ct. (25 Jones & S.) 147, 6 N. Y. Supp. 930, judgment affirmed (1891) 127 N. Y. 649, 27 N. E. 856.

[q] (Tex. 1895) Where a defendant in a criminal case denied having lived in a certain place, it was proper for the prosecution to ask, on a cross-examination, if he was not at a house in that place when officers were searching it for a murderer.—Craft v. State (Cr. App.) 31 S. W. 367.

[r] (Vt. 1895) Where defendant testified as to the value of his real estate, including improvements, it was proper cross-examination to ask him the cost of the buildings and the value of a portion of the real estate, for the purpose of showing that the value of a portion was greater than the amount given on direct examination as the value of the whole.—Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

[s] (Wis. 1890) In a suit for personal injuries caused by falling upon a defective sidewalk, several witnesses testified that plaintiff was intoxicated at the time, which he denied. *Held* proper, on cross-examination, to allow the question, "Are you not habitually in the habit of getting drunk?" as tending to show that he was drunk at the time.—McCracken v. Village of Markesan, 76 Wis. 499, 45 N. W. 323.

§ 970. —— Fraud.

Cross-examination of witnesses in general as to fraud, see ante, §§ 963, 964.

Inquiry as to fraud on direct examination, see ante, § 836.

[a] (U. S. 1892) In an action for wrongful attachment based on an affidavit that plaintiff was "about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors," there was evidence at the trial to show an intent on plaintiff's part at the time of the suing out and levy of the attachment to defraud his creditors by secreting his property by putting it into the shape of notes, and by fraudulently placing them beyond the reach of his creditors; and plaintiff testified in chief on direct examination that on the day of the levy or the next day a large amount owed to him was put in the shape of negotiable notes. *Held*, that plaintiff might properly be asked on cross-examination what he had done with such notes.—Eames v. Kaiser, 142 U. S. 488, 12 Sup. Ct. 302, 35 L. Ed. 1091.

[b] (Ill. 1873) Where plaintiff in replevin, basing his title to the property on a chattel mortgage, gives a full history of the transaction resulting in the giving of the mortgage while testifying in his own behalf, great latitude should be allowed in his cross-examination, especially where fraud is charged in obtaining the mortgage.—Strohm v. Hayes, 70 Ill. 41.

[c] (Ill. 1880) In replevin by A., the purchaser of certain cattle, against B., who had levied execution upon them, and claimed that the sale was fraudulent, *held*, that A. might be asked, on cross-examination, whether he had received any money from the vendor of the cattle, or any of his family, since the year of the sale.—Brosseau v. Warren, 6 Ill. App. (6 Bradw.) 450.

[d] (Ill. 1889) In replevin by one claiming goods under an absolute sale against an attaching creditor, the vendor, having testified in his examination in chief that he had on the same day given the vendee a note and mortgage of the goods, may be cross-examined by the attaching creditor fully in regard thereto.—Huschle v. Morris, 31 Ill. App. 545.

[e] (Iowa, 1885) On cross-examination, a party claiming to own property seized on execution against another, which it is alleged has been transferred to the claimant in fraud of creditors, may be asked whether he did not know there were judgments against his vendor, and as to how he obtained the means used by him in making such purchase, even though no inquiry was made on examination in chief in relation to these matters.—Clark v. Reiniger, 66 Iowa, 507, 24 N. W. 16.

[f] (Iowa, 1895) Where one intervenes, claiming attached goods under a mortgage, the attachment defendant, as a witness for plaintiff, may be asked whether he told the intervener, when he executed the mortgage, that he had conveyed his homestead to his wife, to show his intent in executing the mortgage.—Bussard v. Bullitt, 95 Iowa, 736, 64 N. W. 658.

[g] (Mich. 1878) An assignee of goods, bringing replevin against a constable who had levied on them under an execution against the assignor, may be cross-examined as to whether he was not wholly irresponsible at the time of the assignment, if the purpose is to show that it was a fraud on creditors.—Jennings v. Prentice, 39 Mich. 421.

[h] (Mich. 1888) Plaintiff, as indorsee of a note, sued the maker, who defended on the ground that plaintiff had purloined the note from the payee and forged the indorsement, the payee being dead. It appeared from plaintiff's testimony that the payee had kept the note in his pocketbook. *Held*, that it was proper to ask plaintiff, on cross-examination, if after payee's death he had the pocketbook in his possession, being material to defendant's theory of the case.—Hillman v. Schwenk, 68 Mich. 293, 36 N. W. 77; Id., 68 Mich. 297, 36 N. W. 670.

[i] (Mich. 1888) In a suit on a note, which defendant alleges was obtained by fraud, defendant may be asked, on cross-examination, just where the fraud was.—Mace v. Kennedy, 68 Mich. 389, 36 N. W. 187.

[j] (Mich. 1892) In replevin against a constable it appeared that defendant took eight hogs on attachment against P. at the suit of W. On the evening before the attachment issued, P. transferred the hogs and other chattels to plaintiff, his father-in-law, to satisfy an alleged indebtedness consisting of two notes and an account. *Held*, that under a claim that the transfer was fraudulent defendant was entitled, on cross-examination of plaintiff, to ask whether plaintiff told W., in a conversation about the hogs on the morning of the transfer, that P. owed plaintiff the notes.—Daniels v. Weeks, 90 Mich. 190, 51 N. W. 273.

[k] (Minn. 1868) In replevin for goods of which plaintiff claimed to be the general owner, the defense was that the sale to plaintiff was fraudulent. Plaintiff, on the trial, identified a bill of sale to him, proved the execution and delivery to himself, and testified as to the delivery of goods thereunder. *Held*, that defendant might, upon cross-examination, go into all the circumstances of the sale tending to characterize the delivery thereunder as fraudulent.—Dodge v. Chandler, 13 Minn. 114 (Gil. 105).

[l] (Minn. 1887) In an action by a lessee of a farm against a sheriff for the conversion of wheat raised thereon by sale of the same on execution against the lessor (plaintiff's brother), it appeared that defendant claimed the lease was fraudulent as to the lessor's creditors. It

also appeared that the lessor, during the lease, remained about the premises, assisted in raising the crop, and appeared to be interested in it; and that plaintiff testified in chief that he raised the crop. *Held*, that it was error not to permit plaintiff to be asked on cross-examination who owned the wheat at the time it was threshed.—Allen v. Fortier, 37 Minn. 218, 34 N. W. 21.

[m] (Minn. 1892). On an issue of title to property alleged to have been fraudulently transferred, much latitude is allowed on the cross-examination of a party claiming to own the same. Not only the circumstances of his purchase, but his financial condition, and his object in making it, and the situation, character, and value of the property, may become material matters to be inquired into.—Riddell v. Munro, 49 Minn. 532, 52 N. W. 141.

[n] (Neb. 1889) In replevin for corn seized on execution against plaintiff's husband, plaintiff cannot be cross-examined with a view of proving that the teams employed in working the farm were in fact her husband's, but were fraudulently transferred by him to his father and brother; no other evidence of that fact having been offered or given, and plaintiff not having referred to the teams on her direct examination.—Woodruff v. White, 25 Neb. 745, 41 N. W. 781.

[o] (N. C. 1874) A defendant, offering himself as a witness in his own behalf, may be asked if he has not transferred his property to his brother-in-law to avoid payment of any recovery in the present action, but remained in possession selling as agent, and his answers, although to be taken as conclusive, may be commented upon before the jury, as an embarrassed attempt to gloss over a dishonest act.—Lassiter v. Phillips, 70 N. C. 462.

[p] (Ohio, 1895) In an action to rescind a contract for the sale of certain mining stock by plaintiff to defendant on the ground of fraud, defendant cannot show by cross-examination of the plaintiff that after the beginning of the action plaintiff had entered into certain champertous contracts under which parties with whom plaintiff made the same were to furnish means for the continued prosecution of plaintiff's action and share in the proceeds of any recovery that might be had.—Ford v. Holden, 2 Cleve. Law Rep. 33, 4 Ohio, Dec. 364.

§ 971. —— Limitation to subjects of direct examination.

Limitation of cross-examination of witness in general to subjects of direct examination, see ante, §§ 949–954.

[a] (U. S. 1895) In an action for personal injuries, where plaintiff alleged, by way of special damage, that prior to the accident the business he was engaged in yielded him a certain sum, but at the trial made no attempt to show the extent or value of such business, the refusal to allow defendant to cross-examine on that subject was not error.—Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977.

[b] (Ala. 1857) Where plaintiff seeks to establish the correctness of his demand by his own oath, he must swear to the fact of nonpayment, and cannot be cross-examined as to matters outside of the facts to which he testifies; but if the court allows him to testify, without swearing to the fact of nonpayment, he cannot complain on error that the defendant was permitted to cross-examine him generally.—Pryor v. Harris, 30 Ala. 118.

[c] (Cal. 1888) In an action by the indorsee of a note against the maker, refusal to allow defendant to cross-examine plaintiff, with the view of showing that the note sued on is without consideration, is not error where plaintiff has given no testimony on the point in chief.—Braly v. Henry, 77 Cal. 324, 19 Pac. 529.

[d] (Ill. 1889) A plaintiff testifying in his own behalf cannot be questioned on cross-examination as to the solvency of himself and defendant, where the questions on his direct examination did not in any way involve the subject of either party's solvency.—Anheuser-Busch Brewing Co. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575.

[e] (Ill. 1892) Where a plaintiff, testifying in his own behalf, gives evidence as to his cause of action, he cannot be questioned on cross-examination in regard to matters of set-off.—Rigdon v. Conley, 141 Ill. 565, 30 N. E. 1060.

[f] (Ill. 1892) Where a party testifies in his own behalf, the opposite party has no right to question him on cross-examination as to matters which were not referred to in his direct examination.—Hansen v. Miller, 145 Ill. 538, 32 N. E. 548.

[g] (Ind. 1889) When plaintiff is recalled as a witness in chief, in an action for damages for removing the lateral support to land, and testifies merely as to the date of the sale of a part of the land, and that the land had caved before such sale, and had fallen away from under a stable, it is improper to ask, on cross-examination, if he does not know that the land could be filled in for 25 cents a yard.—Moellering v. Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449.

[h] (Ind. 1891) The seller of a car load of potatoes consigned them to a third person, who was to deliver them to the purchasers as called for. Instead of so doing, the consignee, in payment of the consignor's debt, wrongfully delivered them to another, who had knowledge of all the facts, and the latter sold them to the original purchasers, who also had knowledge of all the facts. *Held*, in an action by the seller for the conversion of the potatoes, brought against all these persons, that questions put to the seller on cross-examination as to whether or not the consignee was his agent for the purpose of selling any goods at about the time of the alleged conversion were properly excluded, unless the inquiry were limited to the goods in controversy.—Kavanaugh v. Taylor, 2 Ind. App. 502, 28 N. E. 553.

[i] (Ind. 1895) In an action for breach of a contract to employ plaintiff, he cannot be cross-examined as to other employment he engaged in after the breach of contract by defendant, where plaintiff did not refer thereto on his examination in chief.—Louisville, N. A. & C. Ry. Co. v. Terrell, 12 Ind. App. 328, 39 N. E. 295.

[j] (Iowa, 1895) In an action by a wife for alienation of her husband's affections, it cannot be shown on cross-examination of plaintiff that her husband married her after having seduced her, to prevent being prosecuted therefor, and that he had no affection for her, the wife not having testified to such matter, on the ground that her going on the stand is an affirmance of the presumption of law that her husband had affection for her.—Bailey v. Bailey, 94 Iowa, 598, 63 N. W. 341.

[k] (Iowa, 1895) In an action on a fire insurance policy, the kind of building insured, its material and age, cannot be shown on plaintiff's cross-examination, where plaintiff had not testified on direct examination as to its value.—Davis v. Anchor Mut. Fire Ins. Co., 96 Iowa, 70, 64 N. W. 687.

[l] (Mich. 1890) In an action to recover wages, where the plea is the general issue, and there is no notice of set-off, and no evidence that the contract of hiring was that the board of plaintiff was to be deducted from his wages, he cannot be asked, on cross-examination, questions tending to show that defendants had paid

his board for him.—O'Hara v. Mernan, 79 Mich. 222, 44 N. W. 599.

[m] (Mich. 1891) In an action for libel, where plaintiff is offered as a witness, any cross-examination affecting the merits of the case is admissible, whether the particular transaction sought to be shown by such cross-examination had been referred to in the direct examination or not.—Hay v. Reid, 85 Mich. 296, 48 N. W. 507.

[n] (Mo. 1884) It is not error for the court to permit the cross-examination of defendant as to matters not testified to in the examination in chief, where defendant makes no objection.—State v. Douglass, 15 Mo. App. 1.

[o] (Mont. 1893) Where plaintiff's direct examination in an action to recover possession of land and for the value of rents and profits related only to the stipulations of an agreement whereby certain lots were leased, inquiries as to plaintiff's information concerning the use which had been made of such lots were not proper cross-examination.—McCormick v. Gliem, 13 Mont. 469, 34 Pac. 1016.

[p] (N. J. 1886) Where a party to a suit denies the principal allegation or charge made against him, in his direct examination, he thereby lays himself liable to a cross-examination upon every circumstance or transaction with which he was connected, which may tend to establish the allegation or charge.—Pullen v. Pullen (Ch.) 5 Atl. 639.

[q] (N. Y. 1872) Where a party calls himself as a witness and is examined in chief, the opposite party may go into the whole case on a cross-examination, and need not confine himself to a cross-examination on the matters that were the subject of the direct examination.—Livingston v. Keech, 34 N. Y. Super. Ct. (2 Jones & S.) 547.

[r] (N. Y. 1896) Where a complaint alleged the employment of plaintiff by defendant for a definite period, and the answer denied this, and plaintiff, testifying for himself, stated no time for which he was employed, and defendant testified that he made no contract for a definite period, defendant should have been allowed to ask plaintiff, when he was called in rebuttal and denied several matters testified to by defendant, to state the period of time for which he was to be employed.—Burns v. Johnston, 8 App. Div. 406, 38 N. Y. Supp. 978.

[s] (Or. 1896) In an action for causing the destruction by fire of wood on plaintiff's premises, a question to defendant, on his cross-examination, as to whether it was customary to "backfire," in order to save one's property, was improper, where there was no direct evidence of defendant's having kindled the fire, and defendant, without referring to any custom, merely testified in chief that after he discovered the fire he raked away the briers near his fence to keep the fence from burning.—Willis v. Lance, 28 Or. 371, 43 Pac. 384, 487.

[t] (Pa. 1892) In an action by a pledgee of stock against a corporation to recover dividends to which he was admittedly entitled, and which were paid by defendant to pledgor, where pledgee merely testifies to his demand of the dividends, he cannot be asked, on cross-examination, as to his having received part payment of the debt, surrendered a note evidencing the same, and accepted another for the balance, when he retained the stock as collateral, and had no knowledge that the dividends had been so paid.—Boyd v. Conshohocken Worsted Mills, 149 Pa. 363, 24 Atl. 287, 30 Wkly. Notes Cas. 317.

[u] (Wis. 1892) In trover against officers for the seizure of plaintiff's property on execution against a third person, an attempt by defendants, who had not entered on their defense nor appeared as representing rights of creditors, to cross-examine plaintiff as to fraud in his title, was rightly objected to, as not being pertinent to his evidence on direct examination.—Welcome v. Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913.

§ 972. —— Irrelevant, collateral, or immaterial matters.

Cross-examination of witnesses in general as to irrelevant, collateral or immaterial matters, see ante, §§ 955–957.

[a] (Ill. 1880) In an action for money loaned, where the defense was the statute of limitations, a question by the plaintiff to the defendant on cross-examination, "Do you take advantage of the statute of limitations to avoid paying the plaintiff this demand?" is incompetent.—Marshall v. Morissey, 6 Ill. App. (6 Bradw.) 542.

[b] (Iowa, 1876) In a suit for the use of the school fund to recover a certain sum of money on account of alleged sales of intoxicating liquors by defendant to a minor, and to habitual drunkards, in violation of Code, § 1539, it is improper to inquire of plaintiff on cross-examination why he instituted the suit.—Cobleigh v. McBride, 45 Iowa, 116.

[c] (Iowa, 1887) The plaintiff in an action cannot be asked, on cross-examination, who told him to bring the action, or whether he told his attorneys how much defendant owed him.—Walthelm v. Artz, 70 Iowa, 609, 31 N. W. 953.

[d] (Mass. 1893) Defendant was employed by plaintiffs to collect the moneys due them from an estate, under powers of attorney. In an action to recover from him moneys retained by him as his charges, as excessive, defendant testified that he was at the time in question employed as a grocer's clerk. *Held*, that he could be cross-examined as to what wages the grocer paid him, to show his capacity, and the reasonableness of his charges.—Norton v. Griffin, 160 Mass. 236, 35 N. E. 462; Coates v. Same, Id.; Bisbee v. Same, Id.; Allen v. Same, Id.; McKenzie v. Same, Id.

[e] (Mich. 1891) Defendant cannot cross-examine plaintiff when a witness on the stand concerning the arrangement which he had made to compensate his attorney for his services, as the statute authorizes a party to agree with an attorney for compensation, and such agreement is not a material matter to be inquired into on trial.—Denman v. Johnston, 85 Mich. 387, 48 N. W. 565.

[f] (N. H. 1892) Where, in an action for injuries caused by a defective highway, plaintiff testifies on cross-examination that he had previously been injured by a defective highway in another town, and sued therefor, and as to the character of such injuries, it is not error to refuse to permit him to be asked also whether he recovered of such town.—Jacobs v. Town of Croydon, 67 N. H. 591, 27 Atl. 122.

[g] (N. Y. 1888) Plaintiff, on cross-examination, cannot be asked whether he did not, as soon as he was injured, commence suit against defendant for the injuries.—Kane v. City of Troy, 48 Hun, 619, 1 N. Y. Supp. 536, judgment affirmed (1890) 119 N. Y. 640, 23 N. E. 1148.

[h] (N. Y. 1888) A question asked plaintiff on cross-examination, whether his wife had also sued the city for the same accident, was properly excluded.—Kane v. City of Troy, 48 Hun, 619, 1 N. Y. Supp. 536, judgment affirmed (1890) 119 N. Y. 640, 23 N. E. 1148.

[i] (Pa. 1895) In a proceeding to remove coexecutors for misconduct, one executor testified that money of the estate was used by him in a business in which his coexecutrix was a partner, and that the coexecutrix was indebted to him in her individual account. *Held*, that he could

refuse to testify as to the items of the individual account, or to produce papers relating thereto, since it was a collateral matter.—In re Lafferty's Estate (Orph. Ct.) 4 Pa. Dist. R. 90.

[j] (Vt. 1889) It appeared that the note sued on was given to the prosecutrix to procure the dismissal of a bastardy proceeding against defendant, and had been transferred to plaintiff. Defendant contended that the note was given only on condition that the prosecutrix should be confined, which contingency did not happen. Plaintiff testified that he told defendant, when brought to his office under arrest, that he could either settle with the girl, marry her, or go to jail. *Held* that, on cross-examination of plaintiff, the court properly excluded all conversation relative to giving bail and procuring counsel as immaterial, and limited the examination to the subject of the settlement and its terms.—Harvey v. Brouilette, 61 Vt. 525, 17 Atl. 722.

[k] (Vt. 1892) In an action by a husband for alienation of his wife's affections, cross-examination of the husband, after his denial of having contracted a bad disorder while visiting a house of ill fame, as to whether he had not told his wife he was using oil of cubebs for a trouble he had, was properly excluded as immaterial, and because the courts are not judges of materia medica.—Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438.

[l] (Wis. 1887) Plaintiff, suing for the price of an article made by him for defendant, testified, on cross-examination, to having made a like article for a certain other person. *Held*, that he could not be asked whether he ever got his pay, or asked for it.—Morawetz v. McGovern, 68 Wis. 312, 32 N. W. 290.

[m] (Wis. 1891) In replevin against a sheriff who had seized property which is claimed by plaintiff under two bills of sale from one M., defendant was not allowed to ask plaintiff, on cross-examination, "What went to make up the rest of the $3,000 [the consideration named in one of the bills of sale]?" Plaintiff had already testified in his own behalf of what a portion of the consideration consisted. *Held*, that the question was material, and that it is proper to allow a party to a suit, when offered as a witness, to be cross-examined fully on the whole case.—Weadock v. Kennedy, 80 Wis. 449, 50 N. W. 393.

§ 973. —— Writings.

See post, § 978 [a].

Admissibility of writings on cross-examination of party, see ante, § 961.

Cross-examination of witnesses in general as to writings, see ante, §§ 958–962.

[a] (Ala. 1893) A party, after having testified to the correctness of book entries, which he has examined to refresh his recollection, and to the fact that they were made in the usual course of business, may be cross-examined as to whether some of the entries had not been made since the origin of suit, without making the entries evidence in the cause, and although the book containing them has not been offered in evidence.—Little v. Lishkoff, 98 Ala. 321, 12 South. 429.

[b] (Conn. 1889) In a suit to collect taxes, where the issue is as to whether defendant had moved her residence from the state, and defendant exhibits and testifies concerning receipts for her board and room in another state, she may be asked on cross-examination why the amounts paid do not appear in the receipts.—City of Hartford v. Champion, 58 Conn. 268, 20 Atl. 471.

[c] (Del. 1846) The books of a party being evidence, with his oath, of a sale and delivery of goods, he may be cross-examined on this point.—Fredd v. Eves, 4 Har. 385.

[d] (Ind. 1890) On an issue as to the genuineness of defendant's signature to the bonds sued on, plaintiff's witnesses having produced letters which they testified had been received from defendant and believed them to be genuine, it was not error, on cross-examination of defendant, to exclude the question as to whether such signatures were genuine.—White Sewing Mach. Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109.

[e] (Ind. 1896) On cross-examination of a party, the court may permit him to be asked, after he has been shown and acknowledged having written a letter containing statements contradictory to his testimony in chief, whether he had written certain extracts from the letter, which were read to him at the time; such extracts not being garbled or wrested from their connection, so as to convey a false meaning, and the entire letter subsequently put in evidence.—Gemmill v. State, 16 Ind. App. 154, 43 N. E. 909.

[f] (Me. 1859) The defendant having been called as a witness by his own counsel and having testified, the opposite party on cross-examination was allowed to examine him as to his intentions in signing the contract in question.—Quimby v. Morrill, 47 Me. 470.

[g] (Minn. 1867) A witness who is also a defendant may be cross-examined as to the items in a ledger which he has offered in evidence.—Thayer v. Barney, 12 Minn. 502 (Gil. 406).

[h] (Ohio, 1890) On the cross-examination of a party offering his books in evidence to sustain an account, it is proper to ask him if he had not made as many as 24 mistakes in keeping his accounts within the last two years, which he had been compelled to correct.—Sheridan v. Tenner, 5 Ohio Cir. Ct. R. 19.

[i] (Tex. 1888) When the testimony of the shipper in an action by him to recover for injuries to horses shipped by him shows that the contract of shipment was in writing, an objection to questions of defendant whether he did not undertake to feed and water the stock, and attend them at his own expense, is properly sustained.—Missouri Pac. Ry. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A. 75.

§ 974. Testimony inconsistent with pleadings.

[a] (N. Y. 1889) Defendant may be asked on his cross-examination to explain statements in his testimony contradicting his answer to the complaint.—Chellis v. Chapman, 52 Hun, 613, 7 N. Y. Supp. 78, judgment affirmed (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

[b] (N. Y. 1891) On cross-examination of a defendant testifying in his own behalf to the terms of the contract on which suit is brought, his attention may properly be called to allegations in his answer which conflict with his testimony. It is not ground for objection thereto that he verified the answer by advice of counsel, and did not state therein his specific understanding of the contract.—Hare v. Mahoney, 60 Hun, 576, 14 N. Y. Supp. 81.

§ 975. Cross-examination of party examined as a witness by adverse party.

[a] (Ala. 1863) The introduction of one of several codefendants, as a witness by the plaintiff, does not constitute him a general witness in the cause, and it is not permissible for the defendants to examine him on any matter of defense not called out by the plaintiff in his examination.—Bell v. Chambers, 38 Ala. 660.

[b] (Ga. 1855) Under the act of 1854, granting to either party in a cause the privilege of a

viva voce examination of his adversary in open court, and providing that when subpœnaed a party shall "testify in the action as other witnesses now, by law, are required to do," parties to an action, when subpœnaed as witnesses in the case, stand on the same footing as any other witnesses, and are subject to the same cross-examination.—Wood v. McGuire, 17 Ga. 303.

[c] (Iowa, 1856) A plaintiff called as a witness by the defendant, and examined as to a certain item or fact, cannot be examined generally to support his own demand.—Everly v. Cole, 3 G. Greene, 239.

[d] (Iowa, 1856) Where defendant objected to a note's being permitted to go before the jury as evidence, on the ground of variance between the one offered and that declared on, and, plaintiff calling defendant as a witness on this question, defendant's counsel wished to examine him in regard to the consideration of the note, which plaintiff objected to, it was *held* that the only inquiry before the court was the preliminary one of variance, and that the objection should be sustained.—Converse v. Warren, 4 Iowa (4 Clarke) 158.

[e] (Iowa, 1861) Before Revision 1860, §§ 3980, 3981, defendant, if called by plaintiff, was not thereby rendered a general witness in the case, but could be cross-examined only as to those points upon which he was called in chief. —Arthur v. Blunt, 12 Iowa, 200.

[f] (Mass. 1886) Where, in an action of contract to recover certain sums paid by plaintiff to defendant for shares in a stock company organized to sell a patented article, which proved to be worthless, and the answers of defendant, upon being called as a witness by plaintiff, to certain questions put by the latter, tended to show that the article was of less value than represented by defendant at the time of the sale of the stock, defendant should have been allowed to answer questions afterwards put by his counsel tending to show that the invention was valuable.—Reeve v. Dennett, 141 Mass. 207, 6 N. E. 378.

[g] (N. J. 1854) Where a party to a suit is called by the opposite party as a witness, his own counsel may cross-examine him.—Teel v. Byrne, 24 N. J. Law (4 Zab.) 631.

[h] (S. C. 1847) If a defendant in "summary process" choose to embrace the alternative allowed by the rule of court, and answer ore tenus to the interrogatories propounded by the plaintiff, this gives no more right to the defendant's counsel to cross-examine the defendant than if he had submitted answers in writing, attested as usual, or had been examined out of the state by commission.—Hill v. Denny, 1 Strob. 338.

[i] (S. C. 1847) Where a defendant is called on, in the "summary process" jurisdiction, to give testimony, he cannot be cross-examined by his own counsel, as a person so called is not regarded as a witness generally, but the object is to extract from him a discovery of such matters as are set down in writing, this mode of proof having been authorized only in cases where, to the party resorting to it, evidence is inaccessible according to common-law rules.—Hill v. Denny, 1 Strob. 338.

10. EXAMINATION OF ADVERSE PARTY AS ON CROSS-EXAMINATION.

RIGHT TO CROSS-EXAMINE, § 976.
COMPELLING ATTENDANCE OF ADVERSE PARTY, § 977.
SCOPE AND MANNER OF CROSS-EXAMINATION, § 978.

Examination of adverse party in general, see ante, § 815.

§ 976. Right to cross-examine.

Right to cross-examine and re-examine in general, see ante, § 907.

[a, b] (U. S. 1885) The Pennsylvania statute, which provides that a party to the record, when called by the adverse party, may be examined as if under cross-examination, is not applicable to a suit in equity in a United States court.—Dravo v. Fabel (D. C.) 25 Fed. 116; Pennsylvania R. Co. v. Allegheny Valley R. Co. (C. C.) 25 Fed. 115.

[c] (Minn. 1896) A defendant against whom a default judgment had been entered could not be called for cross-examination by plaintiff on the trial of the issues raised by the answers of his co-defendants, under Gen. St. 1894, § 5659, providing that a party to the record, or a person for whose immediate benefit an action is prosecuted or defended, may be called for cross-examination by the opposite party, who shall not be concluded by his testimony.—Suter v. Page, 64 Minn. 444, 67 N. W. 67.

[d] (Pa. 1886) An administratrix, defendant to a suit, having an interest, may be called as an adverse party as if for cross-examination under the act of March 27, 1865, unless the plaintiffs have coupled with their bill in equity, as regards her, interrogatories for discovery, in which case she cannot be compelled to testify orally.—William Penn Building & Loan Ass'n v. Mayer, 2 Montg. Co. Law Rep'r, 41.

[e] (Pa. 1886) An administratrix, defendant in a suit, is a party having an interest therein, and cannot be called as an adverse party by the opposite side under the act of April 15, 1869.—William Penn Building & Loan Ass'n v. Mayer, 2 Montg. Co. Law Rep'r, 41.

[f] (Pa. 1893) On an issue to try the ownership of goods alleged to have been sold to one creditor in fraud of others, the seller is not a party whose interest is adverse to the creditor attacking the sale, within Act 1887 (P. L. 160) § 7, providing that an interested party may be compelled by the adverse party to testify as if under cross-examination.—Krall v. Doutrich (Com. Pl.) 3 Pa. Dist. R. 12.

§ 977. Compelling attendance of adverse party.

Attendance of witness for cross-examination in general, see ante, §§ 912–915.

[a] (Tenn. 1889) Defendant's application for an order to compel plaintiff to appear personally at the trial, so that he might cross-examine her, was properly refused, where such application was made before the trial, and before any attempt had been made to take her testimony by deposition or otherwise.—Graham v. McReynolds, 88 Tenn. (4 Pickle) 240, 12 S. W. 547.

§ 978. Scope and manner of cross-examination.

Scope and extent of cross-examination in general, see post, §§ 931–948.

[a] (Minn. 1888) In proceedings to probate a will, a proponent was examined as a witness for the contestants. *Held*, that under Gen. Laws 1885, c. 193, § 1, providing that a party to the record, or one for whose benefit an action is being prosecuted or defended, is compelled to testify as if under cross-examination, he could be interrogated by contestants concerning statements said to have been made by him to others concerning the mental capacity of the deceased.—In re Brown, 38 Minn. 112, 35 N. W. 726.

[b] (Pa. 1874) Where a party is called as a witness by his adversary, as on cross-examination under Act April 15, 1869, leading questions may be put to him, and there may be

drawn from him any facts or admissions which weaken his case or strengthen his adversary's.—Brubaker's Adm'r v. Taylor, 76 Pa. (26 P. F. Smith) 83.

11. CROSS-EXAMINATION OF ACCUSED IN CRIMINAL PROSECUTIONS.

IN GENERAL, § 979.
PARTICULAR SUBJECTS OF INQUIRY, § 980.
—— FACTS INCONSISTENT WITH TESTIMONY, § 981.
LIMITATION OF CROSS-EXAMINATION TO SUBJECTS OF DIRECT EXAMINATION, § 982.
RECALLING FOR FURTHER CROSS-EXAMINATION, § 983.
WAIVER OF OBJECTIONS, § 984.

Cross-examination on voluntary statements by witness, see ante, § 943.

Discretion of court as to cross-examination of accused in criminal prosecutions, see ante, § 925.

Privilege of accused on cross-examination, see post, §§ 1043–1046.

Scope of cross-examination of accused by counsel for joint defendant, see ante, § 910 [b].

§ 979. In general.

[a] (Ala. 1882) A defendant, making his statement under Act Dec. 2, 1882 (Pamph. Acts 1882–83, p. 4), authorizing him to make a statement in his own behalf, not under oath, is not subject to examination or cross-examination.—Chappell v. State, 71 Ala. 322; Whisenant v. State, Id. 383.

[b] (Cal. 1871) The fact that the accused offers himself as a witness in his own behalf does not change or modify the rules of practice with reference to the proper limits of a cross-examination, and does not make him a witness for the state against himself.—People v. McGungill, 41 Cal. 429.

[c] (Ind. 1886) When the accused testifies as a witness, he is to be treated as any other witness upon cross-examination.—Boyle v. State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 518.

[d] (Kan. 1896) When a defendant in a criminal prosecution has offered himself as a witness in his own behalf, he may be cross-examined to the same extent as any other witness, and he may also be recalled by the state for further cross-examination, but he cannot be recalled as a witness for the state, and compelled to testify in its favor.—State v. Lewis, 56 Kan. 374, 43 Pac. 265.

[e] (La. 1891) The state can, on cross-examination of the accused, question him in relation to matters referred to on his direct examination.—State v. Baker, 43 La. Ann. 1168, 10 South. 256.

[f] (Mich. 1891) Laws 1861, No. 125, permitting accused persons to testify, not under oath, in their own behalf, was repealed by Laws 1881, No. 245, permitting them to testify under oath, and the state may cross-examine a defendant, offering himself as a witness, although unsworn, to the same extent as any other witness.—People v. Robinson, 86 Mich. 415, 49 N. W. 260.

[g] (Mich. 1895) The defendant, on becoming a witness in his own behalf, is subject to the same rules of cross-examination, and the prosecution has the same right to inquire fully into his antecedents, as in the case of any other witness.—People v. Sutherland, 104 Mich. 468, 62 N. W. 566.

[h] (Mo. 1878) A defendant in a criminal case who avails himself of Act 1877, p. 356, testifying in his own behalf, subjects himself to the same rules as to cross-examination as other witnesses.—State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506.

[i] (Mo. 1884) The defendant in a criminal case may, when a witness in his own behalf, be cross-examined as to any pertinent matter.—State v. Douglass, 15 Mo. App. 1.

[j] (Mo. 1887) If a defendant in a criminal case becomes a witness in his own behalf, he may be cross-examined and impeached as may other witnesses.—State v. Beaty, 25 Mo. App. 214.

[k] (Wis. 1881) Where a defendant in a criminal action offers himself as a witness in his own behalf, he is subject to cross-examination to the same extent as any other witness.—Yanke v. State, 51 Wis. 464, 8 N. W. 276.

§ 980. Particular subjects of inquiry.

Particular subjects of examination limited to subjects of direct examination, see post, § 982.

[a] (Ala. 1889) Where defendant, in a prosecution for murder, testifies in his own behalf, he may be asked, on cross-examination, where he was from the time of the killing until his arrest.—Rains v. State, 88 Ala. 91, 7 South. 315.

[b] (Ala. 1890) Where defendant, on indictment for assault with intent to kill, attempts to show that he committed the assault while intoxicated, and testifies that he had purchased a bottle of whisky just before, he may be asked on cross-examination from whom he purchased it.—Fonville v. State, 91 Ala. 39, 8 South. 688.

[c] (Cal. 1873) A defendant who becomes a witness in his own behalf, and undertakes, on his direct examination, to state all that transpired between two points of time, may be asked on his cross examination if he has omitted anything pertinent to the case; and his attention may be directed to the precise point by asking him if some specified thing did not occur.—People v. Russell, 46 Cal. 121.

[d] (Cal. 1883) To ask defendant, on cross-examination, the name of his father and mother, cannot prejudice him.—People v. Bowers, 18 Pac. 660.

[e] (Cal. 1889) Where a defendant in a criminal case has testified on direct examination as to his birth, parentage, education, and business, a cross-examination as to whether up to the date of his arrest he had ever been arrested was not improper, as extending beyond the scope of cross-examination.—People v. Fong Ching, 78 Cal. 169, 20 Pac. 396.

[f] (Cal. 1894) Where defendant in a murder trial, to show that deceased was of a quarrelsome character, testifies that he saw him stab a person in a difficulty, he may, on cross-examination, be examined as to what he saw in connection with the stabbing, to show who was the aggressor.—People v. Anderson, 105 Cal. 32, 38 Pac. 513.

[g] (Cal. 1895) When defendant, in accounting for his time on the night of the robbery, testified that he went to a certain part of the town, he could be properly cross-examined, as to what he and his companion were doing there.—People v. Clark, 106 Cal. 32, 39 Pac. 53.

[h] (Ill. 1887) On the trial of an indictment for murder against certain members of an unlawful conspiracy, having for its object the overthrow of the social order by violent methods, a letter written to one of the defendants by a person jointly interested with him in the supply of dynamite to the discontented laboring classes is legitimate material for cross-examination, where defendant tenders himself as a witness.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

[i] (Ind. 1877) One on trial for murder testified that he had had illicit intercourse with the deceased, had met her husband during his intimacy with her, and had killed her in a passion of love and jealousy amounting to insanity. *Held*, that he might be properly asked, on cross-examination, whether, at such meeting, the husband had forbidden him to further associate with her.—Greenley v. State, 60 Ind. 141.

[j] (Iowa, 1890) A defendant charged with burglary may be asked on cross-examination to state who was present at the time the burglary was committed.—State v. O'Brien, 81 Iowa, 93, 46 N. W. 861.

[k] (Mass. 1887) Defendant was indicted for embezzlement, and it appeared that the person from whom the money was embezzled had charged defendant with having spent it in "stock gambling," but defendant denied that such a charge had been made. *Held*, that on cross-examination defendant could be asked if he had not spent considerable sums of money in stock gambling, or in anything else, and could be asked how he obtained the money, such an examination to be confined to a period of time subsequent to that of the embezzlement.—Commonwealth v. Shaw, 145 Mass. 349, 14 N. E. 159.

[l] (Mich. 1885) A defendant in whose saloon a robbery has occurred, and who is alleged to have been concerned therein, may be asked, when a witness in his own behalf, if, when the officer came to his saloon, he assisted him in arresting the guilty person.—People v. Wallin, 55 Mich. 497, 22 N. W. 15.

[m] (Mo. 1893) On a trial for murder, where a witness for the state testified that defendant stated in his presence that it was a man by the name of T. who traveled with him towards the place where deceased's body was found, it was proper to cross-examine defendant as to the statement, for the purpose of showing that T. and deceased, whom defendant testified killed himself, were the same person.—State v. Avery, 113 Mo. 475, 21 S. W. 193.

[n] (Mo. 1895) Where, in a case of arson, the defense is alibi, and defendant, as a witness, simply states that he was not present at the time and place of the fire, it is proper cross-examination to ask him where he was at the time the property was burned.—State v. Harvey, 131 Mo. 339, 32 S. W. 1110.

[o] (Mo. 1896) Where, in a prosecution for seduction, defendant testifies on direct examination that he had constantly visited prosecutrix until after her alleged seduction, it is proper to permit him to be asked on cross-examination why he ceased his visits.—State v. Eisenhour, 132 Mo. 140, 33 S. W. 785.

[p] (Mo. 1896) When defendant has testified all about the homicide on direct examination, questions asked, on cross-examination, with respect to statements made by him before the coroner in regard to matters to which he had testified in chief, are admissible.—State v. Punshon, 133 Mo. 44, 34 S. W. 25.

[q] (N. Y. 1878) It is competent for the state, in a criminal case, to ask the prisoner on cross-examination as to the motives which influenced him in certain actions connected with the crime. —Blake v. People, 73 N. Y. 586.

[r] (N. Y. 1880) When a prisoner testifies in his own behalf that he lent money, it is competent, on cross-examination, to inquire as to the sources from which he received it, and evidence is admissible, to disprove the prisoner's statements, of his pecuniary necessities, the fact of his not paying debts, etc., at about the time.—Pontius v. People, 82 N. Y. 339.

[s] (N. Y. 1891) Where defendant, in an action for an assault and battery, alleged to have been committed while defendant was a police officer, testifies, on cross-examination, that since the alleged assault he and the police department had severed connection, it is error to exclude the question, "You were dismissed, were you not?"—Walsh v. Dolan (City Ct. N. Y.) 15 N. Y. Supp. 96.

[t] (Pa. 1885) A defendant who goes upon the stand and denies his guilt may be cross-examined upon every fact and circumstance that led up to it, or rendered it more probable.—Commonwealth v. Burk, 3 Lanc. Law Rev. 138.

[u] (S. C. 1878) Defendant's counsel in a criminal trial, in cross-examining a witness for the state, introduced new matter affecting the defendant. *Held*, that the prosecution, after the defendant had testified, could cross-examine him on the same subject and introduce witnesses in reply.—State v. Cardoza, 11 S. C. 195.

[v] (Utah, 1893) Defendant having testified in his own behalf, it was competent to inquire of him what his business and antecedents were for 20 years past, and to interrogate him as to past transactions to test his recollection, and to bring to light conduct that would affect his credibility.—People v. Hite, 8 Utah, 461, 33 Pac. 254.

§ 981. —— Facts inconsistent with testimony.

Cross-examination as to facts inconsistent with testimony in general, see ante, § 936.

[a] (Cal. 1890) Defendant, having testified that he bought the horse, which he was alleged to have stolen, from one R., was asked, on cross-examination: "Where is R. now, do you know?" "When did you last hear from him?" "Have you made any effort to procure his attendance?" *Held* proper questions, as his ability or expectation to have R. corroborate his statement might throw some light on its truth. —People v. Cline, 83 Cal. 374, 23 Pac. 391.

[b] (Cal. 1892) On a prosecution for altering a public record, defendant may not be asked on cross-examination whether he had participated in the alteration of another record on the theory that guilty knowledge may thereby be shown, since a conviction may be based on a performance of the acts constituting the offense regardless of any fraudulent intention.—People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

[c] (Cal. 1894) On a trial for embezzlement, defendant testified that his employer permitted him to expend money for many different purposes, in order to promote the business of his employer; that he felt justified in what he expended; and that he did not intend to steal or embezzle the money taken. *Held*, that it was competent to show on his cross-examination that his conduct in leaving the city was inconsistent with such statements.—People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

[d] (Ill. 1896) Where defendant, in a criminal case, testifies that his business is that of laundryman, it is not error to permit him to be asked, on cross-examination, if he was not running an opium smoking business, and did not keep an opium joint, instead of being in the laundry business.—Goon Bow v. People, 160 Ill. 438, 43 N. E. 593.

[e] (Mo. 1887) Under a statute which provided that, when the accused shall offer himself as a witness, he may be cross-examined as any other witness, the defendant, indicted for murder, took the stand in his own behalf. The theory of defense was that accused had accidentally killed deceased in administering chloroform to him in an attempted surgical operation. On his direct examination, defendant stated that he never had a medical diploma, had never been licensed as a physician, nor ever represented himself to be such. *Held*, that it was com-

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petent on his cross-examination to ask whether a certain document purporting to be a medical diploma to himself, which the state had put in evidence in its case in chief, and had again read on the cross-examination, was in defendant's own handwriting, whether it was an actual diploma, when he obtained possession of and for what purpose he wrote it.—State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

[f] (Mo. 1893) Defendant, on a trial for murder, testified that he and deceased went together to the place where deceased's body was found, described the movements of deceased, and that deceased shot himself. *Held*, in order to ascertain defendant's opportunities for observing the movements of deceased, and the surrounding circumstances, it was proper, on cross-examination, to ask if the moon was shining that night. State v. Avery, 113 Mo. 475, 21 S. W. 193.

[g] (Neb. 1895) A defendant in a prosecution for producing an abortion having testified in chief that his acquaintance with the woman on whom the operation was performed was not intimate, it was proper cross-examination to show by him that he had been criminally intimate with her.—Dixon v. State, 46 Neb. 298, 64 N. W. 961.

[h] (S. C. 1891) An accused person who becomes a witness in his own behalf assumes the position of an ordinary witness; and where he has put his character for peaceableness in issue he may be cross-examined as to particular acts of violence which he is alleged to have committed.—State v. Merriman, 34 S. C. 576, 13 S. E. 328, affirming (1891) 34 S. C. 16, 12 S. E. 619.

[i] (S. C. 1891) He may also be asked whether he ever told persons named of an act of violence which he at one time purposed, but was prevented from consummating, with a view to contradicting him by the evidence of the persons named.—State v. Merriman, 34 S. C. 576, 13 S. E. 328, affirming (1891) 34 S. C. 16, 12 S. E. 619.

§ 982. Limitation of cross-examination to subjects of direct examination.

Limitation of cross-examination of witnesses in general to subjects of direct examination, see ante, §§ 949–954.

[a] A defendant testifying in a criminal case on his own behalf can be cross-examined only as to matters brought out in the direct examination.

—(Mich. 1872) Gale v. People, 26 Mich. 157; (Mo. 1882) State v. McLaughlin, 76 Mo. 320; (1882) Same v. Turner, 76 Mo. 350; (1886) Same v. Buella, 89 Mo. 595, 1 S. W. 764; (1886) Same v. Beeman, 2 S. W. 407; (Or. 1885) State v. Lurch, 12 Or. 99, 6 Pac. 408.

[b] (U. S. 1887) Where the accused is examined as a witness in his own behalf, the question as to whether the cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is one of state law as administered in the courts of the state, and not of federal law; and is not a ground on application to the United States supreme court for a writ of error.—Spies v. People, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80.

[c] (Cal. 1885) Under Const. art. 1, § 13, providing that no person shall "be compelled in any criminal case to be a witness against himself," a defendant who has testified in his own behalf cannot be cross-examined as to matters not testified to by him on his examination in chief.—People v. O'Brien, 66 Cal. 602, 6 Pac. 695.

[d] (Cal. 1887) On cross-examination in a criminal trial, where answers of defendant to questions objected to added nothing material to what he had previously voluntarily stated without objection, and only tended to make more clear some of the statements previously made by him, there was no violation of Pen. Code, § 1323, limiting cross-examination of a defendant in criminal actions to matters as to which he was examined in chief.—People v. Sutton, 73 Cal. 243, 15 Pac. 86.

[e] (Cal. 1888) Pen. Code, § 1323, provides that defendant in a criminal action cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined as to all matters about which he was examined in chief. Defendant testified that he did not commit the acts charged in the information. *Held*, that he could be asked, on cross-examination, whether a letter shown him, which contained statements tending to contradict his denial, was in his handwriting.—People v. Rozelle, 78 Cal. 84, 20 Pac. 36.

[f] (Cal. 1888) Defendant having denied all knowledge of any intent to commit the injury charged, or that he advised or participated in the same, may, under the above act, be asked, on cross-examination, if he did not have a conversation with a certain person in which he made threats against the person injured.—People v. Rozelle, 78 Cal. 84, 20 Pac. 36.

[g] (Cal. 1893) Pen. Code, § 688, provides that in a criminal action one cannot be compelled to testify against himself, and section 1323 provides that, if a defendant in a criminal action offer himself as a witness, he may be cross-examined as to matters about which he was examined in chief. *Held* that, where defendant had merely denied that he had advised another to draw money from a bank for the purpose of embezzling it, and had denied all knowledge of intention of the other so to do, it was error on cross-examination to allow him to be asked questions relating to facts transpiring after the money was drawn.—People v. Gallagher, 33 Pac. 890.

[h] (Cal. 1893) On a prosecution for assault with intent to commit murder with a knife, defendant testified as to his presence at the scene of the assault, and his arrest as the perpetrator thereof, but made no mention of anything happening after his arrest. *Held* that, under Pen. Code, § 1323, providing that a defendant who offers himself as a witness can be cross-examined only as to "matters about which he was examined in chief," defendant could not be cross-examined regarding a pistol which fell from his person just after his arrest.—People v. Wong Ah Leong, 99 Cal. 440, 34 Pac. 105.

[i] (Cal. 1893) Defendant, accused of abetting B. in embezzling money drawn by B. from the bank on his employer's account, with which money they two had gone by train to S., testified that he had been with B. most of the day before the crime, and had agreed to meet B. near noon next day at a bar opposite the bank, with no special purpose; that they had agreed to go by a certain train to S.; that they did not agree to take the money with them; that defendant had never advised B. to take his employer's money, agreed with him to go off with it, nor consented to his doing so. *Held*, that the state could ask him, as "matters about which he was examined in chief" (Pen. Code, § 1323), whether, the day the money was drawn, he went with B. and the money to a neighboring city, helped B. to change part of it, returned with B. and the same money, and left B., and went to the depot with part of it.—People v. Gallagher, 100 Cal. 466, 35 Pac. 80.

[j] (Cal. 1894) On a trial for shooting, where defendant testified as to his habit of carrying

a revolver, it was proper on cross-examination to ask him if he could identify as his own a revolver shown him, under Pen. Code, § 1323, providing that a defendant may be cross-examined as to all matters about which he was examined in chief.—People v. Gordon, 103 Cal. 568, 37 Pac. 534.

[k] (Cal. 1896) In a prosecution for embezzlement, it is error to allow the prosecution to cross-examine defendant as to bets made by him at a race track, defendant not having testified in regard thereto on his examination in chief.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

[l] (Iowa, 1895) On trial of an indictment of a banker for receiving money when insolvent, where defendant, to show want of connection with the transaction, testified that, on the morning of the day the deposit was made, he left the town where his bank was located, and went to W., after promising to telephone his son, left in charge of the bank, if things did not look favorable, not to receive deposits, and that he sent that message, the court was not required to confine the cross-examination to what defendant did at W.—State v. Eifert, 65 N. W. 309, 63 Am. St. Rep. 433, 38 L. R. A. 485.

[m] (La. 1892) An accused, who avails himself of the privilege of testifying under Acts 1886, No. 29, may be cross-examined by the state, but only concerning matters as to which the witness has testified in chief.—State v. Underwood, 44 La. Ann. 852, 11 South. 277.

[n] (Mo.) If defendant in a criminal case avails himself of the privilege of testifying in his own behalf, he can be cross-examined only as to matters testified to by him in chief, according to Rev. St. § 1918.—(1881) State v. McGraw, 74 Mo. 573; (1881) Same v. Porter, 75 Mo. 171; (1886) Same v. Chamberlain, 89 Mo. 129, 1 S. W. 145.

[o] (Mo. 1890) Where, in a murder trial, it appeared that one of the defendants had stated that he had tapped deceased with a cane, but that, upon his direct examination as a witness, he had testified that he had no cane with him, and did not strike deceased with a cane, and he was asked on cross-examination, "Were you sitting in the saloon there with your head down on a cane?" it is not error to overrule an objection to the question on the ground that the direct examination had been confined to what occurred after he left the saloon.—State v. McKinzie, 102 Mo. 620, 15 S. W. 149.

[p] (Mo. 1892) Under Rev. St. § 4218, providing that a defendant shall be competent as a witness in a criminal prosecution, and that he shall be liable to cross-examination "as to any matter referred to in his examination in chief," where defendant testified that at the time of the commission of the crime he was at home, in bed, with a sick child, it was not permissible to ask him, on cross-examination, over his objection, whether he had not said in the presence of named persons that the boy was in a deep sleep, and snoring.—State v. Turner, 110 Mo. 196, 19 S. W. 645.

[q] (Wash. 1893) Defendant testified in his own behalf, and on his cross-examination the prosecuting attorney asked him as to his having fled soon after the crime was committed, to evade prosecution. On his direct examination defendant was questioned generally about his connection with the crime, but not as to his movements after the offense. *Held*, that the questions complained of were proper, as affecting the credibility of the witness.—State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

§ 983. Recalling for further cross-examination.

[a] (Ala. 1893) The court may compel an accused, who has offered himself as a witness, to be recalled for further cross-examination.—Thomas v. State, 100 Ala. 58, 14 South. 621.

[b] (Mo. 1894) In a criminal prosecution, a defendant who has testified in his own behalf may be recalled by the state for further cross-examination.—State v. Kennade, 121 Mo. 405, 26 S. W. 347.

§ 984. Waiver of objections.

[a] (Mo. 1885) Where no objection is made nor exception saved to the cross-examination of a defendant in a criminal case, as to matters not testified to in chief, the objection is waived.—State v. Mills, 88 Mo. 417.

12. CROSS-EXAMINATION OF ACCOMPLICES AND CO-DEFENDANTS IN CRIMINAL PROSECUTIONS.

IN GENERAL, § 985.
PARTICULAR SUBJECTS OF INQUIRY, § 986.

§ 985. In general.

[a] (Ill. 1887) Where the murder was committed in an affray, and participants in the affray are witnesses for the prosecution, the cross-examination should be given the greatest latitude, and the direct examination correspondingly restricted.—Sutton v. People, 119 Ill. 250, 10 N. E. 376.

[b] (Ohio, 1871) Where an accomplice testifies as a witness a liberal and full cross-examination should be permitted.—Lee v. State, 21 Ohio St. 151.

§ 986. Particular subjects of inquiry.

[a] (Ariz. 1892) On a trial for stealing a horse, it was error to refuse to permit defendant to ask a self-confessed accomplice if the latter did not testify in the examining court that he (the accomplice) took the horse.—Youree v. Territory, 29 Pac. 894.

[b] (Cal. 1886) Where a witness stated that he had feigned complicity with one indicted for larceny, for the purpose of detecting the thieves, and stated what he said and did in connection with the transaction, a question asked of him as to whether he stole the property which defendant was charged with stealing was properly disallowed, as it was for the jury to determine from the evidence whether he was or was not particeps criminis.—People v. Bolanger, 71 Cal. 17, 11 Pac. 799.

[c] (Mich. 1869) Where upon a criminal prosecution an accomplice testified to facts tending to show his own guilt and that of the defendant on trial, and upon cross-examination admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel and believed he had a good defense upon the merits, and the counsel for the defendant then asked what that defense was, and the witness declined to answer, it was *held* that he should not have been permitted to decline answering the question.—Foster v. People, 18 Mich. 266.

[d] (Mich. 1895) Where an accomplice has already testified on cross-examination as to his knowledge of the responsibility for his acts, the exclusion of the question, "Do you know that you are liable for what you did that night,—criminally liable?" is immaterial.—People v. Considine, 105 Mich. 149, 63 N. W. 196.

[e] (N. Y. 1892) Where, in an action for killing complainant's horses, an alleged accomplice testifies that the death was caused by poison procured by defendant, it is competent to ask him on cross-examination whether he understood such statement by him would relieve him from prosecution.—People v. Christy, 65 Hun, 349, 20 N. Y. Supp. 278, 8 N. Y. Cr. R. 484.

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[f] (N. D. 1895) Where an accomplice has, by his own testimony, made out a case of murder against himself, he may be asked, on cross-examination, if he expected to be hung.—State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

13. QUESTIONS ON CROSS-EXAMINATION.

QUESTIONS ASSUMING FACTS, § 987.
QUESTIONS INVOLVING MATTERS OF OPINION, § 988.
LEADING QUESTIONS, § 989.
REPETITION OF QUESTIONS AND QUESTIONS CALLING FOR REPETITION OF ANSWERS, § 990.
—— QUESTIONS AND ANSWERS IN DIRECT EXAMINATION, § 991.
—— QUESTIONS CALLING FOR ANSWERS RULED OUT ON DIRECT EXAMINATION, § 992.
INDEFINITE QUESTIONS, § 993.

Questions on direct examination, see ante, §§ 817–851.

§ 987. Questions assuming facts.

Questions on direct examination assuming facts, see ante, §§ 829–832.

[a] It is improper, on cross-examination, to assume as true facts which are not in proof.
—(Minn. 1873) St. Paul & S. C. R. Co. v. Murphy, 19 Minn. 500 (Gil. 433);
(Neb. 1883) Levi v. State, 14 Neb. 1, 14 N. W. 543;
(N. Y. 1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[b] (Ala. 1891) On a trial for murder, decedent's attending physician testified that, after being wounded, decedent was twice removed from one place to another, and that "it was drizzling" at the time. On cross-examination the witness was asked, "Is it not possible that removing deceased about in his condition in bad weather, over a rough country, caused his death?" There was no evidence that decedent was removed "over a rough country." *Held*, that the answer to such question was properly excluded.—Bostic v. State, 94 Ala. 45, 10 South. 602.

[c] (Iowa, 1879) The prosecutrix, in a prosecution for seduction, who was shown to have received presents from a male acquaintance during the continuance of a marriage engagement with the defendant, was asked on cross-examination if she had heard at the time she was going with the said acquaintance that he had said she was engaged, and that the only thing lacking was the consent of her mother; the object being to show that, if she received his attentions and presents knowing that he claimed to be engaged to her, her action was not consistent with an engagement to the defendant. *Held*, that the question was objectionable, in assuming, in the absence of any evidence, that she had been keeping company with the said acquaintance; and also in assuming that the remark attributed to him necessarily meant that she was engaged to him.—State v. Curran, 51 Iowa, 112, 49 N. W. 1006.

[cc] (La. 1885) Witnesses should not be cross-examined on the assumption that they have testified to facts touching which they have given no testimony.—State v. Labuzan, 37 La. Ann. 489.

[d] (N. Y. 1893) On an issue as to whether a contract between defendant and a third person, under which plaintiff claimed as assignee, had been rescinded by mutual consent prior to such assignment, defendant was asked, on cross-examination, "What time was this pretended or alleged cancellation of the contract?" *Held*, that the question was not objectionable on the ground that it assumed the contract was a pretended one.—Davis v. Willis, 67 Hun, 650, 22 N. Y. Supp. 839.

§ 988. Questions involving matters of opinion.

Leading questions involving conclusions or matters of opinion on examination in chief, see ante, § 844.

Questions on direct examination involving conclusions or matters of opinion, see ante, §§ 833–836.

[a] (Tex. 1884) In an action against a railway company for personal injuries, it is improper for defendant to ask plaintiff, in his examination by written interrogatories, the question: "Describe minutely how the accident occurred. Was is not your own fault and negligence?" since it calls for an opinion.—Houston & T. C. Ry. Co. v. Reason, 61 Tex. 613.

§ 989. Leading questions.

Discretion of court as to leading questions on cross-examination, see ante, § 927.

Leading questions on direct examination, see ante, §§ 837–851.

[a] Leading questions may be asked in cross-examining a witness.
—(U. S. 1803) Dawes v. Corcoran, Fed. Cas. No. 3,664 [1 Cranch, C. C. 137];
(Miss. 1852) Boles v. State, 24 Miss. (2 Cushm.) 445.

[b] (U. S. 1820) On cross-examination of a witness, he may be asked leading questions, to draw from him a further disclosure than he made upon the principal examination, and in reference to the matter testified about, but not as to other matter.—Harrison v. Rowan, Fed. Cas. No. 6,141 [3 Wash. C. C. 580].

[c] (Ind. 1860) In an action to recover installments on subscriptions to the capital stock of a company, a witness may be asked on cross-examination whether the subscription was not made for the purpose of securing the location of the road on a certain survey, over objection that it was leading.—Vawter v. Ohio & M. R. Co., 14 Ind. 174.

[d] (Iowa, 1882) In an action to recover corn to which plaintiff claimed title by virtue of certain alleged warehouse receipts given him by P., the defense was that the receipts were given to raise money to cover losses sustained by P. in dealing with plaintiff in options. P. was introduced as a witness for plaintiff, and evinced a purpose to sustain the validity of the receipts. *Held*, that it was proper to allow defendant to bring out the true character of the transaction by putting leading questions to P. on cross-examination.—Lowe v. Young, 59 Iowa, 364, 13 N. W. 329.

[e] (N. H. 1884) Where the plaintiffs are called by the defendants as witnesses, such fact does not make it necessary for the plaintiff's counsel to put leading questions to his client.—Gerrish v. Gerrish, 63 N. H. 128.

[f] (N. Y. 1881) Leading questions on cross-examination are not admissible for the purpose of eliciting testimony concerning new matter constituting an element of the case of the party cross-examining.—People v. Court of Oyer & Terminer of New York County, 83 N. Y. 436.

[g] (Va. 1886) A question put to a witness who had just testified that defendant was not liable for a note given for goods, in cross-examination by plaintiff's counsel, "Did you not, a short time before this suit was brought, in a conversation with me, tell me that defendant

ought to pay this note?" is admissible.—Smith v. Watson, 82 Va. 712, 1 S. E. 96.

§ 990. Repetition of questions and questions calling for repetition of answers.

Discretion of court as to repetition of question in the same or another form, see ante, § 928.

Repetition of questions or questions calling for a repetition of testimony on direct examination, see ante, §§ 827, 828.

[a] (Iowa, 1880) In an action for personal injuries, plaintiff's husband, having stated on cross-examination that he did not think he had told her counsel that the injury was to her right leg, could not be required to answer as to whether he had not, at plaintiff's instance, carried a message to her attorneys, to the effect that the injury was to her right leg, since this only called for a repetition of his statement.—Garlick v. City of Pella, 53 Iowa, 646, 6 N. W. 8.

[b] (Mass. 1877) A repetition by the questioner, on cross-examination, of the witness' answer in an interrogative form, does not entitle the opposite party to insist that all the conversation referred to in the answer shall be put in evidence; that interview, etc., not having been introduced on the direct examination.—Perlmutter v. Highland St. R. Co., 121 Mass. 497.

[c] (Mich. 1885) Repetitions of questions in different language are properly excluded on cross-examination, after full answers have been given.—Simon v. Home Ins. Co., 58 Mich. 278, 25 N. W. 190.

[d] (N. Y. 1892) The court may, in its discretion, refuse to permit a witness to be asked on cross-examination questions substantially the same as others previously propounded and answered.—Mason v. Hinds (Super. Buff.) 19 N. Y. Supp. 996.

[e] (Wash. 1896) It is not error to sustain an objection to a question on cross-examination which is merely a repetition of a former question, and calls for nothing material.—Gilliam v. Davis, 14 Wash. 183, 44 Pac. 152.

§ 991. —— Questions and answers in direct examination.

[a] (Mass. 1850) Where a witness, who is called to testify to what was said by a witness on a former occasion, makes a statement thereof from his recollection, assisted by a reference to his minutes taken at the time, it is not the right of the adverse party, on cross-examination, to require him to state again in detail, without referring to his minutes, what was said by the witness.—Odiorne v. Bacon, 60 Mass. (6 Cush.) 185.

[b] (Mich. 1891) Although it is not permissible for counsel on cross-examination to pass through the whole of the direct examination, and ask the witness to repeat it, he has a right to ask the witness to repeat what he has testified to upon a particular point in his direct examination for the purpose, not only of testing his recollection, but of ascertaining whether he will make a statement at variance with what he testified to in chief.—Zucker v. Karpeles, 88 Mich. 413, 50 N. W. 373.

[c] (Mich.) A witness may be asked on cross-examination to repeat what he has testified to on a particular point in his direct examination for the purpose of testing his recollection, and of ascertaining whether he will make a statement at variance with his testimony in chief—(1891) Zucker v. Karpeles, 88 Mich. 413, 50 N. W. 373; (1893) Beers v. Payment, 95 Mich. 281, 54 N. W. 886.

[d] (N. C. 1896) Plaintiff cannot object, where defendant in cross-examination repeats the question put by plaintiff.—Grambling v. Dickey, 118 N. C. 986, 24 S. E. 671.

§ 992. —— Questions calling for answers ruled out on direct examination.

[a] (N. H. 1858) Where the direct testimony of a deponent has been ruled out, a question on cross-examination which is given in such a form as to make the answer thereto a repetition of the incompetent testimony previously ruled out was properly excluded.—Spear v. Richardson, 37 N. H. 23.

§ 993. Indefinite questions.

Indefinite and general questions in examination in chief, see ante, § 821.

[a] (Minn. 1886) The rejection on cross-examination, of questions as to the existence of a contract, for indefiniteness, is not prejudicial to the party offering them, since they may be renewed in more definite form.—Fetsch v. Mandehr, 36 Minn. 295, 31 N. W. 49.

[b] (Mo. 1885) In an action against a railroad company for injuries to plaintiff by collision with a car at a crossing, an affirmative answer to the question, "You didn't stop to look for anything further, thinking that was the only train?" did not show that he did not look or listen before going on the track; but the ambiguity of the question rendered the evidence vague and uncertain, making it a matter for the jury.—Drain v. St. Louis, I. M. & S. Ry. Co., 86 Mo. 574, reversing (1881) 10 Mo. App. 531.

[c] (Tenn. 1892) In cross-examining one on trial for carrying a weapon, it is not permissible to ask him "if he had not been charged with stealing money," as it does not state whether inquiry is thereby made concerning indictments only, or also accusations by individuals.—Hill v. State, 91 Tenn. (7 Pickle) 521, 19 S. W. 674.

14. REDIRECT EXAMINATION.

IN GENERAL, § 994.
LEADING QUESTIONS, § 995.
—— REFRESHING MEMORY, § 996.
SCOPE AND EXTENT IN GENERAL, § 997.
INTRODUCTION OF WRITINGS IN EVIDENCE, § 998.
EXAMINATION AS TO WRITINGS, § 999.
EXPLANATION OF TESTIMONY ON CROSS-EXAMINATION IN GENERAL, § 1000.
MOTIVES OR REASONS FOR ACTS OR STATEMENTS DETAILED ON CROSS-EXAMINATION, § 1001.
DRAWING OUT WHOLE OF TRANSACTION OR CONVERSATION, § 1002.
NEW MATTER ON CROSS-EXAMINATION, § 1003.
IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS, § 1004.
REPETITION OF TESTIMONY ON DIRECT OR CROSS-EXAMINATION, § 1005.

Discretion of court as to recalling witness and re-examination, see ante, § 930.

Recalling witness before cross-examination, see ante, §§ 899–905.

Redirect examination of person giving impeaching evidence, see post, § 1160.

§ 994. In general.

[a] (Mass. 1829) Where, on trial, a witness is examined respecting a matter irrelevant to the issue by both parties without objection, one party cannot afterwards object to the witness' further examination on the same subject.—Young v. Mason, 25 Mass. (8 Pick.) 551.

[b] (Vt. 1886) Where a witness is interrupted in his answer by a cross-examining counsel, he

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may complete it on re-examination.—Bellows v. Sowles, 59 Vt. 63, 7 Atl. 542.

§ 995. Leading questions.

[a] (Ky. 1887) On the separate trial of a defendant jointly indicted with another for robbery, a witness, on cross-examination, testified that the prisoner on trial was generally in the company of the other defendant, who had been positively identified as one of the robbers; that they had been together at a previous hour on the night of the robbery; that the two were always together, etc. Upon re-examination, the prosecuting attorney asked: "You say that [the defendants] were always together?" "Yes, sir; more or less, always together." "Run together?" "Yes, sir; they did." "You saw them together that night?" "Yes, sir." "These men were partners?" "Yes, sir." *Held*, the questions, though of a leading character, related to matter in substance brought out upon the defendant's examination of the witness, and of which the witness had spoken without objection upon the part of the defendant, and were, therefore, not ground for reversal.—Hess v. Commonwealth, 5 S. W. 751.

[b] (N. Y. 1874) Where a witness for plaintiffs, after detailing on his direct examination a conversation between himself and one of the defendants material to the issue, testifies on cross-examination that he had been in plaintiff's employment and was present at an earlier hearing of the case, and that he had not then told plaintiffs of such conversation, nor told plaintiffs' attorney what he would swear to, and also testifies that he had told defendant's attorney part of what took place in the conversation in question, but not all, and is asked as to his reasons for withholding part, there is no error in permitting his attention, on redirect examination, to be called to a particular time and place, and permitting him to be asked, in substance, if he did not then, in the presence of several persons named, narrate the conversation to plaintiff's attorney.—Gilbert v. Sage, 57 N. Y. 639, affirming (1871) 5 Lans. 287.

[c] (Tex. 1886) Where, in a prosecution for murder, a witness 10 years old had testified that he was at his uncle's house when the shot was fired; that about two minutes later defendant entered, and asked him if he heard the gun, and he said that he did; that defendant then told witness' uncle something, but witness did not remember what his uncle told him about it—the following question, on re-examination, when not objected to as leading, was not error, viz.: "Did not your uncle * * * tell you, in the presence of the defendant, to wait until your mother came home the next morning, and she would tell you what to say about the shot?" —Smith v. State, 21 Tex. App. 277, 17 S. W. 471.

[d] (Tex. 1896) Where defendant's witness on cross-examination testified as to the date of the homicide, it is proper to exclude as leading, on redirect examination, the question whether the killing was not on another certain date, and whether the witness was not mistaken as to the date first given.—Harvey v. State, 35 Tex. Cr. R. 545, 34 S. W. 623.

§ 996. —— Refreshing memory.

[a] (Mass. 1894) In an action for injuries caused by an icy sidewalk, a witness for the city testified that shortly before the accident there was some ice on the walk, and he put ashes on it. Cross-examined, he said that he was first asked about the then state of the walk nearly 2½ years after the accident. *Held*, that on redirect examination it was proper to refresh his memory with leading questions as to a conversation he had had on the subject about a month after the accident.—Farrell v. City of Boston, 161 Mass. 106, 36 N. E. 751.

§ 997. Scope and extent in general.

[a] (Cal. 1886) In a murder case, a witness for the state may, on his redirect examination, testify as to a statement made by defendant relating to and connected with the circumstances of the homicide, as detailed on his examination in chief and cross-examination. — People v. French, 69 Cal. 169, 10 Pac. 378.

[b] (Ind. 1882) A witness having testified that defendant's character was bad, and on cross-examination stated that he was reputed to be a drinking and profane man, *held*, that the state could not, on re-examination, show that he was reputed dishonest.—Robinson v. State, 84 Ind. 452.

[c] (Ind. 1894) On trial for an assault with intent to murder one E. it appeared that E. and her children were met in the highway by two men and two women riding in a buggy, when one of the men got out of the buggy, and fired five shots at E. and her children. One of the women who were in the buggy testified that it was her belief that defendant was one of the men, but on cross-examination she stated that she would not like to say he was the man. *Held*, that it was not error to permit such witness to testify on re-examination that she stated after the shooting that she recognized defendant as the person who shot E.—Walker v. State, 136 Ind. 663, 36 N. E. 356.

[d] (Iowa, 1877) On the redirect examination of a witness for the state, the accused may properly object to testimony partially elicited by himself on the cross-examination, if the same has any tendency to mislead the jury as to the time or place of occurrences in question.—State v. Robinson, 47 Iowa, 489.

[e] (Iowa, 1894) The fact that plaintiff fails to move to exclude an incompetent statement made by one of his witnesses on cross-examination and not called for by defendant's question, does not render permissible redirect examination on this matter so referred to by the witness.—Miller v. Illinois Cent. R. Co., 89 Iowa, 567, 57 N. W. 418.

[f] (Iowa, 1896) In an action against the surviving husband of a deceased sister, on her note, where plaintiff has testified that her mother was worth $3,000 when she died, and that defendant's wife received nearly all of it, she may, after cross-examination as to her means of knowledge, testify that, on death of her mother, her heirs approximated her estate at $3,000, though defendant was not present when the approximation was made.—Leipird v. Stotler, 97 Iowa, 169, 66 N. W. 150.

[g] (Iowa, 1896) Where one of plaintiff's witnesses was an employé of defendant, it was not error to allow plaintiff, on redirect examination, to question the witness regarding certain conversations he had had with defendant's attorneys at the former trial, and the information he had given them respecting his knowledge of the case.—Spaulding v. Chicago, St. P. & K. C. Ry. Co., 98 Iowa, 205, 67 N. W. 227.

[h] (La. 1844) It is the universal practice in this state, both in criminal and civil proceedings, to permit a witness, after cross-examination, to be again examined by the party introducing him, or to be subsequently recalled and interrogated on material facts, not before elicited from inadvertence or ignorance of their being within witness' knowledge.—State v. Duncan, 8 Rob. 562.

[i] (La. 1867) In a criminal prosecution, where a witness has been examined by the state and consigned to the defendant, he can only be re-examined by the state for the purpose of explaining any facts which may come out on the cross-examination, and must be confined exclusively to the cross-examination.—State v. Denis, 19 La. Ann. 119.

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[j] (La. 1872) A witness in a criminal trial, who has first been examined in chief, consigned, and cross-examined, may be again recalled and re-examined by the party who first introduced him upon points touching which he had not before testified.—State v. Scott, 24 La. Ann. 161.

[k] (Md. 1876) On a prosecution of one claimed to have evaded the liquor law by selling cigarettes and inviting the purchaser to drink whisky with him, upon which a state's witness, after having detailed the circumstances of his purchasing the cigarettes and getting drinks from defendant, states on cross-examination that he never bought whisky from defendant, and never had any agreement or understanding with him whereby he was to get whisky, if he purchased cigarettes or anything else, may properly be asked, on re-examination in chief, whether, from anything that had already occurred between him and defendant or in defendant's presence, he expected to get whisky for his money, and his reasons for so expecting. —Archer v. State, 45 Md. 33.

[l] (Mass. 1852) On the re-examination of a witness, no questions can be put which do not relate to matters inquired into on the cross-examination.—Dutton v. Woodman, 63 Mass. (9 Cush.) 255, 57 Am. Dec. 46.

[m] (Mass. 1854) A witness, who has been asked on cross-examination when he was first inquired of by any one concerning the facts to which he has testified in chief, may be asked on re-examination whether he had previously communicated the same facts to other persons. —Commonwealth v. Wilson, 67 Mass. (1 Gray) 337.

[n] (Mass. 1856) A witness, who has stated the appearance and conduct of a testator, tending to show his insanity at the time of making his will, and has testified that he refused to make for the testator a bond for the conveyance of land, but, after a private conversation with the obligee, aside from the testator, did make it, may testify, on re-examination, that the obligee told him the bond was intended to secure the land for the testator until he should come to himself.—Baxter v. Abbott, 73 Mass. (7 Gray) 71.

[o] (Mass. 1886) In an action against W., charging him with conspiring with one R. to cheat and defraud the plaintiffs, where defendant's counsel, on cross-examination of D., one of the plaintiffs, asked him certain questions regarding an interview between D., one other plaintiff, and R. relating to the alleged conspiracy, plaintiffs' counsel is entitled, on redirect examination, to ask D. any questions connected with the statements elicited on cross-examination, and with matters having a natural and close connection with the subject of inquiry, and investigation on the part of the defendant on cross-examination.—Dole v. Wooldredge, 142 Mass. 161, 7 N. E. 832.

[p] (Mass. 1898) Where a witness testified on cross-examination that he could not swear he had not been threatened in relation to his testimony, and that the trial justice had intimated that all proceedings against him for failure to appear in compliance with his recognizance would be stayed if he would now testify against defendant, the district attorney may re-examine him as to a conversation between them to show that the former assured the witness, before calling him, that no prosecution on his recognizance would be urged. — Commonwealth v. Bent, 82 Mass. (16 Gray) 239.

[q] (Mich. 1882) Plaintiff in an action for fraud was asked on cross-examination "when he first learned that he had been swindled." He was afterwards asked by his own counsel as to when he first learned of the evidence to support his action, and he answered, "Since I commenced this suit." *Held*, that the latter question was in the line of inquiry opened by the defendant, and that the latter could not complain of it.—Daniels v. Dayton, 49 Mich. 137, 13 N. W. 392.

[r] (Mich. 1885) Where one against whom a heavy award had been made transferred property to his wife, and, in a suit involving his title to it, was cross-examined as to his indebtedness and transfers, it was permissible to ask him on re-examination whether he "was at all alarmed about that matter" (meaning the award).—Hall v. Moriarty, 57 Mich. 345, 24 N. W. 96.

[s] (Mich. 1894) A state's witness having, on cross-examination, denied recollection of having said that he had got to get rid of defendant in that neighborhood, redirect questions as to what produced in witness' mind the opinion, if he had it, that defendant was a good man to get rid of, and whether witness was convinced of his guilt, and so thought him dangerous, being promptly ruled out, were not prejudicial, the jury being warned by the court to take nothing from questions unwarranted by the evidence.—People v. Pyckett, 99 Mich. 613, 58 N. W. 621.

[t] (Mo. 1894) Where a witness for the state, in giving his reasons for saying that B. was the woman he met on the night of the homicide, disclosed on cross-examination that B. had afterwards picked him out from a number of men as the man she met on that night, and the defense insisted that the fact of such selection was witness' sole reason for saying she was the woman whom he met, it was not error to permit the witness to state that he was convinced that she was the woman by her manner of identifying him, and to testify fully as to such identification.—State v. Kaiser, 124 Mo. 651, 28 S. W. 182.

[tt] (Neb. 1885) A witness was called to testify as to the value of a stock of goods which he had appraised. The value, as given by him in his testimony, exceeded the value as ascertained by the appraisement. Upon cross-examination, it was shown that he was present at a sale afterwards made; and, for the purpose of showing that his valuation of the whole stock was wrong, it was sought to show by him that the goods were well sold; that he made purchases at such sale; and that the whole proceeds were much less than the valuation fixed by him. *Held*, that he might testify on re-examination as to what goods he and others bought, what they paid, and what was their value, for the purpose of showing the correctness of the estimate of value as testified to in his examination in chief.—Blerbower v. Polk, 17 Neb. 268, 22 N. W. 698.

[u] (N. H. 1841) The plaintiff offered in evidence his book of accounts, with his suppletory oath; but, on his cross-examination, it appearing in evidence that the articles charged were delivered by a third person, the book was rejected by the court. In the course of his cross-examination he was inquired of by the defendant's counsel touching the case generally. *Held*, that the plaintiff's counsel, although the book had been rejected, might examine him in relation to his evidence relating to the case generally, and that his testimony might be considered by the jury, in connection with the other evidence in the case.—McIlvaine v. Wilkins, 12 N. H. 474.

[uu] (N. H. 1875) In an action of trover, involving an inquiry whether defendant, when he purchased certain liquors of plaintiff, intended to pay for them, and in which he states on cross-examination that he did so intend, and has always been willing to pay the reasonable value of the liquors, a question to him by plaintiffs as to whether a person named, pending the action, representing the interests of plaintiff, offered him to release the claim if he would

pay a sum much less than the contract price of the liquors, is inadmissible.—Hovey v. Grant, 55 N. H. 497.

[v] (N. J. 1881) On a prosecution for performing an abortion, under Crimes Act, § 75, a state's witness, who is cross-examined as to the woman's declarations concerning her delicate condition, made to him as a physician while he was examining her, cannot be re-examined as to other disconnected assertions, made in course of the same conversation, charging the accused with criminal acts and conduct in attempting to produce a miscarriage.—State v. Gedicke, 43 N. J. Law (14 Vroom) 86.

[vv] (N. Y. 1894) In an action for injuries received on entering a street car, where plaintiff was asked on cross-examination if, after entering the car, she spoke of the accident to the driver or to any person in the car—it being the theory of the defense that the accident, as described, had not occurred—plaintiff may testify that on arriving at home she spoke of the accident.—Fuller v. Jamestown St. Ry. Co., 75 Hun, 273, 26 N. Y. Supp. 1078, judgment affirmed (1896) 148 N. Y. 741, 42 N. E. 1093.

[w] (N. Y. 1896) In an action to recover commissions for negotiating a sale of bonds, defendant denied having employed plaintiff to make the sale, and, on cross-examination, plaintiff, on being asked as to whether defendant had not befriended him, replied that he had complained of defendant's treatment in a certain transaction. *Held*, that it was reversible error to allow plaintiff, on redirect examination, to show that the transaction referred to was one in which he was employed by defendant to negotiate a loan for him, and in which defendant, after plaintiff had succeeded in negotiating the loan, closed the transaction with the lender without plaintiff's knowledge, thereby depriving him of the commissions.—Brown v. Barse, 3 App. Div. 257, 38 N. Y. Supp. 400.

[ww] (Ohio, 1896) On a trial for homicide, where defendant, on cross-examination of the officer who made the arrest, attempted to show that he acted without reliable information, it was competent to show, on redirect examination, that the wife of deceased described the man who made the assault.—Moran v. State, 11 Ohio Cir. Ct. R. 464, 5 O. C. D. 234.

[x] (Okl. 1893) In February, C. purchased goods from plaintiff company on credit, and in the following May made a contract with plaintiff's agent, which was intended by both parties to be a sale of the property back to plaintiff. On a trial for the conversion of the goods, one of defendants, who took possession under a mortgage from C., was asked on his redirect examination if he took an inventory of the stock at the time he took possession of it, which was the time of the alleged conversion, and, having answered in the affirmative, was asked to state its actual cash value at that time, which was objected to as not proper redirect examination. *Held* that, as on his examination in chief the witness was not asked in regard to the value of the property, and the question involved new facts so far as his testimony was concerned, the objection was properly sustained.—Robinson v. Peru Plow & Wheel Co., 1 Okl. 140, 31 Pac. 988.

[xx] (R. I. 1859) Where a witness has sworn in his direct examination that the criminal acts were done within the times laid in the indictment, and upon cross-examination it appears that he cannot fix the precise date of any of them, it is permissible in reply to re-examine the witness as to the means by which he is enabled to ascertain that the criminal acts were done within the period covered by the indictment.—State v. Williams, 6 R. I. 207.

[y] (Tex. 1895) In an action for price of corporate stock sold at par, where defendant, to show the improbability of the purchase, proved by plaintiff on cross-examination that stock had been sold much below par, plaintiff can testify on redirect that he purchased the stock originally from defendant, who stated that it would pay at least 25 per cent.—Hoxie v. Silliman (Civ. App.) 29 S. W. 913.

[yy] (Tex. 1895) Where a witness for the state, who had been defendant's accomplice, testified on cross-examination that the prosecution against him had been nolled, it was proper for the prosecution to ask him if his testimony was the same as the statements he had made before the case was dismissed.—Mitchell v. State, 36 Tex. Cr. R. 278, 33 S. W. 867, 36 S. W. 456.

[z] (Vt. 1893) There is no error in refusing to allow defendant to introduce testimony of a witness on redirect examination, it not being in explanation or avoidance of anything obtained by the cross-examination, for the reason that the question asked of the witness on cross-examination was answered adversely to the examiner.—Ranney v. St. Johnsbury & L. C. R. Co., 67 Vt. 594, 32 Atl. 810.

[zz] (Wis. 1874) On trial of an indictment for arson, L., as a witness for the state, testified on his examination in chief that defendant, in a certain conversation with him, said, "I suppose you are going to send me up on that buggy scrape." On his cross-examination the witness explained that the language relative to the "buggy scrape" referred to a buggy for the stealing of which L. had procured the arrest of defendant a few days before that time. On his redirect examination the witness was permitted to testify, under objection as to its competency, as to "what he knew and what he did in regard to the buggy scrape," detailing facts and circumstances tending to show that defendant had stolen the buggy. *Held* that, as this was new matter not admissible within the rule for redirect examination, its admission was a fatal error.—Schaser v. State, 36 Wis. 429.

§ 998. Introduction of writings in evidence.

[a] (Cal. 1896) That defendant's counsel on cross-examination presented a paper to the witness, and requested him to identify certain entries therein, but did not offer the paper or the items in evidence, does not entitle the prosecution on re-examination to introduce the paper in evidence.—People v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

[b] (Iowa, 1896) In an action against a railroad company, one of the witnesses for plaintiff, who had formerly been employed by defendant, on cross-examination, was questioned in regard to his discharge. *Held* that, on redirect examination, a letter from defendant's superintendent commendatory in character was properly admitted as explaining why the witness had left defendant's employ.—Spaulding v. Chicago, St. P. & K. C. Ry. Co., 98 Iowa, 205, 67 N. W. 227.

[c] (Mich. 1893) In an action for breach of contract to deliver sheep at a certain time, plaintiff, having testified for himself, on request of the defense produced his memorandum book of purchases, and was cross-examined therefrom. He testified that the entry of defendant's sale was made at the time, in defendant's presence, but not read to him. *Held*, that the book was admissible on redirect examination to corroborate plaintiff, but not to prove the sale.—Aulls v. Young, 98 Mich. 231, 57 N. W. 119.

[d] (Mo. 1893) Where witnesses on cross-examination are questioned as to certain admissions in depositions formerly given by them, it is error to refuse to allow the whole of the depositions to be read upon redirect examination.—Wilkerson v. Eilers, 114 Mo. 245, 21 S. W. 514.

[e] (N. Y. 1890) Where defendant asked plaintiff on cross-examination if he had made any memorandum of the transaction, and he said he had, plaintiff could not, on his redirect ex-

amination, read the memorandum in evidence.—Avery v. Mattice, 56 Hun, 639, 9 N. Y. Supp. 166, judgment affirmed (1892) 132 N. Y. 601, 30 N. E. 1152.

[f] (Vt. 1873) Where, on cross-examination, the reliability of a witness' testimony is shown to depend on books of entry kept by him in relation to a certain business transacted by him, out of which the matter in controversy arose, and to his mode of doing which he had testified in chief without objection, it is proper for the other party to use such books in evidence for the purpose of showing fully the manner in which his business was transacted and how such books were kept.—Missisquoi Bank v. Evarts, 45 Vt. 293.

[g] (Wyo. 1879) A party bringing out, on cross-examination, the fact of the existence of a certain instrument, cannot complain of the production of the instrument on the redirect examination.—Fillmore v. Union Pac. R. Co., 2 Wyo. 94.

§ 999. Examination as to writings.

[a] (Minn. 1895) Where plaintiff, on cross-examination, stated that he intended a writing drawn by him to be the contract between the parties, it was proper to permit him, on redirect examination, to state that he intended to put in the writing a material provision, in reference to which he had testified on direct examination, but failed to do so through oversight.—Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249.

[b] (Mo. 1890) From the cross-examination of defendant in replevin, it appeared that he knew where the person under whom he claimed title lived, and had written to such person, and received an answer by letter. *Held* that, on his redirect examination, he might state the reasons for not taking the deposition of such person, but that he should not be allowed to state, for that purpose, the contents of the letter received from him; nor was the admission of such testimony justified on the ground that plaintiff had opened the door therefor.—Redman v. Peirsol, 39 Mo. App. 173.

[c] (Neb. 1895) Where defendant's bookkeeper testified that a certain person was not defendant's agent, and on cross-examination a letter was shown, but not introduced in evidence, written by witness, and signed in defendant's name, which recited that such person was defendant's agent, it was not error, on the redirect examination, not to permit the witness to testify whether he was authorized by defendant to write the letter.—Fremont Butter & Egg Co. v. Peters, 45 Neb. 356, 63 N. W. 791.

[d] (Vt. 1873) Where, on cross-examination, the reliability of a witness' testimony is shown to depend on books of entry kept by him in relation to certain business transacted by him, out of which the matter in controversy arose, and to his mode of doing which he had testified in chief without objection, it is proper for the other party to show fully the manner in which his business was transacted and how such books were kept.—Missisquoi Bank v. Evarts, 45 Vt. 293.

[e] (Wis. 1888) A witness who has testified, on cross-examination, that he had seen a credit on the books of plaintiff, may be asked, on re-examination, what was the date of such credit.—Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825.

§ 1000. Explanation of testimony on cross-examination in general.

Admission of writings in explanation of testimony, see ante, § 998.

Rebuttal or explanation of evidence to discredit witness, see post, § 1110.

Recalling for purpose of explaining inconsistent statements, see post, §§ 1261, 1262.

[a] (U. S. 1893) In an action for damages for a death caused by unguarded machinery, where a witness for plaintiff is asked, on cross-examination, if it occurred to him at the time that there was danger about the work, to which he answers in the affirmative, there is no error in permitting him, on redirect examination, to be asked wherein the danger consisted.—Pullman's Palace-Car Co. v. Harkins, 55 Fed. 932, 5 C. C. A. 326, 17 U. S. App. 22.

[aa] (Cal. 1895) In an action for a breach of contract to purchase raisins, a witness for plaintiff, who states that he examined the fruit, and found it in merchantable condition, and on cross-examination states that he cannot tell the number of boxes he examined, may be asked on redirect examination as to how the examination by him compared with the ordinary examination by experts, to ascertain the value or quality of the raisins.—Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

[b] (Ga. 1890) In the re-examination of his own witness counsel has no right to recite his understanding of the evidence given by the witness on cross-examination, as preliminary to having the witness explain his testimony.—Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

[c] (Iowa, 1887) Plaintiff testified, without objection, that his services were worth in his business $200 per month. On cross-examination he said: "I can get more than that. I can get $2,500 for my time outside of my business." On redirect examination he said he meant that he could get that sum for superintending other people's business. *Held*, the defendant could not object to this testimony, as it was merely explanatory of evidence introduced by himself.—Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833.

[d] (Ind. 1892) In an action to recover for services rendered defendant on his farm, one of plaintiff's witnesses testified, on cross-examination, that he had stated to defendant's counsel before the trial that plaintiff's services were worth a certain amount. *Held*, that he should be allowed, on redirect examination, to state that he meant such amount would be proper as a compromise.—Loy v. Petty, 3 Ind. App. 241, 29 N. E. 788.

[e] (Kan. 1896) It was error, in an action against a railroad company to recover damages resulting from a fire set by a locomotive, to permit a witness who testified for plaintiff to explain his apparent hostility to the company by stating that it had refused to settle claims interposed against it by him on an equitable basis.—Atchison, T. & S. F. R. Co. v. Briggs, 2 Kan. App. 154, 43 Pac. 289.

[f] (Mass. 1893) Where, on a trial for robbery, the police officer who made the arrest is asked on cross-examination by defendant's counsel "whether the charge he made against defendant at the station house on committing him was not that of drunkenness," it is competent for the commonwealth on redirect examination to ask the witness to state the exact words he used in making a charge.—Commonwealth v. Armstrong, 158 Mass. 78, 32 N. E. 1032.

[g] (Mich. 1889) In an action by an employé for personal injuries, on plaintiff's cross-examination it was brought out that wages were paid him by defendants after the injury, and were afterwards stopped. *Held*, that it was competent, on redirect examination, for him to state the occasion of his wages being discontinued, and what was said on such occasion by defendants' foreman, who had charge of fixing wages and discharging employés.—Van Dusen v. Letellier, 78 Mich. 492, 44 N. W. 572.

[h] (Mich. 1893) On a prosecution for carnally knowing a young girl, the latter, after testifying on cross-examination that a written statement made by her had been prepared by the

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prosecuting attorney, who told her to sign it, might properly be re-examined to show that the statement was in her own language, that no threats or inducements had been held out to her in regard to it, and that she had not been asked to say anything therein that was not true.—People v. Mills, 94 Mich. 630, 54 N. W. 488.

[i] (Neb. 1896) It is permissible by way of redirect examination to introduce evidence explanatory of facts elicited by the cross-examination, although corroborative of the witnesses' testimony in chief.—Norfolk Nat. Bank v. Job, 48 Neb. 774, 67 N. W. 781.

[j] (N. Y. 1853) Where, on a charge of fraud in the exchange of horses, the plaintiff by compulsory examination has drawn from the defendant a statement from which a fraudulent concealment of a defect might be inferred, it is competent for the defendant to state the circumstances of the transaction so far, and so far only, as to explain the answer and show the reason of the concealment.—Richardson v. Wilkins, 19 Barb. 510.

[k] (N. Y. 1881) On a trial for burglary, the prisoner's general reputation was in issue. A witness testified for the prisoner that he would believe him under oath. On cross-examination he admitted that unfavorable reports as to his character were circulated. On redirect examination he was asked if these were in reference to the prisoner's drinking and horse trading. *Held*, that the question was a proper one, and should not have been ruled out.—Stape v. People, 85 N. Y. 390.

[l] (N. Y. 1889) Where a witness for plaintiff alludes in his cross-examination to a remark made by plaintiff, it is within the discretion of the court to allow him to explain on redirect examination what that remark was, though it was derogatory to defendant.—Graves v. Santway, 52 Hun, 613, 6 N. Y. Supp. 892, judgment affirmed (1891) 127 N. Y. 677, 28 N. E. 256.

[m] (N. Y. 1894) Where defendant, examined as a witness in his own behalf, refuses to answer certain questions, on the ground that they involve privileged communications, he may, on his redirect examination, testify as to such transactions, in order to explain circumstances that had been disclosed on the cross-examination.—Lally v. Emery, 79 Hun, 560, 29 N. Y. Supp. 888.

[n] (N. Y. 1896) Where the only evidence as to the relations between the testatrix and her residuary legatee, who is alleged to have exercised undue influence over testatrix, is that elicited on the cross-examination of such legatee, Code, § 829, does not preclude the witness being given the very fullest opportunity to explain all the transactions as to which he is interrogated, and to give not only the facts, but the circumstances, when material.—In re Spratt's Will, 4 App. Div. 1, 38 N. Y. Supp. 329.

[o] (N. C. 1876) Upon a redirect examination, a witness has the right to give evidence explanatory of his testimony on cross-examination, although such evidence might not have been admissible in the first instance.—State v. Orrell, 75 N. C. 317.

[p] (N. D. 1893) On redirect examination in a criminal case, it is proper to permit the witness to state facts and circumstances that tend to correct any wrong inferences that arise from matters drawn out on cross-examination, and this rule is not changed because such facts may be of a character to prejudice defendant in the minds of the jury.—State v. McGahey, 3 N. D. 293, 55 N. W. 753.

[q] (Ohio, 1883) Where a witness for the prosecution on cross-examination admits having had a certain conversation, but denies that he made a certain statement therein, the prosecution cannot, on re-examination of the witness, before introducing other witnesses to contradict him, show what he said in such conversation.—Dickson v. State, 39 Ohio St. 73.

[r] (Tex. 1886) On re-examination, the witness may be asked for an explanation of an expression used on cross-examination.—Favors v. State, 20 Tex. App. 155.

[s] (Vt. 1844) In an action against a town for an injury occasioned by the insufficiency of a highway, a witness introduced by defendant was asked, on cross-examination, without objection, whether his team had not run off at the same place the day before the injury complained of happened, and he answered that they did. Counsel for plaintiff disclaimed all intention of using the fact, except for the purpose of calling the mind of the witness with more certainty to the time when the injury happened to plaintiff, and the court instructed the jury that they must disregard that fact, except for the purpose specified by plaintiff. *Held*, that defendant was not entitled to re-examine the witness in relation to the circumstances under which his team ran off the road.—Allen v. Town of Hancock, 16 Vt. 230.

§ 1001. Motives or reasons for acts or statements detailed on cross-examination.

[a] (Ill. 1880) A witness for the prosecution, from which the accused has drawn out on cross-examination, with a view to raise an inference favorable to himself and unfavorable to the witness, in whose store the killing occurred, that the witness was loading his gun at the time of the shooting, may be permitted to testify that he loaded his gun to protect his house, having had an intimation that defendant's brother was coming there to shoot deceased.—Wilson v. People, 94 Ill. 299.

[b] (Ind. 1891) Where, in an action for the price of a machine which plaintiff alleges was sold absolutely, and which defendant alleges was taken by him on approval, an agent of plaintiff, after admitting on cross-examination that he went to see the machine work after defendant had received it, may explain, on redirect examination, that his object was to ascertain whether anything had happened to the machine, and to convince defendant that the machine was all right.—Westbrook v. Aultman, Miller & Co., 3 Ind. App. 83, 28 N. E. 1011.

[c] (Iowa, 1888) The prosecuting witness, after having been asked on cross-examination the names of the parties he suspected, was permitted to testify on his redirect examination that another person on the night of the crime had given the name of defendants, who were then suspected. *Held* admissible to explain why witness charged defendants with the crime.—State v. Maher, 74 Iowa, 82, 37 N. W. 5.

[d] (Mass. 1878) On trial of a complaint in bastardy, the complainant, on cross-examination, admitted that she had put her mark to a paper purporting to release the respondent. *Held*, that she might properly be asked, on re-examination, whether the respondent at any time used intimidation or threatened her, solely to ascertain if she had acted under duress.—Mulrey v. McDonald, 124 Mass. 345.

[e] (Neb. 1886) In replevin by a chattel mortgagee against a sheriff, the defense was founded upon an alleged conspiracy between B., the agent of the plaintiff, and R., the mortgagor, to defraud the creditors of R. by the means of the making, delivery, and foreclosing of said mortgage. B. was called as a witness by the plaintiff, and, on cross-examination by defendant's counsel, stated that he went to board with R. shortly after the execution by R. of the mortgage. *Held* error on the part of the court to refuse to allow R. to state, in reply to a question put by plaintiff's counsel, how he came to

go to the house of R. to board.—Kay v. Noll, 20 Neb. 380, 30 N. W. 269.

[f] (Neb. 1887) On a trial of a defendant charged with incest with his niece, the woman was not examined as a witness by the state, but defendant examined her as a witness in his behalf. On being asked if defendant had ever had sexual intercourse with her, she answered he had not. On the cross-examination, counsel for the prosecution presented her with the affidavit which she had made by which proceedings in bastardy had been instituted, and in answer to his question she stated that she had signed the affidavit. On re-examination by defendant's counsel, she was asked if the signing of the affidavit was voluntary on her part. The question was objected to as not cross-examination, and the objection sustained. *Held* error.—Yeoman v. State, 21 Neb. 171, 31 N. W. 669.

[g] (Neb. 1895) Where the sheriff, as a witness for the state in a murder case, was asked, on cross-examination, whether he felt suspicious of defendant, and answered in the affirmative, it was proper to permit the state, on redirect examination, to ask him his reasons for his suspicions.—Collins v. State, 46 Neb. 37, 64 N. W. 432.

[h] (N. J. 1888) In a divorce suit for adultery and cruelty, where plaintiff asserted that she had just cause for separating from defendant, the latter testified on cross-examination that he supposed plaintiff left him because she loved another man more than him. On redirect examination he was asked what reasons he had for such belief. *Held* proper redirect examination, although recrimination was not pleaded.—Pullen v. Pullen (Ch.) 12 Atl. 138.

[i] (N. Y. 1887) On cross-examination of plaintiff, she was asked whether a certain doctor, who had visited her in her illness, had been subpœnaed as a witness in her behalf, and answered that the doctor had told her he would not attend. *Held* that, on redirect examination, it was competent to ask her, and to have her answer, as to what reason the doctor assigned for his refusal.—Uransky v. Dry Dock, E. B. & B. R. Co., 7 N. Y. St. Rep. 395.

[j] (N. Y. 1889) Where plaintiff, in an action for breach of marriage promise, on cross-examination has testified that she was then unwilling to marry defendant, she may testify on re-examination to the reason of her unwillingness.—Chellis v. Chapman, 52 Hun, 613, 7 N. Y. Supp. 78, judgment affirmed (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

[k] (N. Y. 1890) Plaintiff, having stated on cross-examination that he could not identify the person accompanying him after the accident, was properly allowed to testify concerning the reason why he was not positive.—James v. Ford, 16 Daly, 126, 9 N. Y. Supp. 504.

[l] (N. Y. 1896) A witness, on cross-examination, testified that one S. called on him on defendant's behalf, and that he told S. that he was not in the market for a certain kind of property; such statement having been drawn out for the purpose of affecting the witness' credibility. *Held*, that it was incompetent for plaintiff, on redirect examination, to ask the witness whether or not he was actually in the market, and to explain why he had made such statement to S.—Foster v. Tanenbaum, 2 App. Div. 168, 37 N. Y. Supp. 722.

[m] (Tex. 1894) Where plaintiff is cross-examined by defendants as to a deed of his land to their ancestor by the holder of the legal title, he may state, on re-examination, his reasons for having the deed made.—Hicks v. Hicks (Civ. App.) 26 S. W. 227.

[n] (Utah, 1882) A witness for the people having testified on cross-examination that he saw the defendant and the deceased talking together and that he watched them closely, he could not be asked by the prosecution his motive in thus watching them, as it was beyond the legitimate scope of redirect examination.—People v. Biddlecome, 3 Utah, 208, 2 Pac. 194.

§ 1002. Drawing out whole of transaction or conversation.

Drawing out whole of transaction or conversation on cross-examination, see ante, § 933.

[a] (U. S. 1895) A witness who has been cross-examined as to confessions made by defendant cannot, on redirect examination, be asked as to other statements made by defendant in the same conversation in regard to a subject not touched on in the cross-examination.—Ballew v. United States, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388.

[b] (Ala. 1895) Where defendant, on cross-examination, elicited from a witness statements made to him by one H., it was proper to permit plaintiff to question the witness as to the whole conversation, bringing out what witness said to H. relative to the same matter.—Louisville & N. R. Co. v. Malone, 109 Ala. 509, 20 South. 33.

[c] (Ala. 1895) Where prosecutrix was asked on cross-examination whether she had not made a certain statement to a third person, to which she replied that she had not, it was proper to permit her to state on redirect examination what it was she had told such person.—Bracken v. State, 111 Ala. 68, 20 South. 636, 56 Am. St. Rep. 23, following Louisville & N. R. Co. v. Malone (1895) 109 Ala. 509, 20 South. 33.

[d] (Cal. 1880) Where, on the cross-examination of a prosecuting witness, he testified that he had consulted a third person in relation to the transaction out of which the indictment grew, and in part developed what had occurred between them, it was proper for the prosecution to call out all that took place at the consultation.—People v. Smallman, 55 Cal. 185.

[e] (Ky. 1827) Defendant, in a breach of promise suit, in cross-examining a physician introduced by plaintiff to prove her pregnancy, elicited the fact that plaintiff told him she had another disease, and then stopped the interrogatories saying he did not wish to make use of any communication the plaintiff had made to him in his professional capacity. *Held*, that the plaintiff had a right to call for the whole conversation from the witness, to the effect that the disease was venereal and communicated by the defendant.—Withers v. Richardson, 21 Ky. (5 T. B. Mon.) 94, 17 Am. Dec. 44.

[f] (Mich. 1864) Where a witness on cross-examination testified that some years before he had a conversation with the testator, whose will was contested, but stated no part of the conversation, it was *held* incompetent for the opposite party to inquire, on re-examination, what was said by the testator on such occasion.—Beaubien v. Cicotte, 12 Mich. 459.

[g] (Mich. 1874) A witness for the prosecution is held to be as much the people's witness when under cross-examination as when on his examination in chief; and the fact that he is permitted on cross-examination, on a subject entered upon in the direct examination, to detail without objection a part of a hearsay story told him, will not authorize the calling out of the rest of it against objection on the redirect examination, upon the claim that it is part of the same conversation.—Wagner v. People, 30 Mich. 384.

[h] (Mich. 1880) In an action for breach of promise of marriage, where evidence in relation to an offer of settlement made by defendant's brother is called out on redirect examination by plaintiff as part of an interview between plaintiff and her counsel, first inquired about and gone into by counsel for defendant on cross-

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examination of the witness, it should not be stricken out.—Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

[i] (Mich. 1882) One party cannot, on cross-examination, draw out a part of a transaction, and then preclude the other party from getting out what he regards as material to his case.—Wilcox v. Ney, 47 Mich. 421, 11 N. W. 225.

[j] (Mich. 1890) Plaintiff, on cross-examination, being asked if, in a conversation with one N., the latter did not ask him, "Why didn't you do as I did when I left the old man—settle up with him?" admitted having had a talk with N., but denied that N. asked this, and also denied that he said he had reasons for waiting, and denied that there was any such conversation. *Held*, that plaintiff was properly allowed, on redirect, to state what the conversation was.—Alderton v. Wright, 81 Mich. 294, 45 N. W. 968.

[k] (N. J. 1850) Where a witness, on his cross-examination, was asked if the party whose witness he was had spoken to him on the subject of the suit, and he answered that he had, the party calling him, on a re-examination, was allowed to ask what he had said to the witness.—Doughty v. Somerville & E. R. Co., 22 N. J. Law (2 Zab.) 495.

[l] (N. Y. 1827) Where a witness is introduced by a party, and is asked as to a particular fact, and the opposite party, on cross-examination, asks him generally if he ever communicated that fact to any one, and to whom, and he answers that he communicated it to the party calling him, this does not entitle the party calling him to inquire as to his own reply, and other conversation, at the time.—Winchell v. Latham, 6 Cow. 682.

[m] (N. Y. 1849) Where a witness for the prosecution was asked on cross-examination whether he had not offered to leave the state and refuse to testify for remuneration, to which he answered, "Not exactly that," and was then stopped by the prisoner's counsel from giving further answer, the prosecution, on redirect examination, were entitled to elicit the particulars.—People v. Austin, 2 Edm. Sel. Cas. 54.

[n] (N. Y. 1874) In an action for damages caused by a collision between vessels, a witness, on his cross-examination by defendant's counsel, having spoken as to the value of the vessel sunk, and being questioned as to his competency, stated that he had known of the sale of various steamboats, among them the M., the price of which was $3,500. *Held*, that on his re-examination it was competent for plaintiff to elicit testimony that the real value of the boat referred to was $16,000.—Blanchard v. New Jersey Steamboat Co., 67 Barb. 101.

[o] (N. Y. 1889) In an action on notes by plaintiff as surviving partner of one P., the notes not being produced, on cross-examination by defendant of a witness who had testified to having been shown certain notes by P., the defendant elicited certain declarations made by P. on the occasion of such exhibition, and certain negative testimony bearing on the identity of the notes with the notes in suit. *Held*, that plaintiff could, on the redirect examination, show the whole conversation bearing upon the question of identity.—Clift v. Moses, 112 N. Y. 426, 20 N. E. 392.

[p] (N. Y. 1893) Where a party, testifying in his own behalf, is asked on cross-examination as to parts of his testimony upon a former trial, he may, on redirect examination, recite the whole of his testimony on such trial.—Chesebrough v. Conover, 66 Hun, 634, 21 N. Y. Supp. 566, 568, judgment affirmed (1893) 140 N. Y. 382, 35 N. E. 633.

[q] (N. Y. 1895) On trial for murder, where a witness for the state is asked on cross-examination if he had any communication with the coroner, and if he did not suggest the inquiry as to poisoning, the state may, on redirect examination, ask for the whole conversation between the witness and the coroner.—People v. Buchanan, 145 N. Y. 1, 39 N. E. 846.

[r] (Ohio, 1848) Where defendant, on cross-examination, inquired of a witness what a third person told him, it was *held* that this did not authorize the plaintiff upon a re-examination, to ask the witness what the third person, in the same conversation, said the defendant himself had told him.—McCracken v. West, 17 Ohio, 16.

§ 1003. New matter on cross-examination.

New matter which is immaterial, see post, § 1004.

[a] (Iowa, 1872) A witness may be re-examined in respect to a matter drawn out by the cross-examination, or which furnishes a circumstance by which a transaction in question was impressed upon the witness' mind.—Farmers' & Merchants' Bank v. Young, 36 Iowa, 44.

[b] (Iowa, 1881) Although plaintiff in an action for personal injuries against a railroad cannot be asked on re-examination whether he "thought" of protecting himself after the danger signal was given, since his negligence cannot be excused by his forgetfulness, it is not error to admit such testimony where plaintiff had already been cross-examined as to the operations of his mind preceding the accident.—Jeffrey v. Keokuk & D. M. R. Co., 56 Iowa, 546, 9 N. W. 884.

[c] (Kan. 1891) Where a matter of evidence is brought out for the first time on the cross-examination of a witness, the other party may re-examine upon the same matter.—Hamilton v. Miller, 46 Kan. 486, 26 Pac. 1030.

[d] (Mass. 1892) On an indictment for lascivious cohabitation, the husband of the female defendant testified, while being cross-examined by defendants, that some years previous he found his wife sitting with one C., and that he thought it improper, on account of C.'s reputation. *Held*, that it was not error to allow the prosecution to inquire as to the reputation.—Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016.

[e] (N. C. 1896) Where a witness, testifying to the general character of the prisoner, had on cross-examination stated that the prisoner had submitted on the charge of adultery, the redirect examination is limited to the particular matter brought out on cross-examination.—State v. Ussery, 118 N. C. 1177, 24 S. E. 414.

[f] (Tex. 1873) When a party, on cross-examination of a witness, seeks to draw out new matter not inquired about in the examination in chief, he makes the witness his own for that purpose, and the opposite party may cross-examine on such new matter.—Bassham v. State, 38 Tex. 622.

[g] (Wis. 1884) On a trial for murder a witness for the prosecution stated that on the night of the homicide he saw a man on a bridge near where it occurred, and he thought it was defendant. On cross-examination, defendant, seeking to show that it did not occur to witness at the time that the man he saw was defendant, asked, "I want you to tell, as near as you can, when you told anybody" that it was defendant. *Held* that, as the question was thus opened on cross-examination, it was proper, on direct examination, to ask witness, "Did you state to any one soon after that you thought it was defendant?"—Williams v. State, 61 Wis. 281, 21 N. W. 56.

[h] (Wis. 1886) Where a party claims goods under a bill of sale given in consideration of

large sums of money which he claims to have put into the business, and the sale is impeached as fraudulent against creditors, if his cross-examination has been of a character such as to raise a suspicion that he was not in the possession or the owner of such sums, he may, on re-examination, testify from what sources he obtained the money, though on his direct examination he gave no testimony in relation thereto.—Tuckwood v. Hanthorn, 67 Wis. 326, 30 N. W. 705.

§ 1004. Irrelevant, collateral, or immaterial matters.

Cross-examination as to irrelevant, collateral, or immaterial matters, see ante, §§ 955, 957.

[a] (Ill. 1866) In an action against a railroad company for negligently burning the warehouse of plaintiff by the escape of fire from defendant's engine, defendant introduced a witness who testified that he was a master mechanic in the employ of the company and in their machine shop, and that the spark arrester used on the engine from which it was alleged the fire escaped was the best known and in use, and that he knew it was in good repair at the time the fire occurred. On cross-examination he said it was his business to know the condition of every engine at the time it left the shop on each trip; that he knew the condition of the engine from the uniform course of business of the shop, but was unable to state that he had made a personal examination of that engine. On re-examination defendant asked the witness what was the uniform course of business in the shop. *Held*, that it was immaterial that he should explain in detail the course of business in the shop.—Great Western R. Co. v. Haworth, 39 Ill. 346.

[b] (Mass. 1879) A witness for the petitioner testified that the land in question was suitable for the production of cranberries. He was then asked by the petitioner what was the market value of cranberries at the time of the taking in 1875, which question was excluded. On cross-examination he testified that cranberries were lower than in 1875. On re-examination, the question put to him by the petitioner was again excluded. *Held*, that the question was properly excluded.—Gardner v. Inhabitants of Brookline, 127 Mass. 358.

[c] (Mass. 1889) In condemnation proceedings for land taken for a courthouse, where the purchaser of similar estates in the neighborhood testifies, on direct and cross-examination, as to his reasons for purchasing the property, questions on the redirect examination, on the same immaterial matter, are properly excluded.—Roberts v. City of Boston, 149 Mass. 346, 21 N. E. 668.

[d] (Neb. 1895) Though evidence of the price brought for neighboring property is inadmissible in proceedings by a railroad company for condemnation of land, if a witness is allowed to give such evidence on cross-examination he may be questioned thereon on re-examination.—Chicago, R. I. & P. Ry. Co. v. Griffith, 44 Neb. 690, 62 N. W. 868.

[e] (Pa. 1838) A witness cannot be examined directly as to irrelevant matters, though he has been questioned as to them on the previous cross-examination.—Smith v. Dreer, 3 Whart. 154.

[f] (S. D. 1893) When a witness on cross-examination voluntarily refers to a conversation he had with another party, which conversation was not shown to be relevant to the case on trial, for the purpose of fixing the time he first had knowledge of the facts to which he was testifying, the party, whose witness he is, is not entitled to have the full details of that conversation.—Uhe v. Chicago, M. & St. P. Ry. Co., 3 S. D. 563, 54 N. W. 601.

§ 1005. Repetition of testimony on direct or cross-examination.

Repetition of questions on direct examination, see ante, §§ 827, 828.

[a] (Ill. 1893) Where a witness on cross-examination explicitly denies certain matters, he cannot be again called on to testify to the same matters in rebuttal.—Winslow v. Covert, 52 Ill. App. 63.

[b] (Ind. 1866) When a witness has been examined in chief by the plaintiff, he cannot, after the defendant has offered evidence to contradict what the witness has said, recall the witness simply to repeat what he said in the first examination.—Hudspeth v. Allen, 26 Ind. 165.

[c] (Iowa, 1887) Where a witness has testified fully in chief upon the matters inquired of him, it is not error to sustain an objection to his further testifying in rebuttal on the same matters.—Watson Coal & Mining Co. v. James, 72 Iowa, 184, 33 N. W. 622.

[d] (Mich. 1878) Where a conversation, partly in a foreign language, has been testified to and interpreted by the witness on cross-examination, it is not error to refuse to allow it to be again detailed, to test the correctness of the translation, where that is not seriously questioned.—Ulrich v. People, 39 Mich. 245.

[e] (Neb. 1880) The opinion or understanding of a witness as to his rights under a contract is not competent evidence; but where the plaintiff, on the cross-examination of the defendant, asked for and obtained his opinion on the subject, he is not in a situation to complain if such opinion is repeated by the witness on his re-examination in chief.—Goodman v. Kennedy, 10 Neb. 270, 4 N. W. 987.

15. RECROSS-EXAMINATION AND RECALLING WITNESS FOR CROSS-EXAMINATION.

RIGHT TO RECROSS-EXAMINE OR RECALL FOR CROSS-EXAMINATION, § 1006.
SCOPE AND EXTENT OF CROSS-EXAMINATION, § 1007.

Attendance of witness for further cross-examination, see ante; § 912.
Discretion of court as to recalling witness and re-examination, see ante, § 930.
Discretion of court as to recalling witness on direct examination, see ante, § 797.
Recalling accused in criminal prosecutions for further cross-examination, see ante, § 983.

§ 1006. Right to recross-examine or recall for cross-examination.

[a] (Cal. 1875) The fact that, after the prosecutor has left the witness stand, another witness called by the prosecution testifies as to certain occurrences, and in his relation of them differs from the account given by the prosecutor when on the stand, does not give the accused a right further to cross-examine the prosecutor.—People v. Parton, 49 Cal. 632.

[b] (Ga. 1855) Where, on the re-examination in chief of a witness, new matter is brought out, which is neither explanatory of the first nor in rebuttal of the cross-examination, the opposite party have the right to cross-examine again as to such matter.—Wood v. McGuire, 17 Ga. 303.

[c] (Kan. 1896) When a defendant in a criminal prosecution has offered himself as a witness in his own behalf, he may be cross-examined to the same extent as any other witness, and he may also be recalled by the state for further cross-examination, but he cannot be recalled as a witness for the state, and con-

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pelled to testify in its favor.—State v. Lewis, 56 Kan. 374, 43 Pac. 265.

[d] (La. 1873) On the prosecutrix being offered as a witness by the state, she was interrogated in chief, cross-examined by the defense, re-examined by the state, and then sought to be recross-examined by the defense. *Held*, that the court properly refused this to be done, if the re-examination on the part of the state was confined to such matters as the cross-examination drew out.—State v. Turner, 25 La. Ann. 573.

§ 1007. Scope and extent of cross-examination.

[a] (La. 1896) Where a witness is recalled and re-examined, the cross-examination is limited to the matter on which he has been re-examined.—State v. Southern, 48 La. Ann. 628, 19 South. 668.

[b] (Mass. 1858) A witness called by the commonwealth on a criminal trial cannot, upon being recalled by the defendant, be cross-examined by the district attorney upon his testimony before the grand jury.—Commonwealth v. Hudson, 77 Mass. (11 Gray) 64.

[c] (Minn. 1883) Upon the recross-examination of a witness, who had testified to the payment of certain money, he was asked to whom and for what purpose the money was paid. He had not testified as to the purpose of such payment on his re-examination, and on the original cross-examination he had been interrogated on the subject, and there had been ample opportunity to examine him thereon. *Held*, that the question was properly excluded, as not proper cross-examination.—Butler v. Bohn, 31 Minn. 325, 17 N. W. 862.

(C) PRIVILEGE OF WITNESS.

1. NATURE AND GROUNDS OF PRIVILEGE TO REFUSE TO ANSWER IN GENERAL, § 1008.
2. CONSTITUTIONAL AND STATUTORY PROVISIONS, §§ 1009-1014.
3. ANSWER TENDING TO SUBJECT WITNESS TO CIVIL ACTION OR PECUNIARY LOSS, §§ 1015-1017.
4. ANSWER TENDING TO SUBJECT WITNESS TO PENALTY OR FORFEITURE, §§ 1018-1020.
5. ANSWER TENDING TO DISGRACE WITNESS OR RENDER HIM INFAMOUS, §§ 1021-1025.
6. ANSWER TENDING TO SUBJECT WITNESS TO CRIMINAL PROSECUTION, §§ 1026-1037.
7. PRIVILEGE AS TO PRODUCTION OF BOOKS OR DOCUMENTS, §§ 1038-1041.
8. PRIVILEGE OF ACCUSED IN CRIMINAL PROSECUTION, §§ 1042-1046.
9. CAUTION TO WITNESS, §§ 1047, 1048.
10. EFFECT OF RELEASE OR DISCHARGE FROM LIABILITY, §§ 1049, 1050.
11. EFFECT OF STATUTORY PROTECTION OF WITNESS FROM USE OF EVIDENCE AGAINST HIMSELF, §§ 1051, 1052.
12. WAIVER OF PRIVILEGE, §§ 1053-1057.
13. PERSONS ENTITLED TO CLAIM PRIVILEGE, §§ 1058-1060.
14. CLAIM OF PRIVILEGE, §§ 1061-1064.
15. DETERMINATION OF RIGHT TO PRIVILEGE AND PROTECTION OF WITNESS AGAINST SUBSEQUENT USE OF EVIDENCE, §§ 1065-1068.
16. EFFECT OF REFUSAL TO ANSWER, §§ 1069-1071.

Compelling parties to testify, see ante, § 6.
Necessity of physician testifying without payment of professional fee, see ante, § 66.
Persons privileged not to appear and testify, see ante, §§ 5–8.
Privileged communications, see ante, §§ 732–787.
Privilege of witness served with subpœna duces tecum, see ante, § 25.
In bill of discovery, see "Discovery," vol. 16, cc. 1970–1975, § 12; cc. 2046–2048, § 56.
In equity, see "Equity," vol. 19, c. 1238, § 738.
Objections to examination of adverse party before trial on ground of privilege of witness, see "Discovery," vol. 16, cc. 2049–2051, § 58.
Privilege of party as witness in proceedings for discovery, see "Discovery," vol. 16, cc. 2141, 2142, § 117.
Privilege of witness from arrest under execution against the person, see "Execution," vol. 21, c. 2127, § 1230 [a, f].
—— *in proceedings on examination in supplementary proceedings, see* "Execution," vol. 21, cc. 2019, 2020, § 1153.
—— *in testifying in bankruptcy proceedings as to matters tending to incriminate or degrade him, see* "Bankruptcy," vol. 6, c. 458, § 400.
Right to examine adverse party before trial, affected by character of evidence sought to be disclosed, see "Discovery," vol. 16, cc. 2046–2048, § 56.

1. NATURE AND GROUNDS OF PRIVILEGE TO REFUSE TO ANSWER IN GENERAL.

§ 1008. In general.

[a] (U. S. 1870) In taking testimony to be used in an action before the court of claims, a witness will not be compelled to answer a question which, in his opinion, relates to another suit, and not to the action on trial, unless some assurance be given to the court that the answer is expected to elicit testimony relevant to the issue in the action which is being heard.—Hill v. United States, 6 Ct. Cl. 83.

[b] (Md. 1767) In an action of trespass quare clausum, where a warrant of resurvey has been ordered, neither a sheriff nor his deputy can be compelled to give evidence that the defendant in such action had not sufficient notice of the executing of such warrant.—Trammell v. Thomas, 1 Har. & McH. 261.

[c] (N. H. 1865) In a suit against a railway conductor, charging him with collecting fares and not accounting to the company therefor, he was required to state the condition of his property before and since his service, although he claimed it was a part of his defense.—State v. Farmer, 46 N. H. 200.

[d] (N. H. 1871) Since the purchaser of liquor sold in violation of the statute is not guilty of a criminal offense, he cannot be excused from testifying as to the purchase.—State v. Rand, 51 N. H. 361, 12 Am. Rep. 127.

[e] (N. H. 1879) Gen. Laws, c. 228, § 14, providing that one shall not be compelled to disclose his witnesses, nor the manner of proving his case, does not excuse him from testifying to all he knows upon the issue.—Penniman v. Jones, 59 N. H. 119.

[f] (Tenn. 1808) No one, in a court of law, can be obliged to give evidence against himself.—Cook v. Corn, 1 Tenn. (1 Overt.) 340.

2. CONSTITUTIONAL AND STATUTORY PROVISIONS.

CONSTITUTIONALITY OF STATUTE OR ORDINANCE COMPELLING WITNESS TO TESTIFY, OR PRODUCTION OF BOOKS AND PAPERS FOR EXAMINATION, OR MAKING REPORTS, § 1009.
CONSTITUTIONALITY OF ORDER TO PRODUCE BOOKS AND PAPERS, § 1010.

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ACTIONS OR PROCEEDINGS TO WHICH PROVISIONS APPLY, § 1011.
APPLICATION OF PROVISIONS TO CORPORATIONS, § 1012.
APPLICATION OF CONSTITUTIONAL PROVISION TO POWER OF STATE, § 1013.
EFFECT OF PROVISIONS IN GENERAL, § 1014.

§ 1009. Constitutionality of statute or ordinance compelling witness to testify, or production of books and papers for examination, or making reports.

[a] (U. S. 1886) Act June 22, 1874, c. 391, § 5, 18 Stat. 187 [U. S. Comp. St. 1901, p. 2019], authorizing an order in revenue cases requiring defendant or claimant to produce his private books, invoices, and papers, or else the allegations of the government attorney will be taken as confessed, violates Const. Amend 5, forbidding the compelling of a person in a criminal case to be a witness against himself.—Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.

[b] (U. S. 1869) Act July 20, 1868, § 49, authorizing the supervisor of internal revenue to summon persons to come before him and testify under oath and produce their books and papers, does not violate Const. Amend. 5, declaring that no one shall be compelled in any criminal case to be a witness against himself; the proceeding not being criminal, but civil.—In re Meador, Fed. Cas. No. 9,375 [1 Abb. (U. S.) 317].

[c] (U. S. 1870) Act July 20, 1863, § 49 (16 Stat. 144), which gives supervisors of internal revenue the right to examine such books and papers as show the operation of banks, etc., with the public, and are connected with the internal revenue of the United States, is not unconstitutional as compelling a party to testify against himself.—Stanwood v. Green, Fed. Cas. No. 13,301 [2 Abb. (U. S.) 184].

[d] (U. S. 1871) Proceedings under Act June 30, 1864, § 14, as amended by Act July 13, 1866, § 9 (14 Stat. 101), for the purpose of compelling the production of books and giving of evidence before an assessor of internal revenue, are civil, and not criminal; and a party cannot object that the production of books or giving of evidence is in violation of the federal constitution, which provides that no person can be compelled to be a witness against himself in a criminal case.—In re Strouse, Fed. Cas. No. 13,548 [1 Sawy. 605].

[e] (U. S. 1874) Act June 22, 1874, c. 391, § 5, 18 Stat. 187 [U. S. Comp. St. 1901, p. 2019] requiring the production by defendants or claimants of all books, papers, etc., in proceedings under the revenue laws other than criminal, that will tend to prove allegations made by the United States, is not repugnant to Const. U. S. Amend. 5, providing that no persons shall be compelled in any criminal case to be a witness against himself.—United States v. Distillery No. 28, Fed. Cas. No. 14,966 [6 Biss. 483].

[f] (U. S. 1875) Act June 22, 1874, c. 391, § 5, 18 Stat. 187 [U. S. Comp. St. 1901, p. 2019], requiring the production of books and papers in a proceeding against a distillery for forfeiture, is not unconstitutional, within the provision of the constitution declaring that no person shall be compelled in any criminal case to be a witness against himself; such a proceeding not being criminal within the statute.—United States v. Three Tons of Coal, Fed. Cas. No. 16,515 [6 Biss. 379].

[g] (Ind. 1872) Treasury Act 1859 (1 Gav. & H. St. p. 647), providing that no money shall be paid into the state treasury until the auditor of state be furnished with "a description of the liability on account of which such payment is to be made," who shall then make his draft therefor in favor of the state treasurer, and making it the duty of the latter to "number, register, file, and preserve such draft," so far as it compels the treasurer to furnish evidence against himself of the violation of Act 1861 (2 Gav. & H. St. § 456), making it a felony to use any of the funds of the state by way of investment or loan, is in conflict with Const. art. 1, § 14, providing that "no person in any criminal prosecution, shall be compelled to testify against himself."—State v. Kimball, Wils. 174.

[h] (Ind. 1879) That part of 2 Rev. St. 1876, p. 463, § 14, by which it is provided that "any person concerned in such trespass may be compelled to testify against any other person therein concerned," is in direct contravention of both the letter and the spirit of the last clause of section 14 of the bill of rights in the constitution, by which it is expressly provided that "no person, in any criminal prosecution, shall be compelled to testify against himself."—State v. Enochs, 69 Ind. 314.

[i] (Kan. 1885) Code, § 482, "in aid of execution," authorizing the district judge to require a judgment debtor to appear before him to answer concerning his property, which he unjustly refuses to apply towards the satisfaction of a judgment rendered against him, and to order any money in his actual possession and under his control, not exempt by law, to be applied to the satisfaction of the judgment under which the proceedings are had, and to enforce said orders by proceedings for contempt in case of refusal or disobedience, does not violate Bill of Rights, § 10, providing that no person shall be witness against himself.—In re Burrows, 33 Kan. 675, 7 Pac. 148.

[j] (Me. 1867) Act 1864, c. 280, allowing a person charged with crime to testify at his own trial, if he requests to do so, is not unconstitutional, as compelling a person to testify against himself.—State v. Bartlett, 55 Me. 200.

[k] (Mass. 1839) St. 1838, c. 14, giving to bank commissioners power to examine bank officers and agents under oath relative to the condition of the bank, and fixing a penalty for any refusal by such an officer or agent, "without justifiable cause," to testify, does not conflict with the constitutional provision that no one shall be compelled to criminate himself, since, if the evidence of such an officer or agent would criminate him, that fact would be justifiable cause for refusal to testify.—Commonwealth v. Farmers' & Mechanics' Bank, 38 Mass. (21 Pick.) 542, 32 Am. Dec. 290.

[l] (Mo. 1891) The act of 1889, "for the punishment of pools, trusts and conspiracies," requiring some officer of every corporation to inform, under oath, the secretary of state, whether the corporation has violated the act, and prescribing a fine on the corporation and forfeiture of its property, and fine or imprisonment of the officers, in case it or they have violated the act, is in conflict with the constitutional declaration that "no person shall be compelled to testify against himself in a criminal case."—State v. Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

[m] (Mo. 1893) Rev. St. 1889, §§ 4621, 4622, prohibiting a druggist from selling liquor except on the prescriptions of a physician, and declaring that such prescriptions shall be carefully preserved, and produced in court, or before any grand jury, whenever required, and that, on the failure of the druggist to produce the same, he shall be deemed guilty of a misdemeanor, are not in conflict with Const. art. 2, § 23, providing that no person shall be required to furnish evidence in a criminal case against himself.—State v. Davis, 117 Mo. 614, 23 S. W. 759.

[n] (Mo. 1895) The provision of a city ordinance requiring every pawnbroker to enter in

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a book a description of property left with him in pawn, and of the person leaving it, is not unconstitutional, as being in conflict with Const. U. S. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself.—City of St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577.

[o] (N. Y. 1861) The constitution provides that no person shall be compelled in any criminal case to be a witness against himself. New York City Charter, § 52, relating to bribery of the common council, declares that every person offending against the section shall be a competent witness against any other witness offending in the same transaction, and may be compelled to appear and give evidence. *Held*, that the constitution did not continue the common-law privilege allowing a witness to refuse to answer, where his answer tended to disgrace him, and the statute was not unconstitutional.—People v. Kelly, 21 How. Prac. 54.

[p] (Ohio, 1881) 71 Ohio Laws, p. 146, fixing a penalty against railroads for overcharging for transportation, and declaring that allegations of the petition claiming such penalty, not denied by answer, shall be taken as true, does not violate Const. art. 1, § 10, which provides that no person in any criminal case shall be compelled to be a witness against himself.—Cincinnati, S. & C. R. Co. v. Cook, 37 Ohio St. 265.

[q] (Pa. 1891) The fifteenth section of the Bullit bill (Act June 1, 1885), for the better government of cities of the first class, as to compelling witnesses to be sworn and testify before an investigating subcommittee of the councils, is constitutional, in so far as it does not conflict with article 9 of the constitution, that in all criminal prosecutions an accused cannot be required to give evidence against himself. A witness on such an inquiry must answer all questions except such as would tend to criminate him.—In re Yard, 48 Leg. Int. 288.

[r] (Tex. 1889) Pen. Code, art. 756, requires those engaged in the business of slaughtering live stock to report to the commissioners' court the number, age, sex, etc., of stock slaughtered. Article 764 defines the offense of killing for market an unbranded or unmarked animal, or purchasing or killing any animal without taking a bill of sale. *Held*, that the former article does not, as requiring a person to criminate himself under the latter article, violate section 10 of the bill of rights, providing that in all criminal prosecutions the accused shall not be compelled to give evidence against himself.—Aston v. State, 27 Tex. App. 574, 11 S. W. 637.

§ 1010. Constitutionality of order to produce books and papers.

[a] (U. S. 1886) A proceeding to forfeit goods for a violation of the customs revenue laws, whether in rem or in personam, is a criminal case, within the fifth amendment of the constitution, and an order for the compulsory production of defendant's private books and papers, under Act Cong. June 22, 1874, c. 391, § 5, 18 Stat. 187 [U. S. Comp. St. 1901, p. 2019] making a refusal to produce books equivalent to a confession of the allegations which it is charged that they will prove, is void, as in violation of that amendment.—Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.

§ 1011. Actions or proceedings to which provisions apply.

See post, § 1026 [d].

Actions or proceedings in which privilege of accused may be exercised, see post, § 1042½.

Answer tending to subject witness to civil action, see post, § 1015.

[a] (U. S. 1892) The fifth amendment to the constitution of the United States, which declares that no person "shall be compelled in any criminal case to be a witness against himself," extends its protection to a witness called to testify before a grand jury which is investigating alleged violations of the interstate commerce law. It is not limited to cases of criminal prosecution against the witness himself.—Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, reversing In re Counselman (C. C. 1890) 44 Fed. 268.

[b] (U. S.) A witness before a grand jury is not bound to answer, where he states that the answer might implicate himself.—(1829) Sanderson's Case, Fed. Cas. No. 12,297 [3 Cranch, C. C. 638]. CONTRA, see (1824) Devaughn's Case, Fed. Cas. No. 3,837 [2 Cranch, C. C. 501].

[c] (U. S. 1883) The constitutional provision that "no person shall be compelled in any criminal action to be a witness against himself" applies only to evidence in suits or proceedings instituted against the witness himself.—United States v. McCarthy (C. C.) 18 Fed. 87, 21 Blatchf. 469.

[d] (Cal. 1895) A prosecution under Pen. Code, § 772, providing for the removal of public officers for violations of duty, is a criminal case, within Const. art. 1, § 13, declaring that no person shall be compelled to be a witness against himself in any criminal case.—Thruston v. Clark, 107 Cal. 285, 40 Pac. 435.

[e] (Ind. 1860) The provision that no person in any criminal prosecution shall be compelled to testify against himself protects witnesses in civil cases.—Wilkins v. Malone, 14 Ind. 153.

[f] (Ind. 1881) In a bastardy proceeding, defendant may be compelled to testify; the proceeding being a civil one.—Burt v. State, 79 Ind. 359.

[g] (Mass.) The constitutional provision that no one shall be compelled to accuse or furnish evidence against himself does not relate to questions of property, but to criminal cases only.—(1827) Devoll v. Brownell, 22 Mass. (5 Pick.) 448; (1829) Keith v. Woombell, 25 Mass. (8 Pick.) 211.

[h] (Mass. 1871) Const. art. 12, providing that no subject shall be compelled to accuse or furnish evidence against himself, applies to investigations ordered and conducted by the legislature, as such proceedings are regulated by the same rules as in judicial inquiries.—In re Emery, 107 Mass. 172, 9 Am. Rep. 22.

[i] (N. H. 1814) Bill of Rights, art. 15, declaring that no person shall be required to furnish evidence against himself, relates to criminal proceedings only.—Wood v. Weld, Smith, 367.

[j] (N. Y. 1890) The provision of Const. art. 1, § 6, that "no person shall be * * * compelled in any criminal case to be a witness against himself," does not apply to an investigation by police commissioners of a charge against a police sergeant for conduct unbecoming an officer.—People v. McClave, 57 Hun, 587, 10 N. Y. Supp. 560, judgment affirmed (1890) 123 N. Y. 512, 25 N. E. 1047.

§ 1012. Application of provisions to corporations.

[a] (U. S. 1880) The fifth amendment to the constitution of the United States, which forbids that any person shall be compelled in a criminal case to give evidence against himself, applies to a corporation, as well as to persons.—Pollock v. The Sea Bird (D. C.) 3 Fed. 573.

§ 1013. Application of constitutional provision to power of state.

[a] (S. C. 1894) Const. U. S. Amends. 4, 5, providing that no person shall be compelled to testify against himself in a criminal case, have

no application to the power of the state governments, but apply only to the powers of the federal government.—State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877; Id., 41 S. C. 551, 19 S. E. 691.

§ 1014. Effect of provisions in general.

[a] (U. S. 1896) The constitutional privilege of refusing to give self-incriminating testimony was not intended to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime, but only from actual prosecution and punishment.—Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, affirming (C. C. 1895) 70 Fed. 46.

[b] (Cal. 1894) Const. art. 1, § 13, providing that "no person shall be compelled in any criminal case to be a witness against himself," relieves such witness from giving any evidence which in a criminal prosecution against himself might tend to establish the offense with which he may be charged.—Ex parte Cohen, 104 Cal. 524, 38 Pac. 364, 43 Am. St. Rep. 127, 26 L. R. A. 423.

[c] (Minn. 1859) Rev. St. p. 481, § 72, providing that a witness shall not be required to answer questions which will have a tendency to accuse him of any crime or misdemeanor, or expose him to any penalty or forfeiture, is declaratory of the law as it previously existed, and neither restricts nor enlarges the privileges of witnesses.—State v. Bilansky, 3 Minn. 246 (Gil. 169).

[d] (N. Y. 1861) The act of 1860, which makes husband and wife competent as witnesses in case of divorce, does not operate to compel them to testify in cases where a witness is exempt from giving answers which have a tendency to accuse him of crime or expose him to forfeiture.—Anable v. Anable, 24 How. Prac. 92.

3. ANSWER TENDING TO SUBJECT WITNESS TO CIVIL ACTION OR PECUNIARY LOSS.

ANSWER TENDING TO SUBJECT WITNESS TO CIVIL ACTION, § 1015.
ANSWER TENDING TO SUBJECT WITNESS TO PECUNIARY LOSS, § 1016.
—— REVEALING TRADE SECRETS, § 1017.

§ 1015. Answer tending to subject witness to civil action.

Actions or proceedings in general, see ante, § 1011.

[a] A witness cannot excuse himself, or be excused, from giving evidence, because his answer may expose him to a civil action.

—(Ala. 1845) Alexander v. Knox, 7 Ala. 503;
(Ky. 1823) Gorham v. Carroll, 13 Ky. (3 Litt.) 221; (1823) Black v. Crouch, Id. 226; (1831) Commonwealth v. Thruston, 30 Ky. (7 J. J. Marsh.) 62;
(La. 1819) Planters' Bank v. George, 6 Mart. (O. S.) 670, 12 Am. Dec. 487;
(Md. 1818) Taney v. Kemp, 4 Har. & J. 348, 7 Am. Dec. 673; (1829) Hays v. Richardson, 1 Gill & J. 366; (1829) Naylor v. Simmes, 4 Gill & J. 273;
(Miss. 1834) Judge of Probate v. Green, 2 Miss. (1 How.) 146;
(Mo. 1874) Ex parte Munford, 57 Mo. 603;
(N. H. 1825) Copp v. Upham, 3 N. H. 159;
(N. Y. 1867) Taylor v. Jennings, 30 N. Y. Super. Ct. (7 Rob.) 581;
(N. C. 1830) Jones v. Lanier, 13 N. C. 480;
(Tenn. 1834) Zollicoffer v. Turney, 14 Tenn. (6 Yerg.) 297.

[b] (N. Y. 1829) A witness neither nominally nor substantially party to the suit is not exempted from giving evidence, though it should be evidence against him in a civil suit, unless it tends to criminate him, or subject him to some loss or damage in the nature of a penalty or forfeiture.—In re Kip, 1 Paige, 601.

[c] (N. Y. 1841) A witness may refuse to answer a question, where his answer would tend to criminate him or subject him to forfeiture; but he cannot object simply on the ground that his answer might subject him to a civil suit for a debt or otherwise.—Stewart v. Turner, 3 Edw. Ch. 458.

§ 1016. Answer tending to subject witness to pecuniary loss.

[a] A witness is bound to answer a question in a matter pertinent to the issue, where his answer will not expose him to criminal prosecution, or tend to subject him to a penalty or forfeiture, although it may otherwise adversely affect his pecuniary interest.

—(Mass. 1830) Bull v. Loveland, 27 Mass. (10 Pick.) 9;
(Pa. 1818) Baird v. Cochran, 4 Serg. & R. 397.

CONTRA, see
(Conn. 1797) Starr v. Tracy, 2 Root, 528;
(Mass. 1810) Appleton v. Boyd, 7 Mass. 131.

[b] A witness is not excused from answering merely because his answer may subject him to pecuniary loss.

—(Me. 1841) Lowney v. Perham, 20 Me. (2 App.) 235;
(Md. 1829) Hays v. Richardson, 1 Gill & J. 366;
(N. C. 1845) Harper v. Burrow, 28 N. C. 30;
(Vt. 1843) Ward v. Sharp, 15 Vt. 115.

[c] (U. S.) A witness who is interested cannot be compelled to testify against his interest.—(1806) Carne v. McLane, Fed. Cas. No. 2,416 [1 Cranch, C. C. 351]; (1819) Pritchard v. Georgetown, Fed. Cas. No. 11,437 [2 Cranch, C. C. 191].

[d] (U. S. 1828) In an action by a bank against a customer for money had and received on an overdraft, plaintiff asked a witness, who had been a bookkeeper at the time, whether defendant's account, at the time the check was paid, showed a balance equal thereto. *Held*, that the bookkeeper was not obliged to answer, as by answering he might charge himself with the loss.—Bank of the United States v. Washington, Fed. Cas. No. 940 [3 Cranch, C. C. 295].

[e] (Ala. 1843) In a proceeding against a sheriff by motion for neglect in making the amount of an execution, a witness cannot be excused from testifying against him on the ground that he is one of his sureties, unless the sureties are made parties to the proceeding.—Garey v. Frost, 5 Ala. 636.

[f] (Ala. 1843) A surety in the bond of a claimant of property levied on will not be excused from testifying for the plaintiff in execution because he is such surety.—Planters' & Merchants' Bank v. Willis, 5 Ala. 770.

[g] (Conn. 1796) A witness who has become voluntarily interested cannot be privileged from testifying what he knew before, nor can he be compelled to testify to what came to his knowledge after he became interested, if it may render him liable pecuniarily.—Simons v. Payne, 2 Root, 406.

[h] (Conn. 1820) A person who has signed a note as attorney for another, and has afterwards given bonds for his principal to prosecute an appeal from a judgment on that note, is not protected from giving his testimony for the payee to prove the execution of the note, on the ground that it would be against his interest; he having voluntarily assumed such interest

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after the payee had an interest in his testimony.—Phelps v. Riley, 3 Conn. 266.

[i] (Ill. 1843) If a party in interest is not also a party to the record in a suit, he may, at the instance of the opposite party, be compelled to testify as a witness against his own interest, provided his answers do not subject him to a criminal prosecution or to a penalty or forfeiture.—Brooks v. McKinney, 5 Ill. (4 Scam.) 309.

[j] (Ky. 1827) The fact that a witness was interested in favor of the plaintiff's recovery, and expected to get the benefit of the recovery, and that to compel him to testify would be to compel him to testify against his own interests, did not give him the right to refuse, as only the danger of a penal proceeding would give him that right.—Robinson v. Neal, 21 Ky. (5 T. B. Mon.) 212.

[k] (Md. 1826) In an action to recover a deposit claimed to have been made by plaintiff in defendant bank, a stockholder, called as a witness, may be compelled to give evidence that certain money received by the bank belonged to plaintiff, though such evidence is against his interest.—City Bank of Baltimore v. Bateman, 7 Har. & J. 104.

[l] (N. Y. 1827) A party interested as a cestui que trust cannot be compelled to testify.—Mauran v. Lamb, 7 Cow. 174.

[m] (N. C. 1805) A garnishee cannot be asked whether he has paid a bond of 20 years' standing.—Gee v. Warwick, 3 N. C. 358.

[n] (Pa. 1811) A witness will not be compelled to answer a question, where his answer tends to show the invalidity of a judgment by confession entered for him in another proceeding.—In re Bell, 1 Browne, 376.

[o] (Pa. 1842) A witness may be compelled to answer a question, the answer to which may affect his interest civilly.—In re Danforth, 1 Pa. Law J. 148.

[p] (S. C. 1806) A witness may be compelled to give evidence which may ultimately affect his own interest, if the party against whom this interest operates insists on his giving testimony, provided his evidence does not extend to render him infamous or prove him guilty of some crime.—Miller v. Creyon, 2 Brev. 108.

§ 1017. —— Revealing trade secrets.

[a] (U. S. 1888) A witness for complainant in a suit to restrain the infringement of a patent for a medical preparation, having testified only as to the uses and effect of the preparation, cannot, on cross-examination, be required to disclose its ingredients; that being a trade secret, the disclosure of which would injure plaintiff's business.—Moxie Nerve-Food Co. v. Beach (C. C.) 35 Fed. 465.

[b] (N. Y. 1860) In an action to restrain the infringement of a trade-mark, one of the plaintiffs, when offered as a witness on their own behalf as to the issue on the question of damages sustained by them by the infringement, refused to answer as to the materials with which his compound, which he sought to protect by the trade-mark, was prepared. *Held*, that he was not privileged to refuse to answer such a question, and that his claim for damages was properly stricken out as a penalty for contempt in refusing to answer; he not offering other testimony in support of it.—Burnett v. Phalon, 11 Abb. Prac. 157, 19 How. Prac. 530.

4. ANSWER TENDING TO SUBJECT WITNESS TO PENALTY OR FORFEITURE.

IN GENERAL, § 1018.
PERSONS ENTITLED TO PRIVILEGE, § 1019.
PARTICULAR SUBJECTS OF INQUIRY, § 1020.

Forfeiture because of usury, see post, § 1029.

§ 1018. In general.

[a] A witness is not bound to answer a question, if an answer will subject him to a penalty.

—(Ind. 1843) Lister v. Boker, 6 Blackf. 439;
(N. Y. 1838) People v. Rector, 19 Wend. 569;
(Va. 1882) Langhorne v. Commonwealth, 76 Va. 1012.

[b] (N. Y. 1847) Where a witness objects to testifying on the ground that his testimony might subject him to an indictment or prosecution for a penalty, it is not, in a court of review, an answer to the claim of privilege that the statute of limitations has run against the offense, unless it appears that such answer was suggested on the trial.—Henry v. Bank of Salina, 1 N. Y. (1 Comst.) 83.

[c] (N. Y. 1886) A witness shall not be required to give an answer which may tend to expose him to a penalty or forfeiture. Code Civ. Proc. § 837.—Gadsen v. Woodward, 103 N. Y. 242, 8 N. E. 653; Dixon v. Same, 103 N. Y. 638, 8 N. E. 653.

[d] (Va. 1850) A party is not bound to answer interrogatories which may subject him to a penalty or forfeiture, though the object of the suit is not to enforce such penalty or forfeiture, but would only expose the party to another suit.—Poindexter v. Davis, 6 Grat. 481.

§ 1019. Persons entitled to privilege.

Persons entitled to raise objection, see post, §§ 1058–1060.

[a] (U. S. 1873) Where a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself.—United States v. Collins, Fed. Cas. No. 14,837 [1 Woods, 499].

[b] (Ga. 1870) Under Code, § 3798, providing that no person shall be compelled to answer any question tending to criminate himself, it is error, in proceedings against road commissioners for neglect of duty, to compel the defendants to answer questions the answer of which might subject them to a fine, forfeiture, or penalty.—Bryan v. State, 40 Ga. 688.

[c] (N. Y. 1888) Under Code Civ. Proc. § 837, providing that a witness shall not be required to give an answer which shall tend to expose him to a penalty or forfeiture, the president of a bank cannot be examined before trial in an action to subject the bank to a penalty for the taking of usurious interest; the sole object of such examination being to obtain evidence as to the taking of usury.—Davies v. Lincoln Nat. Bank (Sup.) 4 N. Y. Supp. 373, 16 Civ. Proc. R. 68.

§ 1020. Particular subjects of inquiry.

[a] (N. Y. 1847) A witness, or a party called as a witness, may not only object to testifying to the main fact, which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a series of facts, which together would expose him to such penalty or forfeiture.—Henry v. Bank of Salina, 1 N. Y. (1 Comst.) 83.

[b] (N. Y. 1847) Where a note was put in suit for the benefit of the teller of a bank, and the defendant's counsel, in his opening, stated as one ground of defense that the note was discounted by the teller for his own benefit, in violation of the statute, and relied upon usury as another ground, such teller, though ostensibly called as a witness to prove the usury, cannot be required to disclose the transaction, for the reason that his testimony might subject him to the penalty of the forfeiture under the statute, upon a ground distinct from the de-

fense of usury.—Henry v. Bank of Salina, 1 N. Y. (1 Comst.) 83.

[c] (N. Y. 1886) In an action to recover a penalty for selling adulterated milk, contrary to a city ordinance, it was error to compel defendant to testify that he was in the business of selling milk at the time alleged in the complaint.—City of Buffalo v. Ray, 1 N. Y. St. Rep. 730.

[d] (Tenn. 1825) In an action for seduction, the woman called as a witness need not answer whether she has had carnal knowledge with other men, as an answer in the affirmative would subject her to penalties by virtue of Acts 1741, c. 14.—Johnson v. Goss, 10 Tenn. (2 Yerg.) 110.

5. ANSWER TENDING TO DISGRACE WITNESS OR RENDER HIM INFAMOUS.

IN GENERAL, § 1021.
DISCRETION OF COURT, § 1022.
MATERIALITY OR RELEVANCY OF INQUIRY, § 1023.
COMPELLING WITNESS TO STATE REASONS, § 1024.
ANSWERS ON CROSS-EXAMINATION, § 1025.

See post, § 1034 [c].

§ 1021. In general.

[a] A witness is not obliged to answer a question which would show his character to be infamous.
—(U. S. 1827) United States v. Craig, Fed. Cas. No. 14,883 [4 Wash. C. C. 729]; (1840) United States v. Dickinson, Fed. Cas. No. 14,958 [2 McLean, 325];
(N. Y. 1816) People v. Herrick, 13 Johns. 82, 7 Am. Dec. 364.

[b] A witness is not obliged to answer, if the answer will tend to degrade his character.
—(U. S. 1827) United States v. Craig, Fed. Cas. No. 14,883 [4 Wash. C. C. 729];
(N. Y. 1838) People v. Rector, 19 Wend. 569.

[c] (Ala. 1887) A witness cannot refuse to answer a question on the ground that the answer would tend to humiliate and degrade him.—Ex parte Boscowitz, 84 Ala. 463, 4 South. 279, 5 Am. St. Rep. 384.

[d] (Iowa, 1874) The word "ignominy," as used in the Revision, § 3989, excusing a witness from answering any question that would expose him to public ignominy, means public disgrace or dishonor. A plaintiff in an action for seduction need not answer whether, before the alleged seduction, she ever had intercourse with other men than the defendant.—Brown v. Kingsley, 38 Iowa, 220.

[e] (Ky. 1859) A witness cannot be excused from answering a question asked to, and which would, impeach his credibility, merely because he would, by answering the question, bring disgrace upon himself.—Rutherford v. Commonwealth, 59 Ky. (2 Metc.) 387.

[f] (N. Y. 1848) Where a party intends to coerce an answer from a witness tending to degrade him, such party is bound to show affirmatively that the question is relevant.—People v. Lohman, 2 Barb. 216.

[g] (N. C. 1842) Questions to a witness, tending to disparage or disgrace him, may be asked, and cannot be objected to by the opposite party. Whether the witness is bound to answer them, quære.—State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699.

[h] (N. C. 1874) A question as to whether defendant, who was testifying in his own behalf, had not gone to a distant city to consult a Spiritualist to find out about the money in controversy, as tending to show his doubts about the genuineness of a certain receipt, was not to be rejected because it tended to subject the defendant to ridicule.—Lassiter v. Phillips, 70 N. C. 462.

[i] (Pa. 1803) A witness cannot be obliged to testify, if his testimony will accuse himself of an immoral act.—Galbreath's Lessee v. Eichelberger, 3 Yeates, 515.

[j] (Pa. 1847) The legislature of Pennsylvania can compel witnesses to answer questions, the answers to which may not show them to be criminal, but may involve them in shame and reproach.—Commonwealth v. Roberts, Brightly, N. P. 109.

[k] (Pa. 1891) A witness, subpœnaed before a subcommittée of the finance committee of councils, under the fifteenth section of the Bullit bill of June 1, 1885, will not be bound to reply to questions the answers to which might subject him to ignominy and contempt, even although an indictment would not lie against him thereunder.—In re Yard, 48 Leg. Int. 288.

§ 1022. Discretion of court.

[a] (Minn. 1859) Allowing questions which do not tend to criminate, but merely to disgrace or degrade, the witness, is discretionary with the trial court.—State v. Bilansky, 3 Minn. 246 (Gil. 169).

[b] (Mo. 1876) Counsel may sometimes ask a witness a question the answer to which may degrade him, but it is in the discretion of the court to require an answer. The court may also, under certain circumstances, forbid such questions to be asked.—Ring v. Jamison, 2 Mo. App. 584.

§ 1023. Materiality or relevancy of inquiry.

[a] A witness will not be excused from testifying to a fact material to the issue, because his testimony may have a direct tendency to degrade his character.
—(Ill. 1851) Weldon v. Burch, 12 Ill. (2 Peck) 374;
(N. Y. 1867) Taylor v. Jennings, 30 N. Y. Super. Ct. (7 Rob.) 581.

[b] (Cal. 1868) Under Prac. Act, § 408, excusing a witness from giving an answer having a direct tendency to degrade his character, unless it be to a fact in issue, the privilege does not extend to a question relative to a matter alleged in the answer.—Clark v. Reese, 35 Cal. 89.

[c] (Del. 1859) The fact that an answer tends to disgrace a witness will not excuse him from answering if the matter is relevant, but is a good excuse if the question is irrelevant or only collateral.—Knowles v. Knowles, 2 Houst. 133.

[d] (Mich. 1878) A witness is not excused from testifying concerning facts that are relevant, because they may exhibit him in a discreditable light, if they do not show criminality.—Jennings v. Prentice, 39 Mich. 421.

[e] (Mo. 1851) Where the transaction to which a witness is interrogated forms any part of the issue to be tried, the witness will be obliged to answer, however strongly it may reflect on his character.—Clementine v. State, 14 Mo. 112.

[ee] (N. H. 1866) Where a witness is asked a question the answer to which would disgrace him, but could have no bearing on the issue, except so far as it might impeach his credibility, he is privileged from answering it.—State v. Staples, 47 N. H. 113, 90 Am. Dec. 565.

[f] (N. J. 1811) A witness is not bound to answer questions tending to disgrace him, and there is no distinction in such case between

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matters relevant to the main issue and collateral matters.—Vaughn v. Perine, 3 N. J. Law (2 Penning.) 728, 4 Am. Dec. 411.

[g] (N. Y. 1848) Where a witness is asked a question, the answer to which would disgrace him, but could have no bearing on the issue, except as it might impair his credibility, he is privileged from answering.—Lohman v. People, 1 N. Y. (1 Comst.) 379, 49 Am. Dec. 340.

[h] (Ohio, 1888) A witness cannot refuse to answer a question pertinent to the issue, on the ground that such answer will tend to disgrace her, where such answer will not tend to criminate her, and the witness so testifies.—Ammon v. Johnson, 2 O. C. D. 149.

[i] (Pa. 1846) The effect an answer will have on the character of the witness will not excuse him from answering a question material and relevant, but will excuse him from answering a question of a collateral matter.—In re Doran, 2 Pars. Eq. Cas. 467.

[j] (Utah, 1875) A witness is not bound to answer, nor is a court to compel an answer, to an inquiry tending to disgrace a witness, unless the evidence is material to the issue.—Conway v. Clinton, 1 Utah, 215.

§ 1024. Compelling witness to state reasons.

[a] (Md. 1882) A witness having declined to answer questions which manifestly tended, if the answer should be in the affirmative, to degrade him, *held*, that he should not be obliged to say why he declined.—Merluzzi v. Gleeson, 59 Md. 214.

[b] (N. Y. 1882) If a witness refuses to answer a question because an answer might tend to degrade him, and the question is otherwise unobjectionable, he may be compelled to give his reason and claim his privilege.—New v. Fisher, 11 Daly, 308.

§ 1025. Answers on cross-examination.

[a] Where a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on the subject, even though his answers may disgrace him.

—(Cal. 1880) People v. Freshour, 55 Cal. 375, 1 Ky. Law Rep. 224;

(Conn. 1859) Town of Norfolk v. Gaylord, 28 Conn. 309.

[b] (Ala. 1867) There is no rule of evidence preventing a person accused of a crime from asking a witness on cross-examination questions tending to degrade or bring shame on the witness.—Hall v. State, 40 Ala. 698.

[c] (Cal. 1868) In an action for breach of promise of marriage, the character of the plaintiff for chastity being in issue, and the defendant testifying in his own behalf, to a cross-question whether he had ever called the plaintiff his "dear Carrie," or his "dear child," having replied, "I decline to answer the question; when a man takes personal liberties with a woman, he should not come on the stand and swear to it," was asked by the plaintiff, "Did you ever take improper liberties with the plaintiff?" to which, on his declining to answer, the court enforced an answer. *Held*, that the plaintiff's last question was proper, after defendant's insinuation that he had taken improper liberties with plaintiff.—Clark v. Reese, 35 Cal. 89.

[d] (Ga. 1884) A female witness was asked on cross-examination if she did not have children, and she replied she had one. She was then asked if she had ever been married; and, on objection being made, the court said the witness need not answer, and also ruled out the former answer. *Held*, that there was no error, in the absence of any question as to the right of the witness to voluntarily answer questions tending to degrade her.—Gravett v. State, 74 Ga. 191.

[e] (Iowa, 1878) In an action on account for legal services one item of which was $500 for services in a divorce suit, the plaintiff testified that, pending his employment, an agreement was made between him and his client for "more than an ordinary fee," upon the ground that employment involved him in some complications that were compromising him in his profession. *Held*, that he might be compelled to state upon cross-examination what those complications were.—Bolton v. Daily, 48 Iowa, 348.

[f] (Ky. 1896) In a criminal action, it is permissible, upon cross-examination, to inquire into the habits and mode of life of the witness, for the purpose of shaking his credit as a witness, even though the answers may tend to bring him into disgrace.—Warren v. Commonwealth, 99 Ky. 370, 35 S. W. 1028.

[g] (Mo. 1880) A witness, upon cross-examination, may be compelled to answer any questions tending to test his credibility or to shake his credit by injuring his character, however irrelevant to the facts in issue, or however disgraceful the answer would be to himself, except where his answer would expose him to a criminal charge.—Muller v. St. Louis Hospital Ass'n, 73 Mo. 242.

[h] (N. Y. 1869) A witness is privileged, on cross-examination, to refuse to answer a question which does not relate to any matter material to the issue or involved in his direct examination, where he swears that a truthful answer would tend to degrade him.—In re Lewis, 39 How. Prac. 155, Fed. Cas. No. 8,312.

[i] (N. Y. 1878) On cross-examination of the defendant on a trial for forgery, while a witness in his own behalf, an objection to the inquiry, "How many times have you been arrested?" as tending to degrade him, is improperly overruled, after his counsel has raised the question of privilege.—People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183.

[j] (N. C. 1872) In general, questions put to a witness on cross-examination are not objectionable, as tending to disparage him, unless the answer may subject him to indictment or to a statute penalty.—State v. Davidson, 67 N. C. 119.

[k] (N. D. 1896) For the purpose of affecting the credibility of a witness, it is proper to ask him on cross-examination questions the answers to which may tend to degrade, disgrace, or criminate him, though he may refuse to answer any question the answer to which will tend to criminate him.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

6. ANSWER TENDING TO SUBJECT WITNESS TO CRIMINAL PROSECUTION.

IN GENERAL, § 1026.
PARTICULAR SUBJECTS OF INQUIRY, § 1027.
— GAMING, § 1028.
— USURY, § 1029.
— CRIMINAL INTERCOURSE, § 1030.
PERSONS ENTITLED TO PRIVILEGE, § 1031.
— TESTIMONY BY HUSBAND OR WIFE TENDING TO CRIMINATE THE OTHER, § 1032.
COMPELLING WITNESS TO STATE REASONS, § 1033.
ANSWERS ON CROSS-EXAMINATION, § 1034.
— CROSS-EXAMINATION OF WITNESS GIVING INCRIMINATING TESTIMONY, § 1035.
USE OF EVIDENCE OBTAINED IN ANOTHER ACTION, § 1036.
PROMISE OF EXEMPTION FROM PROSECUTION, § 1037.

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§ 1026. In general.

[a] A witness is not bound to answer a question which would tend to expose him to a prosecution for crime.
—(U. S. 1790) United States v. Gooseley, Fed. Cas. No. 15,230;
(Ala. 1896) Alston v. State, 109 Ala. 51, 20 South. 81;
(Ark. 1855) Pleasant v. State, 15 Ark. 624;
(Conn. 1812) Grannis v. Branden, 5 Day, 260, 5 Am. Dec. 143;
(Iowa, 1850) Richman v. State, 2 G. Greene, 532;
(Ky. 1859) Rutherford v. Commonwealth, 59 Ky. (2 Metc.) 387;
(Minn. 1859) State v. Bilansky, 3 Minn. 246 (Gil. 169);
(Mo. 1865) State v. Marshall, 36 Mo. 400; (1881) State v. Talbott, 73 Mo. 347;
(N. H. 1855) Coburn v. Odell, 30 N. H. (10 Fost.) 540;
(N. Y. 1816) People v. Herrick, 13 Johns. 82, 7 Am. Dec. 364; (1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; (1856) Wheeler v. Dixon, 14 How. Prac. 151;
(Vt. 1840) Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec. 356.

[b] (U. S. 1807) If any direct answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict the witness of any crime, he is not bound to answer it, so as to furnish matter for that conviction.—United States v. Burr, Fed. Cas. No. 14,692e.

[c] (Del. 1847) A question may be put to a witness tending to criminate him, but he is not obliged to answer.—Short v. State, 4 Har. 568.

[d] (Ill. 1885) It is the privilege of a witness to refuse to answer questions before a grand jury, if, in his opinion, the answers would tend to disclose matters that might criminate him. —Mackin v. People, 115 Ill. 312, 3 N. E. 222.

[e] (Ind. 1860) A witness cannot be compelled to answer as to any one act, the constant repetition of which would amount to a statute offense.—French v. Venneman, 14 Ind. 282.

[f] (Iowa, 1861) Where the answer to a question in the direct interrogation of a witness would not tend to criminate him, but the questions which might be rightfully put on cross-examination to test the truth of such answer might form a link in a chain of evidence that would criminate him, it was *held* that witness might refuse to answer.—Printz v. Cheeney, 11 Iowa, 469.

[g] (Miss. 1894) Where one is jointly indicted with another, and there is no severance, he cannot be compelled to testify for his codefendant, since it may constrain him to give evidence against himself.—Holman v. State, 72 Miss. 108, 16 South. 294.

[h] (Mo. 1825) A witness is bound to testify, although he stands indicted for the same offense as the person on trial, and although he says his testimony will lead to his own conviction.—State v. Douglass, 1 Mo. 527.

[i] (N. H. 1829) A witness cannot be compelled to answer a question, if his answer will expose him to a criminal prosecution; but, if he voluntarily state a fact, he is bound to state how he knows it, although in so doing he may expose himself to a criminal charge.—State v. K——, 4 N. H. 562.

[j] (N. H. 1854) A witness will not be compelled to answer a question, if his answer will expose him to be criminally prosecuted; and he is not bound to testify to any particular fact, if a full account of his knowledge of such fact would so expose him. If the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is protected.—Janvrin v. Scammon, 29 N. H. (9 Fost.) 280.

[k] (N. H. 1855) If a witness discloses part of a transaction in which he was criminally concerned, without claiming his privilege, he must then proceed and state the whole; but, if what he discloses is not clearly a part of the transaction, he should not be compelled to proceed.—Coburn v. Odell, 30 N. H. (10 Fost.) 540.

[l] (N. J. 1830) A question may be put to a witness, though the answer to it may criminate or disgrace him; but the witness is not bound to answer.—Fries v. Brugler, 12 N. J. Law (7 Halst.) 79, 21 Am. Dec. 52.

[m] (N. Y. 1861) A witness cannot refuse to answer, because his answer might assist in pointing out to the prosecuting officer sources of evidence to sustain a criminal suit against himself, of which otherwise such officer could have had no knowledge.—People v. Kelly, 24 N. Y. 74.

[n] (N. Y. 1861) If a witness objects to a question on the ground that an answer would criminate himself, he must allege in substance that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense; but if, either by reason of a positive statutory prohibition or otherwise, the case is so situated that a repetition of his evidence in a prosecution against him is impossible, his privilege of refusal to answer is gone. —People v. Kelly, 24 N. Y. 74, 24 How. Prac. 369.

[o] (N. Y. 1882) In a proceeding to revoke letters of administration granted on the estate of an alleged decedent, on the ground that he was alive, a witness was produced who stated on his direct examination that he was the alleged decedent, and on his cross-examination testified as to the events of his life prior to a certain year, in which, according to his statements, he left Boston. On being asked whither he went on leaving Boston, he declined to answer, on the ground that his reply would tend to charge him with a crime. He refused to name any person with whom he had lived or associated during the period, or to state any business or occupation in which he had been engaged. He testified that he had neither been in prison nor under arrest; but, when asked whether he had been charged with crime, he again invoked his privilege, and replied that he would not answer in that regard. *Held*, that since, at the time of the refusal, no subject had been broached which suggested the possibility of witness' connection with the commission of a crime, his statement that his answer might tend to incriminate him was an insufficient basis of his claim of privilege. — Youngs v. Youngs, 5 Redf. Sur. 505.

[p] (N. Y. 1894) Though a witness has testified that he was in no way connected with a criminal offense, yet, where the circumstances are such as to place him in danger of a prosecution therefor, he may refuse to testify on the ground that his evidence may tend to criminate him.—People v. Forbes, 143 N. Y. 219, 38 N. E. 303.

[q] (N. C. 1868) Laws 1866, c. 43, makes parties who are on trial for the same criminal offense, charged in the same indictment, competent and compellable to give evidence for or against each other, save that a party is not to give evidence for or against himself, or for or against his wife (and e converso), and is not compellable to answer any question tending to criminate himself.—State v. Rose, 61 N. C. 406.

[r] (Tenn. 1860) Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge, the witness is not bound to answer the question. J.

the fact to which he is interrogated forms but a link in the chain of testimony which would convict him, he is protected, without being required to explain how he might be criminated by the answer; and if it is one of a series of questions, the answers to all of which would establish his criminality, he cannot be compelled to answer that or any of the series, and the court is bound to instruct him whether his answer would tend to criminate or expose him.—Lea v. Henderson, 41 Tenn. (1 Cold.) 146.

[s] (Va. 1874) By the eighth section in the Bill of Rights, providing that in all criminal prosecutions the defendant cannot be compelled to give evidence against himself, he is not only protected from giving evidence against himself on his own trial, but also from giving evidence on the trial of another, where such evidence will tend to criminate him.—Cullen v. Commonwealth, 24 Grat. 624.

[t] (Va. 1882) Where the fact concerning which a witness is interrogated forms even a single remote link in the chain of testimony which may implicate him in a crime or misdemeanor, he is not bound to answer.—Langhorne v. Commonwealth, 76 Va. 1012.

§ 1027. Particular subjects of inquiry.

[a] (U. S. 1804) A witness is not bound to answer the question whether he sold certain stolen goods to defendant.—United States v. Moses, Fed. Cas. No. 15,824 [1 Cranch, C. C. 170].

[b] (U. S. 1807) The secretary of a person charged with treason cannot refuse to answer whether he has present knowledge of the cipher in which is written a letter purporting to have been written by the accused, as any direct answer could not tend to implicate him.—United States v. Burr, Fed. Cas. No. 14,692e.

[c] (U. S. 1879) In a suit by an assignee in bankruptcy to recover the value of property alleged to have been fraudulently transferred by the bankrupt, the bankrupt when called as a witness need not answer whether the defendant had paid him for the property; he having been indicted for putting goods out of the way to defraud creditors.—Tyler v. Angevine, Fed. Cas. No. 14,306 [15 Blatchf. 536].

[d] (U. S. 1894) The vendor of an infringing devise, who is not a party to the suit, may be compelled to testify to the purchase and use thereof by defendant, without violating the constitutional provision that no witness shall be compelled to testify against himself in any criminal case; for Rev. St. §§ 4919, 4921 [U. S. Comp. St. 1901, pp. 3394, 3395], do not subject an infringer to penalties or forfeitures, but merely authorize the court in its discretion, and "according to the circumstances of the case," to impose additional damages.—Masseth v. Johnston (C. C.) 59 Fed. 613.

[e] (Ark. 1855) If the object of questions is to implicate the witness in the compounding of a felony, and thereby to discredit him, he will be privileged from answering.—Pleasant v. State, 15 Ark. 624.

[f] (Cal. 1870) A witness may refuse to answer whether he was previously convicted of petit larceny.—People v. Reinhart, 39 Cal. 449.

[g] (Cal. 1894) Const. art. 1, § 13, provides that no one shall be compelled, in any criminal case, to be a witness against himself. Section 154, Pen. Code, provides that every debtor who fraudulently sells or conceals his property with intent to defraud or delay his creditors is punishable by fine or imprisonment, or both. Petitioner was adjudicated an insolvent, and was cited to appear before the court and be examined regarding his disposition of his property. *Held*, that he was not obliged to answer questions relating to his fraudulent disposition of his property.—Ex parte Clarke, 103 Cal. 352, 37 Pac. 230.

[h] (Ill. 1890) The question as to whether witness was indebted to one of the parties for whom he was business manager, without his consent, does not carry with it any necessary implication of crime, and it is error to exclude it.—Moline Wagon Co. v. Preston, 35 Ill. App. 358.

[i] (Ind. 1843) A penalty is inflicted by an act of 1840 for issuing any small bill, for the purpose of passing the same as a circulating medium; and therefore a witness cannot be required to answer a question which would be evidence against him on such a charge.—Lister v. Boker, 6 Blackf. 439.

[j] (Iowa, 1865) A constable was asked, when a witness before the grand jury, whether he knew of any house in a certain place "where spirituous liquors are sold." He declined to answer on the ground that Revision, § 1578, makes it a misdemeanor for a peace officer who knows of a violation of the liquor law not to inform of the same, and that his answer would criminate himself. *Held*, that the question must be answered, as it referred to a time so recent that the answer, instead of criminating him, was in accord with his duty under the statute.—Hunt v. McCalla, 20 Iowa, 20.

[k] (Iowa, 1876) A witness stated that defendant had admitted to him, in the presence of several others, his guilt of the crime of which he stood charged. *Held*, that the witness might be compelled to give the names of the others present at the time the confession was made, though it may tend to incriminate him.—State v. Fay, 43 Iowa, 651.

[l] (La. 1844) Interrogating an attorney to ascertain whether he was the author of a contemptuous petition and his motive, and compelling him to answer, is not a violation of the constitutional provision that "in criminal prosecutions no one shall be compelled to give evidence against himself."—State v. Soule, 8 Rob. 500.

[m] (Me. 1845) A witness may refuse to answer whether he has not testified falsely in a former case in which he had been called by the same party, because it might criminate himself.—State v. Blake, 25 Me. (12 Shep.) 350.

[n] (Mass. 1886) At the trial of a case, a witness who has testified that she had lived in a certain house is not obliged to answer an inquiry as to the character of the house, where it sufficiently appears that the answer would tend to criminate her.—Commonwealth v. Trider, 143 Mass. 180, 9 N. E. 510.

[o] (Minn. 1868) In an action for libel, it is error to require a witness to testify whether he wrote the libel in question, the effect of an affirmative answer being to subject the witness to a criminal prosecution.—Simmons v. Holster, 13 Minn. 249 (Gil. 232).

[p] (Minn. 1890) On an indictment for forgery where the person whose name was forged is called, for the state, to prove that what purports to be his signature is a forgery, he is not entitled to claim the privilege of silence on the ground that his answer might criminate himself.—State v. Thaden, 43 Minn. 253, 45 N. W. 447; Same v. Tall, 43 Minn. 273, 45 N. W. 449.

[q] (N. H. 1865) In an action against a railway conductor, charging him with collecting fares and not accounting to the company therefor, the defendant was justified in refusing, on the ground that it would tend to criminate himself, to answer whether he had passed persons free in the cars, or whether he had sold tickets below the regular prices.—State v. Farmer, 46 N. H. 200.

[r] (N. Y. 1832) A witness who has preferred a complaint for felony, and who was examined before the magistrate and his examination reduced to writing, is not bound, when testifying on the trial, to answer as to the evidence given

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by him on making his complaint, and on his examination before the magistrate, as the answer might tend to subject the witness to a prosecution for perjury.—Bellinger v. People, 8 Wend. 595.

[s] (N. Y. 1845) In a suit on a note by a bank, the defendant called the cashier to prove that usury was taken by the bank in discounting the note. *Held* that, if the cashier received the usury in behalf of the bank, he would be liable to an indictment under the statute making usury a misdemeanor, and would be, therefore, privileged from testifying.—Curtis v. Knox, 2 Denio, 341.

[t] (N. Y. 1847) A plaintiff on the record, or plaintiff in interest, when called upon to testify under the usury act of 1837, cannot be compelled to disclose facts tending to show that the note, to recover which the suit is brought, was discounted by him in violation of the statute (1 Rev. St. p. 595, § 28) concerning the discounting of notes, etc., by officers and agents of banking corporations.—Henry v. Bank of Salina, 1 N. Y. (1 Comst.) 83.

[u] (N. Y. 1854) A witness, formerly proprietor of a mercantile agency, is excused from answering as to communications made by defendant as a correspondent of the agency to the witness, on the ground that the answer might form a link to convict the witness of libel.—In re Tappan, 9 How. Prac. 394.

[uu] (N. Y. 1860) Since the act of 1850, providing that every person who shall knowingly vend any goods, etc., having thereon any forged trade-marks, without disclosing the fact to the purchaser, shall be deemed guilty of a misdemeanor, the defendant, in an action for infringement of trade-mark, cannot be compelled to testify as to whether he has used labels like the plaintiff's, or whether there were on any of his bottles labels like those of the plaintiff, or whether he has put a different article from the plaintiff's into bottles and labeled them with labels like the plaintiff's; for affirmative answers to such questions might, in connection with other testimony, tend directly to convict him of vending bottles, etc., with counterfeit labels.—Byass v. Sullivan, 21 How. Prac. 50.

[v] (N. Y. 1860) On the trial of an action brought to recover, or upon a reference ordered to ascertain, the damages sustained by plaintiff by the use by defendant of plaintiff's trade-mark, defendant cannot be compelled to answer questions tending to show that defendant has sold articles manufactured by himself with a label thereon imitating, resembling, or purporting to be the label of the plaintiff, which act would be an offense, within chapter 123, § 3, Laws 1850.—Byass v. Smith, 17 N. Y. Super. Ct. (4 Bosw.) 679.

[vv] (N. Y. 1893) A witness need not answer a question as to whether or not she had on a former occasion committed perjury, since an answer might tend to convict her of the crime.—Friess v. New York Cent. & H. R. R. Co., 67 Hun, 205, 22 N. Y. Supp. 104, judgment affirmed (1893) 140 N. Y. 639, 55 N. E. 892.

[w] (N. Y. 1894) On an investigation before a grand jury of a death caused by the generation of gas in jugs which had been provided for that purpose in order to disturb a meeting of a class at college, a student was asked whether he knew when, where, and by whom the jugs were purchased, and to whom they were delivered after they were purchased. *Held*, that such questions tended to criminate the witness, though he had previously stated that he did not know what the contents of the jugs were at the time of the purchase, or what the jugs were intended for.—People v. Seaman (Sup.) 8 Misc. Rep. 152, 29 N. Y. Supp. 329.

[ww] (N. C. 1823) A witness cannot be asked if he did not in conversation state the facts to be otherwise than he testified, as he cannot be compelled to answer any question tending to render him liable to criminal prosecution.—State v. Simpson, 9 N. C. 580.

[x] (Pa. 1846) As Act Feb. 17, 1762, makes it an indictable offense to purchase a lottery ticket, a witness could not be compelled to answer whether or not he had purchased a ticket.—In re Doran, 2 Pars. Eq. Cas. 467.

[xx] (Pa. 1887) In an action for breach of promise, a witness was asked whether plaintiff was a chaste woman. *Held* a proper question, which he could answer categorically without criminating himself.—McFadden v. Reynolds, 11 Atl. 638.

[y] (Tenn. 1852) Champerty is an indictable offense, and one who is a party to a champertous agreement, whether a party to the suit or not, cannot be compelled, as a witness upon the trial of a cause, to make a disclosure touching the agreement, the tendency of which (if voluntarily made) would be to expose him to punishment, or which might be used against him in a prosecution for the offense.—Douglass v. Wood's Lessee, 31 Tenn. (1 Swan) 393.

[yy] (Va. 1874) It is unconstitutional to require any person engaged in a duel to testify against another prosecuted for having fought such duel.—Cullen v. Commonwealth, 24 Grat. 624.

[z] (Wash. 1891) A witness may refuse to answer whether she is a prostitute, on the ground that such evidence may tend to criminate her.—State v. Coella, 3 Wash. St. 99, 28 Pac. 28.

[zz] (Wis. 1868) In an action to try title to an office, it is error to compel a witness to testify whether he voted, when the evidence would tend to criminate himself.—State v. Olin, 23 Wis. 309.

§ 1028. —— Gaming.

[a] (U. S. 1807) A witness must answer whether he saw the defendant at a public gaming table, inasmuch as the answer cannot criminate or tend to criminate the witness himself.—Ex parte Lindo, Fed. Cas. No. 8,364 [1 Cranch, C. C. 445].

[b] (Ill. 1886) A witness, being asked by a grand jury if he knew of any persons having played with cards for money within 18 months in the county, replied: "I cannot answer without criminating myself or divulging the names of witnesses who would criminate me, and of which witnesses the people have no knowledge, as I believe, other than would be derived from my testimony." He was sent before the court, and the answer adjudged evasive; but he refused to make further answer. *Held*, that he was properly fined for contempt.—Smith v. People, 20 Ill. App. (20 Bradw.) 591.

[c] (Ill. 1891) One who has taken part in a gambling game cannot be compelled to testify that the other players gambled, since such an answer would tend to criminate him.—Minters v. People, 39 Ill. App. 438, reversed (1891) 139 Ill. 363, 29 N. E. 45.

[d] (Ind. 1846) A horse race is a game, and is therefore within the statute enacting that any person legally called to give evidence against another for gaming shall be deemed a competent witness to prove such gaming, although such person may have been concerned as a party, and may be compelled to testify as in the case of other witnesses.—Cheesum v. State, 8 Blackf. 332, 44 Am. Dec. 771.

[e] (Iowa, 1850) A witness cannot refuse to answer the question whether he knows of any one, other than himself, being engaged in gaming within two years in M. county.—Richman v. State, 2 G. Greene, 532.

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[f] (Mo. 1829) A witness summoned to appear before the grand jury and give evidence, and refusing to tell "what person or persons have so bet on faro," other than himself, and not naming himself, is liable to imprisonment.—Ward v. State, 2 Mo. 120, 22 Am. Dec. 449.

[g] (Ohio, 1835) A party to a wager cannot be compelled to testify, in an action qui tam to recover the penalty for betting.—Anderson v. State, 7 Ohio (7 Ham.) 250, pt. 2.

§ 1029. —— Usury.

Examination of bank president in action to subject bank to penalty for usury, see ante, § 1019 [c].

[a] (N. Y. 1809) In an action on a note, a witness, who was the real plaintiff, and who was interested and concerned in the contract from the beginning, may decline to answer a question, on being examined by the adverse party, relating to the alleged usury, on the ground that his answer might subject him to a criminal prosecution.—Connor v. Bradey, Anth. N. P. 99.

[b] (N. Y. 1840) Where an action was brought by the holder against the maker of a note, and the defense was usury, the payee who transferred it was held to be privileged from answering questions to show that he had received usurious interest.—Burns v. Kempshall, 24 Wend. 360, affirmed Kempshall v. Burns (1842) 4 Hill, 468.

[c] (N. Y. 1846) Evidence of a usurious agreement forms a link in the chain of evidence to show usury actually paid; and therefore a lender cannot, as a witness between other parties, be compelled to testify to such an agreement, where it does not affirmatively appear that he has not received the usury.—Bank of Salina v. Henry, 2 Denio, 155.

[d] (N. Y. 1846) The defendant's counsel, in opening the defense, stated that the teller of the plaintiffs, who were a banking corporation, had discounted the note sued on for a usurious premium, with knowledge that it had been offered to the bank and refused, and then called the teller as a witness to prove these facts. *Held*, that he was privileged from testifying on the ground that his testimony would tend to subject him to a forfeiture of twice the amount of the loan, under the provisions of 1 Rev. St. p. 595, § 28.—Bank of Salina v. Henry, 2 Denio, 155.

[e] (N. Y. 1847) The deducting and retaining a greater amount than the proper discount, at the legal rate of interest, upon discounting a note, is a misdemeanor, under the statute of 1837; and in an action on the note a witness is excused from testifying that he so discounted it.—Henry v. Bank of Salina, 3 Denio, 593, affirming Bank of Salina v. Henry (1846) 2 Denio, 155.

[f] (N. Y. 1857) Where the defense of usury is set up to an action on a note, and the lender of the money, being called as a witness, refuses to testify, on the ground that his answer might criminate himself, the referee, unless he knows that no usury was in fact taken, should not attempt to compel the witness to answer.—Fellows v. Wilson, 31 Barb. 162.

[g] (Ohio, 1863) A mortgagee may be compelled to answer interrogatories as to the consideration of notes which the mortgage was intended to secure, and whether it was not usurious interest.—Mayham v. Coombs, 14 Ohio, 428.

§ 1030. —— Criminal intercourse.

[a] (Ala. 1887) On trial of a female charged with being a common prostitute, a witness may refuse to answer whether he has had sexual intercourse with the accused, on the ground that his answer would tend to criminate him; limitation not having barred a prosecution for such intercourse.—Ex parte Boscowitz, 84 Ala. 463, 4 South. 279, 5 Am. St. Rep. 384.

[b] (Ind. 1853) In a prosecution for bastardy, a witness, introduced by defendant to prove that the complainant had carnal intercourse with another about the time the child is alleged to have been begotten, may be compelled to testify whether he had carnal intercourse with her about that time, she having denied that she had such intercourse with any other than defendant.—Hill v. State, 4 Ind. 112.

[c] (Ind. 1868) Where a witness in a prosecution for bastardy refused to answer whether he had ever had sexual intercourse with the relatrix, and it was shown by other witnesses that the circumstances (a secret marriage) were such that the act would not have been criminal, it was *held* that his right to silence was withdrawn.—Ford v. State, 29 Ind. 541, 95 Am. Dec. 658.

[d] (Kan. 1893) Where, in a prosecution for bastardy, a witness declines to answer the question as to whether he had intercourse with the relatrix, on the ground that his answer might render him liable to a criminal prosecution, he cannot be required to answer if it reasonably appear that the answer would expose him to such prosecution, or if the fact on which he is interrogated would lead to his conviction of a crime.—Stevens v. State, 50 Kan. 712, 32 Pac. 350.

[e] (Mich. 1873) On trial for seduction where the previous chastity of the woman was in issue, a witness may refuse to answer a question as to whether he had had sexual intercourse with her, on the ground that it might incriminate him.—People v. Brewer, 27 Mich. 134.

[f] (N. J. 1811) A witness in an action for seduction may refuse to testify whether he has ever had criminal connection with the person seduced.—Vaughn v. Perine, 3 N. J. Law (2 Penning.) 728, 4 Am. Dec. 411.

[g] (N. C. 1895) Under Const. art. 1, § 11, providing that no person shall be compelled to give evidence against himself, a witness in divorce proceedings cannot be compelled to answer whether he ever had criminal intercourse with the wife.—Smith v. Smith, 116 N. C. 386, 21 S. E. 196.

[h] (Tenn. 1858) In an action for seduction, the female in being examined as a witness cannot be interrogated as to acts of unchastity with others, where such acts would subject her to a criminal prosecution.—Reed v. Williams, 37 Tenn. (5 Sneed) 580, 73 Am. Dec. 157.

§ 1031. Persons entitled to privilege.

Persons entitled to raise objection, see post, §§ 1058–1060.

[a] (Iowa, 1886) Although selling intoxicating liquors contrary to law is, in Iowa, a criminal offense, yet the buyer is not an abettor or particeps criminis, and cannot refuse to testify whether he had bought liquor on the ground that the answer would tend to criminate him.—Wakeman v. Chambers, 69 Iowa, 169, 28 N. W. 498, 58 Am. Rep. 218.

[b] (Me. 1844) Where one is indicted for being a seller of spirituous liquors without license, another who was to participate in the profits of the business cannot claim, for that reason, to be exempted from testifying to the commission of the offense.—State v. Davis, 23 Me. (10 Shep.) 403.

[c] (Md. 1885) Acts 1882, c. 112, provide that in case of the illegal sale of liquor by any company or corporation, "each or any member of such company, corporation, or association shall be liable, and shall suffer imprisonment as prescribed in this act." *Held* that, under an in-

dictment of an incorporated club, a member could not be compelled to testify to facts tending to prove the guilt of the club.—Chesapeake Club v. State, 63 Md. 446.

[d] (Mass. 1839) The purchaser of spirituous liquor sold in violation of St. 1838, c. 157, § 1, does not, under ordinary circumstances, subject himself to any penalty, either at common law, as inducing the seller to commit a misdemeanor, or under the statute, and may therefore be compelled by imprisonment to testify as to such sale.—Commonwealth v. Willard, 39 Mass. (22 Pick.) 476.

[e] (Tenn. 1883) The statute making it an offense to retail spirituous liquors on Sunday is intended to punish the seller, not the buyer; and the latter cannot, therefore, refuse to testify on the ground that he might criminate himself.—Page v. State, 79 Tenn. (11 Lea) 202.

§ 1032. —— Testimony by husband or wife tending to criminate the other.

Compelling husband or wife to testify in general, see ante, § 136.

[a] (Ala. 1884) A husband or wife cannot be compelled to give testimony which, even in a collateral matter, tends to criminate the other, though it may be received in the absence of objection by the witness or opposite party.—Woods v. State, 76 Ala. 35, 52 Am. Rep. 315.

[b] (Pa. 1870) While a husband or wife of a defendant not on trial is not necessarily an incompetent witness for the commonwealth, where on a joint indictment there is a separate trial, yet it is, notwithstanding, his or her privilege to decline to testify to such facts as would criminate the other.—Commonwealth v. Reid, 8 Phila. 385.

§ 1033. Compelling witness to state reasons.

[a] (Iowa, 1888) Under Code 1873, § 3647, providing that a witness shall not be compelled to answer a question when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, a witness is not prima facie excused from answering questions asked in support of allegations of a petition that witness' husband had conveyed land to her in fraud of creditors, and that she had received it with like intent, and without consideration, unless she can show reasonable grounds for believing that her answer to any particular question would expose her to public ignominy, or to prosecution under Code, § 4074, punishing with fine and imprisonment parties and privies to fraudulent conveyances, who knowingly put them in use as made in good faith. Neither ignominy nor criminality is necessarily involved in such conduct, and there is nothing to show but that, were she criminal in the matter, her prosecution would be barred by limitation.—Mahanke v. Cleland, 76 Iowa, 401, 41 N. W. 53.

[b] (N. H. 1854) Whether the answer of a witness will tend to criminate him is a point which the court will determine under all the circumstances of the case, but without requiring him fully to explain how it would criminate him. Unless the court can see that he will not be criminated, the privilege will be recognized and protected.—Janvrin v. Scammon, 29 N. H. (9 Fost.) 280.

[c] (N. H. 1865) A defendant will not be compelled to show fully how an answer will tend to criminate himself, or how it will have the effect of disclosing the names of his witnesses and the manner of proving his case, if it reasonably appears to the court that the answer will have such effect.—State v. Farmer, 46 N. H. 200.

[d] (N. Y. 1882) If a witness, because an answer to a question otherwise unobjectionable might tend to criminate or degrade him, refuses to answer it, he may be compelled to give his reason and claim his privilege.—New v. Fisher, 11 Daly, 308.

[e] (N. Y. 1893) A witness need not answer a question as to whether or not she had on a former occasion committed perjury, since an answer thereto might tend to convict her of the crime, and she need not give any reasons for claiming such privilege.—Friess v. New York Cent. & H. R. R. Co., 67 Hun, 205, 22 N. Y. Supp. 104, judgment affirmed (1893) 140 N. Y. 639, 35 N. E. 892.

§ 1034. Answers on cross-examination.

[a] (Cal. 1880) Where a witness for the prosecution has testified fully as to his own connection with the actual commission of a larceny charged against defendant, he cannot refuse to testify to the general plan which he and defendant entered into with reference to the stealing, on the ground that it would criminate him in other offenses.—People v. Freshour, 55 Cal. 375, 1 Ky. Law Rep. 224.

[aa] (Conn. 1859) Where a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on the subject, even though his answers may criminate him.—Town of Norfolk v. Gaylord, 28 Conn. 309.

[b] (Ill. 1880) A witness in a civil action, having testified that any judgment in the case went to his benefit, is privileged from answering, on cross-examination, a criminating question as to whether he has gone through bankruptcy without mention of this claim.—Taylor v. McIrvin, 94 Ill. 488.

[c] (Ill. 1890) A witness will not be excused from answering on cross-examination a question tending to impeach his impartiality, unless he claims his privilege on the ground that he will, by answering, expose himself to punishment; mere disgrace, without danger of punishment, is no excuse.—Moline Wagon Co. v. Preston, 35 Ill. App. 358.

[d] (Md. 1876) A party to a civil action, who becomes a witness "at his own request," waives the constitutional privilege of exemption from furnishing or giving evidence against himself tending to criminate; and his acts may be inquired about on cross-examination, though tending to prove him guilty of a crime for the purpose of negativing the truth of his statements made on his direct examination.—Roddy v. Finnegan, 43 Md. 490.

[e] (Mich. 1867) An accomplice testifying for the government, on cross-examination need not disclose his criminality in other cases.—Pitcher v. People, 16 Mich. 142.

[f] (Mich. 1879) A merchant, as the prosecuting witness in a trial for larceny from his store, testified that he had once been a member of a banking firm. He was asked on cross-examination, "Did you not, while a member of that firm, extract from an envelope securities which were left in your vault for safe-keeping, and use their proceeds in stock speculations in New York?" *Held*, that the question should have been allowed, as tending to draw out evidence relative to his moral character, although the witness might properly have refused to criminate himself.—People v. Arnold, 40 Mich. 710.

[g] (Mo. 1880) A witness upon cross-examination may be compelled to answer any questions tending to test his credibility, or to shake his credit by injuring his character, however irrelevant to the facts in issue, or however, disgraceful the answer would be to himself, except where his answer would expose him to a criminal charge.—Muller v. St. Louis Hospital Ass'n, 73 Mo. 242.

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[h] (Mo. 1886) One who has volunteered his testimony in behalf of one indicted cannot be required to submit to a cross-examination on objection that his answers will expose him to a criminal charge growing out of the transaction concerning which he has volunteered his testimony.—State v. Hall, 20 Mo. App. 397.

[i] (N. D. 1896) For the purpose of affecting the credibility of a witness, it is proper to ask him on cross-examination questions the answers to which may tend to degrade, disgrace, or criminate him, though he may refuse to answer any question the answer to which will tend to criminate him.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[j] (Wis. 1859) On cross-examination, it is proper to ask a witness as to his past and present residence, his occupation, his associates, and whether he has ever assumed different names—these do not tend to criminate him apparently, but may affect his credibility.—Kirschner v. State, 9 Wis. 140.

§ 1035. —— Cross-examination of witness giving incriminating testimony.

[a] (Cal. 1880) If a witness discloses a part of a transaction, with which he was criminally concerned, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline to be cross-examined on the ground that his answer may criminate or disgrace him.—People v. Freshour, 55 Cal. 375.

[b] (Fla. 1896) One who votes at an election to which applies Rev. St. § 2787, imposing a punishment for illegal voting, and who, with full knowledge of his rights, testifies, in a suit wherein the validity of that election is in issue, that he did vote at that election, and that his ballot was received by the judges and inspectors, thereby waives his privilege as to giving incriminatory testimony, and must submit to a regular cross-examination as to his qualifications as a voter.—Ex parte Senior, 37 Fla. 1, 19 South. 652, 32 L. R. A. 133.

[c] (Mass. 1853) If a witness, knowing that he is not bound to testify concerning a fact which may tend to criminate himself, voluntarily answers in part, he may be cross-examined as to the whole transaction.—Foster v. Pierce, 65 Mass. (11 Cush.) 437, 59 Am. Dec. 152.

[d] (Mass. 1858) An accomplice, who has testified to facts criminating the prisoner and himself, cannot afterwards decline on cross-examination to answer a question on the ground that it will criminate himself. But if, after so declining, he offers to submit himself to the examination, a party who refuses the offer has no ground of exception.—Commonwealth v. Price, 76 Mass. (10 Gray) 472, 71 Am. Dec. 668.

[e] (Mass. 1879) A witness, who has voluntarily testified in part on a matter tending to criminate him, cannot afterwards on cross-examination decline to answer a question upon the ground that it will criminate him.—Commonwealth v. Pratt, 126 Mass. 462.

[f] (N. Y. 1855) A witness cannot object that the answer to a question put would criminate himself, if the answer is essential to the understanding of facts already voluntarily stated by him. If the witness has stated part of a transaction which implicates defendant, the latter has a right, by cross-examination, to show that the criminality was on the part of the witness and not on his.—People v. Carroll, 3 Parker, Cr. R. 73.

[g] (Vt. 1840) If the witness, understandingly, waive his privilege, and begin to testify, he must submit to a full cross-examination if required.—Chamberlin v. Willson, 12 Vt. 491, 36 Am. Dec. 356.

§ 1036. Use of evidence obtained in another action.

Protection against use of evidence, see post, § 1068.

Statutory provisions as to use of testimony, see post, §§ 1051, 1052.

[a] (Ky. 1887) It is error to permit the commonwealth to prove, on a trial for being a common gambler, that defendant had testified on the trial of another for suffering gaming that he made his living for the most part by gaming.—Grundy v. Commonwealth, 8 Ky. Law Rep. 876.

[b] (Tex. 1874) The statements of the defendant, when examined as a witness in another case, may be given in evidence by the state against her, there being no intimidation or persuasion, although it did not appear that defendant, when examined as a witness, knew she could decline to criminate herself.—Alston v. State, 41 Tex. 39.

[c] (Tex. 1895) In the examination of certain persons charged with robbery, and before his arrest as an accomplice therein, defendant willingly testified, without claiming his privilege to refuse to give evidence which might criminate him. *Held*, that such testimony was admissible against defendant on his own trial.—Armstrong v. State, 34 Tex. Cr. R. 248, 30 S. W. 235.

§ 1037. Promise of exemption from prosecution.

[a] (N. Y. 1894) A witness cannot refuse to testify before the grand jury on the investigation of a charge against another person on the ground that his testimony may tend to criminate him, where he has been promised exemption from prosecution on any evidence which he should give.—In re Taylor (O. & T.) 8 Misc. Rep. 159, 28 N. Y. Supp. 500.

[b] (Tenn. 1883) On the trial of a liquor dealer for illegally selling liquor, his barkeeper, who, if he had made a sale, might also have been indicted, could not be compelled to answer a question which might tend to criminate him, though the attorney general stated in open court that he would not prefer an indictment against him.—Muller v. State, 79 Tenn. (11 Lea) 18.

7. PRIVILEGE AS TO PRODUCTION OF BOOKS OR DOCUMENTS.

IN GENERAL, § 1038.
PRIVILEGE AS TO PRODUCTION OF PARTICULAR BOOKS OR DOCUMENTS, § 1039.
PRIVILEGE OF AGENT TO WITHHOLD BOOKS OR DOCUMENTS TENDING TO INCRIMINATE PRINCIPAL, § 1040.
RIGHT TO SEAL UP PARTS OF BOOKS, § 1041.

Production and inspection of writings before trial affected by character of evidence sought to be disclosed, see "Discovery," vol. 16, cc. 2141, 2142, § 117.

§ 1038. In general.

[a] (U. S. 1890) Where the testimony of a witness before a grand jury, which is investigating alleged violations of the interstate commerce law by the agent of a railroad company, shows that such witness is not himself guilty of the offense, he cannot refuse to produce certain documents demanded by the grand jury on the ground that their production will tend to criminate him.—In re Peasley (C. C.) 44 Fed. 271.

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[b] (Ill. 1896) Where a witness is excused from testifying on the ground that his answers will tend to incriminate him, he cannot be compelled to produce books and papers which will have the same effect.—Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781.

[c] (Mass. 1830) A witness may be compelled, under a subpœna duces tecum, to produce a document in his possession, unless he has a valid excuse for withholding it, though its production will adversely affect his pecuniary interest.—Bull v. Loveland, 27 Mass. (10 Pick.) 9.

[d] (Mass. 1859) It is no ground for the refusal of a witness to produce books or papers, when required by lawful authority, that they are private.—Burnham v. Morrissey, 80 Mass. (14 Gray) 226, 74 Am. Dec. 676.

[e] (N. Y. 1826) A party will not ordinarily be compelled to produce books or papers to furnish evidence against himself.—Utica Bank v. Hillard, 5 Cow. 419.

[f] (N. Y. 1860) The same rule of law which excuses a witness from answering questions which may tend to convict him of a crime or misdemeanor excuses him also from producing books or papers the contents of which may be used against him, and tend to the same result; but it must be shown that the books in question would have such a tendency.—Byass v. Sullivan, 21 How. Prac. 50.

§ 1039. Privilege as to production of particular books or documents.

[a] (U. S. 1868) A tobacco manufacturer will be required to produce his books before the assessor of internal revenue, notwithstanding a criminal proceeding against him; but he will be allowed to object to the exhibit of any particular entry as tending to criminate himself. —In re Lippman, Fed. Cas. No. 8,382 [3 Ben. 95].

[b] (U. S. 1875) Where an information is filed under the internal revenue laws against the distillery and other property, and an order is made requiring the claimants to produce books and papers under Act June 22, 1874, c. 391, § 5, 18 Stat. 187 [U. S. Comp. St. 1901, p. 2019], the claimants cannot object to the production of such evidence on the ground that they are required to testify against themselves in a criminal case. Such a proceeding is not criminal, and the claimants, strictly speaking, are not parties to the proceeding, and a forfeiture of the property does not in any way convict them.—United States v. Distillery No. 28, Fed. Cas. No. 14,966 [6 Biss. 483].

[c] (Mass. 1830) In an action on a note, a witness, served by plaintiff with a subpœna duces tecum to produce the note, testified that the defendant had assigned his property to the witness, who was a creditor, and that the plaintiff and other creditors had placed their demands, including the note in question, in the hands of witness for collection, agreeing that he might furnish stock to the defendant to work up for the benefit of the creditors, and that the proceeds of all the property should be applied to the repayment of the advances made by the witness, and the surplus to the payment of the demands, and that a large sum was due to the witness on account of his advances. *Held*, that the witness had such an equitable interest in the note that the plaintiff was not entitled to have him compelled to produce it.—Bull v. Loveland, 27 Mass. (10 Pick.) 9.

[d] (S. C.) A surety in a sheriff's bond, who, after the death of the sheriff, got possession of his books, was not allowed to excuse himself from the production of the books in evidence, on the ground that they might furnish evidence to charge him civilly.—(1810) Hawkins' Ex'r v. Sumter, 4 Desaus. 102; (1814) Hawkins' Ex'rs v. Same, Id. 446.

§ 1040. Privilege of agent to withhold books or documents tending to incriminate principal.

[a] (U. S. 1890) An officer of a railway company doing business between states, when a witness before the grand jury, investigating alleged violations of the interstate commerce law, cannot refuse to produce certain documents demanded by the grand jury, on the ground that their production would tend to criminate the company, as such a company is not liable criminally for violations of the interstate commerce law, nor subject to its penalties and forfeitures.—In re Peasley (C. C.) 44 Fed. 271.

[b] (Iowa, 1886) The agent of an express company required by a subpœna to produce certain books of the corporation, for the purpose of showing that it has been guilty of a violation of the liquor laws, cannot refuse, under Code 1873, § 3647, to produce the books, because they would incriminate his employers, and will be guilty of contempt if he fails to obey the subpœna.—United States Exp. Co. v. Henderson, 69 Iowa, 40, 28 N. W. 426.

§ 1041. Right to seal up parts of books.

[a] (N. Y. 1847) It is the right of a party, when required to produce books for inspection, if such books contain accounts and transactions which in no way relate to the subject of examination, to seal up such parts of the books. —Titus v. Cortelyou, 1 Barb. 444.

8. PRIVILEGE OF ACCUSED IN CRIMINAL PROSECUTION.

IN GENERAL, § 1042.
ACTIONS OR PROCEEDINGS IN WHICH PRIVILEGE MAY BE EXERCISED, § 1042½.
CROSS-EXAMINATION, § 1043.
—— QUESTIONS AS TO PREVIOUS FAILURE TO TESTIFY, § 1044.
—— EXHIBITION OR TEST IN PRESENCE OF JURY, § 1045.
—— QUESTIONS AS TO OTHER OFFENSES, § 1046.

§ 1042. In general.

[a] (N. Y. 1890) Physicians who were sent to the jail to examine a prisoner accused of murder, whose defense was mental irresponsibility, may testify for the prosecution as to his mental capacity, as such visit did not result in compelling the accused to give evidence against himself.—People v. Kemmler, 119 N. Y. 580, 24 N. E. 9.

§ 1042½. Actions or proceedings in which privilege may be exercised.

[a] (U. S. 1893) Under the provision of the contract labor law of Feb. 26, 1885, c. 164, 23 Stat. 332, § 3 [U. S. Comp. St. 1901, p. 1291], that the penalty may be sued for in a civil action, this action, though civil in form, is criminal in nature, and the defendant cannot be compelled to be a witness against himself. —Lees v. United States, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150, following Boyd v. United States (1886) 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.

[b] (Cal. 1893) A proceeding to punish a person for contempt in violating an injunction being criminal in character, the court has no authority to compel him to be sworn as a witness therein, under Const. art. 1, § 13, which declares that no person shall be compelled, in any criminal case, to be a witness against himself. —Ex parte Gould, 99 Cal. 360, 33 Pac. 1112, 37 Am. St. Rep. 57, 21 L. R. A. 751.

[c] (Kan. 1892) Where proceedings for contempt of court are instituted against a party, whereby he is charged with inducing witnesses to absent themselves from court and avoid pro-

cess, it is error for the state to place the accused upon the witness stand to prove the contempt charged, since the offense is also made a crime by statute, and the accused cannot be compelled to give evidence which might criminate himself.—In re Nickell, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315.

[d] (Pa. 1895) Act May 23, 1887, § 10 (P. L. 158), which provides that defendants in criminal trials cannot be compelled to testify, applies to a defendant who is prosecuted for wife desertion; such offense, though not indictable, being of a quasi criminal nature.—Commonwealth v. Reed (Quart. Sess.) 5 Pa. Dist. R. 57.

§ 1043. Cross-examination.

Waiver by accused in criminal prosecution, see post, §§ 1054, 1055.

[a] (Iowa, 1888) After refusing to allow defendants, charged with assault with intent to murder their adopted daughter by neglect and exposure, to be examined by the state as witnesses in reference to the whereabouts of the adoption papers, the court questioned each of the defendants on that point, and they answered in the presence of the jury. *Held* error, the question having a material bearing on their guilt.—State v. Merkley, 74 Iowa, 695, 39 N. W. 111.

[b] (Mich. 1888) When a defendant testifies in his own behalf, he may be cross-examined as any other witness, and may be compelled to testify whether he did not write to a person for money, stating that he would need $500 to clear him.—People v. Howard, 73 Mich. 10, 40 N. W. 789.

[c] (Minn. 1868) In an action for libel against the subscriber of a newspaper advertisement and his amanuensis, announcing that a horse had been stolen, and that the plaintiff was believed to be the thief, it was *held* to be error to ask the amanuensis, after being sworn as a witness, showing him the manuscript identified as the original, "Did you write this paper?"—the answer might have had "a tendency to expose the witness to a penal liability."—Simmons v. Holster, 13 Minn. 249 (Gil. 232).

[d] (N. D. 1890) Where the accused takes the stand as a witness, it is not error to require him to testify, on cross-examination, as to his antecedents, and that he had passed under names other than his own, and had been in jail at different times and places, when such testimony is objected to as irrelevant, and not proper cross-examination,—no question of privilege having been presented.—Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

[e] (S. C. 1892) Where one accused of murder goes upon the stand, and, on being asked if decedent had not threatened his life, voluntarily states part of a communication made to him by his wife containing such a threat, he may be compelled to state the balance of the communication, as to the reason given for the threat.—State v. Turner, 36 S. C. 534, 15 S. E. 602.

[f] (Tex. 1896) Under Code Cr. Proc. 1895, arts. 770, 790, allowing defendant in a criminal case to testify in his own behalf, and providing that a confession made by a defendant while in jail cannot be used against him unless he was duly warned, the state cannot examine a defendant, when a witness in his own behalf, as to a confession made by him while in jail, without being warned, for the purpose of laying a predicate for his impeachment, and then show by witnesses that he made the confession.—Morales v. State (Cr. App.) 36 S. W. 435; Id., 36 Tex. Cr. R. 234, 36 S. W. 846, distinguishing Quintana v. State (1891) 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730, and Ferguson v. State (1892) 31 Tex. Cr. R. 93, 19 S. W. 901, and overruling Phillipp v. State (Cr. App. 1896) 34 S. W. 272.

§ 1044. —— Questions as to previous failure to testify.

[a] (Ky. 1896) Cr. Code, § 223, providing that a defendant's failure to testify shall not be commented on, or be allowed to create a presumption against him, does not prevent the asking of defendant, on his trial, why he did not testify on the examining trial.—Taylor v. Commonwealth, 34 S. W. 227.

[b] (Mass. 1895) A defendant in a criminal action, who has become a witness in his own behalf, may be required to disclose the fact that he refused to testify before the grand jury, on the ground that he might thereby criminate himself, for the purpose of attacking his credibility as a witness.—Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189.

§ 1045. —— Exhibition or test in presence of jury.

Experiments in court in general, see "Evidence," vol. 20, c. 1022, § 683.

[a] (U. S. 1887) A party prosecuted in a United States district court for violating the election law, by writing names improperly on the registration book, who on the trial testifies, in his own behalf, that he did not write the names unlawfully written, may be compelled, on his cross-examination, to write the same names on a paper in the presence of the jury, and such paper may be offered in evidence on rebuttal, and the jury permitted to compare it with the writing in the registration book, as this is a legitimate method of cross-examination, and the witness is not thereby compelled to furnish testimony against himself.—United States v. Mullaney (C. C.) 32 Fed. 370.

[b] (Colo. 1896) Where accused becomes a witness in his own behalf, and denies writing a document alleged to be a forgery, he may be required on cross-examination to write in the presence of the jury for the purpose of comparison.—Bradford v. People, 22 Colo. 157, 43 Pac. 1013.

[c] (N. C. 1858) A judge has not the right to compel the defendant in a criminal prosecution to exhibit himself to the inspection of the jury, for the purpose of enabling them to determine his status as a free negro.—State v. Jacobs, 50 N. C. 259.

§ 1046. —— Questions as to other offenses.

[a] (Kan. 1894) A defendant who testifies as a witness in his own behalf may be cross-examined on matters affecting his credibility, though it tends to show him guilty of other offenses.—State v. Wells, 54 Kan. 161, 37 Pac. 1005.

[b] (Ky. 1895) Under the bill of rights providing that no one shall be compelled to give evidence against himself, one testifying in his own behalf cannot be compelled to admit the commission of other offenses which would subject him to punishment.—Saylor v. Commonwealth, 97 Ky. 184, 30 S. W. 390.

[c] (Me. 1881) Under the statute of 1871, providing that an accused shall not be compelled to testify on cross-examination to facts which would convict him of any other crime than that for which he is on trial, an accused is not protected against cross-examination because his answers may implicate him in other criminalities besides the offense with which he is charged, if the connection is such that the proof is relevant to the issue, as such statute only excludes compulsory admission of extraneous offenses, evidence of which is offered merely to affect credibility.—State v. Witham, 72 Me. 531.

[d] (N. D. 1896) A defendant in a criminal case who takes the witness stand in his own behalf is subject to the same rules of cross-examination that govern other witnesses; and

he is required to answer any relevant question tending to convict him of the crime charged, though such answer may also tend to convict him of another crime.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[e] (Tenn. 1894) The prosecution has no right to ask defendant whether he has committed other crimes, which have no connection with the case on trial, defendant being entitled to claim his privilege from self-incrimination.—Clapp v. State, 94 Tenn. (10 Pickle) 186, 30 S. W. 214.

9. CAUTION TO WITNESS.

CAUTION BY COURT IN GENERAL, § 1047.
CAUTION BY COURT AS TO PARTICULAR QUESTIONS, § 1048.

§ 1047. Caution by court in general.

[a] (U. S. 1855) The court will interfere for the protection of witnesses when necessary, but will not instruct them beforehand that they are not bound to criminate themselves.—United States v. Darnaud, Fed. Cas. No. 14,918 [3 Wall. Jr. 143].

[b] (Mass. 1849) It is not the duty of the judge, on the interposition of a party against whom a witness is called to testify, and independent of any objection of the witness, to inform the latter of the rule of law that he is not bound to criminate himself.—Commonwealth v. Shaw, 58 Mass. (4 Cush.) 594, 50 Am. Dec. 813.

[c] (Mass. 1859) It is not error to refuse to instruct a witness that if he would avail himself of his right to refuse to answer interrogatories, on the ground that the answers might criminate him, he must make the objection before answering anything upon that subject.—Commonwealth v. Howe, 79 Mass. (13 Gray) 26.

[d] (N. C. 1885) Where one of two persons jointly indicted for an affray is examined by the state as a witness against his codefendant, it is not error for the trial judge to caution him that he need not tell anything liable to criminate himself before he is cross-examined by counsel for the other defendant.—State v. Weaver, 93 N. C. 595.

[e] (Ohio, 1865) In a trial for murder, if the court instructs a witness, after he is sworn, "that he need not answer any question, if, in his judgment, the answer would criminate him, but that if he once begins to answer on any subject he must disclose all he knows on that point," and the witness afterwards waives the privilege conceded to him by the court, the judgment will not be reversed for such instruction.—Mimms v. State, 16 Ohio St. 221.

[f] (S. C. 1896) On trial for violation of the liquor law, defendants' counsel requested the court to instruct the witnesses for the state that they need not answer the question whether they had ever bought intoxicating liquor from the defendants, for the reason that an affirmative answer would criminate the witnesses, in that the dispensary law makes it a misdemeanor to receive intoxicating liquor. *Held* that, the privilege being personal, the request was properly refused.—State v. Butler, 47 S. C. 25, 24 S. E. 991.

§ 1048. Caution by court as to particular questions.

[a] (Minn. 1859) Though it is the privilege of the witness alone to decline to answer, yet it is the duty of the court to tell the witness of the privilege, and after the witness has clearly signified his design to avail himself of it, the court may refuse to allow similar questions to be put, and if put, may rule them out without consulting the witness in each case.—State v. Bilansky, 3 Minn. 246 (Gil. 169).

[b] (N. Y. 1826) Where a witness is asked a question the answer to which may tend to criminate him, it is the duty of the court to inform him of his privilege to refuse to answer.—Southard v. Rexford, 6 Cow. 254.

[c] (N. Y. 1888) In a civil case, the question at issue being whether defendant had purposely burned certain property, a witness who, according to the complaint, had set the fire at the instance of defendant, declined to tell how the fire arose, for fear of criminating himself. He was then asked if he had, before the fire, any conversation with defendant in regard to setting the fire. The court instructed him that if he answered that question he might be obliged to answer the other. *Held*, that the warning was proper.—Boston Marine Ins. Co. v. Slocovitch, 55 N. Y. Super. Ct. (23 Jones & S.) 452.

10. EFFECT OF RELEASE OR DISCHARGE FROM LIABILITY.

IN GENERAL, § 1049.
PROSECUTION BARRED BY STATUTE OF LIMITATIONS, § 1050.

§ 1049. In general.

[a] (Colo. 1891) After an acquittal upon the criminal charge it is too late for a witness to refuse to answer questions on the ground that his answer may tend to criminate himself.—Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698.

[b] (N. Y. 1858) A pardon does not deprive the witness or party of his privilege of refusing to answer as to the offense.—Moloney v. Dows, 2 Hilt. 247.

§ 1050. Prosecution barred by statute of limitations.

[a] When an offense as against a witness is barred by the statute of limitations, he is bound to testify.

—(Ill. 1851) Weldon v. Burch, 12 Ill. (2 Peck) 374;

(Vt. 1894) Childs v. Merrill, 66 Vt. 302, 29 Atl. 532.

[b] (U. S. 1809) In an action for the penalty for transporting slaves, under Act May 10, 1800 (5 Stat. 167), a particeps criminis, after the statute of limitations has run in his favor, may be compelled to testify against the defendant.—United States v. Smith, Fed. Cas. No. 16,332 [4 Day, 121].

[c] (Ala. 1876) The privilege of a witness to refuse to answer questions tending to criminate him extends only to offenses for which he is liable to be punished, and does not exist when a prosecution therefor is barred by limitations.—Calhoun v. Thompson, 56 Ala. 166, 28 Am. Rep. 754.

[d] (Ga. 1893) The privilege of a witness not to criminate himself continues, though a prosecution for the offense would, if commenced after the time of testifying, be barred by limitation, unless it affirmatively appear that no prosecution against him, commenced in due time, is pending.—Southern Railway News Co. v. Russell, 91 Ga. 808, 18 S. E. 40.

[e] (Ill. 1896) A witness cannot be compelled to give testimony tending to incriminate himself, on the ground that a prosecution for the offense is barred by limitations, unless it is affirmatively shown that no prosecution is pending against the witness.—Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781.

[f] (N. H. 1889) Where a prosecution for a penalty is barred by the statute of limitations, a party cannot refuse to discover matters connected with the transaction on the ground that such evidence will induce an exposure to the penalty.—Manchester & L. R. R. v. Concord R. R., 66 N. H. 100, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

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[g] (N. Y. 1845) Where a witness called to establish a defense of usury declines to testify, on the ground that his evidence may expose him to an indictment or subject him to a penalty, and it appears that the statute of limitations has barred all prosecutions, the court is bound to pronounce against his claim to exemption.—Close v. Olney, 1 Denio, 319.

[h] (N. Y. 1845) Where a witness called to establish a defense of usury declines to testify on the ground that his testimony may subject him to prosecution, and it appears that the period of limitation has elapsed since the making of the usurious agreement, but it does not appear that the usurious premium may have been received within the period of limitation, the witness may be compelled to disclose the absence of an offense within the period of limitation, by an examination for that purpose so conducted as not to infringe his privilege.—Close v. Olney, 1 Denio, 319.

[i] (N. Y. 1847) Where a party desires to examine a witness who objects to answer on the ground that he would criminate himself, and the party sets up that the statute of limitations has run against the offense, he must prove, affirmatively, that no indictment was found, or suit commenced, within the period limited by the statute.—Henry v. Bank of Salina, 3 Denio, 593.

[j] (N. Y. 1858) Where a verified complaint alleges matter to the truth of which defendant, if a witness, would be privileged from testifying, the inquiry will not be excluded where an indictment for the offense alleged would be barred by the statute of limitations.—Maloney v. Dows, 2 Hilt. 247.

[k] (N. Y. 1863) In an action to restrain infringement of a trade-mark and to recover damages for counterfeit, defendant cannot refuse to answer or exhibit his books in relation to all sales made three years or more before the inquiry, being protected from criminal prosecution for such sales by the statute of limitations; but he may refuse as to sales subsequent to that time.—Wolfe v. Goulard, 15 Abb. Prac. 336.

[l] (Pa. 1887) A witness was asked in a breach of promise case whether or not he had connection with plaintiff on a certain day more than two years previous. *Held*, that though, to a prosecution for the crime, he could plead the bar of the statute, he could not be compelled to answer.—McFadden v. Reynolds, 11 Atl. 638.

[m] (Tenn. 1887) In a suit by the state against a druggist to collect a tax imposed by law upon retail liquor dealers, the sale of liquors without a license being a misdemeanor, the defendant cannot refuse to testify as to the sales made by him on the ground that he would criminate himself, when the prosecution for the misdemeanor involved in such sale is barred by the statute of limitations.—In re Druggist Cases, 85 Tenn. (1 Pickle) 449, 3 S. W. 490.

[n] (Tex. 1851) If a witness is exempt, by statute, from liability for any offense of which he is compelled to give evidence, or if the offense, as to him, is barred by the statute of limitations, he cannot claim the privilege of not answering, ordinarily, incident to such a case. —Floyd v. State, 7 Tex. 215.

11. EFFECT OF STATUTORY PROTECTION OF WITNESS FROM USE OF EVIDENCE AGAINST HIMSELF.

IN GENERAL, § 1051.
CONSTITUTIONALITY OF STATUTE, § 1052.

Promise of exemption from prosecution, see ante, § 1037.
Protection against use of evidence, see post, § 1068.
—— *by promise not to prosecute, see* ante, § 1037.
Use of evidence in general, see ante, § 1036.

§ 1051. In general.

[a] (U. S. 1892) Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], provides that no "evidence obtained from any party or witness by means of a judicial proceeding * * * shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, * * * in any criminal proceeding, or for the enforcement of any penalty or forfeiture." *Held* that, as this provision would not prevent the use of testimony so obtained to search out other testimony to be used against the witness, the protection afforded is not coextensive with that of the fifth amendment; and hence a witness in any criminal investigation in the federal courts may still refuse to answer on the ground that his testimony will tend to criminate himself.—Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, reversing (C. C. 1890) 44 Fed. 268.

[b] (U. S. 1896) The protection afforded by the act of February 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173] to persons who are required thereby to give self-incriminating evidence in proceedings before the interstate commerce commission, extends to any possible prosecution in the state courts, as well as in the federal courts.—Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

[c] (U. S. 1869) A witness, summoned for examination before an assessor of internal revenue pursuant to Act March, 1865, § 14 (13 Stat. 496), as amended by Act July 13, 1866 (14 Stat. 98), may be compelled to answer questions in regard to the falsity of tax returns of tobacco manufacturers, as disclosures or admissions thus made cannot be used against the witness in criminal prosecutions, under Act Feb. 25, 1868 (15 Stat. 37), entitled an "Act for the protection in certain cases of persons making disclosures as parties or testifying as witnesses."—In re Phillips, Fed. Cas. No. 11,097.

[d] (U. S. 1871) Since the passage of Act Feb. 26, 1868 (15 Stat. 37), for the protection of persons making disclosures as parties or testifying as witnesses, a person who is required, under Act June 30, 1864, § 14, as amended by Act July 13, 1866, § 9 (14 Stat. 101), to produce his books and give evidence before an assessor of internal revenue, cannot refuse to give such evidence on the ground that the testimony may be used against him on some future trial for the commission of a crime.—In re Strouse, Fed. Cas. No. 13,548 [1 Sawy. 605].

[e] (U. S. 1871) Under Act Feb. 25, 1868 (15 Stat. 37), a person may be compelled in a judicial proceeding to testify to matters tending to criminate himself, but no use can be made of such testimony against the witness in a criminal proceeding.—United States v. Brown, Fed. Cas. No. 14,671 [1 Sawy. 531].

[f] (U. S. 1872) As, under Act Feb. 25, 1868 (15 Stat. 37), testimony offered by a witness can in no way be used against him, he is not privileged to refuse to answer.—United States v. Williams, Fed. Cas. No. 16,717.

[g] (U. S. 1875) Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], providing that "no discovery or evidence obtained by means of any judicial proceeding from any party or witness * * * shall be given in evidence, or in any manner used, against such party or witness or his property or estate, in any court of the United States, * * * for the enforcement of any penalty or forefeiture by reason of any act or omission of such party or witness," does not apply to the books and papers of a party seized on a warrant under Act March 2, 1867, § 2 (14 Stat. 547), offered on trial of an action for

violation of customs laws.—United States v. Hughes, Fed. Cas. No. 15,417 [12 Blatchf. 553].

[h] (U. S. 1883) In the United States courts, since the passage of the act of February 25, 1868 (section 860, Rev. St. [U. S. Comp. St. 1901, p. 661]), preventing any incriminating evidence being used against a witness or his property, the reason of the rule permitting a witness to refuse to testify on the ground that his evidence may incriminate him having ceased, the rule should no longer be upheld, nor the privilege of the witness on this ground be sustained.—United States v. McCarthy (C. C.) 18 Fed. 87, 21 Blatchf. 469.

[i] (U. S. 1890) Under Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], providing that "no * * * evidence obtained from a party or witness by means of a judicial proceeding * * * shall be given in any evidence, or in any manner used against him * * * in any court of the United States, in any criminal proceeding," a witness before a grand jury which is investigating alleged violations of the interstate commerce law by a certain railroad company cannot claim the privileges of the fifth amendment to the United States constitution, which provides that no person shall be compelled to be a witness against himself in a criminal case, and refuse to answer questions on the ground that the answer would tend to criminate him.—In re Counselman (C. C.) 44 Fed. 268.

[j] (Ark. 1853) Where two persons unite in the commission of a crime (as in gaming), one of them may be compelled to give evidence on the trial of an indictment against the other; it being provided by statute that "the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense," and thus he is protected from self-accusation, and his common-law and constitutional privilege is secured to him.—State v. Quarles, 13 Ark. (8 Eng.) 307.

[k] (Ga. 1895) One who conducts a lottery in violation of Code, § 4549b, is not guilty of gaming, within section 4545, providing that on the trial of any person guilty of that offense, among others any other person who played at the same time shall be a competent witness, and compelled to give evidence, and that nothing then said by such witness shall at any time be received against him in any prosecution.—Henderson v. State, 95 Ga. 326, 22 S. E. 537.

[l] (Ind. 1874) Under a statute such as 2 Gav. & H. St. 410, § 89, which provides that any person called as a witness to testify against another for gaming is a competent witness, although he may have been concerned as a party, but shall not be liable to indictment or punishment, to exempt a person from prosecution or punishment on the ground that he has been compelled to testify as a witness, it must appear that he was compelled to testify against another for gaming. One who was compelled to testify touching a wager on the result of an election is not exempted.—State v. Henderson, 47 Ind. 127.

[m] (Ind. 1877) On a prosecution for betting money on the result of an election, either of the parties to the wager may be compelled to testify concerning the transaction, under 2 Rev. St. 1876, p. 395, § 8; but if compelled so to testify, he cannot be prosecuted and punished therefor.—Frazee v. State, 58 Ind. 8.

[n] (Ind. 1888) Under Rev. St. § 1800, providing that, whenever any person is required to testify touching the commission of any misdemeanor, his evidence therein shall not be used in any prosecution against him, and he shall not be liable to punishment for such offense, a prosecuting witness on a trial for rape may not, on the ground that the answer may criminate her, refuse to testify whether she voluntarily submitted to sexual intercourse with one of defendants a short time before the alleged rape.—Bedgood v. State, 115 Ind. 275, 17 N. E. 621.

[o] (Ky. 1887) Under the statute providing that "in any prosecution for a penalty against gaming it shall be no exemption for a witness that his testimony may criminate himself; but no such testimony given by the witness shall be used against him in any prosecution except for perjury"—when a self-criminating answer is given to a question asked by the commonwealth, whether given without objection or not, it must be conclusively presumed on the trial of that witness for any offense except perjury that the question was proper, the answer material, and that it was such testimony as the statute will not permit to be used against him.—Grundy v. Commonwealth, 8 Ky. Law Rep. 876.

[p] (N. H. 1878) A statute which provides that a clerk, servant, or agent shall not be excused from testifying against his principal, but that his testimony so given shall not in any prosecution be used as evidence against himself, and that he shall not be thereafter prosecuted for any offense so disclosed by him, does not deprive the witness of the protection afforded by the provision of the bill of rights, that no subject shall be compelled to accuse or furnish evidence against himself.—State v. Nowell, 58 N. H. 314.

[q] (N. Y. 1879) Under Laws 1858, c. 190, § 9, authorizing the board of supervisors to send for persons and papers and to examine the county treasurer's accounts, and providing that the testimony of any witness shall not be given in evidence or used against him on the trial o any indictment or criminal prosecution, the evidence given by the county treasurer in obedience to a subpœna may be used by the governor for his removal, and hence such treasurer was exonerated from answering questions concerning the moneys received by him on the ground that the answers would tend to convict him of a crime or subject him to a penalty, under the rule that a witness is not bound to speak when the answer may subject him to a forfeiture or anything in the nature of a forfeiture of his estate or interest.—In re Dickinson, 58 How. Prac. 260.

[r] (N. Y. 1887) An inquiry before a legislative committee is an "investigation" within the meaning of Pen. Code, § 79, which makes it compulsory on persons concerned in bribery to attend and testify upon any trial or investigation, but declaring that their testimony shall not be used against them in any subsequent proceeding, civil or criminal; and evidence given before such committee, being compulsory, is inadmissible against the person testifying upon any subsequent trial.—People v. Sharp, 107 N. Y. 427, 14 N. E. 319, reversing (1887) 45 Hun, 460.

[s] (N. Y. 1891) The complaint in an action brought by the assignee of a corporation to recover money lost by its treasurer at a gambling house, alleged to have been kept by defendant, charged defendant with violations of Pen. Code, §§ 341, 343, making it unlawful for a person to receive from another any money won by playing at cards or any game of chance, and declaring it to be a misdemeanor to keep any room, etc., to be used for gambling. *Held*, that these allegations brought the action within the language and spirit of section 341 of said Code, declaring that "no person shall be excused from giving testimony upon any investigation or proceeding for violation of this chapter, upon the ground that such testimony would tend to convict him of a crime, but such testimony cannot be received against him upon any criminal investigation or proceeding," and that therefore defendant might be compelled to testify as a witness for plaintiff before trial, notwithstanding his answers might tend to convict him of violation of said provisions against gaming.—

signed in his presence by the persons whose signatures appeared thereon. On cross-examination he declined to state whether the notes when signed were in their present condition, on the ground that it might tend to criminate him. *Held*, that the suppression of the deposition, on the ground that he had waived his privilege by his first answer, and thus should have answered the second question, was error.—Lombard v. Mayberry, 24 Neb. 674, 40 N. W. 271, 8 Am. St. Rep. 234.

[i] (N. H. 1851) It is the privilege of the witness, not of the party, that the witness need not testify to facts which will subject him to a criminal prosecution. If he waives his privilege, and testifies to part of a transaction, in which he was criminally concerned, he is bound to state the whole.—State v. Foster, 23 N. H. (3 Fost.) 348, 55 Am. Dec. 191.

[j] (N. Y. 1848) A witness is not ordinarily bound to testify to his own infamy; but if he does so, for the purpose of fixing crime upon another, he cannot claim the privilege, when asked questions the answers to which may weaken his former testimony, or remove its weight entirely.—People v. Lohman, 2 Barb. 216.

[k] (N. Y. 1854) A witness is not bound to criminate himself and may decline to answer any question which tends to do so, but if he fails to avail himself of his privilege, his answer will be regarded as voluntary, and may be taken as evidence against him.—People v. Hendrickson, 9 How. Prac. 155.

[l] (N. Y. 1882) A witness, by voluntarily answering in part as to a transaction tending to criminate him, waives the privilege of refusing to answer, which he might have had at the outset, if he had chosen to claim it.—Youngs v. Youngs, 5 Redf. Sur. 505.

[m] (N. Y. 1882) In a proceeding to revoke letters of administration granted on the estate of an alleged decedent, on the ground that he was alive, a witness was produced who stated on his direct examination that he was the alleged decedent, and on his cross-examination testified as to the events of his life prior to a certain year, in which, according to his statements, he left Boston. On being asked whither he went on leaving Boston, he declined to answer, on the ground that his reply would tend to charge him with a crime. He refused to name any person with whom he had lived or associated during the period, or to state any business or occupation in which he had been engaged. He testified that he had neither been in prison nor under arrest; but when asked whether he had been charged with crime he again invoked his privilege and replied that he would not answer in that regard. *Held*, that since at the time he refused to answer the questions on cross-examination he had not disclosed any transaction occurring within the five years as to which he subsequently declined to testify, he did not waive his privilege.—Youngs v. Youngs, 5 Redf. Sur. 505.

[n] (N. Y. 1888) Where a witness refuses to answer a question on the ground that it would tend to criminate him, it is incompetent to show that he had on another occasion testified to something which was a waiver of the privilege claimed on this trial.—Boston Marine Ins. Co. v. Slocovitch, 55 N. Y. Super. Ct. (23 Jones & S.) 452.

[o] (N. Y. 1890) On certiorari to review the action of city park commissioners in dismissing a policeman, the record stated the testimony of the relator as follows: "John J. Quinn [relator], being duly sworn, testified as follows: Question. Are you guilty, or not guilty? Answer. I am guilty of going in the box for the simple purpose of drinking my coffee. * * * Q. But you were there, sitting down? A. No, sir; I deny sitting down." *Held*, that it did not appear that relator was wrongfully compelled to be sworn as a witness against himself.—People v. Robb, 56 Hun. 649, 9 N. Y. Supp. 831.

[p] (Ohio, 1887) Upon a motion in a civil case to vacate an arrest made on the ground of a debt incurred by embezzlement, the defendant filed his affidavit, controverting the statements of plaintiff's affidavits. *Held*, that plaintiff could examine him upon the question at issue, and that he could not refuse to answer questions on the ground that the answers would tend to criminate him.—Este v. Wilshire, 44 Ohio St. 636, 10 N. E. 677.

[q, r] (Pa. 1851) Though an elector is not bound to disclose for whom he voted in an election contest, the privilege is a penal one and it may be waived by him, and he may testify if he so desires.—In re Kneass, 2 Pars. Eq. Cas. 553.

[s] (Va. 1874) The fact that a witness has testified before the coroner does not deprive him of the privilege, given him by the eighth section of the bill of rights, of refusing to give evidence which will tend to criminate himself; and, if such testimony before the coroner was given without his being advised of his privilege, it is not a waiver of it by him.—Cullen v. Commonwealth, 24 Grat. 624.

[t] (Va. 1880) The fact that the witness testified before the grand jury, and that it was on his testimony that the indictment was found, will not deprive him of his privilege to decline to testify on the trial of the party indicted on the ground that his evidence will tend to incriminate him.—Temple v. Commonwealth, 75 Va. 89.

§ 1054. Waiver by accused in criminal prosecution.

Cross-examination of accused in general, see ante, §§ 1043–1046.

[a] An accused who offers himself as a witness in his own behalf thereby waives the privilege of refusing to testify.

—(Colo. 1896) Bradford v. People, 22 Colo. 157, 43 Pac. 1013;

(Me. 1881) State v. Witham, 72 Me. 531;

(Mass. 1866) Commonwealth v. Lannan, 95 Mass. (13 Allen) 563;

(N. Y. 1870) McGarry v. People, 2 Lans. 227; (1870) Brandon v. People, 42 N. Y. 265; (1894) People v. Court of Sessions of Albany County, 82 Hun, 242, 31 N. Y. Supp. 373;

(N. C. 1890) State v. Allen, 107 N. C. 805, 11 S. E. 1016;

(Or. 1883) State v. Abrams, 11 Or. 169, 8 Pac. 327.

[b] A defendant in a criminal prosecution, who becomes a witness "at his own request," waives the constitutional privilege of exemption from furnishing or giving evidence against himself; and his acts may be inquired about on cross-examination, though tending to prove his guilt, for the purpose of negativing the truth of his statements made on his direct examination.

—(Iowa, 1876) State v. Fay, 43 Iowa, 651;

(Me. 1875) State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688;

(Nev. 1876) State v. Huff, 11 Nev. 17.

[c] (Ill. 1887) A defendant offering himself as a witness may be compelled, on cross-examination, to give evidence criminating himself; and his evidence may be considered in the light of his position as accused, and his interest in testifying.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

[d] (Ind. 1885) A defendant who voluntarily takes the stand and broadly denies the crime, thus waives his constitutional privilege, and

may be cross-examined on all facts relevant and material to the issue.—Thomas v. State, 103 Ind. 419, 2 N. E. 808.

[e] (Iowa, 1880) Acts 17th Gen. Assem. p. 168, § 1, provides that "defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state." Section 2 provides that the rules of evidence prevailing in civil actions are applicable in criminal proceedings, so far as they are not inconsistent with other express provisions on the subject. *Held* that, where defendant in a criminal case is a witness in his own behalf, he is subject to the same rules regulating cross-examination and impeachment as other witnesses.—State v. Red, 53 Iowa, 69, 4 N. W. 831.

[f] (Iowa, 1890) Where one of two persons, charged with the same offense, testifies on the investigation before the grand jury without claiming his constitutional privilege, and both of them are indicted, he cannot on the trial of his co-defendant refuse to testify, on the ground that his testimony will criminate himself.—State v. Van Winkle, 80 Iowa, 15, 45 N. W. 388.

[g] (Mass. 1867) Under St. 1866, c. 260, a defendant in a criminal cause who offers himself as a witness waives his constitutional privilege of refusing to furnish evidence against himself, and may be interrogated as a general witness in the cause. Thus, where a defendant had testified that there was no glass in a door through which, according to previous testimony, he had been seen to sell liquor, it was *held* proper to put to him the cross-interrogatory whether there was not a glass in the partition near the door.—Commonwealth v. Mullen, 97 Mass. 545.

[h] (Mass. 1873) One testifying that he did not commit the crime charged, thereby waives his constitutional privilege as to criminating himself, and may be cross-examined as to every thing relevant to the issue.—Commonwealth v. Nichols, 114 Mass. 285, 19 Am. Rep. 346.

[i] (Mass. 1876) On trial of an indictment for robbery, the prosecution offered to prove certain confessions by defendant which were excluded as having been obtained by promises and threats made to him by the officers. Afterwards the defendant took the stand and testified in his own behalf, and was asked upon cross-examination what statements he had made in the interview in which the confessions were made. *Held*, that a ruling that, having thus made himself a witness, he could be asked whether he made statements inconsistent with his testimony on the stand, as affecting his credit, was sufficiently favorable to the defendant.—Commonwealth v. Tolliver, 119 Mass. 312.

[j] (Mass. 1895) When a defendant in a criminal action becomes a voluntary witness in his own behalf, he completely waives the protection accorded him under the declaration of rights (article 12), providing that a witness cannot be required to give evidence against himself.—Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189.

[k] (N. H. 1873) The prohibition of the constitution against compelling a subject to furnish evidence against himself (Bill of Rights, art. 15) may be waived by him, and is waived by his consenting to be a witness in his own behalf under Laws 1859, c. 23, and he thereby subjects himself to the rules and tests applicable to other witnesses.—State v. Ober, 52 N. H. 459, 13 Am. Rep. 88.

[l] (N. Y. 1872) Where an accused avails himself of the permission granted by Laws 1869, c. 678, to testify on his own behalf, he thereby subjects himself to the same rules and tests applicable to other witnesses, and waives the provision in his favor, granted by Const. art. 1, § 6, forbidding that an accused be compelled to testify against himself.—Connors v. People, 50 N. Y. 240.

[m] (N. Y. 1892) A defendant in a criminal case, who avails himself of the privilege given by Code Cr. Proc. § 393, to "testify as a witness in his own behalf," becomes a witness generally in the case, subject to the ordinary rules of examination, so that it is no violation of the provision of Const. art. 1, § 6, that no person shall be compelled in any criminal case to be a witness against himself, that the state is allowed to cross-examine him relative to facts not brought out in his examination in chief, or affecting his credibility, but pertinent to the issue.—People v. Tice, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669.

[n] (N. D. 1896) A defendant in a criminal case, who becomes a witness in his own behalf, does not thereby waive his privilege to decline to answer questions the answers to which may tend to convict him of collateral crimes, when such questions are asked solely to affect his credibility.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[o] (Tex. 1891) Though the accused need not give evidence against himself (Bill of Rights, § 10), yet where he testifies in his own behalf, as permitted by Act Leg. 1887, he becomes as any other witness, and may be recalled by the state for further cross-examination.—Mendez v. State, 29 Tex. App. 608, 16 S. W. 766.

[p] (Tex. 1894) Where defendant is sworn as a witness in a criminal case in his own behalf, he waives his rights under Bill of Rights, § 10, which prohibits a person accused of crime from being compelled to testify against himself.—Pyland v. State, 33 Tex. Cr. R. 382, 26 S. W. 621.

[q] (Wash. 1893) Though defendant is, on his direct examination, not questioned as to his movements after committing the offense, questions on cross-examination as to his having fled to escape prosecution do not violate Const. art. 1, § 9, providing that no person shall be compelled in any criminal case to give evidence against himself, as a defendant in a criminal case, taking the witness stand, assumes the character of a witness and as such is subject to be contradicted, disputed, or impeached.—State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

§ 1055. —— Privilege as to withdrawal of documents.

[a] (N. Y. 1895) Defendant was indicted for forging a note which he had paid and taken up before the indictment was found. He was served with a subpœna duces tecum to produce the note before the grand jury, but before the return of the subpœna he voluntarily, at the request of the district attorney, surrendered the note, and it was put in evidence before the grand jury. *Held*, that defendant, by surrendering the note, waived his right to withdraw it from evidence.—People v. Sebring (O. & T.) 14 Misc. Rep. 31, 35 N. Y. Supp. 237.

§ 1056. Waiver by accomplice.

[a] (Ala. 1879) An accomplice who consents to testify for the state cannot shield himself from answering any relevant question under the rule that he shall not be required to criminate himself.—Lockett v. State, 63 Ala. 5.

[b] (Mich. 1857) An accomplice who has been led to give evidence for the government by an express or implied promise of pardon contracts to make a full statement, can keep back nothing, and should be allowed no privileged communications.—Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321.

[c] (Miss. 1887) An accomplice who had turned state's evidence was asked a question, the answer to which would have divulged a confidential statement to his attorney. *Held* admis-

sible, as by turning state's evidence he waived all privileges regarding facts pertinent to the issue, and could be compelled to disclose confidential communications to counsel.—Jones v. State, 65 Miss. 179, 3 South. 379.

§ 1057. Persons entitled to waive privilege.

[a] (Pa. 1870) On the trial of a husband there can be no waiver by the wife as a witness of the privilege which is her husband's.—Commonwealth v. Reid, 8 Phila. 385.

13. PERSONS ENTITLED TO CLAIM PRIVILEGE.

IN GENERAL, § 1058.
PARTY, § 1059.
COUNSEL, § 1060.

Persons entitled to privilege, see ante, §§ 1019, 1031, 1032.

§ 1058. In general.

[a] The objection that an answer by a witness, if made, may tend to criminate him, can only be made by the witness himself.

—(Colo. 1891) Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698;

(Ky. 1831) Sodusky v. McGee, 28 Ky. (5 J. J. Marsh.) 621;

(Me. 1875) State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688;

(Md. 1876) Roddy v. Finnegan, 43 Md. 490.

[b] (Tex. 1893) Testimony is not objectionable because it inculpates the witness, since no one but he can object on that ground.—Brown v. State (Cr. App.) 20 S. W. 924.

§ 1059. Party.

[a] The privilege of refusing to answer is personal to the witness, and is not in any sense the privilege of the party calling him.

—(Cal. 1868) Clark v. Reese, 35 Cal. 89;

(N. H. 1851) State v. Foster, 23 N. H. (3 Fost.) 348, 55 Am. Dec. 191.

[b] Where a witness does not object to testifying on the ground that his testimony would incriminate him, neither of the parties can object to his testimony on such ground.

—(N. Y. 1845) People v. Bodine, 1 Denio, 281;

(Tex. 1894) San Antonio St. Ry. Co. v. Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

[c] (U. S. 1894) In an action against an unincorporated association the defendant cannot object to incriminating testimony given by one of the associates, where the witness himself fails to assert his privilege.—Morgan v. Halberstadt, 60 Fed. 592, 9 C. C. A. 147, 20 U. S. App. 417.

[d] (Cal. 1889) Whether the question put is pertinent or not, the witness may decline to answer on the ground that to do so would tend to criminate him; but, where the question is not pertinent, the party introducing him may object thereto, and his objection should be sustained, whether the witness objects to answering or not.—Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26.

[e] (Mass. 1849) It is the privilege of a witness, and not the right of the party against whom he is called, to object to his giving evidence to criminate himself.—Commonwealth v. Shaw, 58 Mass. (4 Cush.) 594, 50 Am. Dec. 813.

[f] (Mass. 1893) In a prosecution for illegal sales of intoxicating liquors defendant cannot raise the objection that the purchasers, when examined as witnesses, cannot be compelled to criminate themselves.—Commonwealth v. Gould, 158 Mass. 499, 33 N. E. 656.

[g] (Miss. 1859) If the witness is willing to criminate himself, the party cannot object.—Newcomb v. State, 37 Miss. 383.

[h] (Miss. 1876) The accused cannot object to questions put to a witness, on the ground the answers may tend to criminate the witness. The privilege is a personal one, and can be claimed only by the witness.—White v. State, 52 Miss. 216.

[i] (Miss. 1882) A personal privilege of a witness to testify or not at her election is available only to the witness herself, and a party to the action cannot complain because the court compelled her to testify against her objection.—Turner v. State, 60 Miss. 351, 45 Am. Rep. 412.

[j] (N. C. 1890) Neither contestant nor defendant can object to the testimony of a voter alleged to have voted illegally, on the ground that he cannot be compelled to criminate himself, where the witness does not raise the objection himself.—People v. Teague, 106 N. C. 576, 11 S. E. 665.

[k] (Tex. 1889) The state cannot object to a witness' competency on the ground that the testimony will tend to criminate him.—Day v. State, 27 Tex. App. 143, 11 S. W. 36.

[l] (Tex. 1895) The fact that a witness, either voluntarily or by compulsion of court, answers questions relevant to the issue and admissible, but which he has the privilege of not answering, is not available to the party producing the witness as ground for reversal.—Ingersol v. McWillie, 87 Tex. 647, 30 S. W. 869.

[m] (Wis. 1879) The right of a witness to decline answering whether he has been convicted of an infamous offense, on the ground that the answer would tend to degrade him, is personal to such witness, and cannot be taken by the party calling him.—Ingalls v. State, 48 Wis. 647, 4 N. W. 785.

§ 1060. Counsel.

[a] (Colo. 1896) An objection to testifying on the ground of personal privilege must be made by the witness himself, and not by his counsel.—Bradford v. People, 22 Colo. 157, 43 Pac. 1013.

[b] (Iowa, 1892) In an action for seduction plaintiff may claim by her counsel the privilege of not answering criminating questions.—Clifton v. Granger, 86 Iowa, 573, 53 N. W. 316.

[c] (N. D. 1896) The claim of privilege cannot be made by counsel even when the witness is also a party.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[d] (Ohio, 1888) The privilege of a witness to refuse to answer questions on the ground that it will tend to criminate her cannot be interposed by her counsel, where she swears such question will not tend to criminate her.—Ammon v. Johnson, 2 O. C. D. 149.

14. CLAIM OF PRIVILEGE.

IN GENERAL, § 1061.
REFUSING TO TAKE OATH, § 1062.
NECESSITY FOR WITNESS TO CLAIM PRIVILEGE, § 1063.
REQUISITES AND SUFFICIENCY OF CLAIM OF PRIVILEGE, § 1064.

Compelling witness to state reasons why answer would tend to disgrace him, see ante, § 1024.
—— *to incriminate him, see* ante, § 1033.

§ 1061. In general.

[a] (Mich. 1867) An accomplice, testifying for the government, on cross-examination, need not disclose his criminality in other cases; and he may claim his privilege at any stage of the

collateral inquiries.—Pitcher v. People, 16 Mich. 142.

[b] (N. H. 1837) A witness testified that he was destitute of property, but admitted, after inquiry, that he had had a considerable amount of money three or four years previous. He then stated that his money had gone to adjust matters which he could not disclose without subjecting himself to a prosecution for a crime. *Held*, that it was competent to the witness to claim his privilege at this stage of the examination.—Amherst v. Hollis, 9 N. H. 107.

[c] (N. Y. 1857) Where in an action on a note a defense of usury is set up, and the lender of the money, being called as a witness, refuses to testify on the ground that his answer might criminate himself, if the counsel does not claim that usury has in fact been taken, he should so state, and ask the referee to instruct the witness that a mere agreement for a usurious premium is not criminal. If he fails to do so, it is too late to raise that question on appeal.—Fellows v. Wilson, 31 Barb. 162.

§ 1062. Refusing to take oath.

[a] (U. S. 1802) Witness who cannot testify in a cause without criminating himself shall not be sworn.—Neale v. Coningham, Fed. Cas. No. 10,067 [1 Cranch, C. C. 76].

[b] (Cal. 1886) A person called as a witness cannot refuse to be sworn on the ground that his testimony would tend to subject him to punishment for a felony, nor can he urge such privilege until a question is put to him, after being sworn, the answer to which would have such tendency; and the court would then decide whether the answer would have such an effect.—Ex parte Stice, 70 Cal. 51, 11 Pac. 459.

[c] (Pa. 1892) One who has been duly summoned before a committee of the city council, to be sworn and testify in an investigation being conducted by said committee in the matter of the deposits of city moneys, and the default of the city treasurer, cannot refuse to be sworn on the ground that he is under indictment for conspiracy with the treasurer, involving the same transactions as those in regard to which it is sought to interrogate him, but must wait until after he is sworn and questioned before he can claim his privilege.—In re Eckstein, 148 Pa. 509, 24 Atl. 63, 30 Wkly. Notes Cas. 59; Appeal of Yard, Id. Affirming (1891) 10 Pa. Co. Ct. R. 41.

§ 1063. Necessity for witness to claim privilege.

[a] (Fla. 1891) The court should not exclude a question, otherwise proper, because it tends to criminate the witness, but should leave it with the witness to avail himself of his personal privilege or not, as he sees fit.—Williams v. Dickenson, 28 Fla. 90, 9 South. 847.

[b] (Ind. 1884) Where a plaintiff has testified in his own behalf in a suit for personal injury by a defective sidewalk, it is discretionary to allow him to be asked on cross-examination whether he had not combined with others several years before to defraud an insurance company, he not claiming his privilege.—City of South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792.

[c] (La. 1836) A witness is competent, though liable to be asked questions the answers to which may subject him to a criminal prosecution. It is his privilege to decline answering them.—Macarty v. Bond's Adm'r, 9 La. 351.

[d] (La. 1874) Unless a witness makes objection, there is no reason why he should not be allowed to testify in a civil matter, though his testimony may tend to show that he has been guilty of an offense against the laws of the state.—Horrell v. Parish, 26 La. Ann. 6.

[e] (Mass. 1870) Where a witness was asked on cross-examination whether he had been convicted of crime as shown by a record introduced of the conviction of a person of the same name, and the witness did not claim any privilege, but answered the question, no error appeared.—Root v. Hamilton, 105 Mass. 22.

[f] (Mich. 1888) In an action on a note procured by an agent of plaintiff, a farm machine company, defendant's contention being that the note sued on was a forgery, he may inquire of the agent if he had not previously turned in a note to another company which falsely purported to be signed by defendant, where the witness does not claim the privilege of not answering because it would tend to criminate him.—Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536.

[g] (N. J. 1843) If a witness, who wrote the libel by the direction of the defendant, does not ask the protection of the court, but submits to answer the questions put to him, his testimony is admissible, and will be received.—Schenck v. Schenck, 20 N. J. Law (Spencer) 208.

[h] (N. Y. 1882) If a witness, because an answer to a question otherwise unobjectionable might tend to criminate or degrade him, refuses to answer it, he may be compelled to give his reason and claim his privilege.—New v. Fisher, 11 Daly, 308.

[i] (Ohio, 1881) One on trial for murder, testifying for himself, was asked on cross-examination if he had not been arrested for assault with intent to kill. The question was objected to, but the objection was overruled, and the prisoner answered without claiming his privilege. *Held* no error.—Hanoff v. State, 37 Ohio St. 178, 41 Am. Rep. 496.

§ 1064. Requisites and sufficiency of claim of privilege.

[a] (N. Y. 1894) A witness cannot avail himself of his privilege to refuse to answer criminating questions merely by stating that he throws himself on his privilege, but he must make oath that in his opinion the effect of his answer would tend to criminate him.—People v. Seaman (Sup.) 8 Misc. Rep. 152, 29 N. Y. Supp. 329.

[b] (N. D. 1896) A witness who desires to claim his constitutional privilege of declining to answer a question, though he is also the party defendant, must make his claim in person, and under oath, and with sufficient definiteness to render his claim clear.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[c] (Pa. 1886) An administratrix defendant called by plaintiffs to testify as an adverse party cannot refuse to answer questions on the ground that the bill charges a criminal offense, as to make such a plea available she must state on her oath her belief that to answer the questions would criminate her. A submission of the question to the court is not sufficient.—William Penn Building & Loan Ass'n v. Mayer, 2 Montg. Co. Law Rep'r, 41.

[d] (S. C. 1842) A refusal to answer a question by a witness "because the answer would tend to criminate himself" was sufficient.—Poole v. Perritt, 1 Speers, 128.

[e] (Tenn. 1887) In order to be available, a witness must, at the time he is examined, claim his exemption upon the ground that his answer would criminate himself. Where only a general objection is made, and the witness is not shown to have answered only because he was compelled, his answer cannot afterwards be suppressed.—In re Druggist Cases, 85 Tenn. (1 Pickle) 449, 3 S. W. 490.

[f] (Vt. 1840) The witness must first determine whether he will claim the privilege, and, if it is claimed upon oath, the court cannot deny it, unless fully satisfied that the witness is mistaken, or acts in bad faith.—Chamberlin v. Willson, 12 Vt. 491, 36 Am. Dec. 356.

[g] (Wis. 1859) A witness, who declines to answer on the ground that the answer sought may tend to criminate him, must state under oath that he believes that would be the tendency of the answer.—Kirschner v. State, 9 Wis. 140.

15. DETERMINATION OF RIGHT TO PRIVILEGE AND PROTECTION OF WITNESS AGAINST SUBSEQUENT USE OF EVIDENCE.

DETERMINATION OF RIGHT TO PRIVILEGE IN GENERAL, § 1065.
RIGHT OF WITNESS OR COURT TO DECIDE WHETHER TESTIMONY WOULD INCRIMINATE OR DISGRACE, § 1066.
PRODUCTION OF DOCUMENTS, § 1067.
PROTECTION OF WITNESS AGAINST SUBSEQUENT USE OF EVIDENCE, § 1068.

§ 1065. Determination of right to privilege in general.

[a] (Iowa, 1895) Where a witness before a grand jury refuses to testify, it is proper for the court before whom the witness is brought, after declaring that the witness had the right to refuse to testify on the ground that his testimony might tend to incriminate him, to direct the witness to return for further examination before the grand jury as the law exonerates him from answering self-incriminating questions only.—State v. Lewis, 96 Iowa, 286, 65 N. W. 295.

[b] (N. Y. 1845) Where a witness called to establish a defense of usury declines to testify on the ground that his testimony might subject him to prosecution, it is the duty of the court to instruct a witness declining to testify in such a case, that the actual receipt of the usurious premium as well as a usurious agreement is essential to expose him to a criminal prosecution, or subject him to a penalty.—Close v. Olney, 1 Denio, 319.

§ 1066. Right of witness or court to decide whether testimony would incriminate or disgrace.

See ante, § 1033 [b].

[a, b] It is not for a witness, but for the court, to determine whether an answer can criminate him directly or indirectly.

—(Iowa, 1850) Richman v. State, 2 G. Greene, 532; (1863) State v. Duffy, 15 Iowa, 425.

CONTRA, see

(S. C. 1819) State v. Edwards, 2 Nott & McC. 13, 10 Am. Dec. 557.

[c] (U. S. 1807) In determining the right of a witness to refuse to answer on the ground that his answer might tend to incriminate him, it is the province of the court to judge whether any direct answer to the question proposed will furnish evidence against the witness.—United States v. Burr, Fed. Cas. No. 14,692e.

[d] (U. S. 1807) The witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer.—United States v. Burr, Fed. Cas. No. 14,692e.

[e] (U. S. 1821) A witness in a criminal cause will be compelled to answer a question which he says upon his oath he cannot answer without disclosing a fact which may be material and important evidence to criminate himself, as participator in the same offense for which the defendant stands indicted, provided the court should be of opinion that no direct answer to the question could furnish evidence against the witness.—United States v. Miller, Fed. Cas. No. 15,772 [2 Cranch, C. C. 247].

[f] (U. S. 1821) A witness in a criminal case is in contempt for refusing to answer a question, though he objects that it may disclose a fact constituting important and material evidence to criminate him if the court is of opinion that no direct answer to the question could furnish evidence against the witness.—United States v. Miller, Fed. Cas. No. 15,772 [2 Cranch, C. C. 247].

[g] (U. S. 1822) A witness is not bound to answer a question, if it shall appear to the court that the answer would have a probable tendency to criminate the witness.—United States v. Lynn, Fed. Cas. No. 15,649 [2 Cranch, C. C. 309].

[h] (U. S. 1883) To justify a witness in refusing to testify on the ground that his evidence may incriminate him, reasonable ground must appear to the court to apprehend some proceedings against the witness upon a criminal charge, and some danger to the witness in answering.—United States v. McCarthy (C. C.) 18 Fed. 87, 21 Blatchf. 469.

[i] (La. 1810) A witness may be compelled to answer, though he declare he cannot with safety, if the question appear to the court one the answer to which cannot possibly criminate him.—Territory v. Nugent, 1 Mart. (O. S.) 108.

[j] (Mass. 1826) It is the province of the court to judge whether a direct answer to a question may tend to criminate a witness.—Commonwealth v. Braynard, Thacher, Cr. Cas. 146.

[k] (Miss. 1884) On an election contest on the ground of fraud, inspectors and clerks of election have the right to refuse to answer any question which would tend to subject them to a criminal prosecution, and have the right to judge for themselves as to whether it would have that tendency.—Word v. Sykes, 61 Miss. 649.

[l] (N. Y. 1868) Where a witness or party in supplementary proceedings declines to answer questions propounded to him on the ground that his answers will have a tendency to criminate him, it is the province of the court to determine whether that will probably be the effect of the answers, and when it is fairly ascertained that such will not be the effect of the answers, he may be required to answer the questions.—Forbes v. Willard, 37 How. Prac. 193.

[m] (N. Y. 1894) The witness is not the sole judge as to whether his testimony, if given, would tend to criminate him, but the question of privilege is one of fact for the court.—In re Taylor (O. & T.) 8 Misc. Rep. 159, 28 N. Y. Supp. 500.

[n] (Pa. 1891) Laws 1887, p. 161, § 10, provides that any competent witness, except defendants upon trial, may be compelled to testify in any proceeding, but not to answer questions which, in the opinion of the trial judge, will tend to criminate such witness. *Held*, that in a prosecution for bribery of delegates to a congressional convention it was for the trial court to say when the privilege of not answering should be exercised by a witness.—Commonwealth v. Bell, 145 Pa. 374, 22 Atl. 641, 28 Wkly. Notes Cas. 333.

[nn] (S. C. 1842) The witness, with the instruction of the court when necessary, must decide whether his answer will tend to criminate him; and his decision is upon oath, and at the peril of perjury.—Poole v. Perritt, 1 Speers, 128.

[o] (Tex. 1851) It is for the court to judge whether any direct answer to a question which may be proposed may furnish evidence to convict the witness of a crime. If it may, the witness himself must judge what his answer will be, and if he swears that he cannot answer without accusing himself, he cannot be compelled to answer.—Floyd v. State, 7 Tex. 215.

[p] (Wis. 1859) After a witness who declines to answer a question put to him on the ground that the answer may tend to criminate him

states under oath that he believes such would be the tendency of the answer, it is for the trial court to decide whether the answer will have that tendency.—Kirschner v. State, 9 Wis. 140.

§ 1067. Production of documents.

[a] (Mass. 1830) The court and not the witness is to judge of the lawfulness or reasonableness of an excuse which a witness may have for refusing to produce a document in his possession under a subpœna duces tecum.—Bull v. Loveland, 27 Mass. (10 Pick.) 9.

[b] (N. Y. 1861) It is not the right of a witness to judge, except where the answer might criminate him, whether the matter inquired of is privileged or not. If the production of a document is called for, and the witness declines to produce it, upon the ground that the reading of it in evidence would be prejudicial to his interests, or the interests of a person to whom he stood in a confidential relation respecting the instrument, the witness may be required to submit the document to the inspection of the court.—In re Mitchell, 12 Abb. Prac. 249.

§ 1068. Protection of witness against subsequent use of evidence.

Effect of statutory protection from use of evidence, see ante, §§ 1051, 1052.

Use of evidence in general, see ante, § 1036.

[a] (Tenn. 1859) One on trial for gaming who wishes to avail himself of the protection of Acts 1824, c. 5, providing that no witness shall be bound to answer to any criminal proceeding for any offense about which he may have been examined as a witness by virtue of this act, must allege specifically in his plea that he was examined before the jury as to the particular offense charged against him in the indictment, and an averment that he was summoned and went before the grand jury to testify as to unlawful gaming is not sufficient.—Leonard v. State, 39 Tenn. (2 Head) 455.

16. EFFECT OF REFUSAL TO ANSWER.

IN GENERAL, § 1069.
EFFECT ON OTHER EVIDENCE GIVEN BY WITNESS, § 1070.
EFFECT AS EVIDENCE AGAINST WITNESS, § 1071.

§ 1069. In general.

[a] (Cal. 1868) Prac. Act. § 409, providing that on the refusal of a witness to answer, if the witness be a party, his complaint may be dismissed or his answer stricken out, was applicable where defendant in an action for the breach of a promise to marry on his direct examination made insinuations against plaintiff's character, and refused to testify fully with regard thereto on cross-examination.—Clark v. Reese, 35 Cal. 89.

[b] (N. Y. 1859) A witness may be asked on his cross-examination, with a view to affect his credibility if affirmatively answered, whether he had not been guilty of adultery and had a venereal disease since his marriage. If the facts thus inquired into are wholly collateral to the issue, the witness may refuse to answer, and no inference unfavorable to his character can be drawn from such refusal.—People v. Blakeley, 4 Parker, Cr. R. 176.

[c] (N. C. 1853) Where a witness was asked on cross-examination whether he has not been convicted and punished for an infamous crime, and the judge allowed the witness to elect whether he would answer, and he refused, it was *held* that such refusal might be insisted on by counsel in addressing the jury, as warranting the inference that he was unworthy of credit.—State v. Garrett, 44 N. C. 357.

[d] (Pa. 1853) Where a witness declines to answer a question upon the ground that its tendency is to criminate him, from the claim of such privilege and its allowance, no inferences whatever can be legitimately drawn injuriously affecting either party.—Pelin v. Kenderdine, 20 Pa. (8 Harris) 354.

[e] (Tenn. 1884) A witness properly subpœnaed before the grand jury to testify in regard to gaming who refuses to answer touching his knowledge of the offense, although his answer may show his own guilt, is guilty of contempt, for which he may be fined and imprisoned.—Warner v. State, 81 Tenn. (13 Lea) 52.

§ 1070. Effect on other evidence given by witness.

[a] (Mich. 1886) Refusal of a witness to answer a question, where the answer might criminate him, cannot be commented on by counsel, or considered by the jury in determining the weight of the witness' testimony.—People v. Maunausau, 60 Mich. 15, 26 N. W. 797.

[b] (Mich. 1889) On a trial for robbery a prisoner in the county jail testified that one C., who was implicated in the robbery, and who had turned state's evidence, told him while in the jail that the men who committed the robbery were in Chicago, and that, when he asked C. why he had implicated defendant, he replied: "I am not going over the road alone." The witness, when asked why he did not tell defendant this, refused to answer, on the ground that it might criminate him. *Held*, that the court properly refused to charge that because the witness "refused to answer any question which he believed would tend to criminate him is no good reason why he should not be believed as to what he said," and stated that the jury might give the testimony such credit as they thought it deserved.—People v. Gallagher, 75 Mich. 512, 42 N. W. 1068.

[c] (Pa. 1870) A refusal to tell the whole truth, where the reservation is made on the ground that the evidence tends to criminate a husband, does not invalidate the evidence given.—Commonwealth v. Reid, 8 Phila. 385.

§ 1071. Effect as evidence against witness.

[a] (Ga. 1887) The pursuit of one's ordinary avocations on Sunday being an indictable offense in Georgia, a person has the privilege of refusing to answer questions as to whether he bought a bill of exchange on Sunday; and, in an action by him on such bill, a deposition showing his refusal to answer such questions therein propounded cannot be introduced in evidence as tending to show that he did buy such bill on Sunday.—Harrison v. Powers, 76 Ga. 218.

[b] (Iowa, 1880) The refusal of a witness to answer a question on the ground that he might criminate himself cannot subsequently, on the trial of such witness for the same offense, be used against him.—State v. Bailey, 54 Iowa, 414, 6 N. W. 589.

[c] (Mass. 1870) The refusal of a party to a suit, when testifying as witness, to answer a material question on the ground that it might criminate himself—as, on an issue between seller and purchaser of liquors, the refusal of the seller to state whether he had a license—is competent evidence against him.—Andrews v. Frye, 104 Mass. 234.

[d] (N. Y. 1857) Where, in an action on a note, a defense of usury is set up, and the lender of the money, being called as a witness, refuses to testify on the ground that his answer might criminate himself, but the witness is instructed that a mere agreement for a usurious

premium is not criminal, if he still declines to answer on the same ground, it will be equivalent to swearing that a usurious premium was taken.—Fellows v. Wilson, 31 Barb. 162.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) IN GENERAL, §§ 1072-1110.
(B) CHARACTER AND CONDUCT OF WITNESS, §§ 1111-1176.
(C) INTEREST AND BIAS OF WITNESS, §§ 1177-1208.
(D) INCONSISTENT STATEMENTS BY WITNESS, §§ 1209-1266.
(E) CONTRADICTION AND CORROBORATION OF WITNESS, §§ 1267-1289.

Continuance of criminal prosecution to produce corroborating or impeaching evidence, see "Criminal Law," vol. 14, cc. 2069, 2070, §§ 1329, 1330.

Credibility and impeachment of dying declarations offered in evidence in prosecution for homicide, see "Homicide," vol. 26, cc. 724, 725, § 460.

Credibility as question of law or of fact, see "Trial," vol. 46, cc. 1157–1165, §§ 334, 335.

—— *in criminal prosecution, see* "Criminal Law," vol. 14, cc. 2442–2445, §§ 1719–1722.

Equitable relief against judgment on account of newly discovered impeaching evidence, see "Judgment," vol. 30, cc. 1230, 1231, § 848.

Impeachment of witness to will, see "Wills," vol. 49, cc. 765–767, § 682; cc. 819–822, § 723.

Instructions as to credibility of witnesses, see "Trial," vol. 46, cc. 1289–1302, §§ 414–419; cc. 1433–1439, §§ 490–494; cc. 1498–1504, §§ 531–533; cc. 1577, 1578, § 574; c. 1587, § 580; cc. 1655–1657, § 611; c. 1674, § 623; c. 1677, § 625; c. 1711, § 641; cc. 1732, 1733, § 654; cc. 1849, 1850, § 713.

—— *in criminal prosecution, see* "Criminal Law," vol. 14, cc. 2499–2515, §§ 1772–1785; cc. 2677–2682, §§ 1889–1894; c. 2688, § 1897; "Homicide," vol. 26, cc. 939, 940, § 580.

—— *in prosecutions under liquor laws, see* "Intoxicating Liquors," vol. 29, cc. 1238, 1239, § 333.

Newly discovered evidence to discredit, impeach, or contradict witness as ground for new trial, see "New Trial," vol. 37, cc. 1172–1179, §§ 221–223.

—— *in criminal causes, see* "Criminal Law," vol. 15, cc. 172–176, §§ 2331–2332.

Perjury or false testimony as ground of collateral attack on judgment, see "Judgment," vol. 30, c. 1447, § 955.

Remarks and conduct of judge relating to credibility and impeachment, see "Trial," vol. 46, cc. 774–777, § 82.

—— *in criminal trial, see* "Criminal Law," vol. 14, cc. 2261–2263, §§ 1530, 1531.

Review in appellate court of decisions depending on credibility of witnesses, see "Appeal and Error," vol. 3, cc. 1764–1767, §§ 3904–3905½.

—— *in criminal prosecutions, see* "Criminal Law," vol. 15, cc. 863, 864, § 3077.

Weight of evidence, see "Evidence," vol. 20, cc. 3565–3633, §§ 2424–2459.

(A) IN GENERAL.

1. CREDIBILITY IN GENERAL, §§ 1072-1078.
2. EFFECT OF MISTAKEN, INACCURATE, OR FALSE TESTIMONY, §§ 1079-1083.
3. EVIDENCE TO CORROBORATE OR SUSTAIN UNIMPEACHED WITNESS, §§ 1084-1086.
4. RIGHT TO IMPEACH OR DISCREDIT WITNESS IN GENERAL, §§ 1087-1093.
5. IMPEACHMENT OF ONE'S OWN WITNESS, §§ 1094-1100.
6. IMPEACHMENT OF CAPACITY, KNOWLEDGE, OR RECOLLECTION OF WITNESS, §§ 1101-1103.
7. CROSS-EXAMINATION TO DISCREDIT OR TEST RELIABILITY, §§ 1104-1108.
8. RECALLING WITNESS FOR PURPOSE OF IMPEACHMENT, § 1109.
9. REBUTTAL OR EXPLANATION OF EVIDENCE TO DISCREDIT WITNESS, § 1110.

1. CREDIBILITY IN GENERAL.

IN GENERAL, § 1072.
IMPROBABILITY OF STATEMENT, § 1073.
PRESUMPTIONS, § 1074.
YOUTHFULNESS, § 1075.
MEANS OF KNOWLEDGE OF WITNESS, § 1076.
RECOLLECTION OF WITNESS, § 1077.
MANNER OF TESTIFYING, § 1078.

§ 1072. In general.

[a] (U. S. 1873) It is a rule of presumptions that, ordinarily, a witness who testifies to an affirmative, is entitled to be preferred to one who testifies to a negative. The latter may have forgotten what occurred. It is impossible to remember what never existed.—Stitt v. Huidekoper, 84 U. S. (17 Wall.) 384, 21 L. Ed. 644.

[b] (U. S. 1895) Where there is an irreconcilable conflict in the evidence of the crews of the colliding vessels, the testimony of disinterested witnesses on other vessels, in a position to see what took place, should govern the case.—The Charles H. Trickey, 66 Fed. 1020, 14 C. C. A. 225, 33 U. S. App. 35; Sargent v. Sargent, Id.

[c] (U. S. 1855) Where testimony offered on different sides with regard to the leading facts in a case is wholly irreconcilable, the demeanor of witnesses, and the fact whether those on the same side agree or not with each other, will be considered by the court in weighing the evidence.—Dickenson v. The Gore, Fed. Cas. No. 3,893 [Newb. Adm. 45].

[cc] (U. S. 1872) Evidence of verbal statements made in time of excitement and peril should be received with great caution, and, when opposed to the direct and concurring testimony of many witnesses, is entitled to but little weight.—The Masten, Fed. Cas. No. 9,268 [1 Brown, Adm. 436].

[d] (U. S. 1882) To justify a settled belief that the statements of a witness are willfully fabricated, the court should not rest its judgment upon possibilities, but there should be strong circumstances and tangible facts plainly pointing to such a conclusion.—Southworth v. Adams, Fed. Cas. No. 13,194 [11 Biss. 256].

[e] (U. S. 1882) The testimony of witnesses from the two colliding vessels was in irreconcilable conflict as to the condition of the weather. *Held*, that superior credit was due to those witnesses who were sustained by collateral evidence concerning the material subsidiary points respecting the force of the wind and time of the commencement of the rain, storm, and gale.—The Florence P. Hall (D. C.) 14 Fed. 408.

[f] (U. S. 1888) Elements affecting credibility of witnesses are to be judged of by jurors as they would judge of it in an important matter

in everyday life.—United States v. Hughes (D. C.) 34 Fed. 732.

[g] (U. S. 1894) Under Code Or. § 683, making the jury exclusive judges of the credibility of witnesses, they may disregard uncontradicted testimony, where it is unsatisfactory to their minds.—Craft v. Northern Pac. R. Co. (C. C.) 62 Fed. 735.

[h] (Ark. 1875) A witness cannot be impeached by evidence tending to show that a third person was prejudiced against the accused, and had threatened to procure the witness to testify against him.—Benton v. State, 30 Ark. 328.

[i] (Ga. 1858) When a witness aged 59 years testifies to facts which transpired 53 or 54 years previously, her testimony should be perfectly consistent, to be credited.—Parker v. Chambers, 24 Ga. 518.

[j] (Ga. 1860) When there is an apparent conflict of evidence, the jury must reconcile the testimony so as to make all the witnesses speak the truth, if possible. If the testimony is irreconcilable, credit should be given to the witnesses who had the best means of knowledge, but the jury should consider their manner of testifying and the circumstances upon which their recollection, as to time, dates, etc., is based.—Durham v. Holeman, 30 Ga. 619.

[k] (Ga. 1869) An instruction to a jury that, as between several witnesses, the one who had most interest in noticing and remembering the facts to which he has testified should be preferred, is erroneous.—Phillips v. Williams, 39 Ga. 597.

[l] (Ill. 1862) A jury cannot willfully disregard the testimony of an unimpeached witness.—Robertson v. Dodge, 28 Ill. (18 Peck) 161, 81 Am. Dec. 267; Robinson v. Magarity, Id. 423.

[m] (Ill. 1862) While a jury may judge of the credibility of a witness, they must exercise their judgments while doing so, and not their will merely.—Robertson v. Dodge, 28 Ill. (18 Peck) 161, 81 Am. Dec. 267.

[mm] (Ill. 1862) A witness can only be impeached by a direct attack upon his testimony and character.—Hansell v. Erickson, 28 Ill. (18 Peck) 257.

[n] (Ill. 1865) More weight will often be attached to the position of a witness for observing a fact, who testifies that it could not occur without his observation, than to the affirmative or negative form of his testimony.—Chicago, B. & Q. Ry. Co. v. Cauffman, 38 Ill. 424.

[nn] (Ill. 1878) There can be no pretense in law or in fact for saying that because a man is pecuniarily worthless he is unworthy of belief, or that if another has means, his evidence should be believed rather than that of a person without means.—Van Duzor v. Allen, 90 Ill. 499.

[o] (Ill. 1884) In determining the credibility of a witness, the jury should consider the fact of his interest, if any, in the case, his demeanor and conduct on the witness stand, and the fact that he is contradicted by other witnesses.—Rider v. People, 110 Ill. 11.

[oo] (Ill. 1894) It is error to instruct that the credit of a witness depends on his ability and opportunities to know what occurred, and his disposition to tell the truth, and that the statements of a witness having a superior memory, and superior opportunities for knowing what occurred, are entitled to greater weight.—Williams v. John Davis Co., 54 Ill. App. 198.

[p] (Ind. 1857) There is no distinction between civil and criminal cases, in respect to the mode of arriving at a conclusion as to the credibility of witnesses.—Lewis v. Lewis, 9 Ind. 105.

[pp] (Ind. 1859) Instructions were given that a disposition on the part of a witness, who was the girl seduced, testifying in an action per quod, by her father, to prevaricate on immaterial points, should not affect her credit on material points, corroborated by circumstances or other witnesses, and (upon the defendant's request) that the jury, in estimating her credibility, should compare her testimony given on the bastardy trial, and her former statements, with her present testimony, and should observe her bearing, her own contradictions, and her position with reference to the parties. *Held*, that on the whole the jury were not misled.—Richardson v. Fouts, 11 Ind. 466.

[q] (Ind. 1872) It is not error to instruct the jury, in a case depending on the credibility of witnesses, that the testimony of a witness given in open court, in the presence of the opposite party and the other witnesses, and where the witness is subjected to a thorough cross-examination, and where the court or jury have the opportunity of observing the manner, appearance, and conduct of the witness, is entitled to greater weight than the evidence of a witness embodied in a deposition, taken in private, and remote from the court and jury, and where all the ordinary tests of truth cannot be applied.—Carver v. Louthain, 38 Ind. 530.

[qq] (Iowa, 1892) The fact that a witness for plaintiff is called after plaintiff's testimony has been closed, and when a motion is about to be made for judgment for defendant, and that another also is called after defendant's testimony is partly in, although irregular, or perhaps suspicious, will not warrant the appellate court in declaring the testimony of such witnesses false, and of no value.—Asbach v. Chicago, B. & Q. Ry. Co., 86 Iowa, 101, 53 N. W. 90.

[r] (Iowa, 1896) Where plaintiff is a co-partnership, the fraudulent act of one partner does not affect the credibility of the others, who were guiltless of intentional wrong.—Gutherless v. Ripley, 98 Iowa, 290, 67 N. W. 109.

[rr] (La. 1852) Where a sea captain, having met with a disaster, prepares a signed protest of the circumstances while fresh in his memory, setting forth the manner of its occurrence, and afterwards, when litigation involving a charge of misconduct against himself arose, attempts, as a witness, in accounting for the disaster, to set forth statements of material incidents in his voyage not disclosed by his protest, his testimony must be viewed with grave distrust, and cannot be considered as satisfactorily verifying the circumstances of the loss.—McDowell v. General Mut. Ins. Co., 7 La. Ann. 684, 56 Am. Dec. 619.

[s] (Mich. 1870) The veracity of a witness cannot be impeached on any assumption that he must have known whatever is brought home to the cognizance of his attorney.—Dickinson v. Dustin, 21 Mich. 561.

[ss] (Miss. 1860) The motives of a witness to commit perjury may be considered by the jury as affecting his credit.—George v. State, 39 Miss. 570.

[t] (Neb. 1894) The credibility of witnesses is a question exclusively for the jury, and, when a number of witnesses testify directly opposite to each other, the jury need not regard the weight of the evidence as evenly balanced, but may determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, and from all the other surrounding circumstances, which are more worthy of credit.—Howell Lumber Co. v. Campbell, 38 Neb. 567, 57 N. W. 383.

[tt] (Neb. 1896) A jury is not bound to blindly accept as true all testimony which is not directly contradicted or impeached.—Murphey v. Virgin, 47 Neb. 692, 66 N. W. 652.

[u] (N. Y. 1845) In weighing direct evidence, the jury should regard the capacity of the witness,—whether he was able to see and under-

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stand the transaction, and also whether he was attentive or careless, prejudiced or dispassionate, or whether he has some sinister motive that might lead him to fabricate that which he did not see.—People v. Bodine, 1 Edm. Sel. Cas. 36.

[uu] (N. Y. 1867) Although it is within the province of the jury, in considering the weight of evidence, to pass upon the credit due the respective witnesses, they may not, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted witness, who testifies fairly, and gives clear, rational, consistent, and relevant testimony.—Seibert v. Erie R. Co., 49 Barb. 583.

[v] (N. C. 1842) Where a jury are left in a reasonable and real doubt as to the credibility of a witness, they should disregard his testimony, and give such a verdict as they would have done if he had not been a witness.—Miller v. Richardson, 24 N. C. 250.

[vv] (Pa. 1845) As the credibility of a witness must be judged of by the jury, any evidence which tends to affect it is competent.—Magehan v. Thompson, 9 Watts & S. 54.

[w] (Pa. 1873) The manner of a witness, the reasonableness of his testimony, his sources of knowledge, his capacity to understand and intelligently narrate what he sees and knows, and his motives and bias, each and all, are elements of belief or disbelief.—Lodge v. Frankford & H. R. Co., 30 Leg. Int. 92.

[ww] (Pa. 1894) Where the testimony of a witness who refuses to swear that he will tell the whole truth is necessary in order to infer adultery, such inference cannot be drawn, and such testimony must be wholly rejected.—Ginther v. Ginther (Com. Pl.) 15 Pa. Co. Ct. R. 130.

[x] (Pa. 1896) Though the oral testimony of plaintiff's witnesses to prove the existence of conditions in a lost deed be uncontradicted, the question as to their existence is for the jury.—Lehigh Coal & Navigation Co. v. Evans, 176 Pa. 28, 34 Atl. 999, 38 Wkly. Notes Cas. 286.

[xx] (Tex. 1893) Where there is no fact in the record which tends to rebut the statements of a witness the court is not authorized to reject them, especially where there are other facts or circumstances corroborative thereof.—Clark v. McGrath (Civ. App.) 22 S. W. 527.

[y] (Tex. 1894) The jury are the exclusive judges of the credibility of the witnesses.—Dill v. State (Cr. App.) 28 S. W. 950.

[yy] (Tex. 1895) The wife of plaintiff may be impeached by testimony that she had stated in a conversation with witness that she was afraid of plaintiff, and that he had dictated to her what she should testify to.—Donahoo v. Scott (Civ. App.) 30 S. W. 385.

[z] (Tex. 1895) The state could not show that, though it made a diligent search for evidence, it was unaware of the testimony of a witness testifying for defendant in support of an alibi, thereby discrediting the testimony of such witness.—Coker v. State, 35 Tex. Cr. R. 57, 31 S. W. 655.

[zz] (Vt. 1882) The disability of a dumb witness, rendering it impossible to cross-examine him with facility, affects his credibility, though not his competency.—Quinn v. Halbert, 55 Vt. 224.

§ 1073. Improbability of statement.

[a] (U. S. 1881) Where a defendant in a criminal prosecution otherwise unimpeached testifies under circumstances calculated to create a strong bias, and he states what is in its nature incredible, his testimony is not necessarily to be believed, as the credit of testimony is left to the jury, who are judges of the probability or improbability and credibility of the witness and his testimony.—United States v. Borger (C. C.) 7 Fed. 193, 19 Blatchf. 249.

[b] (U. S. 1885) Where an extraordinary transaction is disclosed, no satisfactory explanation of which is vouchsafed, and the evidence of the transaction, which it was in the power of the parties to produce, has been withheld, the court may disregard the testimony of the parties so far as it is improbable, and interpret the transaction in a way consistent with the ordinary conduct and motives of business men.—Chandler v. Town of Attica (C. C.) 22 Fed. 625, 23 Blatchf. 66.

[c] (Ala. 1883) The mere fact that testimony is unreasonable and improbable does not compel the jury to disbelieve it.—Ross v. State, 74 Ala. 532.

[d] (Ga. 1846) Where witnesses testified to what they saw, on a certain night, aided by the starlight and the light from neighboring houses, it was not permitted to impeach them by witnesses who offer to prove that on a similar starlight night they made experiments between the same hours, and with the same degree of light, and were unable to discern objects distinctly at the distance testified to by the witnesses to be impeached.—Sealy v. State, 1 Ga. (1 Kelly) 213, 44 Am. Dec. 641.

[e] (Ill. 1889) The testimony of unimpeached witnesses, as to the bona fides of a conveyance, cannot be ignored because the transaction was not businesslike.—Dunn v. Weir, 34 Ill. App. 612.

[f] (Ill. 1890) The fact that the account given by a witness of a transaction is in the abstract improbable is not of itself sufficient to discredit him, though he is testifying in his own interest.—Bunn v. Third Nat. Bank, 38 Ill. App. 76.

[g] (La. 1877) Where the testimony of a witness is improbable and suggestive of collusion and conspiracy, it is entitled to no weight.—Breard v. Mechanics' & Traders' Ins. Co., 29 La. Ann. 764.

[h] (La. 1891) Positive testimony by witnesses whose character and credibility are not impeached cannot be overcome by suspicion founded on mere improbability of their statements, when not shown to be in any sense impossible; especially when the trial judge has given credence to it.—Succession of Barrett, 43 La. Ann. 61, 8 South. 438.

[i] (Me. 1856) Evidence offered to show the improbability of a transaction, as stated by a witness, but having no tendency to show that he had given a different account of it, is not a mode of impeaching him known to the law.—Shaw v. Emery, 42 Me. 59.

[j] (Minn. 1894) The positive testimony of an otherwise unimpeached witness can only be disregarded when its improbability or inconsistency, appearing from the evidence in the case, furnishes a reasonable ground for doing so.—Second Nat. Bank v. Donald, 56 Minn. 491, 58 N. W. 269.

[k] (N. J. 1883) In weighing evidence, the credibility thereof, as it appears probable under the tests of experience and observation, is to be considered.—Daggers v. Van Dyck, 37 N. J. Eq. (10 Stew.) 130.

[l] (N. Y. 1871) Where the statements of a witness are grossly improbable, the jury are not bound to refrain from exercising their judgment and to adopt the statements of such witness.—Elwood v. Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140.

[m] (N. Y. 1886) While a court is bound to believe a disinterested, unimpeached, uncontradicted witness, who gives evidence not in any way discredited, or in itself improbable or in-

credible, it is not bound to give credit to a witness who is interested in the result of the action, and whose evidence is improbable, and discredited by circumstances, or is against common experience and observation.—New York & Brooklyn Ferry Co. v. Moore, 102 N. Y. 667, 6 N. E. 293; New York Ferry Co. v. Same, Id.

[n] (N. C. 1890) That a witness who testified that he was present when deceased was shot did not know where deceased lived, or the date when she was shot, will not warrant a charge to disbelieve his testimony.—State v. Jacobs, 107 N. C. 873, 12 S. E. 248.

[o] (Ohio, 1853) The improbability of a witness' story may justify the jury in not believing him, though he is not directly impeached.—French v. Millard, 2 Ohio St. 44.

[p] (Tenn. 1848) The mere fact that statements proved by one witness to have been made by the prisoner were not heard by others who were present is not a sufficient circumstance to discredit such person, if otherwise unimpeached.—Clark v. State, 27 Tenn. (8 Humph.) 671.

§ 1074. Presumptions.

[a] (Ala. 1888) The law raises no presumption as to whether or not a witness under oath speaks the truth.—Stix v. Keith, 85 Ala. 465, 5 South. 184, overruling Rowland v. Plummer (1874) 50 Ala. 182.

[b] (Miss. 1849) Every presumption is in favor of the credibility of a witness; and although there may be impeaching testimony, if it is overbalanced, his testimony cannot be rejected.—Comstock v. Rayford, 20 Miss. (12 Smedes & M.) 369.

§ 1075. Youthfulness.

[a] (Ill. 1891) The testimony of a witness as to the distance of a fence from a certain point should not be disregarded, although at the time when he measured the distance he was but 12 years old.—Moffett v. South Park Com'rs, 138 Ill. 620, 28 N. E. 975.

[b] (N. J. 1885) A child of young and tender age was a witness in a suit for divorce between her father and mother. She was under the mother's charge when a witness, and gave favorable testimony for her. *Held*, upon a petition to open the decree upon the ground that the child was willing to swear to statements contrary to her former testimony, she having in the meanwhile been transferred to the care of the father, that her testimony was entitled to no weight.—Pedrick v. Pedrick (Ch.) 3 Atl. 406.

[c] (N. Y. 1893) Under Code Cr. Proc. § 392, providing that where a child under the age of 12 years, offered as a witness, does not, in the opinion of the court, understand the nature of an oath, the evidence of such child may be received, though not given under oath, "but no person shall be convicted on such testimony unsupported by other evidence," corroboration is not required where the testimony of a child is received under oath.—People v. O'Brien, 74 Hun, 264, 26 N. Y. Supp. 812.

[d] (S. C. 1813) The evidence of a child of seven years of age, corroborated by circumstances, is sufficient to justify a conviction of a capital crime, although that evidence be contradicted by the evidence of an adult; the credibility of the witnesses being left to the jury.—State v. Le Blanc, 3 Brev. 339.

§ 1076. Means of knowledge of witness.

As affecting competency, see ante, §§ 80–87.
Impeachment of knowledge, see post, § 1108.

[a] (U. S. 1851) On a question as to the strength and direction of the wind arising, on the trial of a libel for collision, brought in behalf of a sailing vessel against a steamboat, the testimony of those on board the former, whose movements depend upon the wind, is entitled to more weight than that of those on board the latter, whose movements are independent of it.—The Genesee Chief v. Fitzhugh, 53 U. S. (12 How.) 443, 13 L. Ed. 1058.

[b] (U. S.) A direct conflict between equally credible witnesses must be resolved in favor of the one having the best opportunity to know the facts.—(1849) Barrett v. Williamson, Fed. Cas. No. 1,051 [4 McLean, 589]; (1854) Abbe v. Rood, Fed. Cas. No. 6 [6 McLean, 106]; (1870) Ayer v. The Glaucus, Fed. Cas. No. 683 [4 Cliff. 166].

[c] (U. S. 1863) In collision cases, the testimony of passengers who have no practical knowledge of seamanship should be received with caution.—Klots v. The Red Jacket, Fed. Cas. No. 7,871.

[d] (U. S. 1868) The evidence of the pilot of a steamer that he saw the sail vessel from a quarter to a half mile off is more reliable than that of other witnesses, who came out suddenly into the darkness, that she could not be seen so far off.—The Western Metropolis, Fed. Cas. No. 17,439 [2 Ben. 399].

[e] (U. S.) The testimony of the witnesses on board a sail vessel as to the direction of the wind will be *held* more reliable than that of witnesses on board the steamer with which she came in collision.—(1871) The Hammonia, Fed. Cas. No. 6,005 [4 Ben. 515]; (1872) The Hansa, Fed. Cas. No. 6,037 [5 Ben. 501].

[f] (U. S. 1882) Where there is a vast conflict of testimony, in which there is a question of identity to be established, it is for the jury first to consider which witnesses had the best opportunity and were most likely to know the facts, and, second, to give to those witnesses whose long acquaintance and special opportunities were such as to enable them to carry in their recollection the identity of the particular party, greater weight than those who only casually knew the party.—Wackerle v. Mutual Life Ins. Co. (C. C.) 14 Fed. 23, 4 McCrary, 508.

[g] (U. S. 1892) Where testimony is conflicting, the jury should consider, in determining what weight to attach to the testimony of witnesses, their means of information.—United States v. Ybanez (C. C.) 53 Fed. 536.

[h] (Ala. 1833) A single witness, who heard a conversation set up in complainant's bill between complainant and a deceased executor, is sufficient to prove the declarations made in such conversation, as against a surviving executor, who does not, in denying that there was such a conversation, show how he acquired knowledge justifying his denial.—Waters v. Creagh, 4 Stew. & P. 410.

[i] (Ala. 1853) When there is a conflict in the testimony of two witnesses, which cannot be reconciled, regard must be had, in determining which one is mistaken, to the capacity of the witnesses, their respective opportunities of knowing the facts to which they depose, and the nature of the facts deposed to, as calculated to impress themselves with more or less force on the memory.—Hitt v. Rush, 22 Ala. 563.

[j] (Ill. 1855) In determining the relative weight of conflicting testimony of two witnesses, the preponderance should be given the one who had the better opportunity of being correctly informed as to the matters in controversy.—Brady v. Thompson, 17 Ill. (7 Peck) 270.

[k] (Ill. 1858) A witness may be impeached by his want of intelligence or means of knowing the facts to which he testifies.—Rankin v. Crow, 19 Ill. (9 Peck) 626.

[l] (Ill. 1862) A witness' want of intelligence or the means of knowing the facts of which he

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testifies may justify the jury in discrediting him; but if he is corroborated his testimony ought not to be rejected.—Hansell v. Erickson, 28 Ill. (18 Peck) 257.

[m] (Ill. 1863) The instruction of the judge on the trial of an indictment, "that if the jury find that" the witness, who had stated a conversation by defendants among themselves containing admissions, did not hear all the conversation between the prisoners, and did not pretend to have understood all they said, her testimony is entitled to much less weight than if she had heard and understood the whole of the conversation upon the same subject. But it is for the jury to say whether she related the words or substance of the language used, and whether such language was in relation to distinct facts, and how far it tends to prove defendants guilty. *Held* correct.—White v. Walker, 31 Ill. 422.

[n] (Ill. 1883) It is error to instruct the jury that they should be governed by the testimony of such witness as in their opinion had the best knowledge, as the witness with the best knowledge is not always entitled to the most credit.—German Fire Ins. Co. v. Von Gunten, 13 Ill. App. (13 Bradw.) 593.

[o] (Ind. 1858) A witness testified that a settlement between the plaintiff and the defendant was, "as he understood," etc., and afterwards that it was "understood and agreed by the parties," as before. *Held*, that the source of his understanding, and the facts on which it was based, sufficiently appeared.—Thomas v. White, 11 Ind. 132.

[p] (Iowa, 1890) On trial for keeping a house of ill fame, a witness may state the reputation of the house, though his information has been received from traveling men, who did not reside in the place.—State v. Lee, 80 Iowa, 75, 45 N. W. 545, 20 Am. St. Rep. 401.

[q] (N. Y. 1863) Greater reliance is to be placed upon the testimony of an impartial and respectable lawyer, in regard to the due execution of a legal instrument, than upon that of a nonprofessional witness.—Julke v. Adam, 1 Redf. Sur. 454.

[r] (N. C. 1891) In an action to set aside a power of attorney on account of the maker's want of mental capacity, it is proper to charge that the law attaches peculiar importance to the testimony of a subscribing witness, and of the attending family physician.—Smith v. Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

[s] (Tex. 1856) Where an unimpeached witness states a fact as of his own knowledge, it must be taken that he had competent means of information and knowledge of the fact, unless the contrary appears.—Kottwitz v. Bagby, 16 Tex. 656.

[t] (Vt. 1879) Where the cross-examination of a witness disclosed that testimony which both counsel and the court supposed to be of facts within her own knowledge was really hearsay, and the counsel for the state then told the jury that the testimony was withdrawn from their consideration, it was proper for the court to discharge the witness and inform the jury that her testimony was of no account.—State v. Babcock, 51 Vt. 570.

§ 1077. Recollection of witness.

As affecting competency of witness, see ante, § 82.

Impeachment of recollection, see post, § 1103.

[a] (Ala. 1850) The circumstance that a witness called to testify to declarations cannot state the precise time or place or the names of the persons goes only to his credibility.—Walker v. Blassingame, 17 Ala. 813.

[b] (Ala. 1855) A witness who is introduced by the state to prove the defendants' confessions, and who states, on re-examination, "that he had testified to the substance of all that each of said defendants stated on that occasion, but that they may have stated something which he did not recollect," is competent to testify to the confessions, if in themselves admissible.—Brister v. State, 26 Ala. 107.

[c] (Ala. 1876) When a witness testifying to a conversation or confession admits that he cannot recollect all that was said at the time, this is no reason for rejecting his testimony entirely.—Pond v. State, 55 Ala. 196.

[d] (Ark. 1880) The fact that defendant, in a conversation with a witness, said something which the witness cannot remember, will not exclude his testimony of what he does remember.—Wright v. State, 35 Ark. 639.

[e] (Ill. 1873) The testimony of a witness which is clear and positive as to a certain transaction is entitled to greater weight than that of one who remembers nothing of such transaction, except from seeing his handwriting in a receipt given by him.—Chicago & A. R. Co. v. Shea, 66 Ill. 471.

[f] (La. 1852) The testimony of witnesses who speak positively and minutely of facts of no interest to them, happening many years before during their childhood, is not a sufficient ground of belief.—Chandler v. Hough, 7 La. Ann. 440.

[g] (N. J. 1878) A witness who feigns forgetfulness of circumstances collateral to his main story, which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief.—Gibbons v. Potter, 30 N. J. Eq. (3 Stew.) 204.

[h] (N. Y. 1863) Witnesses not being able to recollect positively the language used when the contract was made, the jury are authorized to consider the probability of plaintiffs being satisfied with the answer defendants claim to have made, and the probability of defendants making such an answer.—Audubon v. Excelsior Ins. Co., 27 N. Y. 216.

[i] (Tex. 1878) On a trial of R. for theft of a gelding, the principal witness for the state was unable to recognize R. as the man he had seen in possession of the animal, but stated that as a witness in a previous trial he had identified the person then accused as the man. The prosecuting attorney thereupon testified that R. was the person so identified. *Held*, that this was competent to remedy the defect of memory of the principal witness.—Ruston v. State, 4 Tex. App. 432.

[j] (Tex. 1882) Where a witness testifies to the contents of a deed that has been lost for 20 years, it is enough if the witness can testify to its substance, though his recollection is not very specific.—Parks v. Caudle, 58 Tex. 216.

[k] (Utah, 1891) On trial for a murder committed 32 years before, when the principal witness for the prosecution was only 5 years old, where the other witnesses have grown old, the lapse of time since the commission of the crime is a strong circumstance to be considered by the jury.—People v. Hancock, 7 Utah, 170, 25 Pac. 1093.

§ 1078. Manner of testifying.

[a] (U. S. 1892) Where testimony is conflicting, the jury should consider, in determining what weight to attach to the testimony of the witnesses, their manner of testifying.—United States v. Ybanez (C. C.) 53 Fed. 536.

[b] (Ga. 1860) When a witness testifies to facts incoherently or inconsistently, that circumstance goes to the credibility of the witness; and if the manner is very incoherent or incon-

sistent, the testimony should be considered with great caution.—Evans v. Lipscomb, 31 Ga. 71.

[c] (Ill. 1858) A witness may be impeached by his manner of testifying on the stand, and the jury may be justified in disregarding his evidence, unless it is sustained by other evidence in the case.—Rankin v. Crow, 19 Ill. (9 Peck) 626.

[d] (Ill. 1862) The manner of a witness on the stand may justify the jury in discrediting him, but if he is corroborated his testimony ought not to be rejected.—Hansell v. Erickson, 28 Ill. (18 Peck) 257.

[e] (Ill. 1894) It is proper to instruct the jury, in determining the credibility of a witness, to take into consideration his conduct and demeanor on the stand, and that if they believe from the evidence that any witness has willfully sworn falsely as to any material matter, they may disregard his testimony except in so far as it is corroborated.—Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056.

[f] (Ind. 1859) A witness may not only be impeached by evidence of general bad reputation, but by so conducting himself and testifying as to discredit his whole statements.—Terry v. State, 13 Ind. 70.

[g] (Miss. 1860) The manner of a witness in testifying may be considered as affecting his credit.—George v. State, 39 Miss. 570.

[h] (N. C. 1854) The conduct of a witness in stating that she did not know the distance between certain objects in a yard because she had not measured it, and that she could not tell whether it was a quarter of a mile or less, though calculated to prejudice her in the opinion of the jury, was not a matter that called for the exclusion of testimony, and it was proper for the jury to consider it as affecting her credit and not her competency.—State v. Peace, 46 N. C. 251.

[i] (Ohio, 1853) The manner of a witness on the stand may justify the jury in not believing him, though he is not directly impeached.—French v. Millard, 2 Ohio St. 44.

[j] (Tex. 1854) The jury are not required to believe a witness, although he makes a plain statement of what is not impossible, and is neither impeached nor contradicted, but may discredit him on account of the manner of giving the testimony, the attendant circumstances, or the improbability of the statement.—Cheatham v. Riddle, 12 Tex. 112.

2. EFFECT OF MISTAKEN, INACCURATE, OR FALSE TESTIMONY.

IN GENERAL, § 1079.
FALSUS IN UNO, FALSUS IN OMNIBUS, § 1080.
WILLFULNESS OR MISTAKE, § 1081.
MATERIALITY OF FALSE TESTIMONY, § 1082.
CONTRADICTION OR CORROBORATION ON OTHER POINTS, § 1083.

Effect of contradiction, see post, § 1283.
—— *of impeachment by inconsistent statements, see* post, §§ 1265, 1266.
Instructions to jury, see "Trial," vol. 46, cc. 1501–1504, § 532.

§ 1079. In general.

[a] (U. S. 1822) The doctrine that, if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony, can be received only under many qualifications, and with great caution.—The Santissima Trinidad, 20 U. S. (7 Wheat.) 283, 5 L. Ed. 454, affirming decree (1821) Fed. Cas. No. 2,568 [1 Brock. 478].

[b] (U. S. 1873) In an action to set aside a settlement made five years previously, and after the death of one of the parties, in order that complainant might have the benefit of a certain credit, the testimony of the wife and daughter of such deceased party, from memory, as to the date of a receipt on which the credit was based, is insufficient proof of mistake to warrant a decree setting aside such settlement, where several years had elapsed since the witnesses saw such receipt, and their testimony was inconsistent as to circumstances that impressed such date on their minds.—Willett v. Fister, 85 U. S. (18 Wall.) 91, 21 L. Ed. 804.

[c] (U. S. 1846) The general veracity of witnesses to a collision should not be impeached because of their different statements of attendant incidents, as the confusion and disturbance consequent on the occurrence would naturally tend to prevent such distinct observation as would enable the eyewitnesses to give concurring descriptions.—Corks v. The Belle, Fed. Cas. No. 3,231a.

[d] (U. S. 1888) A witness may be impeached by showing that in a material matter about which he could not be mistaken his testimony was untrue.—United States v. Hughes (D. C.) 34 Fed. 732.

[e] (U. S. 1893) The testimony of a witness 77 years of age, as to an event in his boyhood of a nature to be vividly impressed upon his mind, is not discredited by the fact that his statements as to certain other events were confused, and somewhat contradictory, upon a long cross-examination, and his memory at fault as to dates.—McClaskey v. Barr (C. C.) 54 Fed. 781.

[f] (Ala. 1861) Confusion or conflict as to dates cannot affect very strongly the credibility of a witness when the events of which he was speaking transpired more than thirty years before.—Black v. Black, 38 Ala. 111.

[g] (Mich. 1894) A mistake of a month in fixing the time of the intercourse at which the child was conceived will not warrant an instruction that the jury may, by reason of it, discredit her claim that the intercourse was consented to under promise of marriage.—Badder v. Keefer, 100 Mich. 272, 58 N. W. 1007.

[h] (Miss. 1857) Where one of two witnesses, whose testimony is contradictory, is fully sustained where he testifies to facts of which other witnesses are cognizant, and the other, in many instances, upon important and material facts, is contradicted by the unimpeached testimony of other witnesses, the testimony of the latter will be disregarded, and that of the former will be entitled to credit, in determining the questions at issue between them.—Fox v. Matthews, 33 Miss. 433.

[i] (Mo. 1872) If a witness contradict himself on any material point, his testimony may be disregarded.—State v. Miller, 49 Mo. 505.

[j] (Neb. 1884) The fact that a witness made an erroneous statement as to whether or not there was a defalcation of certain moneys, which depended to a great extent upon figures and computation, does not render his evidence of no credit.—Buffalo County v. Van Sickle, 16 Neb. 363, 20 N. W. 261.

[k] (Nev. 1880) Witnesses testified that a certain note was executed and delivered August 5, 1875. The note, being produced, appeared to bear date August 5, 1878. *Held*, in the absence of any opportunity being given to the witnesses to explain, that this circumstance was not sufficient to authorize the court to pronounce their testimony false.—Taft v. Kyle, 15 Nev. 416.

[l] (N. Y. 1896) The mere fact that plaintiff, in an action for injuries received while a passenger on defendant's street car, made a mistake in his testimony as to the number of the

car, does not necessarily impeach his testimony, so that no reliance should be placed on the residue.—Schaffer v. Second Ave. R. Co., 1 App. Div. 48, 36 N. Y. Supp. 1046.

[m] (Tex. 1847) Where a witness swore to a fact as occurring in 1821 or 1822, and it was proved to have occurred in 1823, it was *held* not to destroy his credibility as to other facts. —Jones v. Laney, 2 Tex. 342.

§ 1080. Falsus in uno, falsus in omnibus.

[a] The whole testimony of a witness may be rejected by the jury where it is found that he has willfully testified falsely as to a material fact.

—(U. S. 1856) Wellman v. Blood, Fed. Cas. No. 17,385 [1 McArthur, Pat. Cas. 432]; (1865) Union Sugar Refinery v. Matthiesson, Fed. Cas. No. 14,399 [3 Cliff. 639, 2 Fish. Pat. Cas. 600]; (1869) United States v. Blaisdell, Fed. Cas. No. 14,608 [3 Ben. 132]; (1869) Same v. Harries, Fed. Cas. No. 15,309 [2 Bond, 311]; (1885) Mann v. Arkansas Valley Land & Cattle Co. (C. C.) 24 Fed. 261; (1887) Strauss v. Abrahams (C. C.) 32 Fed. 310;

(Cal. 1881) People v. Soto, 59 Cal. 367;

(Ill. 1884) Rider v. People, 110 Ill. 11; (1855) O'Halloran v. Kingston, 16 Ill. App. (16 Bradw.) 659; (1889) Anderson v. People, 34 Ill. App. 86;

(Iowa, 1877) State v. Wells, 46 Iowa, 662;

(Mo. 1851) State v. Mix, 15 Mo. 153; (1876) Same v. Orr, 64 Mo. 339; (1877) White v. Maxcy, 64 Mo. 552; (1894) Cameron v. Hart, 57 Mo. App. 142; (1894) Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366; (1894) McFadin v. Catron, 120 Mo. 252, 25 S. W. 506;

(N. Y. 1885) People v. Petmecky, 99 N. Y. 415, 2 N. E. 145, affirming (1884) 2 N. Y. Cr. R. 450;

(Wis. 1894) Allen v. Murray, 87 Wis. 41, 57 N. W. 979.

[b] It is proper to charge that, if the jury find that a witness has intentionally testified falsely as to material matters, they may disregard his testimony altogether, instead of telling them that they must disregard it unless corroborated.

—(Cal. 1896) People v. Oldham, 111 Cal. 648, 44 Pac. 312;

(D. C. 1884) Oliver v. Cameron, 11 D. C. 237;

(Ill. 1886) Hoge v. People, 117 Ill. 35, 6 N. E. 796; (1887) Clapp v. Bullard, 23 Ill. App. 609;

(Iowa, 1890) Judge v. Jordan, 81 Iowa, 519, 46 N. W. 1077;

(Mich. 1893) Cole v. Lake Shore & M. S. Ry. Co., 95 Mich. 77, 54 N. W. 638;

(N. Y. 1894) Demond v. Brooklyn City R. Co. (City Ct. Brook.) 8 Misc. Rep. 610, 29 N. Y. Supp. 318;

(Wis. 1854) Mercer v. Wright, 3 Wis. 645.

[c] Juries are the exclusive judges of the weight of testimony, and are not obliged to reject all the testimony of a witness simply because he has testified falsely in one particular.

—(Ill. 1875) Reynolds v. Greenbaum, 80 Ill. 416; (1881) Pennsylvania Co. v. Conlan, 101 Ill. 93;

(Me. 1856) Parsons v. Huff, 41 Me. 410; (1856) Merrill v. Inhabitants of Whitefield, Id. 414;

(Mo. 1853) State v. Anderson, 19 Mo. 241; (1860) Same v. Schoenwald, 31 Mo. 147;

(N. H. 1844) Senter v. Carr, 15 N. H. 351;

(N. Y. 1889) People v. Kerr (O. & T.) 6 N. Y. Supp. 674, 6 N. Y. Cr. R. 406;

(Wis. 1854) Mercer v. Wright, 3 Wis. 645.

[d] If a witness willfully swears falsely in a material matter, his testimony should be rejected entirely, unless corroborated.

—(U. S. 1848) Giltner v. Gorham, Fed. Cas. No. 5,453 [4 McLean, 402];

(Ga. 1853) Day v. Crawford, 13 Ga. 508; (1874) Pierce v. State, 53 Ga. 365;

(Ill. 1861) Crabtree v. Hagenbaugh, 25 Ill. (15 Peck) 233, 79 Am. Dec. 324;

(N. Y. 1882) Clark v. Mechanics' Nat. Bank, 11 Daly, 239; (1888) In re Hyman, 13 N. Y. St. Rep. 136.

[e] The maxim, "Falsus in uno," etc., imports that the witness' whole testimony is to be suspected, but not necessarily rejected.

—(Cal. 1879) People v. Hicks, 53 Cal. 354; Same v. Sprague, Id. 491;

(Miss. 1878) Finley v. Hunt, 56 Miss. 221.

[ee] The rule, "Falsus in uno, falsus in omnibus," is to be applied by the jury according to their own judgment for the ascertainment of the truth, and is not a rule under which the judge may withdraw the evidence from the jury's consideration and direct them to disregard it.

—(N. C. 1855) State v. Williams, 47 N. C. 257;

(Ohio, 1869) Mead v. McGraw, 19 Ohio St. 55.

[f] (U. S. 1856) If there be reason to suppose that the perjury or prevarication of one witness is the result of subornation, it affords a reasonable ground in a doubtful case for suspecting the testimony of other witnesses adduced by the same party.—Wellman v. Blood, Fed. Cas. No. 17,385 [1 McArthur, Pat. Cas. 432].

[g] (U. S. 1884) Where a witness falsifies a fact in respect to which he cannot be presumed liable to mistake, courts are bound, upon principles of law, morality, and justice, to apply the maxim, "Falsus in uno, falsus in omnibus." —American Bell Tel. Co. v. People's Tel. Co. (C. C.) 22 Fed. 309, 22 Blatchf. 531.

[gg] (U. S. 1885) The jury are at liberty to reject the testimony of a witness as incredible, although he is not impeached or contradicted by direct evidence, where there is some intrinsic improbability in his narrative, and he has shown himself unworthy of credit by his attempt to falsify a collateral transaction involved in the suit.—Tracey v. Town of Phelps (C. C.) 22 Fed. 634, 23 Blatchf. 71.

[h] (Ala. 1879) The maxim that a witness who intentionally gives false testimony as to any material fact is to be wholly discredited is not a rule of law imperatively binding the jury, but is to be applied according to their sound judgment.—Grimes v. State, 63 Ala. 166.

[hh] (Cal. 1885) The presumption arising under Code Civ. Proc. § 2061, that "a witness false in one part of his testimony is to be distrusted in others," is rebuttable, and may be overcome by circumstances of which the jury are the sole judges.—White v. Disher, 67 Cal. 402, 7 Pac. 826.

[i] (Cal. 1886) Code Civ. Proc. § 2061, provides that a witness false in one part of his testimony "is to be" distrusted in others. *Held*, that it is error to instruct that, in such case, the jury "are at liberty" to disregard any part of such testimony.—Brown v. Griffith, 9 Pac. 425.

[ii] (Cal. 1887) An instruction that the jury might reject, wholly or in part, the testimony of a witness who had "willfully testified falsely in regard to any one person or any one particular fact in the case," was objected to on the ground that it should only have told the jury to distrust or reject the testimony of a witness who had willfully sworn falsely "as to a material point in the case." *Held* that, under

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the rule "that a witness false in one part of his testimony is to be distrusted in others" (Code Civ. Proc. § 2061, subd. 3), the instruction was not erroneous.—People v. Flynn, 73 Cal. 511, 15 Pac. 102.

[jj] (Ill. 1867) Where there is no evidence tending to corroborate a witness, it is not error to instruct the jury that, if they believe, from the evidence, that the witness has willfully sworn falsely upon any material point, they may disregard his entire testimony.—Howard v. McDonald, 46 Ill. 123.

[jj] (Ill. 1871) The maxim, "Falsus in uno, falsus in omnibus," should be applied in all cases where the testimony of a witness is intentionally false.—United States Exp. Co. v. Hutchins, 58 Ill. 44.

[k] (Ill. 1886) The jury cannot properly be instructed that, if they believed plaintiff had sworn willfully false on any one point in the case, they may disregard the whole evidence, as the giving of such an instruction may deprive the plaintiff of the benefit of his entire evidence.—Coggins v. Chicago & A. R. Co., 18 Ill. App. (18 Bradw.) 620.

[kk] (Iowa, 1855) A requested instruction that, when a witness swears falsely as to one material fact, he is not entitled to credit, may be given with the qualification that, if the jury are satisfied that the witness has so sworn, they ought to look with suspicion and distrust on the whole of his testimony, but if they are satisfied that the witness has sworn the truth in relation to other material facts, the latter should not be discredited.—McCrary v. Crandall, 1 Iowa (1 Clarke) 117.

[l] (Iowa, 1855) To instruct the jury that a witness who has sworn falsely upon one material point is utterly unworthy of credit is wrong.—McCrary v. Crandall, 1 Iowa (1 Clarke) 117.

[ll] (Kan. 1866) The presumption that a witness will declare the truth ceases as soon as it manifestly appears that he is guilty of perjury, in a material matter in the case.—Campbell v. State, 3 Kan. 488.

[m] (Kan. 1866) In a trial for murder, if the jury believe from all the evidence that a witness has testified falsely in respect to any material fact, it is their duty to disregard the whole of her testimony.—Campbell v. State, 3 Kan. 488.

[mm] (Me. 1840) The rule that, if a witness testifies falsely as to any one material fact, the whole of his testimony must be rejected, is not of such binding effect as to authorize the court to instruct the jury that they cannot believe one part of his statement and disbelieve another. This is but a presumption of law, and cases often occur in which jurors may yield entire credit to certain statements and disbelieve others.—Lewis v. Hodgdon, 17 Me. (5 Shep.) 267.

[n] (Me. 1841) An instruction to the jury that, if they believed that one of the parties had attempted to deceive them in an important particular relative to the issue, they might take it into consideration in connection with other conflicting testimony, is not legally objectionable.—Millay v. Millay, 18 Me. (6 Shep.) 387.

[nn] (Mass. 1867) It is not an absolute rule of law that, if the jury find that a witness has willfully sworn falsely in relation to any matter material to the issue on the trial, they shall wholly disregard his testimony except in those particulars in which it is corroborated.—Commonwealth v. Billings, 97 Mass. 405.

[o] (Mich. 1880) The jury were charged that if they believed defendant had willfully sworn falsely as to any material fact, and they should be of opinion that such willful false swearing rendered the witness incredible in the whole, it would be their right to disregard his entire testimony. *Held* proper.—O'Rourke v. O'Rourke, 43 Mich. 58, 4 N. W. 531.

[oo] (Mich. 1888) A charge that, if a witness swears to a matter which is willfully false, then the jury is under no obligation to believe anything he says, is technically correct, and not ground for reversal.—Hillman v. Schwenk, 68 Mich. 293, 297, 36 N. W. 77, 670.

[p] (Miss. 1860) The jury on considering all the circumstances may act on or disregard the testimony of a witness, in whole or in part, as they shall deem it worthy or unworthy of belief.—George v. State, 39 Miss. 570.

[pp] (Mo. 1867) It is not error in the court to instruct the jury that, if they find that a certain witness willfully and knowingly swore falsely to any material matter in the case, they are authorized to discredit the whole of his testimony.—Paulette v. Brown, 40 Mo. 52.

[q] (Mo. 1888) Where there is a direct conflict of testimony, it is not error to instruct a jury that, if they believe that a witness has knowingly testified to a falsehood, they may disregard his entire testimony.—State v. Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

[qq] (Mo. 1894) Where the testimony of witnesses is wholly irreconcilable, and the credibility of some is questioned, it is not error to instruct that the jury may disregard wholly or in part the testimony of any witness who they believed had sworn falsely.—Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co. (Sup.) 27 S. W. 615.

[r] (Mo. 1895) Where defendant admits that he received the money sued for, and claims that he disbursed it for plaintiff's use, but cannot remember to whom it was paid, the admission as to the receipt of the money may be accepted as true, and the evidence as to the disposition of it rejected.—Johnson v. Blell, 1 Mo. App. Rep'r, 291, 61 Mo. App. 37.

[rr] (Neb. 1880) In an action on a note, the defense of usury in the note and the taking of usurious interest after maturity was supported by the testimony of defendant and another, but was positively denied by plaintiff. *Held*, that the court was not justified in finding the taking of usurious interest after maturity, and at the same time that the note was originally free from usury, but should have applied the rule that, where a party swears falsely to a fact in respect of which he cannot be presumed liable to mistake, courts are bound to apply the maxim falsus in uno, falsus in omnibus, and to give no credit to any alleged fact depending upon his statement alone.—Dell v. Oppenheimer, 9 Neb. 454, 4 N. W. 51.

[s] (Neb. 1883) Defendant swore positively that he did not sign a mortgage in dispute, but his statement was disproved by the evidence of a number of disinterested witnesses. *Held*, that the jury properly disregarded his testimony in other particulars as unworthy of belief.—Gandy v. Poole, 14 Neb. 98, 15 N. W. 223.

[ss] (Neb. 1886) In a replevin suit there was no evidence before the court that any witness had sworn falsely, but the main witness for the plaintiff, before his final dismissal as such witness, made a correction and retraction of a part of his testimony. *Held* error on the part of the court to give in charge to the jury the maxim, "falsus in uno, falsus in omnibus."—Kay v. Noll, 20 Neb. 380, 30 N. W. 269.

[t] (N. M. 1892) The court properly instructed the jury that "if you believe from the evidence that the defendant, as a witness, * * * has willfully sworn falsely in this trial as to any matter or thing material to the issue in this case, then you are at liberty to disregard his entire testimony, except so far as it has been corroborated by other credible evidence, or by

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facts and circumstances proved on the trial."—Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905.

[tt] (N. Y. 1848) Where a witness is discredited on one point, and makes a statement on another point, which is supported by his evidence alone, or principally, when, confessedly, there can be no one to contradict what the witness says, if untrue, and where his statement is in effect contradicted by the attending circumstances, his evidence will be considered insufficient.—Burtus v. Tisdall, 4 Barb. 571.

[u] (N. Y. 1878) A finding based solely on statements of a witness who has made false statements on other points is not erroneous, where it does not clearly appear that the witness was corrupt.—Deering v. Metcalf, 74 N. Y. 501.

[uu] (N. Y. 1880) On a trial for murder, the accused, in his own behalf, was the only person who gave direct evidence of the incidents of the homicide from having witnessed them. *Held*, that an instruction was proper, based on the maxim, "Falsus in uno," etc., to the effect that where a witness commits willful perjury in a part of his testimony, the whole should sometimes be rejected.—People v. Moett, 58 How. Prac. 467.

[v] (N. Y. 1886) The jury have a right to disregard the evidence of a witness who has willfully and corruptly sworn to a state of facts known to him to be untrue.—People v. Buddensieck, 4 N. Y. Cr. R. 230.

[vv] (N. Y. 1891) The willful false swearing of a witness in one particular does not absolutely discredit his entire testimony; but the whole is to be submitted to the court or jury to determine, by the ordinary tests of veracity, whether and how far they may believe him.—Smith v. Smith (Com. Pl.) 13 N. Y. Supp. 817.

[w] (N. C. 1828) The testimony of a witness who is corruptly false in any particular should be entirely disregarded by the jury; and a charge that they might reject part of the testimony which they did not believe, and act on what they did believe, is erroneous.—State v. Jim, 12 N. C. 508.

[ww] (N. C. 1860) The maxim, "Falsum in uno, falsum in omnibus," does not prevail in courts of law, the fact that a witness has sworn falsely as to one matter going to the credibility and not to the competency of his testimony as to other matters.—State v. Smith, 53 N. C. 132.

[x] (N. C.) The rule, "Falsum in uno, falsum in omnibus," does not now prevail in this state, and a jury may believe a part, all, or none of the testimony of a witness.—(1869) State v. Brantley, 63 N. C. 518; (1870) Same v. Spencer, 64 N. C. 316.

[xx] (Ohio, 1864) The testimony of a witness, clearly shown to have committed perjury in one material point of his evidence, must be wholly rejected, and cannot be relied upon for any purpose whatever.—Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470.

[y] (Pa. 1886) An instruction that if plaintiff is convicted of willful falsity in his testimony in any material particular, the jury should throw out his evidence, *held* not ground for reversal.—Sharp v. City of Erie, 4 Atl. 161.

[z] (S. C. 1887) Whether the doctrine, "Falsus in uno, falsus in omnibus," should be applied to the testimony of a witness, *held* to be entirely within the discretion of the trial judge.—James v. Mickey, 26 S. C. 270, 2 S. E. 130.

[zz] (Va. 1891) Where, in a murder trial, deceased's son testifies that he knew the hour at which the assault occurred, because he looked at a clock in the house, and his sisters testify that there was no clock, the value of his evidence is for the jury, and an instruction is properly refused declaring that, if the witness swore falsely in this respect, his whole testimony is destroyed, and should be disregarded.—Hash v. Commonwealth, 88 Va. 172, 13 S. E. 398.

§ 1081. Willfulness or mistake.

[a] The whole testimony of a witness is not to be disregarded because he testified falsely as to a material fact, unless he did so knowingly and willfully.

—(Ariz. 1893) Follett v. Territory, 33 Pac. 869;
(Cal. 1866) People v. Strong, 30 Cal. 151;
(Colo. 1876) Gottlieb v. Hartman, 3 Colo. 53;
(Ill. 1861) Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; (1871) United States Exp. Co. v. Hutchins, 58 Ill. 44; (1886) Hoge v. People, 117 Ill. 35, 6 N. E. 796;
(Mo. 1876) State v. Elkins, 63 Mo. 159; (1884) Same v. Lett, 85 Mo. 52; (1886) Same v. Palmer, 88 Mo. 568.

[b] The maxim, "Falsus in uno, falsus in omnibus," should only be applied to a willful mistatement by the witness.

—(Ill. 1871) United States Exp. Co. v. Hutchins, 58 Ill. 44; (1871) Pope v. Dodson, Id. 360; (1876) Gulliher v. People, 82 Ill. 145; (1877) Chicago, B. & Q. R. Co. v. Boger, 1 Ill. App. (1 Bradw.) 472;
(Iowa, 1868) Callanan v. Shaw, 24 Iowa, 441;
(Miss. 1884) Vicksburg & M. R. Co. v. Hedrick, 62 Miss. 28;
(Neb. 1884) Buffalo Co. v. Van Sickle, 16 Neb. 363, 20 N. W. 261; (1896) Omaha & R. V. R. Co. v. Krayenbuhl, 48 Neb. 553, 67 N. W. 447.

[c] (U. S. 1848) If one portion of a witness' testimony be contradicted, but it do not appear that the witness intentionally swore falsely, the rest of his testimony is not necessarily rendered unworthy of credit by such contradiction.—Giltner v. Gorham, Fed. Cas. No. 5,453 [4 McLean, 402].

[d] (Ark. 1892) An instruction that, "if the jury find that any witness has sworn falsely to any material fact, they may, if they see proper, disregard the entire testimony of such witness," is incomplete, since false swearing discredits the entire testimony of a witness only when it is willful.—Frazier v. State, 56 Ark. 242, 19 S. W. 838.

[e] (Ill.) Because a witness makes an untrue statement it does not follow that his whole testimony is to be disregarded. The motive actuating the witness must be regarded. The maxim, "Falsus in uno," etc., should only be applied to cases where a witness willfully gives false testimony.—(1854) Brennan v. People, 15 Ill. (5 Peck) 511; (1884) Smith v. Forbes, 14 Ill. App. (14 Bradw.) 477.

[f] (Ill. 1866) An instruction that, if the jury believe a witness has testified falsely to a point material to the issue, they are at liberty to disregard his testimony, is erroneous, unless qualified by a restriction to the case of such untruth as is willful and not the result of inadvertence or want of recollection.—Yundt v. Hartrunft, 41 Ill. 10.

[g] (Ill. 1879) It is only when a witness has intentionally sworn falsely as to one matter that the jury may be instructed to reject his entire testimony, unless corroborated.—Quinn v. Rawson, 5 Ill. App. (5 Bradw.) 130.

[h] (Ill. 1886) It is of the utmost importance, in the rule of law giving the jury liberty to reject the uncorroborated testimony of a witness who has sworn falsely upon a material point that the false testimony be knowingly and will-

fully given. An instruction which omits this qualification is grossly erroneous.—Freeman v. Easly, 117 Ill. 317, 7 N. E. 656.

[i] (Ill. 1887) A witness should not be entirely discredited because he has made a false statement, unless he made it knowing it was false, and it was material to the issue.—Spencer v. Dougherty, 23 Ill. App. 399.

[j] (Ill. 1889) An instruction to the effect that if the jury believe that a witness has testified falsely upon any material matter they may disregard all his testimony, except as corroborated, is erroneous as treating an innocent mistake as having the same effect upon his credibility as willful perjury.—Murtaugh v. Murphy, 30 Ill. App. 59.

[k] (Ill. 1889) It is error for the court to instruct the jury that they may disregard the uncorroborated testimony of a witness, if they believe he has sworn falsely upon a material question, without specifying that they must be satisfied that the false statement was knowingly and willfully made.—Linck v. Whipple, 31 Ill. App. 155.

[l] (Ill. 1891) The testimony of a witness should not be rejected unless he has willfully sworn falsely, and his testimony is uncorroborated.—Shove v. Rowe, 42 Ill. App. 150.

[m] (Ill. 1895) It is only where it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other evidence, that a jury is warranted in disregarding his testimony.—Hutchinson Nat. Bank v. Crow, 56 Ill. App. 558.

[n] (Ill. 1896) Although a witness may be mistaken as to some parts of his evidence, it does not follow, as a matter of law, that he has willfully told an untruth, or that the jury would have the right to reject his testimony.—Hutchinson Nat. Bank v. Crow, 56 Ill. App. 558.

[o] (Iowa, 1899) A charge that, if the jury find that a witness has made a false statement through mistake or misapprehension, his entire testimony should not be disregarded, but that, if he has intentionally sworn falsely, then it may be, is not error.—Winter v. Central Iowa Ry. Co., 80 Iowa, 443, 45 N. W. 737.

[p] (Kan. 1883) An instruction that if the jury believe a witness has sworn falsely, they may reject his testimony or any part of it, is erroneous; as, unless the testimony was willfully false, it is no ground for disregarding the entire testimony of the witness.—Barney v. Dudley, 40 Kan. 247, 19 Pac. 550.

[q] (Mich. 1882) A jury has a right to disregard the positive testimony of a witness if they are satisfied from other evidence that it is erroneous, even though they do not think it intentionally false.—Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99, 13 N. W. 374.

[r] (Mo. 1879) Upon a trial, plaintiff and defendant contradicted one another upon the main issue, and the court charged that, if any witness had testified falsely as to any material fact, the jury might discredit his testimony as to such fact. *Held* error.—Shenuit v. Brueggestradt, 8 Mo. App. 46.

[s] (Mo. 1887) An instruction on the doctrine of falsus in uno, etc., is in Missouri sufficient if it charge that the witness had willfully sworn falsely, the words "willfully" and "knowingly" being prescribed in the alternative in such cases.—State v. Beaucleigh, 92 Mo. 490, 4 S. W. 666.

[t] (Mo. 1888) It is proper to refuse to instruct that, if the jury believe that any witness has sworn falsely concerning any material fact, they may disregard the whole or any part of his testimony, the qualification that such false swearing was willfully or intentionally done being omitted.—Blitt v. Heinrich, 33 Mo. App. 243.

[u] (Mo. 1890) Where there is an irreconcilable conflict in the testimony, and the veracity of witnesses is impeached, and evidence of contradictory statements is offered, it is proper to instruct as to the credibility of witnesses, but it is error to charge that, "if any witness has made any willfully false statement, they may disregard the whole of said witness' testimony," without limiting it to "willfully false statements," made under oath, of some fact material to the issue in the case.—State v. Buchler, 103 Mo. 203, 15 S. W. 331, distinguishing State v. Jones (1885) 86 Mo. 623.

[v] (Mont. 1892) An instruction that if the testimony of a witness has been given under the influence of ill-will towards a party, and any portion of it is untrue as to any material fact, it may be entirely disregarded, is erroneous, in failing to state that it must be knowingly and willfully untrue, especially where there is nothing to show that the witness was actuated by ill-will, but only that he was not friendly.—Bonnie v. Earll, 12 Mont. 239, 29 Pac. 882.

[w] (N. M. 1895) It is error to instruct that, if the jury believe that any witness has testified falsely, they may disregard all the testimony of such witness, unless it is corroborated by other credible evidence, as it omits the element that the testimony must have been willfully false.—Pacific Gold Co. v. Skillicorn, 8 N. M. 8, 41 Pac. 533.

[x] (N. Y. 1875) The jury are not bound to disregard the testimony of a witness on all points because of false testimony on one material point, if it be a point on which the witness might be mistaken or deceived.—Koehucke v. Ross, 16 Abb. Prac. (N. S.) 345.

[y] (N. D. 1895) The testimony of a witness who testified falsely as to a material fact in the case could not be wholly disregarded by the jury, unless they believed that he so testified intentionally.—McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

[z] (Wash. 1892) An instruction that, if the jury disbelieve the testimony of any witness in regard to any material matter, they shall disregard all his evidence, is properly refused. The jury must believe the testimony to be willfully false.—State v. Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332.

§ 1082. Materiality of false testimony.

[a] (U. S. 1853) Mistake by a witness in an immaterial fact should not discredit him. The maxim, "Falsus in uno, falsus in omnibus," only applies where there is willful, corrupt falsehood, in one particular, amounting to perjury.—Marshall v. Mee, Fed. Cas. No. 9,129 [1 MacArthur, Pat. Cas. 229].

[b] (D. C. 1879) A witness who, upon a trial, testifies falsely in regard to a matter, the truth of which he must have known, although the fact is immaterial, is to be disbelieved, and his evidence disregarded in every particular.—Huber v. Teuber, 3 MacArthur, 484, 36 Am. Rep. 110.

[c] (Ga. 1857) Where a witness swears willfully and knowingly false, even to a collateral fact, his testimony should be entirely rejected, unless it be so corroborated by circumstances or other unimpeachable evidence as to be irresistible.—Ivey v. State, 23 Ga. 576.

[d] (Ill. 1861) Where a witness contradicts himself in regard to an immaterial matter, such contradiction alone will not render his testimony unworthy of credit.—Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324.

[e] (Ill. 1886) The principle that, if the jury believe from the evidence that a witness has

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willfully sworn falsely in the case, they are at liberty to disregard his testimony except so far as corroborated by other credible evidence in the case, is subject to the essential qualification that such knowingly false testimony must have been to matters material to the issue.—Dacey v. People, 116 Ill. 555, 6 N. E. 165.

[f] (Mo. 1893) A jury may not disregard the evidence of a witness on the ground that they believe he has willfully sworn falsely, unless the false swearing was in regard to a material fact.—White v. Lowenberg, 55 Mo. App. 69.

[g] (N. Y. 1892) In an action against a husband for divorce on the ground of adultery, it appeared that the parties were living apart, and that for some time before the action was brought defendant had living with him, as the only other member of his household, an unmarried woman of about his age, in the ostensible relation of housekeeper and domestic servant. The only additional evidence tending to support the charge of adultery was the testimony of four men, entire strangers to defendant, who gained access to his house at night under shallow and absurd pretenses. They swore that their visits had no reference to an action for divorce, and did not know that such an action was contemplated. *Held*, that the referee, if convinced that such witnesses testified falsely as to their pretenses for such visits, had a right to reject the whole of their testimony as unworthy of credit.—Welke v. Welke, 63 Hun, 625, 17 N. Y. Supp. 298.

[h] (Wis. 1895) An instruction that, if the jury believe that any witness has told an untruth, they may reject his entire testimony, must be confined to an untruth as to a material fact.—Schmitt v. Milwaukee St. Ry. Co., 89 Wis. 195, 61 N. W. 834.

§ 1083. Contradiction or corroboration on other points.

[a] (U. S. 1822) If a witness upon his cross-examination has sworn falsely, in the opinion of the jury, upon an immaterial point, it is competent for them to give their verdict upon his testimony in chief upon other points, corroborated by other testimony.—Turner v. Foxall, Fed. Cas. No. 14,255 [2 Cranch, C. C. 324].

[b] (Ga. 1857) If a witness is shown to have willfully and corruptly sworn falsely as to a leading fact about which there could be no unintentional error, the mere fact that her evidence is corroborated in some other immaterial points will not restore her credibility.—Smith v. State, 23 Ga. 297.

[bb] (Ga. 1857) A witness may be discredited as to a particular fact, and yet believed as to others, provided he be sustained by corroborating proof.—Richardson v. Roberts, 23 Ga. 215.

[c] (Ga. 1877) A jury need not discard all the testimony of a corrupt witness, when he is satisfactorily corroborated on material points by circumstances or by other unimpeached evidence.—Skipper v. State, 59 Ga. 63.

[d] (Ill. 1864) The testimony of a witness swearing falsely in one particular may be believed upon other points, if corroborated.—Meixsell v. Williamson, 35 Ill. 529.

[e] (Ill. 1865) It is error to tell the jury that, if a witness has sworn falsely in one particular, his whole testimony must be rejected; for he may, in other portions of his testimony, be corroborated.—Blanchard v. Pratt, 37 Ill. 243.

[f] (Ill. 1877) An instruction that testimony of any witness who has willfully sworn falsely may be disbelieved unless corroborated by other unimpeached witnesses is erroneous unless qualified by the words "or by circumstances in evidence."—Angelo v. Faul, 85 Ill. 106.

[g] (Ill. 1880) An instruction that the entire testimony of a witness may be disregarded if he has willfully and knowingly sworn falsely as to any material point is erroneous without the qualification as to his being uncorroborated by other testimony.—Goeing v. Outhouse, 95 Ill. 346.

[h] (Ill. 1880) But where the point was as to a certain conversation, and the only corroborating evidence was that of the witness' son 12 years old, who, when the conversation took place, was but 9 years old, *held*, that the inaccuracy of the instruction was not a sufficient ground for reversal.—Goeing v. Outhouse, 95 Ill. 346.

[i] (Iowa, 1879) It is not error to modify an instruction that, if the jury believe that plaintiff has willfully testified falsely as to any material fact, they would be authorized in rejecting all his testimony, by adding, "unless corroborated by other credible evidence."—Brown v. Chicago, R. I. & P. R. Co., 51 Iowa, 235, 1 N. W. 487.

[j] (Mich. 1867) Where a witness has sworn willfully false in anything material, such testimony will seriously affect all the witness has sworn to, and no credit should be given to any fact depending on his statement alone, but when corroborated by proof it may receive such credit as it appears to the jury to deserve.—Knowles v. People, 15 Mich. 408.

[k] (Mo. 1877) Where a witness has willfully sworn falsely as to a material fact, the jury are at liberty to disregard his entire testimony, including that part which has been corroborated by other witnesses.—Brown v. Hannibal & St. J. R. Co., 66 Mo. 588.

[l] (N. Y. 1893) The testimony of a witness who is found to have intentionally sworn falsely on a material issue in the action is of no legal force or effect as to another matter, in respect of which he is contradicted, and is not sustained by corroborative evidence; and a judgment resting on such testimony alone will be reversed as wholly without evidence.—Morgenthau v. Walker (Com. Pl.) 2 Misc. Rep. 245, 21 N. Y. Supp. 936.

3. EVIDENCE TO CORROBORATE OR SUSTAIN UNIMPEACHED WITNESS.

IN GENERAL, § 1084.
CORROBORATION OF UNIMPEACHED OR UNCONTRADICTED WITNESS, § 1085.
EVIDENCE OF GOOD CHARACTER OF UNIMPEACHED WITNESS, § 1086.

Corroboration of witness in general, see post, §§ 1284–1289.

§ 1084. In general.

[a] (Ala. 1882) Evidence is not admissible to sustain the credibility of a witness whose testimony was not sought to be impeached.—Moon's Adm'r v. Crowder, 72 Ala. 79.

[b] (Ga. 1859) A party cannot introduce evidence to support the testimony of his own witness before he is attacked, either for want of character, or because he has made contradictory statements.—Hamilton v. Conyers, 28 Ga. 276.

[c] (Mass. 1882) If, in any event, one of two defendants can be allowed to testify that he is pecuniarily irresponsible, in order that greater value may be attached to his testimony, he cannot so testify before his credibility has been attacked.—Bryant v. Tidgewell, 133 Mass. 86.

[d] (N. Y. 1877) Where, in an action on a fire policy, defendant's secretary is called to contradict the testimony of plaintiff that such officer had waived a condition of the policy, he cannot, for the purpose of fortifying his testimony, be asked general questions touching the extent of his powers, unless he has been directly or indirectly impeached.—Adams v. Greenwich Ins. Co., 70 N. Y. 166.

[e] (Tex. 1891) In an action for personal injuries, plaintiff, on his direct examination, may testify as to the occupation and standing of his witnesses, though their character was not assailed by defendant.—Galveston, H. & S. A. Ry. Co. v. Thornsberry (Sup.) 17 S. W. 521.

§ 1085. Corroboration of unimpeached or uncontradicted witness.

[a] (U. S. 1893) Testimony by a physician, who made an autopsy, that he examined the stomach of deceased for traces of alcohol, may be corroborated by showing that it had been intimated to him that deceased had been drinking that day, as it amounted to no more than asking the witness what was the purpose and scope of his investigation.—Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290.

[b] (Iowa, 1865) Evidence to corroborate a witness may be excluded if his testimony has not been attacked in any manner.—State v. Rorabacher, 19 Iowa, 154.

[c] (La. 1842) Where a witness is illiterate, or his testimony seems extraordinary, it may be sustained, though he be unimpeached, by showing that he made the same statements at the time of the transaction.—Pilié v. Kenner, 2 Rob. 95.

[d] (Mich. 1882) A witness has no power to produce corroborating testimony, and his failure to do so cannot be used against the party for whom he testifies.—People v. Lyons, 49 Mich. 78, 13 N. W. 365.

[e] (N. Y. 1826) Evidence is inadmissible to support a witness' testimony, by showing the consistency between his former declarations and his testimony on the trial, unless he is first impeached.—Jackson v. Etz, 5 Cow. 314.

[f] (Or. 1885) After a state's witness, on a trial for forgery, has testified that the signature apparently his, and alleged to be forged, is not his, he cannot be recalled to write his name for purposes of comparison, as he could not be allowed to demonstrate on his direct examination that he had told the truth.—State v. Lurch, 12 Or. 99, 6 Pac. 408.

[g] (Pa. 1866) Where a pardoned convict has testified, in a criminal trial, to communications in the penitentiary between the prisoners and others, corroborating evidence by himself that he had shown visitors how communication between the cells was possible was admissible, though there had been no formal attempt to impeach him.—Howser v. Commonwealth, 51 Pa. (1 P. F. Smith) 332.

[h] (Pa. 1871) Where direct evidence has been given on the subject of handwriting, the testimony of experts is admissible in corroboration.—Burkholder's Ex'rs v. Plank, 69 Pa. (19 P. F. Smith) 225.

§ 1086. Evidence of good character of unimpeached witness.

[a] Evidence of good character of a witness cannot be given until his character has been attacked.

—(Cal. 1884) People v. Bush, 65 Cal. 129, 3 Pac. 590;

(Ind. 1884) Fitzgerald v. Goff, 99 Ind. 28;

(N. Y. 1852) People v. Gay, 7 N. Y. (3 Seld.) 378; (1885) People v. Van Houter, 38 Hun, 168;

(Pa. 1839) Braddee v. Brownfield, 9 Watts, 124; (1853) Werts v. May, 21 Pa. (9 Harris) 274.

[b] (Conn. 1830) The person injured and the principal witness in a prosecution for an attempt to commit a rape was deaf and dumb. The public prosecutor offered evidence to prove that her general character for truth was good. *Held*, that such evidence was admissible, though no impeachment of her character had been attempted.—State v. DeWolf, 8 Conn. 93, 20 Am. Dec. 90.

[c] (Conn. 1850) Though by the general rule, a witness cannot be supported by evidence of his general character as to truth except after a general impeachment of it, yet where the witness is in the situation of a stranger, such evidence is admissible without such previous impeachment.—Merriam v. Hartford and New Haven Railroad Co., 20 Conn. 354, 52 Am. Dec. 344.

[d] (Ga. 1890) Evidence of character to support the credit of a witness is not receivable before impeaching evidence has been adduced, even though the witnesses to character attend the trial voluntarily, and refuse to wait until their testimony is receivable.—Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

[e] (Ind. 1863) In a criminal trial upon indictment, after the state has introduced its testimony, and the defendant has introduced his, but has not attempted to impeach the witnesses produced by the state, it would be error to allow the state to introduce testimony as to the general moral character, or standing for integrity, of its witnesses. The character of a witness is presumed to be good until impeached. —Johnson v. State, 21 Ind. 329.

[f] (Ind. 1882) Evidence of the good character for veracity of a witness whose character has not been attacked is inadmissible.—Brann v. Campbell, 86 Ind. 516.

[g] (Mo. 1880) Where defendant has testified as a witness, evidence in support of his character for truth and veracity, before testimony has been offered to impeach such character, should be excluded.—State v. Cooper, 71 Mo. 436.

[h] (N. Y. 1852) Evidence cannot be given of the good character of a witness, until evidence, either on direct or cross-examination, has been given, on the other side, tending to impeach it. —People v. Gay, 7 N. Y. (3 Seld.) 378.

[i] (Or. 1894) Evidence to show plaintiff's reputation for truth is not admissible where such reputation has not been attacked.—Osmun v. Winters, 25 Or. 260, 35 Pac. 250.

[j] (Tex. 1885) Attacks in the argument of counsel on a witness' veracity do not justify the admission of testimony to sustain his reputation for truth and veracity.—Ricks v. State, 19 Tex. App. 308.

4. RIGHT TO IMPEACH OR DISCREDIT WITNESS IN GENERAL.

IN GENERAL, § 1087.
NATURE OF TESTIMONY, § 1088.
WITNESSES WHOSE TESTIMONY MAY BE DISCREDITED, § 1089.
—— ABSENT WITNESS AND STIPULATION AS TO TESTIMONY, § 1090.
—— PARTY TO ACTION, § 1091.
—— ACCUSED IN CRIMINAL CAUSE, § 1092.
TIME FOR IMPEACHMENT, § 1093.

§ 1087. In general.

[a] (La. 1893) In a criminal trial, where the state places a particular witness for the first time on the stand, by permission of the court, after the parties have closed their case, to rebut the testimony of a witness for defendant, defendant may impeach him.—State v. Spencer, 45 La. Ann. 1, 12 South. 135.

§ 1088. Nature of testimony.

[a] (Ind. 1884) A witness called by defendant in a bastardy suit to testify that the witness had had connection with plaintiff denied such connection. *Held*, that he had not testified to anything prejudicial to defendant which

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would allow the latter to impeach him.—Hull v. State, 93 Ind. 128.

[b] (Ky. 1893) A witness who has testified in the case may be impeached, whether his evidence was material or not.—Davis v. Commonwealth, 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201.

[c] (La. 1884) Evidence offered in a criminal case merely to impeach the credibility of a witness who testified that he did not recollect whether he had or had not done a particular act was inadmissible.—State v. Chevallier, 36 La. Ann. 81.

[d] (N. C. 1806) A party may discredit a witness introduced by the opposite party, though a distinct fact has been proved by the witness in favor of the party attempting to discredit the witness.—Sawrey v. Murrell, 3 N. C. 397.

[e] (R. I. 1893) On a trial for burglary, a witness for defendant, who was not an expert in diamonds, offered to show the jury diamonds very similar to those which the state's witnesses had identified as the stolen property. *Held*, that the court properly refused to have the stones go to the jury, since, to discredit the state's witnesses, defendant should have presented the stones to them when on the stand, in order to test their power to distinguish between the stones presented by the state and those offered by defendant.—State v. Ellwood, 18 R. I. 234, 26 Atl. 190.

[f] (Tex. 1893) It is not error to exclude evidence offered to impeach a witness where such witness has testified only to an immaterial fact.—Battaglia v. Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385, 1118.

§ 1089. Witnesses whose testimony may be discredited.

Impeachment of impeaching witness, see post, § 1174.

Witness who may be impeached as to character, see post, §§ 1111–1113.

[a] (Ga. 1885) Where defendant, on trial for wife beating, uses his wife as a witness, her credit may be impeached under the rules applicable to witnesses generally.—Memmler v. State, 75 Ga. 576.

[b] (Ky. 1883) When the evidence of an accomplice has been corroborated, he may be impeached in the same manner as any other witness.—Craft v. Commonwealth, 81 Ky. 250, 50 Am. Rep. 160.

§ 1090. —— Absent witness and stipulation as to testimony.

Contradiction, see post, § 1271.

Inconsistent statements, see post, § 1213.

[a] (Ala. 1890) Where a negro is on trial for a crime, and the state admits that absent witnesses will testify to certain circumstances stated, the state cannot afterwards ask a witness whether such absent witnesses are black or white.—Fonville v. State, 91 Ala. 89, 8 South. 688.

[b] (Cal. 1893) Where a murder case had been previously tried three times, and the parties stipulated to use the evidence of one of defendant's witnesses, as given at the last trial, it was not error to exclude evidence given at the first trial, when offered by defendant to impeach such witness.—People v. Hawes, 98 Cal. 648, 33 Pac. 791.

[c] (Ill. 1892) Where, to avoid a continuance applied for on the ground of an absent witness, a party admits that the absent witness would testify as alleged, a letter from such witness is not admissible to impeach his testimony.—North Chicago St. R. Co. v. Cottingham, 44 Ill. App. 46.

[d] (Ky. 1889) When accused himself has testified, the fact that he has sworn to an affidavit, that an absent witness would testify to certain facts, which the prosecution has admitted to be true, does not preclude the prosecution from impeaching his testimony, on the ground that it would be contradicting what it has admitted to be true.—Pace v. Commonwealth, 89 Ky. 204, 12 S. W. 271.

[e] (Mont. 1890) Where, in order to avoid a continuance for the purpose of taking depositions, a party admits that the witnesses would testify to the facts desired to be proved by them, he may reserve the right to impeach their testimony.—State v. Gibbs, 10 Mont. 212, 25 Pac. 289.

[f] (Tex. 1860) Evidence is inadmissible merely to impeach the credit of a deponent who is not present in court to explain the contradiction.—Weir v. McGee, 25 Tex. Supp. 20.

§ 1091. —— Party to action.

Impeachment as to character, see post, § 1112.

[a] (Ill. 1871) Where suit is brought in the names of two parties for the use of one of them, and the party having no interest testifies against his coplaintiff, it is competent to impeach him by other witnesses.—Carey v. Henderson, 61 Ill. 378.

§ 1092. —— Accused in criminal cause.

Cross-examination of accused in general, see post, § 1106 [f].

Impeachment as to character, see post, § 1113.

[a] (U. S. 1889) Where a defendant in a criminal case becomes a witness for himself, under Act Cong. March 16, 1878, making him a "competent" witness, his credibility may be impeached.—United States v. Brown (D. C.) 40 Fed. 457.

[b] (Ala. 1895) A defendant who testifies in his own behalf subjects himself to impeachment as any other witness.—Buchanan v. State, 109 Ala. 7, 19 South. 410.

[c] (Ga. 1883) Where two defendants charged with a crime agree to be tried jointly, with the right to each to testify in behalf of the other, as if tried separately, each can be impeached as a witness for the other.—McGruder v. State, 71 Ga. 864.

[d] (Iowa, 1877) An accused examined for his codefendant is liable to impeachment as though he were not himself upon trial.—State v. Hardin, 46 Iowa, 623.

[e] (Iowa, 1886) Where the defendant testifies in his own behalf, he may be impeached or contradicted in the same manner as any other witness, and is not entitled to notice of the state's intention.—State v. Teeter, 69 Iowa, 717, 27 N. W. 485.

[f] (Mo. 1886) On indictment for a crime, where the defendant offers himself as a witness, he may be impeached as any other witness, except that on his cross-examination he can only be questioned as to such matters as he testified to in his examination in chief.—State v. Bulla, 89 Mo. 595, 1 S. W. 764.

[g] (Mo. 1887) If defendant in a criminal case becomes a witness in his own behalf he may be impeached as may other witnesses.—State v. Beaty, 25 Mo. App. 214.

[h] (N. Y. 1870) Where a prisoner on trial for felony avails himself of the privilege granted by Laws 1869, c. 678, of testifying as a witness in his own favor, he may be impeached the same as any other witness.—Burdick v. People, 58 Barb. 51.

[i] (N. C. 1895) Where, on trial of four persons for an affray, three of them have testified, and the fourth, who was their antagonist, is

called in his own behalf, his codefendants have the same right to impeach him as though he were a state's witness.—State v. Goff, 117 N. C. 755, 23 S. E. 355.

§ 1093. Time for impeachment.

[a] (Mich. 1880) Testimony to impeach a person not yet sworn is inadmissible.—People v. Whitson, 43 Mich. 419, 5 N. W. 454.

[aa] (Miss. 1866) The credit of a witness cannot be impeached before his testimony has been offered.—Mullins v. Cottrell, 41 Miss. 291.

[b] (N. Y. 1817) The credit of a witness cannot be impeached after hearing and decree.—Livingston v. Hubbs, 3 Johns. Ch. 124.

5. IMPEACHMENT OF ONE'S OWN WITNESS.

IN GENERAL, § 1094.
WITNESS WHOM PARTY IS COMPELLED TO CALL, § 1095.
WITNESS HOSTILE TO PARTY, § 1096.
PARTY CALLED AS WITNESS BY ADVERSARY, § 1097.
WITNESS CROSS-EXAMINED AS TO MATTER NOT SUBJECT OF DIRECT EXAMINATION, § 1098.
DEPOSITION TAKEN OR WITNESS CALLED BY ONE PARTY, AND INTRODUCED BY ADVERSARY, § 1099.
WITNESS FOR BOTH PARTIES, § 1100.

Contradiction of testimony, see post, §§ 1268–1270.
Inconsistent statements, see post, §§ 1214–1219.
Interest or bias, see post, § 1178.

§ 1094. In general.

[a] A party voluntarily putting a witness upon a stand to testify in his own behalf is thereby estopped from assailing his general character for truth and veracity, or from impeaching him.

—(Ill. 1865) Rockwood v. Poundstone, 38 Ill. 199;
(Iowa, 1866) Thorn v. Moore, 21 Iowa, 285.

[b] A party cannot disparage his own witness by showing him to be generally unworthy of credit.

—(Me. 1846) Brown v. Osgood, 25 Me. (12 Shep.) 505;
(N. C. 1845) Shelton v. Hampton, 28 N. C. 216.

[c] A party cannot impeach his own witness.

—(Ala. 1858) Griffin v. Wall, 32 Ala. 149;
(Iowa, 1894) Smith v. Dawley, 92 Iowa, 312, 60 N. W. 625;
(N. Y. 1830) Lawrence v. Barker, 5 Wend. 301; (1867) People v. Skeehan, 49 Barb. 217; (1891) Thalheimer v. Klapetzy, 59 Hun, 619, 12 N. Y. Supp. 941;
(S. C. 1828) Perry v. Massey, 1 Bailey, 82.

[d] (U. S. 1829) A party cannot discredit his own witness by testimony as to his general character.—United States v. Watkins, Fed. Cas. No. 16,649 [3 Cranch, C. C. 441].

[e] (U. S. 1834) Upon the trial of an indictment for keeping a house of ill fame, the prosecution will not be permitted to prove that its own witness is a woman of ill fame.—United States v. McDowell, Fed. Cas. No. 15,671 [4 Cranch, C. C. 423].

[f] (U. S. 1880) Where a party who assails a conveyance from husband to wife, as made in fraud of creditors, calls the husband and wife as witnesses, and afterwards reads their depositions in court, he thereby vouches for their credibility, and cannot be heard, in argument, to question their veracity.—Tarsney v. Turner (C. C.) 48 Fed. 818.

[g] (Ala. 1829) A party cannot ask his own witness questions tending to show him incompetent or unworthy of credit, nor can he examine other witnesses to prove him incompetent or unworthy of credit.—Winston v. Moseley, 2 Stew. 137.

[h] (Ala. 1858) Where the answer of the garnishee is adduced in evidence by the contesting plaintiff, he cannot discredit it in a request for instructions to the jury, since such answer having been made evidence by the act of plaintiff, it was not permissible for him to discredit such evidence.—Price v. Mazange, 31 Ala. 701.

[i] (Ark. 1884) The state, in a criminal proceeding, may not impeach its own witness.—Carr v. State, 43 Ark. 99.

[j] (Cal. 1855) Where the defendant called a witness, who testified that in making a contract, now the subject of litigation, he was conscious, and recollected what he did, and was capable of doing business, it was *held* he could not introduce evidence of the witness' insanity at that time.—Montgomery v. Hunt, 5 Cal. 366.

[k] (Ga. 1874) A party cannot discredit his own witness, unless it is shown that he was entrapped to introduce the witness by statements made by him contradictory to those he has testified to.—McDaniel v. State, 53 Ga. 253.

[l] (Ind. 1860) The Criminal Code has not changed the common-law rule that the state cannot impeach its own witness.—Quinn v. State, 14 Ind. 589.

[m] (Ind. 1895) A witness cannot be impeached by the party calling him, unless he testifies to some matter prejudicial to such party. It is not enough that witness merely fails to testify to facts sought to be proven by him.—Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

[n] (Iowa, 1888) On trial of a pharmacist for the unlawful sale of liquor, the state is not bound by a statement of its witness that he purchased the liquor for medicinal purposes, but may inquire of him how many times he was sick, the nature of his ailments, when he made the purchases, etc., to show that the alleged object of the purchase was a mere pretense, and that defendant knew that fact.—State v. Cummins, 76 Iowa, 133, 40 N. W. 124.

[nn] (Kan. 1886) The question as to whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court; and a slight error in such a matter, where the testimony of the witness is of small importance, is not ground for reversal.—St. Louis & S. F. Ry. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176.

[o] (Kan. 1894) In a criminal case the state cannot impeach the general character for truth and veracity of one of its own witnesses.—State v. Keefe, 54 Kan. 197, 38 Pac. 302.

[oo] (La. 1895) The state cannot impeach its own witness by asking irrelevant questions, the object of which is to discredit the witness' testimony.—State v. Vickers, 47 La. Ann. 1574, 18 South. 639.

[p] (Md. 1829) A party will not be permitted to take testimony to discredit his own witness.—Winder v. Diffenderffer, 2 Bland, 166.

[pp] (Mass. 1834) It is not competent for a party, calling the subscribing witness for the purpose of proving the execution of a deed, to impeach his general character for truth.—Whitaker v. Salisbury, 32 Mass. (15 Pick.) 534.

[q] (Mich. 1889) In an action for injuries occasioned by defendant's negligence, in which plaintiff testified, her counsel, for the purpose of showing that her memory was defective, in-

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troduced a witness who was allowed to relate a conversation had with her, after her examination, concerning what she had testified to. *Held*, that this testimony was inadmissible.—Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143.

[qq] (Miss. 1881) Where circumstances suggest the presumption that the party introducing a witness knows that his testimony will not be in accordance with his representations, evidence of surprise is necessary, before such witness may be impeached by the party calling him.—Moore v. Chicago, St. L. & N. O. R. Co., 59 Miss. 243.

[r] (Mo. 1885) One cannot impeach his own witness unless he has been entrapped into offering him, or there is some imposition or surprise.—Dunn v. Dunnaker, 87 Mo. 597.

[s] (N. Y. 1860) The mere fact that the witness testified differently from what the party expected is not a sufficient reason for discrediting him.—Sanches v. People, 22 N. Y. 147.

[ss] (N. Y. 1873) Where a party calling a witness is surprised by testimony contrary to his expectations, he cannot put questions to him the sole effect of an affirmative answer to which will be to discredit the witness.—Bullard v. Pearsall, 53 N. Y. 230.

[t] (N. Y. 1873) There is no exception to the rule that a party cannot impeach his own witness. As far as he can go is to show the witness to be mistaken or that the facts are different from the version the witness gives of them.—Sisson v. Conger, 1 Thomp. & C. 564.

[tt] (N. Y. 1877) Where, in an action for divorce on the ground of adultery, plaintiff calls as a witness the alleged paramour of defendant, plaintiff cannot assert that such witness is unworthy of belief.—Pollock v. Pollock, 71 N. Y. 137.

[u] (N. Y. 1887) A party is not bound by all the statements of a witness called by him, if adverse, even though no other witnesses are called to contradict him, but may rely, for making out a case, upon part of his testimony, although, in other parts, the witness denies the fact sought to be proved, and attempts to explain away the inference sought to be drawn from his previous statements.—Becker v. Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515.

[uu] (N. C. 1880) The general rule which forbids one to impeach the veracity of his own witness, and only allows evidence that the facts were otherwise than as testified by such witness, applies to examinations under Code, §§ 332–340, preliminary to trial of persons immediately interested in the action.—Strudwick v. Brodnax, 83 N. C. 401.

[v] (Ohio, 1880) A witness cannot be impeached on the ground of surprise by the party calling him if the witness does not testify adversely to him, but merely fails to give testimony as expected.—Mutual Life Ins. Co. v. Schmidt, 6 Ohio Dec. 901.

[vv] (Pa. 1891) When, by the testimony of a witness called by plaintiff, the case of plaintiff is sworn away, he is bound by it, and there is nothing to go to the jury, as plaintiff cannot ask credit for him in one part of his testimony, and deny it to him in another.—Guinney v. Hand (Com. Pl.) 2 Pa. Dist. R. 67.

[w] (S. C. 1839) The rule that a party shall not discredit his own witness, being for the protection of the witness himself, cannot be waived by agreement of the parties to the action.—Farr v. Thompson, Cheves, 37.

[ww] (S. C. 1885) One cannot discredit his own witness.—Bauskett v. Keitt, 22 S. C. 187.

[x] (Tex. 1882) Where a state witness testified that certain cattle, among which was the cow, the subject of the prosecution, were seen by him at a time earlier than the state claimed they could have been, *held*, that the testimony was injurious to the state, and the witness could therefore be impeached.—Tyler v. State, 13 Tex. App. 205.

[xx] (Tex. 1887) Defendant was being tried for larceny of a heifer. The state's witness testified on main examination: "I never heard defendant say anything about the Sparks yearling." In order to impeach this testimony the witness was asked by the state whether he had ever stated to counsel for prosecution "that defendant had tried to hire him (witness) to go before the grand jury, and testify for him in this cause, and that he had offered to hire him to testify before the jury, and that he was so drunk when before the grand jury that he did not know what he then swore." *Held*, that the attempt to impeach the witness was not authorized by Code Cr. Proc. art. 755.—Bennett v. State, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. Rep. 875.

[y] (Tex. 1887) Before one's own witness can be impeached under Code Cr. Proc. art. 755, it must appear not only that the witness has testified differently from what was anticipated but also that his testimony is injurious to the party calling him.—Bennett v. State, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. Rep. 875.

[yy] (Tex. 1888) The state may impeach its own witness testifying unfavorably, but the court should charge that such testimony can be considered only as affecting the credit of the witness.—Williams v. State, 25 Tex. App. 76, 7 S. W. 661.

[z] (Tex. 1895) Code Cr. Proc. art. 755, providing that a party introducing a witness may attack his testimony when facts stated by the witness are injurious to his cause, does not authorize the state to attack a witness called by it, who does not testify to any facts injurious to it, but simply fails to make out its case.—Gibson v. State (Cr. App.) 29 S. W. 471.

[zz] (Wyo. 1879) Where a party's witness has established a fact, the party cannot request that it be left to the jury to find against his evidence that there was no such fact, as a party cannot complain that he is held to the effect of the evidence which he vouched for by producing the witness who gives it.—Fillmore v. Union Pac. R. Co., 2 Wyo. 94.

§ 1095. Witness whom party is compelled to call.

Inconsistent statements, see post, § 1216.

[a] (Ind. 1892) An indispensable witness, within Rev. St. 1881, § 507, providing that a party producing a witness shall not be allowed to impeach his credit by evidence of bad character unless it was indispensable that the party should produce him, etc., is one whom a party is compelled to produce to satisfy the requirements of the law.—Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87.

[b] (Me. 1840) The rule that a party cannot discredit his own witness does not apply to those cases where the party is under the necessity of calling the subscribing witnesses to an instrument.—Dennett v. Dow, 17 Me. (5 Shep.) 19.

[c] (N. H. 1885) The common-law rule forbidding a party to discredit his own witness has no application when the party, by legal intendment, has no choice, as in the case of an attesting witness.—Whitman v. Morey, 63 N. H. 448, 2 Atl. 899.

[d] (N. J. 1862) The rule is by no means well settled that because a party cannot avoid making an individual his witness, as in case of a subscribing witness, he is, therefore, at liberty to impeach his veracity. The authorities are in

conflict upon this subject.—Brown v. Bulkley, 14 N. J. Eq. (1 McCart.) 294.

[e] (Pa. 1849) A party who has been obliged to examine the subscribing witnesses to a deed for the sole purpose of complying with the legal necessity of this formal proof of his execution may impeach the credibility of such witness by general evidence when he has been subsequently called and examined in chief by the other party in relation wholly to other matters than those connected with the execution of such deed.—Hart v. Burns, 4 Clark, 337.

[f] (S. C. 1846) Where a party is bound to produce a subscribing witness, if his testimony tends to invalidate the instrument, the party may impeach him, and show, by other testimony, the validity of the instrument.—Williams v. Walker, 2 Rich. Eq. 291, 46 Am. Dec. 53.

§ 1096. Witness hostile to party.

[a] (Fla. 1891) Whether or not a witness has proved adverse to the party producing him, so as to permit his impeachment under McClel. Dig. p. 518, § 26, is a question as to which a large discretion is necessarily reposed in the trial judge; and where the record on appeal does not clearly show that his refusal to permit the impeachment was erroneous, his ruling will not be disturbed.—Williams v. Dickenson, 28 Fla. 90, 9 South. 847.

[b] (Fla. 1894) Under Rev. St. § 1101, permitting a party producing a witness to impeach him when he proves adverse, a witness cannot be impeached who simply fails to testify to beneficial facts that were expected from him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him.—Adams v. State, 34 Fla. 185, 15 South. 905.

[c] (N. Y. 1882) It is competent to show that a witness is hostile to the party to the suit against whom he has testified, and this may be shown by the witness himself or otherwise.—Schultz v. Third Ave. R. Co., 89 N. Y. 242, reversing (1880) 46 N. Y. Super. Ct. (14 Jones & S.) 211.

[d] (N. Y. 1889) Where a witness called by the people states that what he testified before the grand jury was untrue, the people may cross-examine him as to the details of his testimony before the grand jury, and may show to the court the grand jury's minutes, to show that the witness is an unwilling one.—People v. Ricker, 51 Hun, 643, 7 N. Y. Cr. R. 19, 4 N. Y. Supp. 70, judgment affirmed (1889) 115 N. Y. 668, 22 N. E. 1126.

§ 1097. Party called as witness by adversary.

Contradiction of testimony, see post, § 1269.
Inconsistent statements, see post, § 1215.

[a] (U. S. 1889) As Rev. St. § 914, providing that the practice, etc., in federal courts shall conform as near as may be to that in state courts in like causes, expressly excepts equity causes, where plaintiffs read in evidence, in a suit in equity in the federal courts, depositions of defendants, they make defendants their own witnesses, and cannot contend that they are unworthy of credit, though the depositions were taken "as under cross-examination," under a state statute (1 Brightly, Purd. Dig. Pa. p. 728) providing that a party to any civil proceeding may be examined "as if under cross-examination," at the instance of the adverse party, "but the party calling for such examination shall not be concluded thereby."—Dravo v. Fabel, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421.

[b] (U. S. 1885) A party who has voluntarily put his adversary on the witness stand cannot insist that his testimony be ignored if it happen to disappoint him. It is competent testimony in the case, and, unless self-contradictory or inherently improbable, it must prevail in the absence of countervailing evidence.—Dravo v. Fabel (D. C.) 25 Fed. 116.

[c] (U. S. 1887) Where a party is called as a witness by the opposite party, the latter is not bound by his general statement as to his motives or intentions in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify.—McLean v. Clark (C. C.) 31 Fed. 501.

[d] (U. S. 1892) A complainant who has called defendants as his witnesses is bound by what they say, and cannot ask the court to disbelieve them, or to infer that they have testified falsely.—Graves v. Davenport (D. C.) 50 Fed. 881.

[e] (Ala. 1874) Where a party takes the deposition of his adversary as a witness and reads it in evidence on the trial, he thereby makes him his witness, and cannot afterwards impeach his general character for truth and veracity.—Warren v. Gabriel, 51 Ala. 285.

[f] (Ark. 1854) When a party makes his election to rest his case upon the testimony of the adverse party, he is not allowed to disprove or impeach him by calling other witnesses.—Drennen v. Lindsey, 15 Ark. 359.

[g] (Ga. 1878) A party who calls his adversary as a witness thereby vouches for his credibility to the extent of putting him upon the footing of an ordinary witness, and he cannot be impeached by general reputation.—Gabbett v. Sparks, 60 Ga. 582.

[h] (Ga. 1881) Where one party makes a witness of his adversary, relying upon his testimony at a former trial, and is entrapped by the witness changing his testimony, he may impeach him.—Cox v. Prater, 67 Ga. 588.

[hh] (Ill. 1884) Where a party calls the adverse party as a witness, all of his testimony, both favorable and unfavorable, is to be considered.—Sawyer v. Moyer, 109 Ill. 461.

[i] (Ill. 1888) Where a party has called and examined the adverse party as his own witness, he is precluded from introducing evidence for the mere purpose of impeachment.—United States Life Ins. Co. v. Kielgast, 26 Ill. App. 567.

[j] (Iowa, 1872) Where a party calls his adversary as a witness he cannot afterwards attempt to show that he is unworthy of belief.—Hunt v. Hoover, 34 Iowa, 77.

[k] (Mich. 1878) A complainant, who makes the defendant his sole witness to show fraud on the latter's part, cannot discriminate between favorable and unfavorable testimony where it is all equally probable, merely on suspicion that the unfavorable testimony is false.—Darling v. Hurst, 39 Mich. 765.

[l] (Mo. 1872) Where one has made the opposite party his witness he cannot afterwards impeach him.—Chandler v. Fleeman, 50 Mo. 239.

[m] (Mo. 1891) In an action to subject certain lands to the satisfaction of a judgment, the complaint alleged that the legal title thereof was in one to whom the judgment debtor had conveyed fraudulently and without consideration, but stated that the wife of the latter claimed to own such lands, and she was therefore made a defendant. *Held*, that the introduction by plaintiff of a deposition of the wife, taken in another proceeding, does not make her his witness, and bar him from impeaching her statements; she being a party to the suit.—Jamison v. Baggot, 106 Mo. 240, 16 S. W. 997.

[mm] (Mo. 1891) Where a party calls on the other to testify, he vouches for his credit as a witness.—Bensberg v. Harris, 46 Mo. App. 404.

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[n] (N. Y. 1851) Having made the plaintiff a witness, the defendant cannot impeach his credibility, nor contradict him for the mere purpose of impeachment; but has a right to show by the further examination of the plaintiff or otherwise, that although he had no direct knowledge or information of the alleged fraud, he had notice enough to put him on inquiry.—Holbrook v. Mix, 1 E. D. Smith, 154.

[o] (N. Y. 1856) Where a defendant calls the adverse party as a witness, and thereby represents him as worthy of credit, he is precluded from denying it by introducing evidence for the purpose of impeaching him by showing that his general character for truth was bad.—Pickard v. Collins, 23 Barb. 444.

[p] (N. Y. 1880) Where the purpose for which plaintiff called defendant as a witness was not formal, and he was not obliged by law to call him, *held*, that the judge was bound to hold the witness credible, even upon cross-examination or on direct examination as a witness for the defense.—Branch v. Levy, 46 N. Y. Super. Ct. (14 Jones & S.) 428.

[q] (N. C. 1890) Code, § 579, abolishes the action to obtain discovery under oath, and provides that "no examination of a party shall be had on behalf of the adverse party, except in the manner prescribed in this chapter." Section 580 provides that a party to an action may be compelled to testify at the instance of the adverse party. Section 583 provides that "the examination of the party thus taken may be rebutted by adverse testimony." *Held*, that a party who puts his adversary on the stand cannot impeach him by attacking his credibility.—Helms v. Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893.

[r] (N. C. 1893) The fact that a party has examined an adverse party, under Code, § 581, prior to the trial, does not make him the witness of the party examining him.—Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328.

[s] (Tex. 1846) Where one party to a suit makes a witness of the other, he thereby places his testimony beyond impeachment. He may prove the witness mistaken by proving the facts to be otherwise, but he will not be allowed to impeach his credibility.—Paxton v. Boyce, 1 Tex. 317.

[t] (Wis. 1895) The fact that plaintiff called defendant as his witness does not relieve the jury of its duty to weigh the testimony of such witness, and plaintiff is not bound to hold out such witness as worthy of credit as to everything he may testify to.—Garny v. Katz, 89 Wis. 230, 61 N. W. 762.

[u] (Wis. 1895) It is not error to refuse to charge that when a party calls his opponent as a witness he holds him out as worthy of credit, as his credibility must be considered in view of his character, intelligence, and interest in the case, and the manner in which he testifies.—Garny v. Katz, 89 Wis. 230, 61 N. W. 762.

§ 1098. Witness cross-examined as to matter not subject of direct examination.

Contradiction of testimony, see post, § 1270.
Inconsistent statements, see post, § 1217.

[a] (Ala. 1893) A party to an action may, on cross-examination, prove a fact by a witness of the adverse party without making such witness his own; and he does not thereby vouch for his credibility, or forfeit the right to impeach him as being a witness of his adversary.—Johnson v. Armstrong, 97 Ala. 731, 12 South. 72.

[b] (Ga. 1887) Interrogatories had been answered by a witness for plaintiff, and were crossed by defendant, but the latter, to lay a foundation to impeach that witness, sued out and was allowed a second set of cross-interrogatories. *Held* no error, and defendant did not thereby make him its witness.—Augusta & K. R. Co. v. Killian, 79 Ga. 234, 4 S. E. 165.

[c] (Iowa, 1892) The rule that a party cannot impeach a witness called by him does not apply to a matter brought out by the opposite party on cross-examination.—Smith v. Utesch, 85 Iowa, 381, 52 N. W. 343.

[d] (Ky. 1837) Where a cross-examination of a witness elicits facts entirely distinct from those which he was called to prove, and altogether favorable to the other party, he is still the witness, and his testimony is the evidence of the party who called him.—Gregory v. Nesbit, 35 Ky. (5 Dana) 419.

[e] (N. Y. 1836) A party who cross-examines a witness to prove facts wholly disconnected with the direct examination makes the witness his own, and cannot subsequently discredit him.—People v. Moore, 15 Wend. 419.

§ 1099. Deposition taken or witness called by one party, and introduced by adversary.

[a] (Colo. 1888) Where two depositions were taken by defendant, who read the second, and plaintiff read the first to show contradictory statements, the court properly refused to instruct the jury that "plaintiff is bound by the statement contained in the deposition [the first one taken] read by him, as by reading the same he put it in evidence and vouched for its credibility."—Thompson v. Gregor, 11 Colo. 531, 19 Pac. 461.

[b] (Conn. 1794) If the plaintiff call a witness, but does not use him, and he is used by the defendant, the plaintiff may impeach his character.—Bebee v. Tinker, 2 Root, 160.

[c] (Ill. 1891) A deposition taken by plaintiff, but introduced by defendant, may be contradicted by plaintiff on rebuttal.—City of Bloomington v. Osterle, 139 Ill. 120, 28 N. E. 1068.

[d] (Kan. 1882) One introducing in evidence the deposition of the other party to the suit is not bound by its statements. He may prove his case by other evidence going to discredit and contradict statements made in the deposition.—Wallach v. Wylie, 28 Kan. 138.

[e] (Ky. 1861) Where a party in a suit takes a deposition, or a cross-examination, or has a witness sworn, and then refuses to read such document or examine such witness, the other party has the privilege of doing so, and the evidence will be considered to be that of the party who so reads, or examines, and he will not be permitted to impeach it.—Musick v. Ray, 60 Ky. (3 Metc.) 427.

[f] (Mo. 1891) Where a party reads in evidence a deposition taken by the opposing party, he vouches for the credit of the witness.—Bensberg v. Harris, 46 Mo. App. 404.

[g] (N. Y. 1874) Where plaintiff takes the deposition of a witness and rests without reading it and defendant reads it, plaintiff cannot introduce evidence to impeach the witness.—Jordan v. Jordan, 3 Thomp. & C. 269.

[h] (N. C. 1849) Where a party takes the deposition of a witness and does not use it, or subpœnas a witness and does not call him, he does not make him his witness.—Neil v. Childs, 32 N. C. 195.

[i] (S. C. 1851) Plaintiff, on the first trial, read the testimony of a witness taken by commission; on the second trial he declined reading it, and it was read by the defendant. *Held*, that the witness, under these circumstances, was the defendant's witness, and that the plaintiff might impeach his credibility.—Cudworth v. South Carolina Ins. Co., 4 Rich. Law, 416, 55 Am. Dec. 692.

[j] (Tenn. 1837) Where the complainant refuses to use a deposition taken by him, and the

defendant reads it, the deponent is the defendant's witness, and the complainant may introduce evidence to impeach him.—Richmond v. Richmond, 18 Tenn. (10 Yerg.) 343.

§ 1100. Witness for both parties.

Inconsistent statements, see post, § 1218.

Recalling witness for purpose of impeachment, see post, § 1109.

[a] (U. S. 1895) Plaintiff, after calling and using a witness to prove certain things, cannot impeach with respect to facts testified to by him when a witness for defendant.—Smith v. Provident Sav. Life Assur. Soc. of New York, 65 Fed. 765, 13 C. C. A. 284.

[b] (Ala. 1871) Where a witness is called back after being dismissed by the party who summoned him, he becomes the witness of the party calling him back, and cannot be impeached by the party so calling him.—Barker v. Bell, 46 Ala. 216.

[c] (Colo. 1894) Where a party makes the witness of his adversary his own, he cannot discredit his testimony, and is concluded by it, except where a different state of facts in regard to the same proposition is established by other competent evidence.—Tourtelotte v. Brown, 4 Colo. App. 377, 36 Pac. 73.

[d] (Ga. 1872) When interrogatories are taken out by defendant and crossed by plaintiff, and defendant introduces and reads to the jury the answers to the direct interrogatories, failing to read the answers to the cross-interrogatories, plaintiff by reading the answers to the latter does not make the witness his witness, so that he cannot impeach him.—McArdle v. Bullock, 45 Ga. 89.

[e] (Ind. 1858) The court may, in its discretion, refuse to permit a deposing witness' mental capacity to be impeached, both parties having used his depositions at previous ineffectual trials of the same case, without objection, and the witness living out of the state, so that proper evidence as to his capacity could not be procured during the trial.—Carpenter v. Dame, 10 Ind. 125.

[f] (Mich. 1859) Where, after the plaintiff had closed his case, the defendant recalled one of the plaintiff's witnesses, having had due opportunity, at the proper time, to cross-examine such witness, and not being compelled to call him, and examined such witness, not as to matters testified to in chief, but as to material facts in support of the defendant's own case, it was *held* that the defendant had made the witness his own and could not afterwards impeach his testimony.—Craig v. Grant, 6 Mich. 447.

[g] (N. Y. 1860) To call the adversary's witness to prove a party's case does not make him the party's witness, so as to prevent that party from impeaching him.—Mattice v. Allen, 33 Barb. 543.

[h] (N. Y. 1860) A witness of the plaintiff was cross-examined in part, and the cross-examination then "suspended." The plaintiff having rested his case, the defendant recalled the witness, and continued to cross-examine him. The plaintiff then re-examined, and elicited important testimony from him, upon which he was again cross-examined by the defendant, who then offered evidence to impeach him. *Held*, that the recalling by the defendant, who did not attempt to draw new matter from the witness to prove his defense, was but the continuance of the cross-examination, and was not making him the defendant's witness.—Mattice v. Allen, 33 Barb. 543.

[i] (N. Y. 1874) A party cannot impeach his own witness, though subsequently called as a witness for the adverse party, by general evidence.—Coulter v. American Merchants' Union Exp. Co., 56 N. Y. 585.

[j] (N. Y. 1895) In an action by a judgment creditor to set aside a deed as fraudulent, where plaintiff puts in evidence the deposition of the judgment debtor in supplementary proceedings, and the debtor testifies for defendants, plaintiff may, on cross-examination, impeach him by showing that his deposition was untrue.—Salt Springs Nat. Bank v. Fancher, 92 Hun, 327, 36 N. Y. Supp. 742.

[k] (N. C. 1883) Since a party cannot contradict his own witness, where the state examined a witness, who was afterwards put upon the stand and examined by the defendant, it was incompetent for the state, on cross-examination, to discredit him.—State v. Taylor, 88 N. C. 694.

[l] (Tenn. 1848) Where the deposition of a witness is taken by both parties, neither party can impeach his credibility.—Story v. Saunders, 27 Tenn. (8 Humph.) 663.

6. IMPEACHMENT OF CAPACITY, KNOWLEDGE, OR RECOLLECTION OF WITNESS.

IMPEACHMENT OF CAPACITY IN GENERAL, § 1101.
INTOXICATION, § 1102.
IMPEACHMENT OF KNOWLEDGE OR RECOLLECTION, § 1103.

§ 1101. Impeachment of capacity in general.

[a] (Ala. 1853) It is no objection to the credibility of a witness that he is subject to fits of mental derangement, if he is sane at the time he is offered.—Campbell v. State, 23 Ala. 44.

[b] (Ala. 1853) If the competency of a witness be attacked on the ground of insanity, and the court decides he is sane, the evidence given to the court cannot be submitted to the jury to affect his credibility.—Campbell v. State, 23 Ala. 44.

[c] (Conn. 1859) The question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes to the credibility of his testimony and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the opposing party with his other evidence.—Holcomb v. Holcomb, 28 Conn. 177.

[d] (Del. 1838) It is not permissible to attempt to impeach the credibility of a witness by showing that his mind has been so impaired by disease and temporary insanity that his memory cannot be relied on.—Phillips v. Short, 2 Har. 339.

[e] (Del. 1838) Evidence that a witness was temporarily insane between the time of the occurrence of the facts narrated by him and the giving of his testimony is inadmissible to impeach his credibility.—Phillips v. Short, 2 Har. 339.

[f] (Ill. 1873) On the trial of a case where plaintiff, a man of culture, testified, while the witnesses on the other side were Germans, apparently of little education, and one or two of whom spoke English quite imperfectly, the court instructed the jury that a witness might be impeached just as effectually by his manner of testifying, his feelings toward the parties, inconsistency in his statements, if any, his want of intelligence, or the want of means of knowing the facts of which he testifies, as by the direct testimony of other witnesses. *Held*, that the instruction was erroneous, as it was calculated to give the jury to understand that a witness might

be just as effectually impeached by a lack of intelligence as by the positive testimony of other witnesses.—Chicago W. D. Ry. Co. v. Bert, 69 Ill. 388.

[g] (Ill. 1892) Where the evidence shows merely that defendant was often ill, and at such times got excited, it is prejudicial error to charge that, if the jury find that she was suffering from hysteria or other illness, whose tendency was to give her false and imaginative ideas of things, such fact is to be considered with the other evidence on the question of her credibility as to matters occurring during her times of sickness.—Schoen v. Schoen, 48 Ill. App. 382.

[h] (Iowa, 1879) For the purpose of impeaching a witness, a physician may testify that his mind was impaired by disease, and that his memory was thereby affected.—Alleman v. Stepp, 52 Iowa, 626, 3 N. W. 636.

[i] (N. H. 1876) Where defendants, in an indictment for an assault, set up that the testimony of the prosecuting witness originates in insane delusions, to which he is subject, they should not be confined to evidence of his insane condition on the very day of the alleged assault. Circumstances showing his mental condition at previous times may have a bearing on the question of his sanity at that time.—State v. Kelley, 57 N. H. 549.

[j] (N. Y. 1854) Evidence to affect the credibility of a witness, tending to show that he has been of imbecile mind and memory, is admissible, though no objection to his competency was made when he was sworn.—Rivara v. Ghio, 3 E. D. Smith, 264.

[k] (N. Y. 1876) A personal and self-regarding incident occurring during a period of insanity, and testified to by its subject, either while still insane or when recovered from that state, is not per se an evidential fact, and its probative force rests wholly upon corroborating circumstances.—People v. New York Hospital, 3 Abb. N. C. 229.

[l] (N. C. 1844) On trial of an issue of bastardy, the examination of the prosecutrix being made, by act of assembly, prima facie evidence, defendant cannot show on the trial that she was an incompetent witness at the time of her examination before the magistrates, as that she was a colored woman, or had previously been convicted of some infamous offense which disqualified her from taking the oath.—State v. Patton, 27 N. C. 180.

[m] (Ohio, 1864) The credibility of a competent witness cannot be impeached by general evidence that the witness is not possessed of ordinary intelligence or powers of mind.—Bell v. Rinner, 16 Ohio St. 45.

[n] (Vt. 1834) Evidence that a party is of poor health, and subject to depression of spirits, is admissible to invalidate his declarations, at such a time, as to his affairs.—Brackett v. Wait, 6 Vt. 411.

[o] (Vt. 1862) A witness having testified as to the sanity of a testatrix, *held*, that the other side might prove, as affecting the degree of credit to be given to such witness, that his mind was still affected by a severe disease of the brain which he had had a year previous.—Fairchild v. Bascomb, 35 Vt. 398.

§ 1102. Intoxication.

Impeachment of character, see post, § 1117.

[a] (Conn. 1805) The credit of a witness may be impeached by showing that, at the time the facts sworn to took place, the witness was intoxicated; but such intoxication must be proved by direct testimony, or by acts and conduct of the witness, and not by evidence of the quantity of spirits he had previously drunk.—Tuttle v. Russell, 2 Day, 201, 2 Am. Dec. 89.

[b] (Iowa, 1883) The intoxication of a witness at the time of the events to which he testifies does not destroy, though it may impair, his credibility. He is entitled to belief if his recollection of the events is clear, or if he is corroborated by other witnesses.—State v. Gastello, 62 Iowa, 404, 17 N. W. 605.

[c] (Mass. 1889) The plaintiff having testified as to his going to the city marshal's office on the morning after the arrest complained of, and as to what took place there, it was competent to show, as affecting his credit as to this portion of his testimony, that he was under the influence of liquor at that time.—Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899.

[d] (Neb. 1894) In a criminal case the state may show in rebuttal that a witness who testified for defendant was intoxicated at the time of the happening of the events about which he testified.—Willis v. State, 43 Neb. 102, 61 N. W. 254.

[e] (N. Y. 1873) Where a physician who had attended a deceased person gives material evidence as to the capacity of such person to do a testamentary act, the opposing party may show that the witness, during the time of his attendance on deceased, was under the influence of liquor and not capable of judging of the mental condition of deceased.—Sisson v. Conger, 1 Thomp. & C. 564.

[f] (N. Y. 1885) Defendant sold furniture to plaintiff, taking a mortgage for the price. Defendant seized the furniture, and plaintiff sued for a conversion, and for insults, abuse, and damage to plaintiff's premises. *Held*, that evidence of defendant's intoxication when he took the furniture was admissible as affecting the reliance to be placed on his version of the transaction.—Van Loan v. Willis, 13 Daly, 281.

[g] (N. C. 1893) Evidence that one who testified as an eyewitness to the homicide was "very drunk" at the time of the homicide is competent, as going to his credibility.—State v. Rollins, 113 N. C. 722, 18 S. E. 894.

[h] (Tenn. 1845) A witness may be discredited by proving that he was drunk at the time the transaction he attempts to relate took place. The large quantity of liquor drank is a circumstance tending to prove drunkenness, and, as such, is competent evidence to prove that fact.—Fleming v. State, 24 Tenn. (5 Humph.) 564.

[i] (Wis. 1895) Testimony of a witness may be discredited by showing that he was drunk while the events to which he testified were taking place.—Mace v. Reed, 89 Wis. 440, 62 N. W. 186.

§ 1103. Impeachment of knowledge or recollection.

Credibility depending on means of knowledge, see ante, § 1076.

Cross-examination to test recollection, see post, § 1105.

[a] (U. S. 1896) Evidence of a person, familiar with the particular department of history, as to the date of an historical fact, of which the court will take judicial notice, may be received for the purpose of testing the recollection of another witness who has testified to various facts and dates, material to the pending issue, some of which were fixed by the date of such historical fact.—Ludtke v. Hertzog, 72 Fed. 142, 18 C. C. A. 487, 30 U. S. App. 637.

[b] (Cal. 1896) It was not competent for the defendant to attempt to impeach the memory of a witness by the testimony of others to the effect that he was a person of weak memory.—Ah Tong v. Earl Fruit Co., 112 Cal. 679, 45 Pac. 7.

[c] (Ga. 1856) A witness cannot be called to impeach the memory merely of another witness.—Goodwyn v. Goodwyn, 20 Ga. 600.

[d] (Iowa, 1886) When, on an indictment for larceny, a witness for the prosecution identified the accused as a person he had seen under circumstances connecting him with the larceny, and, on cross-examination, testified to his custom of taking notice of his customers, and his ability to recognize any man with whom he had held business relations two years after such transactions, an offer by defendant's counsel to show that two men in the court-room, whom, at defendant's request, the witness identified as customers of his, had never held business relations with the witness, is irrelevant, since the only proper subject of impeachment is witness' particular recollection of accused, not his general powers of memory.—State v. Falconer, 70 Iowa, 416, 30 N. W. 655.

[e] (Mo. 1882) A letterpress copy of a letter, if otherwise competent, may be shown to be in the handwriting of a party who, as a witness, denies all knowledge of it.—Clark v. Finn, 12 Mo. App. 583.

[f] (N. Y. 1854) Where it is sought to impeach the credibility of a witness by showing that he had no positive knowledge of facts stated in his affidavit to be true of his own knowledge, it is competent to show that he did not understand the full import of the language used in the deposition. Thus, where the affidavit of a foreigner, imperfectly acquainted with English, was in English, and his cross-examination at the trial in his own language by means of an interpreter, it is competent, on resuming the direct examination, to show that he had a different understanding of the language used, from that given it by the court and jury.—Lemoine v. Gauton, 2 E. D. Smith, 343.

[g] (N. C. 1876) To prove, of a witness, that his memory is weak, is a legitimate way of impeaching his testimony, and the opinions of those who knew him may be resorted to for that purpose.—Isler v. Dewey, 75 N. C. 466.

7. CROSS-EXAMINATION TO DISCREDIT OR TEST RELIABILITY.

CROSS-EXAMINATION TO TEST RELIABILITY, § 1104.
—— RECOLLECTION OR MEMORY, § 1105.
CROSS-EXAMINATION TO DISCREDIT WITNESS OR DISPARAGE TESTIMONY, § 1106.
INQUIRY AS TO CONVERSATION BETWEEN WITNESS AND OTHER PERSON RELATIVE TO FACTS, § 1107.
PERSONAL AFFAIRS, ACTS, AND TRANSACTIONS OF WITNESS NOT PERTAINING TO ISSUES, § 1108.

Impeachment by showing inconsistent statements, see post, §§ 1228–1252.
—— *of character, see* post, §§ 1135–1149.
—— *on ground of bias or prejudice, see* post, §§ 1192–1199.

§ 1104. Cross-examination to test reliability.

[a] (U. S. 1814) A witness cannot be asked a collateral question, irrelevant to the matter in issue, merely to test his credibility.—Odiorne v. Winkley, Fed. Cas. No. 10,432 [2 Gall. 51, 1 Robb, Pat. Cas. 52].

[b] (Ala. 1893) In an action against a bank to recover a deposit paid out by defendant on checks to which plaintiff's name was forged, plaintiff may be asked to point out in a package of checks, part of which are genuine and part forged, the genuine from the forged.—First Nat. Bank of Birmingham v. Allen, 100 Ala. 476, 14 South. 335, 46 Am. St. Rep. 80, 27 L. R. A. 426.

[c] (Ala. 1893) The extent to which a witness may be cross-examined for the purpose of testing his credibility is within the discretion of the court.—Tobias v. Treist, 103 Ala. 664, 15 South. 914.

[d] (Cal. 1857) In replevin against an attaching creditor of plaintiff's vendor, plaintiff having shown no title but possession, it is competent for defendant to cross-examine as to the nature and length of possession, to show that it was colorable, and to test the witness' means of knowledge.—Thornburgh v. Hand, 7 Cal. 554.

[e] (Ga. 1894) The court may refuse to allow a witness' power of vision to be tested by requiring the witness to go to the window, and look at an object on the street, which was not visible to the judge and jury from their positions in the court room.—Heath v. State, 93 Ga. 446, 21 S. E. 77.

[f] (Ill. 1802) Where a witness testifies that he signed a certain instrument without reading it, it is proper, on cross-examination, to inquire as to his previous business, to show that he was a man of experience and affairs.—Poppers v. Peterson, 43 Ill. App. 571.

[g] (Iowa, 1881) It is the plaintiff's right, on cross-examination in a suit against a railroad for killing stock, to test the accuracy of the observation of a witness as to the location of the accident by showing the speed which the train was making.—Kyser v. Kansas City, St. J. & C. B. R. Co., 56 Iowa, 440, 9 N. W. 338.

[h] (Iowa, 1890) A witness for defendant, who has testified that the place did not have the reputation of a house of ill fame, may be asked whether he is married, whether he has sons, what interest he has in such places, and whether he has talked with others in regard to the house, since the answers sought to be brought out may tend to show that, from his habits, the witness would not be apt to know the reputation of the house.—State v. Lee, 80 Iowa, 75, 45 N. W. 545, 20 Am. St. Rep. 401.

[i] (Kan. 1884) On a trial for murder, had more than a year after the homicide, a witness for defendant testified to certain material facts. This witness had resided in the immediate vicinity all the time, was aware of the homicide, and the consequent excitement, of the arrest and commitment of defendant. The facts so testified to were the appearance of three strangers riding rapidly away from the place of the homicide right after the time it must have taken place. *Held*, that the state might, on cross-examination, ask the witness whom, if any one, he told of these facts.—State v. McKinney, 31 Kan. 570, 3 Pac. 356.

[j] (La. 1881) A witness may be cross-examined as to matters not embraced in the direct examination, for the purpose of testing his credibility.—State v. Willingham, 33 La. Ann. 537; Same v. Gregory, Id. 737.

[k] (Me. 1893) The cross-examination of a witness, that shows mental illusion or unbalance concerning the subject-matter of the examination in chief, is competent for the consideration of the jury in weighing the testimony in chief, though, standing alone, it has no force to prove the facts stated.—Pease v. Burrowes, 86 Me. 153, 29 Atl. 1053.

[l] (Mich. 1879) Where the plaintiff, in an action to recover damages for false imprisonment, had introduced evidence that she was a physician, and offered proof as to the extent and value of her practice, it was proper on cross-examination to inquire fully as to the nature of her practice and whether she secured it by advertising through handbills or otherwise.—Van Deusen v. Newcomer, 40 Mich. 90.

[m] (Mich. 1883) A witness, having testified, on cross-examination, that a chancery bill against him had been sworn to, was further

asked whether it charged him with forgery. It was objected that the bill was the best evidence. *Held*, that the question was relevant as tending to test the witness' memory, and as a step towards impeachment; and that, in the absence of an objection that the bill ought first to be shown to the witness, the exception might be treated as if that had been done, and the allowance of the question was therefore within the discretion of the trial judge.—Ives v. Leonard, 50 Mich. 296, 15 N. W. 463.

[n] (Mich. 1888) In replevin for logs it is competent to show the quantity of logs which a witness, who has testified as to the quantity of logs in question, made in scaling other lands of which plaintiff had the actual scales, in order to test his accuracy.—Busch v. Nester, 70 Mich. 525, 38 N. W. 458.

[o] (Minn. 1871) Allowing irrelevant questions to be put to a witness, on cross-examination, for the purpose of discrediting his testimony, is matter of discretion with the trial court.—State v. McCartey, 17 Minn. 76 (Gil. 54).

[p] (N. Y. 1890) A witness having testified on his direct examination that he had had experience in judging what was indicated by refuse after fires, it was competent for defendant to ask him on cross-examination as to how many other fires he had had.—Schlesingen v. Springfield Fire & Marine Ins. Co., 58 N. Y. Super. Ct. (26 Jones & S.) 112, 9 N. Y. Supp. 727.

[q] (S. C. 1895) On a trial for arson, a question asked of a witness who was at defendant's house on the evening of the fire, whether he got any liquor there, was admissible to test his ability to identify those who were present.—State v. Rhodes, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306.

[r] (Tex. 1890) Evidence as to the willingness with which a witness would have trusted testator to make an important bargain for him is irrelevant, even on a cross-examination for the purpose of testing the ground and extent of a favorable opinion as to testator's sanity expressed by the witness on his direct examination.—Prather v. McClelland, 76 Tex. 574, 13 S. W. 543.

§ 1105. —— Recollection or memory.

[a] (Ala. 1893) The extent to which the cross-examination of a witness may be pursued to test his memory is within the discretion of the court.—Noblin v. State, 100 Ala. 13, 14 South. 767.

[b] (Cal. 1890) In an action to quiet title, defendant claimed under a grant made by the Mexican governor of California in 1838, but plaintiff alleged that such grant was really made in 1848, after California had become subject to the United States. The Mexican ex-governor himself testified to a positive recollection that he wrote the grant on the day of its date. *Held*, that it was proper on cross-examination to ask the ex-governor as to another grant, to show that he had no special recollection of it, when no effort was made to contradict him, or to show that the making of such grant was a wrongful act.—Davis v. California Powder Works, 84 Cal. 617, 24 Pac. 387.

[c] (Conn. 1868) The plaintiff claimed to recover on a policy of insurance on the life of his first wife, and being himself a witness, he was, on cross-examination, asked how nearly he could tell the date of his second marriage, in order to test the accuracy of his memory. The plaintiff was charged with having procured a large insurance upon the life of his wife at a time when he knew or might have known that she had a fatal disease fastened upon her. *Held*, that under the circumstances of the case the court exercised its discretion properly in allowing the question to be put.—Kelsey v. Universal Life Ins. Co., 35 Conn. 225.

[d] (Conn. 1889) Where the justice testifies that defendant, on the first trial, made certain admissions, and defendant denies having made them, it is in the discretion of the court to allow counsel to cross-examine defendant as to what occurred on the justice's trial, to test his recollection.—State v. Duffy, 57 Conn. 525, 18 Atl. 791.

[e] (Conn. 1889) A witness having testified to defendant's residence in another state, and as to how often and under what circumstances he had seen her there, he may be cross-examined respecting one who lived next door to defendant to test his memory and his habits of observation.—City of Hartford v. Champion, 58 Conn. 268, 20 Atl. 471.

[f] (Iowa, 1882) In an action on a note, the execution of which was denied by defendant, plaintiff, having testified as to what defendant said when the note was shown him, was properly asked on cross-examination what his business was, and how many notes he had at that time, in order to show the untrustworthiness of his memory.—Smith v. Wagaman, 58 Iowa, 11, 11 N. W. 713.

[g] (Me. 1848) On the cross-examination of a witness, the presiding judge, in the exercise of a sound discretion, may rightly permit an inquiry of a witness for his reasons why he did certain acts, to test the accuracy of the recollection of the witness, or to affect his credibility, although it may have no direct tendency to support or disprove the issue.—Inhabitants of New Gloucester v. Bridgham, 28 Me. (15 Shep.) 60.

[h] (Mass. 1885) In a will contest, where a witness who testified as to testatrix's capacity is asked, on cross-examination, for the purpose of testing his memory, how many days he attended a former trial, and how many days he was paid for, there is no ground for exception, as the questions are either competent or immaterial.—Sewall v. Robbins, 139 Mass. 164, 29 N. E. 650.

[i] (N. H. 1859) Hearsay evidence is generally inadmissible, and it cannot be asked, even on cross-examination, what others have said, though the apparent object is to ascertain a reason for the party's noticing and recollecting another fact.—Dudley v. Elkins, 39 N. H. 78.

[j] (R. I. 1892) On a prosecution for burglary, where a manufacturer, as a witness for the state, has identified an article as having been sold by him eight years before to a person other than defendant, he cannot, for the purpose of testing his recollection, be required, on cross-examination, to give the amount of his yearly business, as that is a private matter, wholly foreign to the investigation.—State v. Ellwood, 17 R. I. 763, 24 Atl. 782.

§ 1106. Cross-examination to discredit witness or disparage testimony.

[a] On cross-examination of a witness, a question irrelevant to the matter in issue cannot be asked to impeach him.

—(U. S. 1840) United States v. Dickinson, Fed. Cas. No. 14,958 [2 McLean, 325];

(Ala. 1859) Rosenbaum v. State, 33 Ala. 354; (1859) Blakey's Heirs v. Blakey's Ex'r, Id. 611; (1861) Bivens v. Brown, 37 Ala. 422.

[b] (U. S. 1861) A cross-examination going to the credit of the witness is limited only by the discretion of the court.—Johnston v. Jones, 66 U. S. (1 Black) 209, 17 L. Ed. 117.

[c] (Ala. 1858) In an action to establish a will, a witness may be asked on cross-examination if, at the time of such cross-examination,

he was not under the influence of ardent spirits.—Pool's Heirs v. Pool's Ex'r, 33 Ala. 145.

[cc] (Ark. 1855) Defendant was indicted for an assault with a deadly weapon, with intent to murder. *Held*, that the following questions, asked by defendant's counsel of the government witness, were proper, and should have been admitted: (1) Were you excited from anger when this assault took place? (2) Did you not have a fight or a scuffle immediately before this took place?—Hofler v. State, 16 Ark. 534.

[d] (Cal. 1893) A. had been tried three times for the murder of G. A witness, L., did not appear at the first trial, but on the second trial testified that he saw A. shoot G. *Held*, that it was error to refuse to allow defendant, on trial for perjury committed in that action, to ask L. who took him up to the district attorney's office, in that it appeared somewhat suspicious that he should come at so late a time to tell what he knew about the case.—People v. Lem You, 97 Cal. 224, 32 Pac. 11.

[e] (Fla. 1893) A witness testified that while standing at the east side of a house called a "commissary," where deceased was killed, shortly before the killing, he heard accused use language indicating a purpose to kill deceased. On cross-examination the witness was asked what kind of a building was that commissary. *Held*, that the question was proper, as the witness' answer might have shown the falsity of his statement.—Williams v. State, 32 Fla. 251, 13 South. 429.

[f] (Ind. 1890) Where accused becomes a witness in his own behalf, his accuracy may be tested, on cross-examination, in the same method as that of an ordinary witness.—Keyes v. State, 122 Ind. 527, 23 N. E. 1097.

[g] (Iowa, 1879) In an action of slander a witness for defendant called upon a point in mitigation of damages, was, on cross-examination, for the purpose of discrediting him, asked in regard to certain alleged fraudulent practices of defendant in which the witness aided, having no connection with the issue. *Held* improper.—Madden v. Koester, 52 Iowa, 692, 3 N. W. 790.

[h] (Me. 1862) A party, whose goods were attached, having testified for the receiptor, in an action on the receipt, that they were of less value than the amount of the judgment, the plaintiff, on cross-examination, was permitted to interrogate the witness if subsequent attachments of the goods were not made by his own procurement, in favor of certain other creditors, whom he desired to secure.—Thompson v. Smiley, 50 Me. 67.

[i] (Mass. 1849) A witness, on cross-examination, cannot be asked a question, otherwise irrelevant, for the purpose of testing his moral sense.—Commonwealth v. Shaw, 58 Mass. (4 Cush.) 593.

[j] (Mass. 1877) Where, on a trial for perjury of one alleged to have falsely sworn, on a prosecution for forging certain bonds, that he saw a certain person write a name in a hotel register, such person testifies that he never wrote the name in the register, but that he signed the forged bonds as surety by the same name, which was fictitious, there was no error in excluding a question asked by defendant on cross-examination for the purpose of discrediting him, "When you signed the fictitious name to the bond did you swear before the magistrate that you had sufficient property to respond, and was that true?"—Commonwealth v. McLaughlin, 122 Mass. 449.

[k] (Mich. 1864) A question to a witness, whether he did not testify on a former trial, that "he said yes and no, and played good Lord and good devil, because he did not know into whose hands he might fall," is admissible, as affecting his candor and fairness.—Beaubien v. Cicotte, 12 Mich. 459.

[l] (Mich. 1874) On cross-examination of a witness, claiming to have been robbed of a large amount of money, questions tending to elicit the fact that he was considerably indebted and straitened, and that his stock of goods was small, and also to show that he made statements, on a preliminary examination of the prisoner, making his inventory to have been much larger than he knew it to have been in fact, are admissible, as bearing upon the probabilities, and to test his candor and credibility.—People v. Morrigan, 29 Mich. 4.

[m] (Mich. 1893) A prosecuting attorney has no right to imply that a witness for defendant is swearing falsely by asking him if he knows the penalty for perjury.—People v. O'Brien, 96 Mich. 630, 56 N. W. 72.

[n] (Minn. 1871) The question of the propriety of allowing questions not relevant to the issue to be put to a witness, for the purpose of discrediting him with the jury, rests in the discretion of the presiding judge.—State v. McCartney, 17 Minn. 76 (Gil. 54).

[o] (Minn. 1882) A witness cannot be cross-examined as to a matter wholly immaterial to the issue in the case for the purpose of discrediting him.—Allen v. Coates, 29 Minn. 46, 11 N. W. 132.

[p] (Mo. 1895) Where defendant is a witness, the prosecuting attorney can cross-examine him as to matters not testified to in chief for purposes of impeachment.—State v. Anderson, 126 Mo. 542, 29 S. W. 576.

[q] (Neb. 1887) A question on cross-examination, the object of which is to show that the witness had tried to suborn another witness in the case, is not competent, where the answer contemplated by the question could only have shown that the witness under examination offered the other witness an extravagant inducement to go to court and testify, the presumption being that she would testify truly.—Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 295.

[r] (N. Y. 1821) Where the teller of a bank was called as a witness for a party, to prove the correctness of his entry, it was *held* that he might be asked, on cross-examination, "whether he was not in the constant habit of making mistakes."—Mechanics' & Farmers' Bank v. Smith, 19 Johns. 115.

[s] (N. Y. 1880) Where in an action on a note the payee is called by plaintiff to prove that it was an accommodation note, on cross-examination evidence may be received that he had negotiated other notes of the defendant, which he stated at the time to be business paper, as it was competent to show by him his own declaration in regard to like notes by way of weakening his credibility.—Bayliss v. Cockcroft, 81 N. Y. 363.

[t] (N. Y. 1891) In an action for breach of a contract for the sale of a business, which contained a stipulation that the seller should not carry on the same line of business for five years, questions put to the vendor on his cross-examination, as to business transacted by him after the commencement of the suit, were competent to affect his credit.—Breck v. Ringler, 59 Hun, 623, 13 N. Y. Supp. 501.

[u] (N. C. 1890) Defendant was asked on cross-examination "what he played off crazy for," reference being had to the fact that, when the case stood for trial at a former term, he either was, or professed to be, insane. *Held* competent, as, if he had admitted that he feigned insanity, it would have discredited his testimony, and tended, with the other evidence, to prove his guilt.—State v. Pritchett, 106 N. C. 667, 11 S. E. 357.

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[v] (Ohio, 1893) A party desiring to offer independent evidence to impeach a witness of his adversary cannot do so during cross-examination of such witness, but must wait until his time comes to offer evidence.—National Ben. Ass'n v. Harding, 7 Ohio Cir. Ct. R. 438.

[w] (Or. 1886) Under Laws 1880, p. 28, providing that, when the accused offers himself as a witness in his own behalf, "the offer, when so made, shall be deemed to have given to the prosecution a right to cross-examine him upon all the facts to which he has testified, tending to his conviction or acquittal," it is error to permit the accused to be asked on his cross-examination, with a view to discrediting him, questions not relating to facts to which he has testified on his examination in chief.—State v. Saunders, 14 Or. 300, 12 Pac. 441.

[x] (Or. 1888) A juror in a former trial, in which there was a disagreement as to defendant, and one S. was acquitted, was called by defendant to testify as to the testimony of S. at the former trial, S. having since died. On cross-examination, he was asked "whether he did not hang the jury for 36 hours," and other questions relating to the deliberations of the jury. *Held* improper.—State v. Huffman, 16 Or. 15, 16 Pac. 640.

[y] (Pa. 1896) In scire facias on a lien for street paving done under the supervision of the assistant commissioner of highways, and accepted by the city, defendants alleged that the work was improperly done, and a witness so testified. *Held*, that it was proper to attack the credibility of the witness by asking him whether he had not charged such officer with corruptly receiving the fruits of perjury by a clerk in connection with the same paving contract.—City of Philadelphia v. Reeder, 173 Pa. 281, 34 Atl. 17, 38 Wkly. Notes Cas. 52.

[yy] (Tex. 1885) The credibility of a witness cannot be impeached by interrogating him with respect to matters not relevant to the issues.—Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118.

[z] (Tex. 1887) At the trial of an action on a promissory note, where an expert has been called by the defendant to testify to the genuineness of the signature to the note, it is not error for the court to refuse to allow the plaintiff to ask the witness questions going to his credibility, and not to his competency as an expert, before the latter has answered the questions propounded by the defendant; the witness upon cross-examination being interrogated and answering fully as to the matters concerning which inquiry was made by the plaintiff.—Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848.

[zz] (Wis. 1874) In an action for conversion, on the issue whether the goods in controversy were delivered by plaintiffs to the defendant, or to a third party for sale on commission, one of the plaintiffs as a witness was asked by defendant on cross-examination whether plaintiffs had at any time heard that such third party had failed. *Held*, that while it was within the discretion of the court to admit the question, if its object was to discredit the witness by showing that plaintiffs had a motive for seeking to hold defendants liable instead of the third party, there was no error in rejecting it.—Zimmerman v. Fairbank, 35 Wis. 368.

§ 1107. Inquiry as to conversation between witness and other person relative to facts.

[a] (U. S. 1895) In a personal injury suit against a master where plaintiff, on cross-examination, was asked whether his counsel did not tell him that his whole case depended on his swearing that he complained of the defects in the machinery which caused his injury, and answered "No," it was not error to exclude the further question whether he did not know that his whole case depended on his so swearing.—Homestake Min. Co. v. Fullerton, 69 Fed. 923, 16 C. C. A. 545, 36 U. S. App. 32.

[b] (U. S. 1843) The prisoner has a right to show the spirit and temper with which the prosecution has been conducted, and if it has been brought to bear against the accused he has a right to bring it to the attention of the jury, and hence it is proper to ask the government's witness on cross-examination whether any person engaged in the prosecution has tampered with the witness.—United States v. Dowden, Fed. Cas. No. 14,990a [1 Hayw. & H. 145].

[c] (Ala. 1893) A witness testifying to deceased's dying declarations may be asked if deceased's wife did not repeat to him such declarations before he went on the stand.—Boulden v. State, 102 Ala. 78, 15 South. 341.

[d] (Iowa, 1889) Two persons jointly indicted with defendant for murder, having had no communication with each other, gave the same account of the killing at the time of their arrest. *Held*, that a refusal to allow defendant, on cross-examination, to ask one of such persons whether he had not had a private conversation with the other at a place named, two or three days after the murder, was proper, as the question was not necessary for impeachment.—State v. Munchrath, 78 Iowa, 268, 43 N. W. 211.

[e] (Minn. 1895) Two witnesses testified that, while walking together on the night of the homicide, they met a person in a buggy, and the facts each testified he observed were the same. *Held*, that it was proper to permit them on cross-examination to be questioned as to whether there was any concert between them as to their testimony, and, one of them having testified as to the features of the person in the buggy, to permit the other to be asked whether the former had before claimed to be able to recollect the features of such person.—State v. Hayward, 62 Minn. 474, 65 N. W. 63.

[f] (Tenn. 1889) In an action for seduction and breach of promise of marriage, it was proper to allow defendant to ask plaintiff's mother, on cross-examination, if her husband did not say that if she did not swear plaintiff's child to defendant he would send her to hell, there being evidence that her husband was a violent and desperate man; that he was not on friendly terms with defendant; that his wife and daughter were afraid of him; that he had threatened to do plaintiff bodily harm if she did not swear her child to defendant; and that the witness had made statements out of court contradictory to her testimony.—Graham v. McReynolds, 88 Tenn. (4 Pickle) 240, 12 S. W. 547.

[g] (W. Va. 1871) Although the rules of courtesy among counsel discountenance the practice if inquiring if a witness has had any private conversation with the counsel of the party calling him, yet no legal reason exists why such inquiry, when important, may not be made.—Forney v. Ferrell, 4 W. Va. 729.

§ 1108. Personal affairs, acts and transactions of witness not pertaining to issues.

[a] (Iowa, 1895) A witness for the state testified that he knew defendant, and that, on the night of the robbery, defendant was at witness' place of business for a minute or two, and on cross-examination he said he was working for one L. *Held*, that it was within the discretion of the court to refuse to permit the witness to answer the question, "What business is conducted in that place?"—State v. Osborne, 96 Iowa, 281, 65 N. W. 159.

[b] (Ky. 1890) It was proper, in order to discredit a witness, to ask him with whom he was

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living, in order to show his surroundings, and how they might influence him.—Roberts v. Commonwealth, 20 S. W. 267.

[c] (N. H. 1879) In an action for entering plaintiff's house, the defendant asked the plaintiff's husband on cross-examination if he had been notified to quit every house he had lived in for 10 years and been put out by legal proceedings in every case. The question was excluded. *Held*, that the question being asked for the purpose of disparaging his credibility, it was discretionary with the trial term as to how far a cross-examination should be allowed to proceed for that purpose, and the exercise of such discretion will not be disturbed.—Merrill v. Perkins, 59 N. H. 343.

[d] (N. Y. 1874) At the trial of an action to set aside a mortgage as usurious, a witness for the defense who had acted for defendant in the negotiation of the mortgage was questioned as to whether he had not, on other loans by defendant to other parties, taken notes from them for sums in excess of legal interest paid to defendant. *Held*, that the evidence was inadmissible for the purpose of affecting the credit to be given to witness.—Pooler v. Curtiss, 3 Thomp. & C. 228.

[e] (N. Y. 1889) On an issue of negligence, testimony of a witness cannot be impeached by asking him if he voted at an election a certain ticket, which was blasphemous. The voter cannot be compelled to state how he voted; the New York statute requiring ballots to be folded so as to conceal their contents (Laws 1842, c. 130, tit. 4, § 7), and forbidding that they be marked to designate the voter (Laws 1880, c. 366, § 3), and that the inspectors open them, or allow them to be opened (Laws 1842, c. 130, tit. 4, § 28).—Martin v. Wood (Sup.) 4 N. Y. Supp. 208, judgment affirmed (1889) 52 Hun, 613, 5 N. Y. Supp. 274.

[f] (N. Y. 1891) On the cross-examination of a witness in a criminal trial the court may, without error, in the exercise of judicial discretion, exclude questions whose answers cannot affect or impeach the credibility of the witness' testimony, such as, "You are somewhat of an amateur detective, are you not?"—People v. Fleming, 60 Hun, 576, 14 N. Y. Supp. 200.

[g] (N. Y. 1892) In an action against a railroad company for personal injuries alleged to have resulted from defendant's negligence, defendant cannot show on cross-examination of plaintiff, for the purpose of discrediting his evidence, that he had made similar claims against other corporations, not connected with the claims in suit.—Hansee v. Brooklyn El. R. Co., 66 Hun, 384, 21 N. Y. Supp. 230.

8. RECALLING WITNESS FOR PURPOSE OF IMPEACHMENT.

§ 1109. In general.

[a] (Ala. 1874) Where the cross-examination of a witness has been temporarily suspended with the knowledge and assent of the court, and the prosecuting officer for the purpose of preparing questions on which to found impeachment, it is error to refuse to allow him to be recalled and the cross-examination continued.—Hall v. State, 51 Ala. 9.

[b] (Ala. 1883) It is within the discretion of the trial court to refuse to allow a witness to be recalled to lay a foundation to impeach him.—Bell v. State, 74 Ala. 420.

[c] (Ala. 1890) It is within the discretion of the court, after a witness has been examined by defendant, and cross-examined, to allow him to be recalled by plaintiff to lay the foundation for his impeachment by proof of contradictory statements.—Richmond & D. R. Co. v. Vance, 93 Ala. 144, 9 South. 574, 30 Am. St. Rep. 41.

[d] (Cal. 1896) A witness for the prosecution, near whose house the shooting took place, testified that he stood in his yard at the time of the shooting, and had an unobstructed view of both men. A witness for the defense testified that the prosecuting witness had told him that he stood in the barn. A request for the recall of the prosecuting witness, for the purpose of laying a predicate for his impeachment, was refused. All of the facts in the testimony sought to be impeached had been established by other witnesses, or admitted by accused. *Held*, that the ruling, while not commended, was not sufficient ground for reversal.—People v. Shaw, 111 Cal. 171, 43 Pac. 593.

[e] (Ill. 1890) Where the attention of counsel has been called by the court to the rule that a witness cannot be impeached by evidence of statements made by him out of court, unless his attention has been called on cross-examination to the time and place of the alleged statement, it is not an abuse of discretion to refuse to allow them, after an objection to the impeaching evidence has been sustained, to recall the witness for the purpose of laying the proper foundation for the impeaching testimony.—Aneals v. People, 134 Ill. 401, 25 N. E. 1022.

[f] (Iowa, 1851) Where the court and counsel have already allowed irregularities at a trial, the defendant may recall one of the plaintiff's witnesses for the purpose of impeaching him by other evidence.—Ross v. Hayne, 3 G. Greene, 211.

[g] (Iowa, 1859) A party cannot claim the privilege as a matter of right to recall a witness for the purpose of impeachment or to settle the question as to what he testified to when previously on the stand.—State v. Ruhl, 8 Iowa (8 Clarke) 447.

[h] (Iowa, 1886) After defendant has rested his case, leave to recall one of his witnesses for the purpose of laying the foundation for his impeachment may be granted plaintiff, such leave being a matter within the discretion of the court.—Huff v. Aulman, 69 Iowa, 71, 28 N. W. 440, 58 Am. Rep. 218.

[i] (Iowa, 1887) The defendant recalled a witness for further cross-examination, and, for the purpose of showing his contradictory statements, asked him if he had not made a statement of the transaction to one Alonzo Wallace which was materially different in some respects from the account given by him when on the witness stand, which was excluded by the court on the objection urged by the district attorney that the defendant had no right to recall the witness for that purpose at that time, which was sustained; the court incorrectly remarking at the time that the question had been answered by the witness on his former examination. *Held*, though the question had not been previously answered by the witness, and the ruling of the court was erroneous, those facts were not ground for reversal, inasmuch as, by subsequently being allowed to call Wallace as a witness, and examine him in regard to the contradictory statements without the impeached witness first having had an opportunity to explain the statement or correct his testimony, the defendant had all the benefit and advantage he would have had had the question been allowed.—State v. Winter, 72 Iowa, 627, 34 N. W. 475.

[j] (Kan. 1872) Where a defendant in a criminal cause has testified in his own behalf and left the stand, it is not error for the court to allow him to be recalled by the state and cross-examined for the purpose of laying the foundation for impeaching his testimony, if the cross-examination related to the testimony he had given in his own behalf.—State v. Horne, 9 Kan. 119.

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[k] (La. 1892) Under Acts 1886, No. 29, § 2, which provides that, if accused avail himself of the privilege of testifying in his own behalf, he shall be subject to all the rules which apply to other witnesses, an accused, after being dismissed as a witness, may be recalled by the state for the purpose of laying a foundation for his contradiction.—State v. Walsh, 44 La. Ann. 1122, 11 South. 811.

[l] (La. 1895) Though the cross-examination of a state's witness is closed, defendant should be allowed to question him as to contradictory statements, as the basis to introduce proof of such statement as impeaching.—State v. Nixon, 47 La. Ann. 836, 17 South. 303.

[m] (La. 1896) Although a defense witness has been cross-examined and dismissed without being questioned as to contradictory statements out of court, the state, not having commenced rebutting, may be permitted to recall and examine the defense witness, to lay the basis for contradicting him, and to prove such contradictory statements.—State v. Goodbier, 48 La. Ann. 770, 19 South. 755.

[n] (Mo. 1877) A party, after cross-examining a witness of the other side, may, by permission of court, recall and question him for the purpose of impeaching him, and afterwards introduce other testimony to that end. He does not, by so recalling him, make the witness his own.—State v. Jones, 64 Mo. 391.

[o] (Pa. 1853) When the object of recalling a witness for cross-examination is to lay the foundation for proving his declarations out of court, it is error to refuse permission to recall him if proof of the witness' declarations be afterwards rejected because he had no previous opportunity of explanation.—Covanhovan v. Hart, 21 Pa. (9 Harris) 495, 60 Am. Dec. 57.

[p] (S. C. 1890) It is a matter wholly within the discretion of the court to permit a witness to be recalled for further cross-examination, for the purpose of laying the foundation for his impeachment.—Huff v. Latimer, 33 S. C. 255, 11 S. E. 758.

[q] (Tenn. 1879) The trial court may, in its discretion, permit witnesses for the accused to be recalled by the prosecuting attorney, and re-examined with a view to contradicting their previous testimony.—Lawless v. State, 72 Tenn. (4 Lea) 173.

[r] (Tex. 1878) It was error to refuse to allow the defendant to recall a state's witness for the purpose of laying a predicate for the introduction of evidence to prove that he had made contradictory statements.—Harvey v. State, 37 Tex. 365.

[s] (Tex. 1890) By recalling a state witness for the sole purpose of laying a foundation for his impeachment, defendant does not make him his own witness, and is not thereby deprived of the right of impeaching him.—Bennett v. State, 28 Tex. App. 539, 13 S. W. 1005.

[t] (Tex. 1890) On trial for gaming, a state's witness, who alone testifies that defendant played the game, may be recalled by defendant, and asked questions for the purpose of laying a foundation for his impeachment.—Bennett v. State, 28 Tex. App. 539, 13 S. W. 1005.

[u] (Tex. 1891) On a trial for murder a witness may be recalled for the purpose of laying a foundation to impeach him by showing that in previous proceedings he had testified differently as to certain facts.—Fuller v. State, 30 Tex. App. 559, 17 S. W. 1108.

[v] (Tex. 1895) The court can recall defendant, after he has been examined on his own behalf, for the purpose of laying a predicate to impeach him by another witness.—Chapman v. State (Cr. App.) 30 S. W. 225.

[w] (Utah, 1895) It is within the discretion of the trial court to permit the prosecution, after the introduction of evidence in rebuttal, to recall a witness of defendant for further cross-examination, and to lay a foundation for his impeachment.—People v. Thiede, 11 Utah, 241, 39 Pac. 837.

[x] (Va. 1874) The defendant in a criminal case, wishing to show that a witness for the state, who has already testified and left the stand, has made a different statement at another time, is entitled to have such witness recalled and to examine him on the particular point, whether his failure to examine him when he was on the stand was from inadvertence or from the fact that he or his counsel were not informed of the contradicting evidence.—Little v. Commonwealth, 25 Grat. 921.

[y] (Wis. 1891) A witness of the opposite party may be recalled for further cross-examination touching statements made by him out of court, to lay the foundation of his contradiction by way of impeachment; and, where he has been so recalled, it is error to rule out the impeaching evidence, on the ground that the party had made the witness his own by recalling him.—Perkins v. State, 78 Wis. 551, 47 N. W. 827.

9. REBUTTAL OR EXPLANATION OF EVIDENCE TO DISCREDIT WITNESS.

Of contradicting evidence, see post, § 1281.
Of evidence impeaching character, see post, §§ 1165–1175.
—— *of inconsistent statements, see* post, §§ 1258–1264.
—— *of interest or bias, see* post, §§ 1204–1207.

§ 1110. In general.

[a] (N. C. 1886) Evidence elicited on cross-examination, calculated and intended to discredit the witness, may be explained, notwithstanding such explanatory testimony would have been incompetent on the examination in chief.—State v. Glenn, 95 N. C. 677.

[b] (Va. 1877) Where to impeach the credibility of a witness evidence is admitted to show that he was drunk at the time of the acts concerning which he has testified, he can rebut such evidence only by proof of his actual condition at the time; and statements or declarations made by himself or others which might prejudice the adverse party are not admissible for the purpose of showing that they were such statements as only a sober man could have made.—Haynes v. Commonwealth, 28 Grat. 942.

(B) CHARACTER AND CONDUCT OF WITNESS.

1. WITNESSES WHO MAY BE IMPEACHED AS TO CHARACTER, §§ 1111-1113.
2. CHARACTER AND REPUTATION IN GENERAL, §§ 1114-1133.
3. CONDUCT OF WITNESS WITH REFERENCE TO CAUSE, §§ 1133, 1134.
4. CROSS-EXAMINATION FOR PURPOSE OF IMPEACHMENT, §§ 1135-1149.
5. IMPEACHING EVIDENCE, §§ 1150-1164.
6. EVIDENCE TO SUSTAIN CHARACTER OF WITNESS OR TO IMPEACH IMPEACHING WITNESS, §§ 1165-1175.
7. EFFECT OF IMPEACHMENT, § 1176.

As affecting competency of witness, see ante, §§ 108–118.
Harmless error in admission of evidence as to character of witness, see "Appeal and Error," vol. 3, c. 2096, § 4160.

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Impeachment of character of subscribing witness, see "Evidence," vol. 20, c. 2275, § 1612.
Instructions by court as to character of witness in criminal prosecution, see "Criminal Law," vol. 14, c. 2508, § 1779.

1. WITNESSES WHO MAY BE IMPEACHED AS TO CHARACTER.

IN GENERAL, § 1111.
PARTY AS WITNESS IN CIVIL ACTION OR PROCEEDING, § 1112.
ACCUSED AS WITNESS IN CRIMINAL PROSECUTION, § 1113.

Impeachment of impeaching witness as to character, see post, § 1174.
Witness whose testimony may be discredited, in general, see ante, §§ 1089–1092.

§ 1111. In general.

[a] (Ind. 1881) Where, in a criminal trial, the defendant moves to postpone the trial in order to obtain the testimony of an absent witness, and the prosecution admits that such witness would testify, if present, as stated in defendant's affidavit, which is thereupon read in evidence, it is incompetent to show such witness' character to be bad.—Powers v. State, 80 Ind. 77.

[b] (Ky. 1893) Where the affidavit as to what an absent witness would testify to is admitted in evidence as a deposition so as to prevent a continuance, the reputation of the absent witness may be impeached by the commonwealth.—Johnson v. Commonwealth, 94 Ky. 578, 23 S. W. 507.

[c] (Ohio, 1878) Where an affidavit for the continuance of a case, on the ground of inability to procure the testimony of an absent witness, contains a statement of what is expected to be proved by the witness, and such statement is given in evidence on the trial as the testimony of the witness, its credibility may be attacked in the same manner as that of a deposition, by impeaching the veracity of the witness.—United States Life Ins. Co. v. Wright, 33 Ohio St. 533.

§ 1112. Party as witness in civil action or proceeding.

Right to discredit testimony in general, see ante, § 1091.

[a] (Ind. 1884) Where plaintiff testifies, defendant may prove his general moral character for the purpose of impeaching his credibility.—Wright v. Hanna, 98 Ind. 217.

[b] (Mass. 1881) The fact that a party to an action has testified to the court on a preliminary question does not, after such question has been decided, warrant the introduction of evidence that he has pleaded guilty to an indictment charging him with a crime.—McLaughlin v. Cowley, 131 Mass. 70.

[c] (N. Y. 1874) Where plaintiff is sworn as a witness in chief and has testified in reply, the defendant may offer evidence in rebuttal impeaching his character for truth and veracity.—Foster v. Newbrough, 58 N. Y. 481, reversing (1873) 66 Barb. 645.

[d] (N. Y. 1884) Where a party to a suit testifies in his own behalf, he may be impeached.—Mather v. Parsons, 32 Hun, 338.

[e] (N. Y. 1887) Though in an action for slander the evidence concerning the reputation of the plaintiff must ordinarily be restricted to the time before the utterance of the slanderous words, plaintiff by testifying in his own behalf places his credibility as a witness in question, and thereafter his general character up to the time of his appearance as a witness was a proper subject of inquiry.—Calkins v. Colburn, 10 N. Y. St. Rep. 778.

[f] (N. C. 1819) Under Acts 1756, c. 4, providing that a book may be given in evidence if a party makes out by his own oath that it contains a true account of all the dealings, evidence is admissible to show that a person who swears to his own book account is not to be believed under oath, as such act only removes the incompetency of the party who is examined as a witness and leaves his credibility open to inquiry.—Kitchen v. Tyson, 7 N. C. 314.

[g] (Tenn. 1858) Although one made a party respondent by a bill in equity is, as far as he is required to answer, made a witness thereby, and his statements may be attacked by circumstances intrinsic or extrinsic, yet his general character cannot be impeached.—Murray v. Johnson, 38 Tenn. (1 Head) 353.

[h] (Wis. 1853) Under the statutes of this state, evidence to impeach the character for truth and veracity of a party swearing to his account books is inadmissible.—Winne v. Nickerson, 1 Wis. 1.

§ 1113. Accused as witness in criminal prosecution.

Cross-examination, see post, §§ 1144–1148.
Nature and scope of attack, see post, §§ 1129–1132.
Right to discredit testimony in general, see ante, § 1092.

[a] (Ark. 1885) Where a defendant has become a witness in his own behalf, his character may be impeached, though his good character may not have been previously put in issue.—McCoy v. State, 46 Ark. 141.

[b] (Ga. 1886) A defendant in a criminal case who avails himself of the privilege given by Code, § 4376, of making a statement not under oath, which is to have such force as the jury think right to give it, cannot be impeached by proof of his bad character, and by testimony that witnesses would not believe him if he were under oath.—Doyle v. State, 77 Ga. 513.

[c] (Mo. 1878) A defendant in a criminal case who avails himself of Acts 1877, p. 356, testifying in his own behalf, subjects himself to the same rules as to the impeachment as other witnesses.—State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506.

[d] (Mo. 1878) The character of defendant testifying in his own behalf may be impeached, though he has offered no evidence that it is good.—State v. Cox, 67 Mo. 392.

[e] (Mo. 1878) Where the accused volunteers as a witness, he makes his general character a proper subject of evidence.—State v. Rugan, 5 Mo. App. 592, affirmed (1878) 68 Mo. 214.

[f] (N. Y. 1876) In a prosecution for misdemeanor, defendant offered no evidence of good character. After he had testified in his own behalf, the prosecution gave evidence to establish his bad character, and he subsequently offered evidence in rebuttal of this. *Held*, that the jury could consider the evidence of bad character given by the prosecution only as impeaching his credibility as a witness.—Adams v. People, 9 Hun, 89.

[g] (Pa. 1886) A witness who avails himself of the privilege to testify in his own behalf, given by Act May 21, 1885, is subject to have his character for truth and veracity attacked.—Commonwealth v. Duckworth, 2 Pa. Co. Ct. R. 443.

[h] (R. I. 1885) Pub. St. c. 214, § 38, provides that a person who has been convicted of a felony may testify like any other witness, except that

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such conviction may be shown to affect his credibility. Section 39 provides that "no respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent." *Held*, that a defendant in a criminal proceeding, who testifies in his own behalf, becomes liable to impeachment.—State v. McGuire, 15 R. I. 23, 22 Atl. 1118.

[i] (Tenn. 1895) The character of an accused since the charge may be considered as going to his credibility as a witness in his own behalf. —Lea v. State, 94 Tenn. (10 Pickle) 495, 29 S. W. 900.

2. CHARACTER AND REPUTATION IN GENERAL.

(a) WITNESSES IN GENERAL, §§ 1114-1128.
(b) ACCUSED IN CRIMINAL PROSECUTION, §§ 1129-1132.

Evidence of good character of contradicted witness, see post, § 1282.
—— *of interested or prejudiced witness, see* post, § 1206.
—— *of unimpeached witness, see* ante, § 1086.
—— *of witness impeached by inconsistent statements, see* post, § 1259.
Admissibility of evidence of character of prosecutrix's associates in bastardy proceedings, see "Bastards," vol. 6, cc. 1943, 1944, § 161.

(a) WITNESSES IN GENERAL.

IN GENERAL, §§ 1114, 1115.
PARTICULAR TRAITS OF CHARACTER OR HABITS, § 1116.
—— INTEMPERANCE AND USE OF DRUGS, § 1117.
RACE, § 1118.
RELIGIOUS FAITH OR MORAL SENSE, § 1119.
BUSINESS, OCCUPATION, OR OFFICIAL POSITION OF WITNESS, § 1120.
UNCHASTITY, § 1121.
RELEVANCY TO ISSUE, § 1122.
REPUTATION AS TO VERACITY, § 1123.
PLACE AND TIME OF ACQUIRING REPUTATION, § 1124.
PARTICULAR ACTS OR FACTS, § 1125.
ACCUSATION OR INDICTMENT FOR CRIME, § 1126.
CONVICTION, § 1127.
—— EFFECT OF PARDON OR ACQUITTAL ON NEW TRIAL, § 1128.

Cross-examination, see post, §§ 1135-1142.

§§ 1114, 1115. In general.

[a] Evidence of general moral character should be admitted to impeach the testimony of a witness.

—(Ala. 1856) Ward v. State, 28 Ala. 53; (1885) Motes v. Bates, 80 Ala. 382; (1888) Davenport v. State, 85 Ala. 336, 5 South. 152; (1890) McInerny v. Irvin, 90 Ala. 275, 7 South. 841; (1894) Yarbrough v. State, 105 Ala. 43, 16 South. 758;

(Ky. 1821) Hume v. Scott, 10 Ky. (3 A. K. Marsh.) 260; (1824) Blue v. Kibby, 17 Ky. (1 T. B. Mon.) 195, 15 Am. Dec. 95; (1835) Tacket v. May, 33 Ky. (3 Dana) 79;

(Mo. 1850) State v. Shields, 13 Mo. 236, 53 Am. Dec. 147; (1875) Same v. Breeden, 58 Mo. 507; (1880) Same v. Miller, 71 Mo. 590; (1882) Same v. Grant, 76 Mo. 236; (1893) Same v. Raven, 115 Mo. 419, 22 S. W. 376;

(N. C. 1829) State v. Boswell, 13 N. C. 209;

(Pa. 1850) Commonwealth v. McLain, 4 Clark, 462;

(S. C. 1833) Anonymous, 1 Hill, 251;

(Tenn. 1858) Gilliam v. State, 38 Tenn. (1 Head) 38, 73 Am. Dec. 161.

CONTRA, see

(U. S. 1836) United States v. White, Fed. Cas. No. 16,675 [5 Cranch, C. C. 38];

(Cal. 1865) People v. Yslas, 27 Cal. 630;

(Ill. 1849) Frye v. Bank of Illinois, 11 Ill. (1 Peck) 367;

(Ind. 1877) Farley v. State, 57 Ind. 331;

(Kan. 1868) Taylor v. Clendening, 4 Kan. 524;

(Minn. 1884) Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145;

(Miss. 1850) Newman v. Mackin, 21 Miss. (13 Smedes & M.) 383;

(Ohio, 1855) Craig v. State, 5 Ohio St. 605;

(S. C. 1848) Clark v. Bailey, 2 Strob. Eq. 143;

(Tex. 1859) Boon v. Weathered's Adm'r, 23 Tex. 675; (1864) Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; (1886) Kennedy v. Upshaw, 66 Tex. 442, 1 S. W. 308.

[b] (U. S. 1859) It certainly is inadmissible to ask in the first instance what is the reputation of the impeached witness for moral character. The first question, at least, must be confined to his reputation for truth and veracity.—Teese v. Huntingdon, 64 U. S. (23 How.) 2, 16 L. Ed. 479.

[c] (U. S. 1888) A witness may be impeached by showing that his general character for truth in the community where he lives is bad.—United States v. Hughes (D. C.) 34 Fed. 732.

[d] (Ala. 1891) Where defendant in a criminal case has testified in his own behalf, the state may, for the purpose of impeaching his credibility, ask witnesses the general character of defendant in the neighborhood in which he lived, without restricting the inquiry to his reputation for truth and veracity.—Mitchell v. State, 94 Ala. 68, 10 South. 518.

[e] (Idaho, 1886) The provisions of Code Civ. Proc. § 897, that "the credibility of witnesses may be drawn in question by evidence affecting their character for truth, honesty, and integrity," is simply declaratory of the common law, and establishes no new rule for the impeachment of witnesses.—People v. Barnes, 2 Idaho, 148, 9 Pac. 532.

[f] (Iowa, 1859) It is not competent to show, in order to impeach a witness, that he is a man of notorious bad character.—State v. Sater, 8 Iowa (8 Clarke) 420.

[g] (Iowa, 1859) In an effort to impeach a witness, the proper inquiry is as to his general reputation for veracity where he is best known. The general character and standing of a witness, as a good or bad man, without reference to his character for truth, is not admissible for the purpose of impeaching him.—Carter v. Cavenaugh, 1 G. Greene, 171.

[h] (Iowa) Under Code 1873, § 3649, the moral character of a witness may be proved for the purpose of testing his credibility.—(1884) State v. Kirkpatrick, 63 Iowa, 554, 19 N. W. 660; (1885) Same v. Hart, 67 Iowa, 142, 25 N. W. 99.

[i] (Iowa, 1886) On a trial for murder, the court erred in refusing to allow a witness to be asked if he knew what was the general moral character of one of the principal witnesses for the prosecution.—State v. Froelick, 70 Iowa, 213, 30 N. W. 487.

[j] (Iowa, 1890) In order to impeach a witness, it must be shown that his reputation is generally reported and considered bad in the

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community.—Winter v. Central Iowa Ry. Co., 80 Iowa, 443, 45 N. W. 737.

[k] (Me. 1844) It is not competent for the respondent to prove, on the trial of an indictment, that a witness introduced by the state "bore a notoriously infamous character." — State v. Bruce, 24 Me. (11 Shep.) 71.

[l] (Me. 1856) Evidence to impugn the character of a witness is commonly to be confined to his character for truth.—Shaw v. Emery, 42 Me. 59.

[m] (Me. 1877) Evidence cannot be introduced in a criminal cause to prove that the general reputation of a witness is bad.—State v. Morse, 67 Me. 428.

[n] (Mich. 1883) Testimony impeaching the general reputation of a witness is admissible, its weight being for the jury.—Dovey v. Lane, 52 Mich. 49, 17 N. W. 272.

[o] (Minn. 1872) The only object in inquiring into the character of a witness is to ascertain whether his statements, in themselves, are entitled to credit. If he is a truthful person, they are; otherwise they are not. A witness, therefore, in coming into court, would perhaps properly be considered as asserting his character for truthfulness to be good, and be charged with notice to defend it; but is not responsible to answer, or be required to meet an attack upon his character in any other respect. A man may indulge in vices which destroy his general character, yet his truthfulness, and his reputation for truthfulness, may be unimpeachable. An inquiry in such a case as to his moral character would mislead, instead of assist, in arriving at the object of investigation, namely, his credibility; it would in any event be an unnecessary attack and exposure of him to contempt and disgrace. Further, by such general inquiry as to character, the administration of justice would be hindered and delayed by collateral issues, and be more easily made the channel of venting private hatred and malice.—Rudsdill v. Slingerland, 18 Minn. 380 (Gil. 342).

[p] (Mo. 1877) Where a witness has testified that he knows the character of a party for truth and veracity to be bad, it is not error to refuse to admit his further testimony relative to the moral character of such party.—Brown v. Hannibal & St. J. R. Co., 66 Mo. 588.

[q] (Mo. 1887) Evidence was given as to the general reputation of a witness for morality, but, when instructing as to the weight to be attached to the testimony of the witness, the judge directed the jury to consider the "reputation of the witness for morality," omitting the word "general." *Held*, no cause for reversal.—State v. Miller, 98 Mo. 263, 6 S. W. 57.

[r] (Mo. 1894) The inquiry on the impeachment of a witness may extend to his general moral character, but not to his general character as a law-abiding, orderly man in the community.—State v. Ragsdale, 59 Mo. App. 590.

[s] (N. J. 1869) The general reputation in the community where a witness is known, as to his habit in respect to telling the truth, is the only test which the law allows as to character.—Atwood v. Impson, 20 N. J. Eq. (5 C. E. Green) 150.

[t] (N. Y. 1818) The rule of evidence as to impeaching the credit of witnesses who have been examined should be the same in equity as in law. The inquiry ought to be general as to the general character of the witnesses for veracity, but it seems that on a special application to the court the inquiry may be allowed to go beyond the general credit as to particular facts affecting his character, provided those facts are not material to the matter in issue between the parties.—Troup v. Sherwood, 3 Johns. Ch. 558.

[u] (N. Y. 1842) If the character of a witness is impeached, one who knows his "general character" may testify, though he disclaim a knowledge of his character for truth and veracity.—Johnson v. People, 3 Hill, 178, 38 Am. Dec. 624.

[v] (N. Y. 1852) Proof of the general bad character of a witness, as that term is generally understood and used in society, does not necessarily and legally prove the fact that his character for veracity is bad.—Gilbert v. Sheldon, 13 Barb. 623.

[w] (N. Y. 1852) Proof of general bad character of a witness is immaterial evidence, if the party avows his intention to stop with that inquiry. In order to render the impeachment of a witness effectual, further questions must be put.—Gilbert v. Sheldon, 13 Barb. 623.

[x] (N. C. 1894) In a prosecution for bastardy, the answer of a witness for the state, on cross-examination, "I do not keep a bawdyhouse," cannot be impeached by evidence of bad character.—State v. Cagle, 114 N. C. 835, 19 S. E. 766.

[xx] (Or. 1876) "Character" and "reputation" are not synonymous terms. Character is what one is morally; reputation is what one is reputed to be—the estimate which the community has of a person's character.—Leverich v. Frank, 6 Or. 212.

[y] (S. C. 1818) Evidence offered to impeach the credibility of a witness is properly rejected where it has no relation to the general character of the witness.—State v. Alexander, 2 Mill, Const. 171.

[yy] (Tex. 1854) The immoral character of a witness does not destroy her testimony, or render her infamous, in the legal sense of the term. —Jones v. State, 13 Tex. 168, 62 Am. Dec. 560.

[z] (Tex. 1880) The inquiry must be limited to the general reputation of the assailed witness for truth, and the impeaching witness must predicate his testimony on that reputation, and not upon his personal knowledge or opinion.—Holbert v. State, 9 Tex. App. 219, 35 Am. Rep. 738.

[zz] (Va. 1849) A witness called to impeach the credibility of another witness cannot be questioned as to the character of the latter in any respect except as to veracity.—Uhl v. Commonwealth, 6 Grat. 706.

§ 1116. Particular traits of character or habits.

Cross-examination, see post, § 1137.

[a] (Ala. 1895) It is proper to refuse to permit a witness to be asked, for the purpose of impeaching the testimony of another witness, as to the latter's reputation for "honesty and integrity," and also whether he was not a "common thief."—McCutchen v. Loggins, 109 Ala. 457, 19 South. 810.

[b] (Ark. 1890) Where one of the witnesses for the state testifies that he has no fixed habitation or business, but lives in unlawful cohabitation with a woman who worked as a menial servant, and another testifies that his occupation is to "fight, and sometimes shoot a little craps," it is error to charge the jury that proof that a witness has been guilty of gambling, fighting, or unlawful cohabitation does not in any manner affect his credibility.—Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41.

[c] (Mass. 1859) Witnesses called to impeach the credit of another witness, and who have testified that his character for truth was bad, may be asked by the party calling them whether this related wholly or in part to that witness' punctuality in paying his debts.—Pierce v. Newton, 79 Mass. (13 Gray) 528.

[d] (Mo. 1888) An instruction, in such case, that "the character of a person in the neighborhood in which he lives, consists in the general opinion and estimation in which he is held by his

neighbors, founded upon their opportunity to observe his conduct," should be limited to their opinion of his moral character; and a statement that he was regarded as "a stubborn, contentious man in politics, in church, and in his school-district," is properly excluded.—State v. Parker, 96 Mo. 382, 9 S. W. 728.

[e] (Mo. 1890) Evidence that a witness for the state had the reputation of being a rash, dangerous, and turbulent man when in liquor, is not competent to discredit his testimony.—State v. Nelson, 101 Mo. 464, 14 S. W. 712.

[f] (Mo. 1895) A witness may be impeached by proof that his reputation for fair dealing was bad.—Kingman & Co. v. Shawley, 1 Mo. App. Rep'r, 281, 61 Mo. App. 54.

[g] (N. H. 1884) A witness for the defendant testified that one of plaintiff's witnesses had made obscene and profane threats against the defendant, and stated that she had sent her son from the room to prevent his hearing them. *Held* that, as the statement was calculated to strengthen her credit before the jury, it was competent for plaintiff to prove that the witness herself was in the habit of using profane and obscene language.—Quimby v. Blackey, 63 N. H. 77.

[h] (N. Y. 1892) The fact that plaintiff is an habitual litigant is no ground of impeachment as a witness.—Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136, affirming (1891) 60 Hun, 579, 14 N. Y. Supp. 468.

[i] (Tex. 1894) A witness for defendant cannot be impeached by testimony that he is a confidence man and a thief.—Conway v. State, 33 Tex. Cr. R. 327, 26 S. W. 401.

[j] (Vt. 1846) It is not competent, for the purpose of impeachment, to prove that the witness is a notorious counterfeiter.—Crane v. Thayer, 18 Vt. 162, 46 Am. Dec. 142.

[k] (Va. 1886) Evidence that witness was "given to rows, and to putting them off on others," is inadmissible, as it does not render witness incompetent for infamy, nor does it impeach his veracity.—Briggs v. Commonwealth, 82 Va. 554.

[l] (Va. 1894) Evidence of bad conduct on the part of the state's witnesses, that a warrant had been issued for their arrest for petit larceny, and that deceased and his wife kept a house of ill fame, was properly excluded.—Vance v. Commonwealth, 19 S. E. 785.

§ 1117. —— Intemperance and use of drugs.

Intoxication as impeachment of capacity or knowledge, see ante, § 1102.

[a] (Fla. 1891) Evidence of the use of opium cannot be introduced to impair the credit of a witness unless it be shown that the witness was under the influence of it when examined, or when the litigated event occurred, or that his mind was impaired generally by the use of it.—Eldridge v. State, 27 Fla. 162, 9 South. 448.

[b] (Ga. 1858) To show that a witness is in the habit of using laudanum does not discredit her testimony in the absence of proof that her mind is thereby affected, or that she was under the influence of the opiate when her deposition was taken.—McDowell v. Preston, 26 Ga. 528.

[c] (Me. 1849) Evidence of intemperate habits is inadmissible to impeach a witness.—Thayer v. Boyle, 30 Me. (17 Shep.) 475.

[d] (Mo. 1883) Evidence that a witness was a common drunkard is admissible to impeach his testimony.—State v. Grant, 79 Mo. 113, 49 Am. Rep. 218.

[e] (N. H. 1850) Evidence of the intemperate habits of a witness is not competent for the purpose of impeaching his character for truth.—Holtt v. Moulton, 21 N. H. (1 Fost.) 586.

[f] (N. Y. 1893) Evidence that a witness who testified that she had been an eyewitness of the crime was addicted to the opium habit, and of the extent of said habit's influence over her, is competent in impeachment.—People v. Webster, 139 N. Y. 73, 34 N. E. 730, affirming (1893) 68 Hun, 11, 22 N. Y. Supp. 634.

§ 1118. Race.

[a] (U. S. 1888) While race distinctions, affecting the intelligence and moral stamina of the witnesses, are to be considered in weighing their testimony, care should be taken not to exaggerate the consideration into a mere aversion for the witness' testimony on account of his race.—The General Rucker (D. C.) 35 Fed. 152.

[b] (Ky. 1893) Testimony of a witness, who was formerly a slave, that he is 117 years old, does not affect his credibility as to events that he testifies to, nor does the discrepancy as to dates in the statements of other witnesses, who also were slaves, affect their credibility.—Davis v. Meaux, 22 S. W. 324.

[c] (Mo. 1887) Plaintiff in ejectment was allowed, as introductory to his testimony, to state that "he lived in Mississippi before the war; was a slave." *Held* that, as it is proper for the jury to know who the witness is, where from, and such personal matters as will enable them to appreciate his character, and estimate the value of his testimony, the admission of such statement was not error.—Avery v. Fitzgerald, 94 Mo. 207, 7 S. W. 6.

[d] (Va. 1847) The fact that a witness is of negro descent, though not so near as to render him incompetent as a witness, is not competent to impeach his credibility.—Dean v. Commonwealth, 4 Grat. 541.

§ 1119. Religious faith or moral sense.

Cross-examination to show religious belief, see post, § 1139 [oo].

[a] (Cal. 1887) A question put by defendant's counsel to a prosecuting witness seeking to impeach him by showing him to be an atheist may well be objected to under Const. art. 1, § 4, and Code Civ. Proc. § 1879, which provide that a witness shall not be incompetent on account of "opinion in matters of religious belief."—People v. Copsey, 71 Cal. 548, 12 Pac. 721.

[b] (Iowa, 1881) Under Code 1873, § 3637, which provides that "facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility," the religious belief of a witness may be shown for the purpose of affecting his credibility, but it must be by voluntary statements previously made, and not by his examination upon the stand.—Searcy v. Miller, 57 Iowa, 613, 10 N. W. 912.

[c] (Me. 1842) Evidence that a witness had stated "that he had lost his devotion, that he intended now to serve the devil as long as he had served the Lord, and that he had a pack of cards which he carried about in his pocket and called them his Bible," is not admissible to discredit the witness, not conflicting with any statement of his.—Halley v. Webster, 21 Me. (8 Shep.) 461.

[d] (N. Y. 1845) Though it appears on cross-examination that a witness has not the moral sense requisite to make him a competent witness, the court will not strike out his testimony, but will leave it to the jury with instructions as to its due weight.—People v. Harper, 1 Edm. Sel. Cas. 180.

[e] (N. Y. 1858) Under the constitution of this state which came in force January 1, 1848, and

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which permits infidels and atheists to testify, witnesses may be cross-examined as to their religious belief, and their answers will go to their credibility.—Stanbro v. Hopkins, 28 Barb. 265.

[f] (N. Y. 1883) It appearing probable that a party to a suit disbelieves in a future life, he may be asked the question when he testifies in his own behalf.—Higgins v. Higgins, 14 Abb. N. C. 13.

[g] (Pa. 1867) Where there is a conflict of testimony as to the belief of a witness in a Supreme Being, the court should refer the testimony on the point to the jury, to go to the credibility of the witness.—Commonwealth v. Winnemore, 2 Brewst. 378.

§ 1120. Business, occupation, or official position of witness.

[a] (U. S. 1881) The illegal occupation of a person may always be shown as bearing on his credibility as a witness.—United States v. Duff (C. C.) 6 Fed. 45, 19 Blatchf. 9.

[b] (Ga. 1857) It is not competent to ask a witness whether the former owner of property, alleged to have been stolen from him by the defendant, was not a professional gamester to impeach his testimony.—Long v. State, 22 Ga. 40.

[c] (Ill. 1857) Spies and informers are not odious to the law, and their evidence is not to be discredited as coming from that source.—Town of St. Charles v. O'Malley, 18 Ill. (8 Peck) 407.

[d] (Ill. 1890) The jury in determining the credibility of a witness cannot consider the business of the witness, as it permits the credibility to depend on the prejudice that might exist in the mind of the jury against any class of business that might be obnoxious to him.—Wiedemann v. Ryan, 34 Ill. App. 568.

[e] (Mich. 1878) Where a public officer is a witness in a case in which his own conduct is involved, it is improper in charging the jury to call attention to his high character, as tending in itself to establish his credibility.—Wisner v. Bardwell, 38 Mich. 278.

[f] (Mo. 1896) It is error to admit evidence of third parties showing the positions of trust plaintiff had held in his county.—Carson v. Smith, 133 Mo. 606, 34 S. W. 855.

[g] (N. Y. 1898) A witness is not to be discredited because he is in the lottery business, as that is a question for the jury.—Upington v. Keenan, 67 Hun, 648, 21 N. Y. Supp. 699.

[h] (N. C. 1821) The testimony of a witness does not necessarily acquire any additional weight because he is a clergyman.—Sneed v. Creath, 8 N. C. 309.

[i] (Pa. 1834) If it were competent on a question as to the credibility of a witness to establish that he had been elected constable, the fact could not be established by the certificate of the clerk of the sessions, but the record should be produced.—Brewster v. Yourd, 3 Watts, 99.

[j] (Pa. 1834) On the question as to the credibility of a witness, it was not competent to show that he had been elected constable.—Brewster v. Yourd, 3 Watts, 99.

[k] (Tex. 1896) It is not error in a civil case to refuse to permit defendant to show by a witness that plaintiff, who testified in her own behalf, kept an assignation house.—Pennsylvania Fire Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. 55.

[l] (Vt. 1896) It is not competent, for the purpose of general impeachment, to show that a witness had formerly kept a house of ill fame.—State v. Fournier, 68 Vt. 262, 35 Atl. 178.

[m] (Wis. 1881) Any party to an action is entitled to the testimony of any person who is cognizant of facts material to his case, and the witness is not to be discredited merely because he is engaged in some particular lawful avocation.—Connolly v. Straw, 53 Wis. 645, 11 N. W. 17.

§ 1121. Unchastity.

Cross-examination, see post, § 1138.

[a] The fact that a witness is a prostitute cannot be singled out as a ground for impeaching her credibility.

—(Ala. 1890) McInerny v. Irvin, 90 Ala. 275, 7 South. 841; (1894) Rhea v. State, 100 Ala. 119, 14 South. 853;

(Mass. 1846) Commonwealth v. Churchill, 52 Mass. (11 Metc.) 538, 45 Am. Dec. 229;

(Miss. 1896) Tucker v. Tucker, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623;

(N. Y. 1816) Jackson v. Lewis, 13 Johns. 504; (1835) Bakeman v. Rose, 14 Wend. 105, affirmed (1837) 18 Wend. 146;

(Vt. 1835) State v. Smith, 7 Vt. 141; (1843) Spears v. Forrest, 15 Vt. 435.

CONTRA, see

(Ga. 1860) Weathers v. Barksdale, 30 Ga. 888;

(Mass. 1817) Commonwealth v. Murphy, 14 Mass. 387.

[b] Want of chastity cannot be singled out and made a special ground for impeaching a witness.

—(Ala. 1875) Holland v. Barnes, 53 Ala. 83, 25 Am. Rep. 595; (1894) Spicer v. State, 105 Ala. 123, 16 South. 706;

(Cal. 1865) People v. Ysias, 27 Cal. 630;

(La. 1894) State v. Hobgood, 46 La. Ann. 855, 15 South. 406;

(Mich. 1893) People v. Mills, 94 Mich. 630, 54 N. W. 488;

(Nev. 1876) State v. Larkin, 11 Nev. 314;

(Pa. 1835) Gilchrist v. McKee, 4 Watts, 380, 28 Am. Dec. 721.

[c] (U. S. 1834) Evidence is inadmissible that the witness is a common prostitute, to discredit her testimony. The question must go to her general reputation for veracity.—United States v. Masters, Fed. Cas. No. 15,739 [4 Cranch, C. C. 479].

[d] (U. S. 1840) A witness called to impeach the character of another witness cannot be asked whether she was not a lewd person, as the question must be restricted to her general character for veracity.—United States v. Dickinson, Fed. Cas. No. 14,958 [2 McLean, 325].

[e] (Ala. 1890) Evidence offered by defendant as to the character of the house kept by one of plaintiff's witnesses, and as to the orders of the municipal authorities in reference to her, was properly excluded, since, although the bad character of a witness may be shown to impeach, the cause producing such bad character cannot be inquired into, unless on cross-examination.—Birmingham Union Ry. Co. v. Hale, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748.

[f] (Cal. 1895) On a trial for murder, evidence that the wife of deceased, who was a witness for the state, was an inmate of a house of prostitution, was not admissible to affect her veracity.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[g] (Conn. 1877) A common prostitute may be a reliable witness; it is for the jury to judge, taking the habits of the woman and all the circumstances into consideration, whether she is a credible witness.—State v. Shields, 45 Conn. 256.

[h] (Ga. 1858) That a woman is a prostitute does not necessarily affect her character for truthfulness.—Smithwick v. Evans, 24 Ga. 461.

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[i] (Iowa, 1867) To impeach the credibility of a witness, it is improper to ask as to her character for chastity; the question should be as to her general moral character.—Kilburn v. Mullen, 22 Iowa, 498.

[j] (La. 1892) The character of a witness cannot be impeached by showing that he associates with lewd and abandoned women, but the showing must be of such moral turpitude in the witness that no one would be justified in believing his uncorroborated statements.—State v. Jackson, 44 La. Ann. 160, 10 South. 600.

[k] (Md. 1794) In a petition for freedom, where a white woman was offered as a witness to prove the descent of the petitioner from a free white woman, the court would not permit evidence to be offered that the witness was reputed to associate with negroes, in order to impeach her credit with the jury.—Thomas v. Pile, 3 Har. & McH. 241.

[l] (Mo. 1850) In discrediting a witness, her general character for chastity may be inquired of.—State v. Shields, 13 Mo. 236, 53 Am. Dec. 147.

[m] (Mo.) A male witness cannot be impeached by evidence of his reputation for unchastity. —(1888) State v. Clawson, 30 Mo. App. 139; (1891) Same v. Coffey, 44 Mo. App. 455; (1895) Same v. Sibley (Sup.) 31 S. W. 1033.

[n] (Tenn. 1879) The admission of testimony for the prosecution in a criminal case, against the objection of the defendant, to show that a witness for the defendant was a woman of bad character, and had had bastard negro children, is ground for reversal of the judgment.—Merriman v. State, 71 Tenn. (3 Lea) 393.

[o] (Tex. 1893) In a prosecution for theft, defendant could not prove by a witness that she, the witness, was a common prostitute, solely for the purpose of disgracing her in the eyes of the jury.—Stayton v. State, 32 Tex. Cr. R. 33, 22 S. W. 38.

§ 1122. Relevancy to issue.

[a] (Ga. 1847) On an indictment for assault with intent to rape, evidence that the prosecutrix was a common prostitute is admissible to impeach her credibility, and disprove her statement that the attempt was forcible.—Camp v. State, 3 Ga. (3 Kelly) 417.

[b] (Ind. 1873) When a female has testified to certain indecent conduct toward herself, evidence relating to her general character for chastity is admissible to impeach her.—Indianapolis, P. & C. Ry. Co. v. Anthony, 43 Ind. 183.

[c] (Iowa, 1886) On indictment for bigamy, evidence of the unchaste character of the complaining witness, with whom the illegal marriage is alleged to have been contracted, is inadmissible to discredit her testimony.—State v. Nadal, 69 Iowa, 478, 29 N. W. 451.

[d] (Mich. 1892) On a trial for the unlawful sale of intoxicating liquor, the fact that a witness is in the habit of drinking beer does not affect his credibility, and the admission of evidence of that fact is error.—People v. Kahler, 93 Mich. 625, 53 N. W. 826.

[e] (N. C. 1877) Where a mother has testified on the issue of the legitimacy of her child, her character for chastity cannot be impeached.—Warlick v. White, 76 N. C. 175.

[f] (N. C. 1896) Where, in a prosecution for slandering prosecutrix by accusing her of unchastity, she goes upon the stand as a witness for the state, defendant may show her reputation for morality as of the time of the trial, to discredit her testimony.—State v. Spurling, 118 N. C. 1250, 24 S. E. 533.

[g] (Utah, 1889) On trial for adultery, where the only evidence against defendant is that of the girl with whom it is charged that the crime was committed, it is error to reject evidence of the bad character of the witness.—United States v. Bredemeyer, 6 Utah, 143, 22 Pac. 110.

§ 1123. Reputation as to veracity.

[a] (Ill. 1886) A witness may be impeached by showing that his reputation for truth and veracity is bad.—Hoge v. People, 117 Ill. 35, 6 N. E. 796.

[b] (Ind. 1873) Where a witness has testified to certain indecent conduct toward herself, evidence relating to her general character for truth and veracity is admissible to impeach her.—Indianapolis, P. & C. Ry. Co. v. Anthony, 43 Ind. 183.

[c] (Ind. 1879) A charge to the effect that a man's reputation for truth is made by what his neighbors generally say of him in that respect; that if they generally say that he is untruthful that makes his reputation for truth bad, but if they say nothing whatever about him as to his truthfulness, the fact of itself is evidence that his general reputation for truth is good—is substantially correct.—Davis v. Foster, 68 Ind. 238.

[d] (Ind. 1892) Where, in a criminal case, defendant requests the court to instruct the jury that, "if a man's neighbors generally say he is untruthful, that makes his reputation for truth bad; but if, on the other hand, a man's neighbors generally say nothing about his truthfulness, that fact of itself is evidence that his general reputation for truth is good"—it is not error for the court to so modify the last clause as to make it read, "That fact of itself may be evidence that his general reputation for truth is good; whether it is or not is a question solely for the jury."—Conrad v. State, 132 Ind. 254, 31 N. E. 805.

[e] (Minn. 1868) In an action of libel, where the testimony of a witness tended to disprove malice, it was *held* that the character of the witness for truth and veracity might be shown, by witnesses residing in the same vicinity, to be such that he should not be believed.—Simmons v. Holster, 13 Minn. 249 (Gil. 232).

[f] (Mo. 1894) The inquiry on the impeachment of a witness may extend to his general reputation for truth and veracity.—State v. Ragsdale, 59 Mo. App. 590.

§ 1124. Place and time of acquiring reputation.

Competency of impeaching witness depending on time to which knowledge relates, see post, § 1156.

Time and place of conviction, see post, § 1127 [c, j, m].

—— *of former conviction of accused as witness, see* post, § 1132 [e, f].

[a] (Ark. 1874) The admission of testimony as to the reputation of a witness for truth and veracity, at some other time, and at a different place from that of his residence at the time of testifying, is in the discretion of the court; and it is only in cases of gross abuse that the discretion will be controlled, especially where no surprise is shown.—Snow v. Grace, 29 Ark. 131.

[b] (Ark. 1877) Evidence of the reputation of a witness for truth and veracity two years prior to the time of a trial and at a different place is admissible for the purpose of impeaching him.—Lawson v. State, 32 Ark. 220.

[c] (Ark. 1877) Testimony of the reputation of a witness as to truth and veracity is not rendered inadmissible by the fact that it relates to a time two years before the trial and to a different place or neighborhood; the remoteness of time and place merely affecting the weight to be given the testimony.—Lawson v. State, 32 Ark. 220.

[d] (Ark. 1879) A witness may be impeached by proof of his character for veracity in the neighborhood where he has been living until within a few months of the trial.—Holliday v. Cohen, 34 Ark. 707.

[dd] (Ga. 1889) A witness in a criminal case who resided in Georgia, formed there a bad general character, removed to another state while bearing such character (which was seven or eight years before the trial), and has resided there ever since, may be impeached by proof of such bad character left behind in Georgia, though there be no evidence touching the character formed or borne by the witness in the state to which he removed, and in which he resided at the time of testifying.—Watkins v. State, 82 Ga. 231, 8 S. E. 875, 14 Am. St. Rep. 155.

[e] (Ill. 1856) The character of a witness who resided several years in a certain place may be impeached by evidence showing what it was when he resided in that place, though the witness had, for several years before the trial, no particular place of abode.—Holmes v. Statler, 17 Ill. (7 Peck.) 453.

[ee] (Ill. 1877) It is not necessary that the impeaching testimony shall relate to the character of the witness for truth and veracity at the time and place where he lived when he gave his testimony, but his general reputation at a former period and in another neighborhood may, if not too remote, tend to prove the issue.—Brown v. Leuhrs, 1 Ill. App. (1 Bradw.) 74.

[f] (Ill. 1877) That a witness has since removed from a neighborhood by the inhabitants of which his character and reputation for truth and veracity is sought to be shown is no ground for excluding their evidence.—Blackburn v. Mann, 85 Ill. 222.

[ff] (Ind. 1851) Testimony as to character must relate to the time at which the witness sought to be impeached is examined.—Rucker v. Beaty, 3 Ind. 70.

[g] (Ind. 1862) Testimony, to impeach a witness, should go to his character at the time of the trial.—Rogers v. Lewis, 19 Ind. 405.

[gg] (Ind. 1863) Evidence designed to impeach the general character of a witness should relate to the time when he testified, and his character at the place where he then resided and among those who knew it there.—City of Aurora v. Cobb, 21 Ind. 492.

[h] (Ind. 1877) Evidence of the general moral character of a witness, introduced for the purpose of impeaching him, must be confined to the time at which he testifies, and in the neighborhood where he then resides.—Rawles v. State, 56 Ind. 433.

[hh] (Ind. 1879) The fact that a witness has not resided in the neighborhood for six weeks before the time when he testifies will not prevent his impeachment by evidence of his reputation therein.—Louisville, N. A. & C. Ry. Co. v. Richardson, 66 Ind. 43.

[i] (Ind. 1882) Where the character of a witness is in question, his character at another place three years before is properly shown.—Memphis & O. R. Packet Co. v. McCool, 83 Ind. 392.

[ii] (Ind. 1889) It is error to exclude evidence of the character of a witness, offered for purposes of impeachment, because it refers to his reputation in a place from which he had moved 60 days before giving evidence in the case.—Pape v. Wright, 116 Ind. 502, 19 N. E. 459.

[j] (Ind. 1891) A witness whose character it was sought to impeach was confined to prison for the seven years intervening between her residence in another state and the trial. *Held*, that it was not error to exclude inquiry as to her general moral character at "the present time" in the neighborhood of her residence, evidence of her character at the time of her residence having been given.—Sage v. State, 127 Ind. 15, 26 N. E. 667.

[jj] (Ind. 1896) The credibility of a witness can be impeached by evidence as to his reputation for veracity in the place in which he had lived nearly all his life, but from which he had removed four months before the trial.—Gemmill v. State, 16 Ind. App. 154, 43 N. E. 909.

[k] (Iowa, 1889) A witness who has lived in one place for five years next preceding a trial, and is well known there, cannot be impeached by witnesses from places where he had formerly lived, testifying that his reputation was bad when he lived at those places.—State v. Potts, 78 Iowa, 656, 43 N. W. 534, 5 L. R. A. 814.

[kk] (Kan. 1891) A witness, who had lived for many years in another state, had removed to his place of residence at the time of the trial only a few months previous thereto. *Held*, that evidence as to his reputation for truth and veracity in the place of his former residence was competent to impeach him.—Coates v. Sulau, 46 Kan. 341, 26 Pac. 720.

[l] (Ky. 1879) Without proof that a witness's character is bad at the time of the trial, evidence is inadmissible that it was bad long before the trial.—Mitchell v. Commonwealth, 78 Ky. 219.

[ll] (Ky. 1889) Evidence is admissible as to defendant's general character for morality and truthfulness at the time he testifies, and it need not relate to the time of the offense charged.—Commonwealth v. Hourigan, 89 Ky. 305, 12 S. W. 550.

[m] (Ky. 1893) Evidence of the bad character of a witness, sought to be impeached, two years before the trial, is competent.—Davis v. Commonwealth, 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201.

[mm] (Ky. 1895) Evidence that the general reputation for veracity in B. county of a witness was bad, when that county was not then nor had been prior to the trial the residence of that witness, is inadmissible.—Combs v. Commonwealth, 97 Ky. 24, 29 S. W. 734.

[n] (Ky. 1895) The credibility of a witness cannot be impeached by evidence as to her chastity 16 years before the trial.—Turner's Guardian v. King, 98 Ky. 253, 32 S. W. 941, 33 S. W. 405.

[nn] (La. 1889) On an indictment for murder, a question as to the general reputation of a witness for veracity is properly excluded, where it does not call for such reputation in the neighborhood where such witness lives.—State v. Johnson, 41 La. Ann. 574, 7 South. 670.

[o] (La. 1893) Testimony as to what character defendant, who had testified as a witness, had in a neighborhood in which he resided at a period long prior to the trial is inadmissible to impeach him as a witness.—State v. Taylor, 45 La. Ann. 605, 12 South. 927.

[oo] (Mass. 1867) Evidence of the reputation of a witness for veracity a year and a half previous to the trial is admissible.—Commonwealth v. Billings, 97 Mass. 405.

[p] (Mich. 1875) Evidence of bad reputation for veracity four years previous to the trial is admissible to impeach a witness who has no fixed domicile and has been out of the state over a year of the time, and whose residence at the place of such reputation was as long as at any other.—Keator v. People, 32 Mich. 484.

[pp] (Mich. 1883) Where it is sought to impeach the credibility of a witness by showing his reputation for truth and veracity, the inquiry as to his reputation need not be confined

to the immediate vicinity of his residence, but may extend to his reputation throughout any part of the city wherein he resides and is well known.—People v. Lyons, 51 Mich. 215, 16 N. W. 380.

[q] (Minn. 1884) Impeaching evidence of the bad reputation of a witness for truth and veracity is not restricted to his reputation at or very near the time of the trial at which he testifies. The limit of time is within the discretion of the court.—Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95.

[qq] (Miss. 1893) Evidence of the reputation of a witness for veracity in the neighborhood from which he moved two years before the trial is admissible.—Norwood & Butterfield Co. v. Andrews, 71 Miss. 641, 16 South. 262.

[r] (Mo. 1881) The only evidence offered to impeach a witness was that his character three years before was bad. *Held* inadmissible.—Wood v. Matthews, 73 Mo. 477.

[rr] (Mo. 1887) The general reputation of a witness cannot be impeached by evidence of his general reputation at a distant place where he visited for three months.—Waddingham v. Hulett, 92 Mo. 528, 5 S. W. 27.

[s] (Mo. 1888) Where defendant has lived in the county for 20 years, evidence as to his character before that time, while living in another state, is not admissible to impeach him as a witness.—State v. Parker, 96 Mo. 382, 9 S. W. 728.

[ss] (Neb. 1886) Where it is sought to impeach the testimony of a witness by showing a bad reputation for truth and veracity, the inquiry as to such reputation must be limited to the community in which the witness resides, or has recently resided.—Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[t] (Neb. 1893) Evidence of the general reputation of a witness for untruthfulness, to be available for his impeachment, must have reference to his reputation at his present or recent place of residence, and should not relate to a residence which had ceased two and a half years before he testified.—Sun Fire Office of London v. Ayerst, 37 Neb. 184, 55 N. W. 635.

[tt] (N. H. 1838) Where testimony is offered to impeach the general character of a witness for truth, the inquiries are not limited to the character of the witness prior to the suit, but extend to the time of the examination of the witness.—State v. Howard, 9 N. H. 485.

[u] (N. Y. 1829) A witness who goes to the former residence of a party to learn his character will not be allowed to testify as to the result of his inquiries.—Douglass v. Tousey, 2 Wend. 352, 20 Am. Dec. 616.

[uu] (N. Y. 1838) Where the present character of a witness for truth and veracity is slightly impeached, evidence of bad character in that respect in years past is admissible.—People v. Abbot, 19 Wend. 192.

[v] (N. Y. 1847) The character of a witness may be impeached by persons in whose neighborhood he had lived until four years prior to the trial, though he had then removed to another place 14 miles from that neighborhood, where he had since resided, and the witnesses did not know the character which he bore at the latter place.—Sleeper v. Van Middlesworth, 4 Denio, 431.

[vv] (N. Y. 1866) Evidence of the bad character of a witness while residing in the town of A. for eight years was objected to on the ground that the witness sought to be impeached had had a fixed residence in another place for the last three or four years, and that the evidence must be directed to his present character at his present residence, about which the impeaching witness did not pretend to know anything. *Held*, that it was error to exclude the evidence.—Rathburn v. Ross, 46 Barb. 127.

[w] (N. Y.) Evidence to impeach a witness is not limited to the time of the taking of his deposition; it may be shown at the trial that his character was afterwards pronounced bad by his neighbors.—(1879) Dollner v. Lintz, 9 Daly, 17; (1881) Id., 84 N. Y. 669.

[ww] (N. C. 1878) It is not too remote for an impeaching witness to testify as to the general character of the witness attacked as it existed some two or three years before the trial.—State v. Lanier, 79 N. C. 622.

[x] (Pa. 1850) In support of the character of a witness who is impeached, he is not confined to the same neighborhood, or to the same time spoken of by the witnesses who impeach him, but he may prove his character for veracity years previously, and in a different country in which he had resided. Testimony of a person acquainted with the witness, and living in his neighborhood, that he never heard his character for truth spoken against or questioned, is competent.—Morss v. Ayres, 15 Pa. (3 Harris) 51; Same v. Palmer, Id.

[xx] (Tex. 1885) The impeaching testimony need not be restricted to the reputation of the witness in the place of his present residence.—Coffelt v. State, 19 Tex. App. 436.

[y] (Tex. 1886) Evidence of a witness' bad reputation for truthfulness in a county where he had lived until four years before is competent, as it will not be presumed that one of mature age, and of a notoriously bad reputation, has so reformed within four years as to acquire a different reputation.—Mynatt v. Hudson, 66 Tex. 66, 17 S. W. 396.

[z] (Tex. 1896) Where the evidence of a witness is such that it clearly raises the issue of his veracity, or the testimony of other witnesses relating to his character at or near the time of the trial tends to impeach his character for truth and veracity, or in case the person whose character is in issue has removed beyond the jurisdiction of the court, or has been transient, so that he has no fixed and known residence for a time sufficient to make a reputation for truthfulness, resort may be had to evidence of the reputation of such witness at the place of his former residence, and at a time remote from the trial.—Brown v. Peres, 89 Tex. 282, 34 S. W. 725, modifying Mynatt v. Hudson (1896) 66 Tex. 66, 17 S. W. 396.

[zz] (Vt. 1858) It is not competent, for the purpose of impeaching a witness, to inquire of others, as a distinct proposition, independent of their opinion of his present character for truth, what his reputation in that respect was at some former time.—Willard v. Goodenough, 30 Vt. 393.

[zzz] (Vt. 1882) In an attempt to impeach a witness, evidence of his reputation just before the commencement of the pending suit is admissible on the issue of his present reputation.—Amidon v. Hosley, 54 Vt. 25.

§ 1125. Particular acts or facts.

Cross-examination, see post, § 1139.

[a] A witness' character can be impeached by general reputation only, and not by evidence of particular facts.

—(Ala. 1896) Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540;
(Ill. 1859) Crabtree v. Kile, 21 Ill. (11 Peck) 180;
(Ky. 1858) Thurman v. Virgin, 57 Ky. (18 B. Mon.) 785;
(N. C. 1830) Barton v. Morphes, 13 N. C. 520;

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(Pa. 1824) Wike v. Lightner, 11 Serg. & R. 198;

(Tex. 1859) Boon v. Weathered's Adm'r, 23 Tex. 675.

[aa] A witness' general moral character cannot be impeached by evidence of particular acts of immorality.

—(Ala. 1850) Nugent v. State, 18 Ala. 521;

(Ind. 1860) Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; (1861) Wilson v. State, 16 Ind. 392; (1879) Cunningham v. Same, 65 Ind. 377; (1895) Griffith v. Same, 140 Ind. 163, 39 N. E. 440;

(N. Y. 1859) Macdonald v. Garrison, 2 Hilt. 510;

(N. C. 1886) State v. Garland, 95 N. C. 671.

[b] The testimony of a witness cannot be impeached by evidence of particular crimes.

—(U. S. 1840) United States v. Vansickle, Fed. Cas. No. 16,609 [2 McLean, 219];

(Ala. 1889) Smith v. State, 88 Ala. 73, 7 South. 52; (1893) Lowery v. Same, 98 Ala. 45, 13 South. 498;

(Ind. 1841) Walker v. State, 6 Blackf. 1;

(Miss. 1881) Smith v. State, 58 Miss. 867;

(S. C. 1836) State v. Free, 1 McMul. 494.

[bb] Evidence of particular instances of falsehood is not admissible, where the general reputation of a witness for veracity is in question.

—(Mass. 1880) Commonwealth v. Kennon, 130 Mass. 39;

(Va. 1833) Rixey v. Bayse, 4 Leigh, 330.

[c] (Ark. 1855) In a criminal prosecution the character of the prosecutrix cannot be impeached by evidence of particular acts of unchastity, though it may be by general evidence of her reputation.—Pleasant v. State, 15 Ark. 624.

[cc] (Cal. 1856) Where, in a prosecution for rape, the prosecutrix is the only witness, proof of particular acts of lewdness are admissible, not so much to impeach her testimony as to do away with the presumption of resistance.—People v. Benson, 6 Cal. 221, 65 Am. Dec. 506.

[d] (Cal.) Under Code Civ. Proc. § 2051, a witness' credit cannot be impeached by evidence of specific wrongful acts.—(1889) Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; (1890) Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1.

[dd] (Cal. 1892) Under Code Civ. Proc. § 2051, providing that a witness cannot be impeached by evidence of particular wrongful acts, it was error to compel one of defendant's witnesses to state whether he and defendant had participated in the alteration of a record other than that charged in the indictment.—People v. O'Brien, 96 Cal. 171, 31 Pac. 45.

[e] (Cal. 1893) Testimony to show improper relations between the state's witnesses, a man and woman, in order to impeach the woman's testimony, is inadmissible.—People v. Sherman, 32 Pac. 879.

[ee] (Cal. 1893) Evidence that defendant had a pistol on his person at the time of his arrest is not admissible for the purpose of impeaching his character as a witness on a trial for assault with intent to commit murder.—People v. Wong Ah Leong, 99 Cal. 440, 34 Pac. 105.

[f] (Ga. 1860) That a female witness has borne a bastard child cannot be given in evidence to destroy her credit.—Weathers v. Barksdale, 30 Ga. 888.

[ff] (Ga. 1878) A witness cannot be impeached by proof of special acts of adultery.—Johnson v. State, 61 Ga. 305.

[g] (Ga. 1887) In an action for damages for a tort, where it is sought to show the general bad character of plaintiff, evidence of specific acts is inadmissible.—Ratteree v. Chapman, 79 Ga. 574, 4 S. E. 684.

[gg] (Ill. 1849) In impeaching the testimony of a witness, his general reputation for truth and veracity only can be inquired into, and no evidence of particular facts can be given.—Frye v. Bank of Illinois, 11 Ill. (1 Peck) 367.

[h] (Ill. 1876) Evidence that plaintiff has been guilty of adultery is inadmissible, in an action by a woman for assault and battery, for the purpose of impeaching her testimony.—Dimick v. Downs, 82 Ill. 570.

[hh] (Ill. 1886) Where it is sought to impeach a witness, the fact that he has been discharged by his employer is immaterial.—Hoge v. People, 117 Ill. 35, 6 N. E. 796.

[i] (Ind. 1886) Specific acts of immorality cannot ordinarily be proved to impeach a witness, although it may sometimes be proper, on cross-examination, to ask a witness about such matters; but the whole matter rests in the discretion of the trial court.—Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726.

[ii] (Ind. 1892) In a prosecution for seduction, an inquiry of the prosecutrix as to whether she had not been asked by a certain person if he had "quit in time," to which she had replied that it was none of his business, was properly excluded where it was not shown how the answer would have tended to impeach her, or how it would otherwise have affected the matter in issue.—Williams v. State, 3 Ind. App. 350, 29 N. E. 1079.

[j] (Iowa, 1859) It is not competent to show, in order to impeach a witness, that he is esteemed a horse thief.—State v. Sater, 8 Iowa (8 Clarke) 420.

[jj] (Iowa, 1882) Where witness admitted that he had stolen horses, evidence of how long he had stolen horses, as tending to show his character, was immaterial.—State v. McIntire, 58 Iowa, 572, 12 N. W. 593.

[k] (Ky. 1895) The credibility of a witness cannot be impeached by proof of a particular instance of moral turpitude, but the evidence must be directed to the character of a witness for truth, or to her general moral character.—Commonwealth v. Wilson, 32 S. W. 166.

[kk] (La. 1832) One who seeks to show his witness worthy of credit cannot complain of evidence to prove him guilty of larceny.—Prevost v. Simeon, 4 La. 472.

[l] (La. 1872) The remedy by attachment is stricti juris, and when invoked to restrain the debtor from selling his property to the detriment of the creditor, proof of a specific act of immorality will not be received to impeach the credibility of the defendant as a witness on the motion to dissolve.—Ball v. Lignoski, 24 La. Ann. 484.

[ll] (Mass. 1877) Where, on a trial for perjury of one alleged to have falsely sworn, on a prosecution for forging certain bonds, that he saw a certain person writing a name in a hotel register, such person testifies that he never wrote the name in such register, but that he signed the forged bonds as surety by the same name, which was fictitious, there was no error in excluding an offer of defendant to show by the magistrate what the witness stated under oath, when he signed the bond, concerning his property, for the purpose of discrediting him.—Commonwealth v. McLaughlin, 122 Mass. 449.

[m] (Mass. 1879) At the trial of an indictment under Gen. St. c. 161, § 54, charging the defendant with defrauding A. by means of false pretenses, a record of a proceeding for divorce, in which A. was a party, and in which the jury found that A. had committed adultery, is not admissible to affect the credibility of A. as

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a witness.—Commonwealth v. Stevenson, 127 Mass. 446.

[mm] (Mass. 1885) Defendant agreed to pay plaintiff commissions on all sales of machinery made in a certain town, in consideration of an agreement by plaintiff to use his undivided influence in favor of machinery manufactured by defendant. Plaintiff was a director in two mill corporations in such town which had purchased machinery from defendant, he having received commissions on one of such sales. In an action to recover commissions on the other sale, it was shown that plaintiff had not disclosed to his associates the fact that he was receiving commissions on the sales of machinery made to them. *Held*, that a charge that the jury had "a right to consider the commercial morality of such conduct as affecting plaintiff's veracity or truthfulness as a witness" was correct.—Jennings v. Whitehead & Atherton Mach. Co., 138 Mass. 594.

[n] (Mass. 1895) Evidence that the prosecuting witness made improper proposals to defendant's wife, after the arrest, is inadmissible, in a criminal action, to discredit that witness.—Commonwealth v. Smith, 162 Mass. 508, 39 N. E. 111.

[nn] (Mass. 1896) Where a defendant testified that he had seen the state's witness who testified as the accomplice only once, when he called on such defendant to be treated for a disease, it was proper to refuse to allow such defendant to state the nature of the disease.—Commonwealth v. Bishop, 165 Mass. 148, 42 N. E. 560.

[o] (Minn. 1859) On the trial of an indictment for larceny of clothing, the prosecution cannot, for the purpose of discrediting one of defendant's witnesses, prove a larceny by the accused of clothing not charged in the indictment.—Hoberg v. State, 3 Minn. 262 (Gil. 181).

[oo] (Minn. 1889) A witness may be discredited by evidence as to his reputation for truth and veracity, but specific and particular acts cannot be shown, except in certain cases.—State v. Barrett, 40 Minn. 65, 41 N. W. 459.

[p] (Minn. 1896) A witness cannot be impeached by showing particular acts of corruption or dishonesty.—Matthews v. Hershey Lumber Co., 65 Minn. 372, 67 N. W. 1008.

[pp] (Mo. 1850) The evidence of general bad character of a witness should not be confined to the single fact of want of veracity on oath.—Day v. State, 13 Mo. 422.

[q] (Mo. 1888) Evidence that the adverse party has attempted to tamper with a witness is admissible for the purpose of impeaching the testimony of such adverse party, but for no other purpose.—Bates v. Holladay, 31 Mo. App. 162.

[qq] (Mo. 1891) In a prosecution for seduction, evidence of specific immoral acts on the part of the girl is inadmissible for the purpose of impeaching her credibility.—State v. Rogers, 108 Mo. 202, 18 S. W. 976.

[r] (Mo. 1894) The veracity of a witness cannot be impeached by evidence of specific past delinquencies.—State v. Gesell, 124 Mo. 531, 27 S. W. 1101.

[rr] (Mo. 1895) A female witness cannot be discredited by proof of specific acts of lewdness on her part.—State v. Sibley (Sup.) 31 S. W. 1033.

[s] (N. Y. 1818) In impeaching the credit of a witness, the inquiry ought to be general as to the general character of the witness for veracity; but on special application to the court the inquiry may be extended to particular facts not in issue.—Troup v. Sherwood, 3 Johns. Ch. 558.

[ss] (N. Y. 1860) An offer to show that a witness had been imprisoned for gross intoxication was properly excluded, as it was an effort to impeach a witness by proof of a particular offense.—Greaton v. Smith, 1 Daly, 380.

[t] (N. Y. 1860) It is not competent, in order to affect the credibility of a witness, to ask him if he had not been expelled from an Odd Fellows' Lodge.—Greaton v. Smith, 1 Daly, 380.

[tt] (N. Y. 1864) In impeaching a witness by the direct examination of another witness, the only proper inquiry is as to the general moral character, and the public reputation of the former as a truthful or untruthful person. It is not permissible to inquire into specified acts of immorality or misconduct.—Wehrkamp v. Willet, 4 Abb. Dec. 548.

[u] (N. Y. 1867) That a married woman should hang out signals to a man to induce him to come to her house is an impeachment of her general character.—Shepard v. Parker, 36 N. Y. 517.

[uu] (N. Y. 1881) A party cannot give proof of specific acts for the purpose of impeaching the character of a material witness against him.—Conley v. Meeker, 85 N. Y. 618, affirming (1880) 9 Wkly. Dig. 288.

[v] (N. Y. 1891) While interrogatories may be allowed for the purpose of showing, to impeach a witness, a plan by which his crimes are to be used to compel him to testify in a certain manner, and an arrangement that, in case he so testifies, he shall not be prosecuted for such crimes, interrogatories directed to establishing his unreliability as a witness because of specific offenses are not competent.—Gilpin v. Daly, 58 Hun, 610, 20 Civ. Proc. R. 91, 12 N. Y. Supp. 448; Same v. Appleby, 59 Hun, 624, 13 N. Y. Supp. 394.

[vv] (N. Y. 1892) In an action to recover the value of eggs sold and delivered, a witness who, on being called to impeach defendant, had testified that he knew and had dealt with defendant, and that defendant's reputation among the wholesale trade was bad, was asked, "What were his returns on eggs that he bought from you—large or small?" and replied, "His returns of losses with us were very heavy during the last portion of the time he dealt with us—the last month, or perhaps year." *Held*, that the evidence of transactions between witness and defendant was incompetent and irrelevant to impeach defendant's credibility.—Davey v. Lohrmann (Com. Pl.) 1 Misc. Rep. 317, 20 N. Y. Supp. 675.

[w] (N. Y. 1894) Evidence that a witness committed a specific act of forgery is not admissible to discredit him.—Carlson v. Winterson (Com. Pl.) 10 Misc. Rep. 388, 31 N. Y. Supp. 430, affirming judgment (City Ct. N. Y. 1894) 9 Misc. Rep. 711, 29 N. Y. Supp. 1142, and judgment affirmed (1895) 147 N. Y. 652, 42 N. E. 347.

[ww] (N. C. 1885) A witness who admits that he assisted in the perpetration of a fraud is impeached.—Davis v. Council, 92 N. C. 725.

[x] (N. C. 1888) On a trial for obtaining goods on false pretenses, a witness cannot be asked for the purpose of impeaching the defendant as a witness if it was not said that defendant had practiced some fraud on another firm, as such interrogatory related to another fraudulent act wholly collateral to the issue before the jury.—State v. Bullard, 100 N. C. 486, 6 S. E. 191.

[xx] (N. D. 1896) It does not impair the credibility of a witness to show the commission of a collateral crime more than 20 years before the examination.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052.

[y] (Ohio, 1817) Particular facts may be proven to support the character of a witness, but not to impeach it.—Gleason v. Williams, Tapp. 174.

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[yy] (Ohio, 1896) Where a person who is a witness has committed a crime involving moral turpitude, such fact should be taken into consideration as affecting the weight and value of his testimony.—In re Franklin County Com'rs, 7 Ohio N. P. 450, 5 Ohio S. & C. P. Dec. 691.

[yyy] (Or. 1879) A. called witnesses to impeach the general reputation for truth of B., a witness on the other side. The cross-examination of A.'s witnesses elicited particular facts tending to show that B. was not worthy of belief. *Held*, that the jury might consider such facts as affecting the credibility of B.—Steeples v. Newton, 7 Or. 110, 33 Am. Rep. 705.

[z] (Pa. 1848) Proof of a voluntary confession or admission of an accomplice, to the officer having him in legal custody, is competent evidence for the defense for the purpose of discrediting the accomplice's testimony as a witness for the prosecution.—Commonwealth v. McGowan, 2 Pars. Eq. Cas. 341.

[zz] (Tex. 1884) Defendant cannot impeach a state's witness by showing that he has harbored horse thieves.—McAfee v. State, 17 Tex. App. 135.

[zzz] (Tex. 1889) A witness cannot be impeached by showing that he falsely took the "ironclad oath" after the late war. His general reputation for veracity only can be called in question.—Moore v. Moore, 73 Tex. 383, 11 S. W. 396.

§ 1126. Accusation or indictment for crime.

As affecting competency of witness, see ante, § 109.

[a] (Ala. 1853) Evidence that several indictments for libel are pending against a witness is not admissible to impeach him.—Campbell v. State, 23 Ala. 44.

[b] (Ala. 1880) A question put to one witness to impeach another, by showing that the latter had been indicted for burglary and sought to evade arrest, is inadmissible, being directed to a particular fact and not to general reputation.—Moore v. State, 68 Ala. 360.

[c] (Ark. 1879) A witness cannot be impeached by proving that he has been indicted for larceny.—Anderson v. State, 34 Ark. 257.

[d] (Ga. 1876) In an action on a contract, pending indictments, found by the grand jury after the suit was brought, are not relevant, although the person indicted be a principal witness for the defendant, and though the offenses charged be forgery and larceny by the witness in respect to the money constituting the consideration of the contract sued on.—City Bank of Macon v. Kent, 57 Ga. 283.

[e] (Ind. 1881) It is not admissible to impeach a witness by proof or suggestion that he has been indicted for any offense; and such error is not harmless, notwithstanding the witness denied his guilt and explained the circumstances, but still admitted that he had been indicted; this being calculated to prejudice the jury against him.—Canada v. Curry, 73 Ind. 246.

[f] (Iowa, 1859) It is not competent to show, in order to impeach a witness, that he is or has recently been under a charge of horse theft in another county.—State v. Sater, 8 Iowa (8 Clarke) 420.

[g] (Ky. 1868) An examination of an impeaching witness, as to the character of another witness for truth, must be confined to the general reputation of the witness; evidence as to particular facts is inadmissible, as that "he had been prosecuted for false swearing," or "belonged to a clique that were banded together to swear negroes out of any offense charged against them."—Taylor v. Commonwealth, 66 Ky. (3 Bush) 508.

[h] (Mich. 1882) A witness cannot be impeached by the direct testimony of other witnesses that he has himself been arrested; and, if the question is raised, it is collateral, and he may explain the fact, and his explanation cannot be contradicted.—Driscoll v. People, 47 Mich. 413, 11 N. W. 221.

[i] (Mo. 1886) Where one indicted with plaintiff in an action for malicious prosecution has appeared as a witness in such action, evidence of the indictment found against him previously to the one complained of is admissible to affect his credibility, it appearing that he had entered a plea of guilty to that indictment, but the government had dismissed the proceeding without entering judgment on the plea.—Peck v. Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236.

[j] (N. J. 1887) A witness cannot be impeached by showing that he has been charged with and arrested for a crime.—Pullen v. Pullen, 43 N. J. Eq. (16 Stew.) 136, 6 Atl. 887.

[k] (N. Y. 1829) A witness is credible who has been indicted for perjury and forgery, not having been tried and convicted.—Jackson v. Osborn, 2 Wend. 555, 20 Am. Dec. 649.

[l] (N. Y. 1865) A witness is not impeached by the fact of his being under indictment.—Lipe v. Eisenlerd, 32 N. Y. 229.

[m] (N. Y. 1871) The rule that a judge may, in the exercise of his discretion, admit disparaging questions to be put to a witness, for the purpose of impairing his general credit, is confined to the acts or declarations of the witness, and does not extend to the acts or declarations of others; hence, a charge of perjury is inadmissible in evidence as affecting the credibility of a witness against whom it is made.—Berner v. Mittnacht, 2 Sweeny, 582.

[n] (N. Y. 1877) A mere indictment, or criminal charges made before a magistrate, are not admissible to discredit a witness.—West v. Lynch, 7 Daly, 245.

[o] (N. C. 1830) A witness to the character of another could not be asked if he had not heard the first accused of a particular larceny, as proof of particular facts is inadmissible in impeaching a witness.—Barton v. Morphes, 13 N. C. 520.

[p] (Tex. 1885) The state may not, on a criminal trial, put in evidence a pending indictment against defendant's witness for an offense wholly outside that on trial.—Clark v. State, 18 Tex. App. 467.

[q] (Tex. 1887) Upon a trial for perjury, as bearing upon the motives and credibility of a witness for the defense, but not to assail his competency, the state offered in evidence an indictment pending against the witness for perjury in the same trial in which defendant's perjury was alleged to have been committed. *Held* that, for the purposes for which it was introduced, the evidence was competent and admissible.—Brown v. State, 24 Tex. App. 170, 5 S. W. 685.

[r] (Tex. 1894) Evidence that witnesses for defendant had been indicted for the same crime, but that the prosecution had been dismissed, is admissible to attack their credibility.—Matkins v. State, 33 Tex. Cr. R. 605, 28 S. W. 536.

[rr] (Tex. 1895) For the purpose of affecting the credibility of a witness, an indictment 10 years before might be objected to as too remote.—Linz v. Skinner (Civ. App.) 32 S. W. 915.

[s] (Wis. 1881) A witness cannot be impeached by mere proof that he was once charged with the commission of forgery, and arrested therefor.—McKesson v. Sherman, 51 Wis. 303, 8 N. W. 200.

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§ 1127. Conviction.

Cross-examination, see post, § 1141.
Evidence, see post, § 1161.

[a] (U. S. 1893) In Ohio, in civil cases, though there is no express statutory provision concerning it, previous conviction of an infamous crime is relevant to impeach the credibility of a witness.—Baltimore & O. R. Co. v. Rambo, 59 Fed. 75, 8 C. C. A. 6, 16 U. S. App. 277.

[b] (U. S. 1887) Proof of a conviction for obtaining goods under false pretenses tends to impeach the veracity of a witness.—Fisher v. Crescent Ins. Co. (C. C.) 33 Fed. 544.

[c] (Ala. 1853) The record of a conviction of a witness for libel in another state is not admissible to discredit him when testifying in Alabama.—Campbell v. State, 23 Ala. 44.

[d] (Cal. 1886) A record of conviction of a misdemeanor, if admissible in any case to impeach a witness, is admissible only when the offense involves moral turpitude or infamy.—People v. Carolan, 71 Cal. 195, 12 Pac. 52.

[e] (Conn. 1856) The record of the conviction of the offense of being a prostitute is not admissible on the trial of a cause, for the purpose of impeaching a witness who has testified.—State v. Randolph, 24 Conn. 363.

[f] (Conn. 1889) The record of a conviction of simple assault was received in evidence to impeach defendant's testimony, and the jury were specifically told that they might consider it for that purpose. Defendant was his own principal witness, and his testimony was important. *Held*, that the facts that the record was admissible for other purposes, and that an entry in a pass-book, showing that defendant had been tried and fined, was admitted for another purpose, without objection, do not make the error harmless.—Card v. Foot, 57 Conn. 427, 18 Atl. 713.

[g] (Conn. 1889) Even if proof of conviction by a justice's court of simple assault were authorized, only a final judgment of conviction could be shown, and not one from which an appeal had been taken.—Card v. Foot, 57 Conn. 427, 18 Atl. 713.

[h] (Conn. 1889) Gen. St. § 1098, which provides that no person shall be disqualified as a witness by reason of his conviction of a crime, but such conviction may be shown for the purpose of affecting his credit, authorizes only such convictions to be shown as formerly disqualified the convict from testifying, and not a conviction by a justice's court of simple assault.—Card v. Foot, 57 Conn. 427, 18 Atl. 713.

[i] (Ga. 1893) The fact that a witness has been convicted of a crime involving moral turpitude is admissible for the purpose of discrediting his evidence, and when such conviction has been proved it is not error to charge the jury on the law as to the impeachment of witnesses, since evidence which discredits a witness on the ground of infamy tends to impeach him.—Ford v. State, 92 Ga. 459, 17 S. E. 667.

[j] (Ill. 1894) The fact that the conviction of a witness for a crime was had many years before the trial is no reason for excluding evidence thereof.—Wollf v. Van Housen, 55 Ill. App. 295.

[k] (Ind. 1872) The conviction of a person of felony, which by the Revised Statutes of 1843 rendered him incompetent to give evidence in a court, under the Revised Statutes of 1852, may be shown for the purpose of affecting his credibility.—Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568.

[l] (Ind. 1873) A record showing an indictment for an assault and battery with intent to commit a rape, and an acquittal of the intent and conviction for a simple assault and battery, is inadmissible in evidence for the purpose of affecting the credibility of a witness.—Glenn v. Clore, 42 Ind. 60.

[ll] (Md. 1894) For the purpose of discrediting a witness, it may be shown that he was convicted of drunkenness, and confined in jail.—McLaughlin v. Mencke, 80 Md. 83, 30 Atl. 603.

[m] (Mass. 1830) The record of the conviction of a witness, in another state, for an infamous crime, is admissible in evidence to affect his credibility.—Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491.

[mm] (Mass. 1846) The record of a conviction for the offense of obtaining money under false pretenses cannot be introduced to discredit a witness.—Utley v. Merrick, 52 Mass. (11 Metc.) 302.

[n] (Mass. 1862) Under Gen. St. c. 131, § 13, the conviction of any crime may be shown, to affect the credibility of a witness.—Commonwealth v. Hall, 86 Mass. (4 Allen) 305.

[nn] (Mass. 1868) "Conviction," as used in Gen. St. c. 131, § 13, permitting conviction of any crime to be shown to affect the credibility of a witness, *held* to mean a judgment of the court.—Commonwealth v. Gorham, 99 Mass. 420.

[o] (Mass. 1880) The record of a criminal court, showing that a person was indicted for an offense to which he pleaded guilty, and that he was discharged on probation, is not admissible in evidence to impeach his credibility as a witness, under St. 1870, c. 393, § 3.—Fay v. Harlan, 128 Mass. 244.

[oo] (Mass. 1888) Under Pub. St. c. 169, § 19, providing that "the conviction of a witness of a crime may be shown to affect his credibility," the conviction of the witness of any crime, whether a felony or a misdemeanor, may be shown to affect his credibility.—Commonwealth v. Ford, 146 Mass. 131, 15 N. E. 153.

[p] (Mass. 1889) Pub. St. c. 169, § 19, which provides that the conviction for a crime may be shown to affect the credibility of a witness, does not require the crime to be of such a nature as of itself to affect his credibility, and evidence of a conviction for assault is admissible for purposes of impeachment.—Quigley v. Turner, 150 Mass. 108, 22 N. E. 586.

[pp] (Mich. 1870) An entry on the records of a circuit court reciting that an attorney had been guilty of malpractice, and directing the prosecuting attorney to draft and perfect proper charges, whereupon the attorney appeared, confessed his misconduct, and tendered a return of his license, which was accepted, and his name stricken from the roll of attorneys, is not admissible to impeach the attorney's veracity when examined as a witness, as he can only be directly attacked by the record evidence of a conviction, and such document could not be used as a record of that kind.—Dickinson v. Dustin, 21 Mich. 561.

[q] (Mich. 1882) Under Comp. Laws, § 5966, the fact that a witness had been convicted of an infamous crime may be shown as a distinct fact bearing on his credit as a witness.—People v. Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

[qq] (Mich. 1893) It is proper, for the purpose of discrediting a witness in a civil action, to show a former conviction for crime.—Cole v. Lake Shore & M. S. Ry. Co., 95 Mich. 77, 54 N. W. 638.

[r] (Mich. 1895) Where there is evidence that a witness has been convicted of a criminal offense, an instruction that the jury shall consider this fact in determining the credibility of his evidence is proper.—Comkey v. Carpenter, 106 Mich. 1, 63 N. W. 990.

[rr] (Miss. 1890) Under Code 1880, § 1607, providing that the record of conviction of a

witness of any "crime" may be given in evidence as affecting his credibility, and section 3105, declaring that "any violation" of law is a crime, within the meaning of section 1607, the record of the conviction of a witness for larceny of a hog, without felonious intent, is admissible to affect his credibility.—Helm v. State, 67 Miss. 562, 7 South. 487.

[s] (Mo. 1882) When the defendant in a criminal case has been examined as a witness in his own behalf, it is competent for the state to introduce the record of his former conviction for another offense for the purpose of affecting his credibility.—State v. Kelsoe, 76 Mo. 505, reversing judgment (1881) 11 Mo. App. 91.

[ss] (Mo. 1889) On a trial for assault with intent to kill, where defendant has testified in his own behalf, evidence of his prior conviction of violating a municipal ordinance by frequenting a bawdy-house, a mere misdemeanor not infamous at common law, or by statute, is not admissible to impeach his credibility.—State v. Taylor, 98 Mo. 240, 11 S. W. 570.

[t] (Mo. 1894) The fact that a witness has been convicted of a public offense is not admissible to impeach his credibility, unless the record shows that the offense was an infamous crime.—State v. Warren, 57 Mo. App. 502.

[tt] (Mo. 1895) A record of a conviction for gambling is not admissible for the purpose of discrediting a witness.—State v. Donnelly, 130 Mo. 642, 32 S. W. 1124.

[u] (Mo. 1896) Error in admitting evidence of plaintiff's conviction of a misdemeanor to impeach him is not waived by plaintiff's introducing like evidence with reference to a witness of defendant.—Gardner v. St. Louis & S. F. Ry. Co., 135 Mo. 90, 36 S. W. 214.

[uu] (Mo. 1896) Evidence that a witness has been convicted of a misdemeanor is not admissible to impeach him.—Gardner v. St. Louis & S. F. Ry. Co., 135 Mo. 90, 36 S. W. 214.

[v] (N. Y. 1884) It may be shown, as affecting the credibility of a witness, that he has been convicted of misdemeanors.—People v. Burns, 33 Hun, 296.

[w] (N. Y. 1889) In an action by a wife under the "civil damage act" for the value of a horse killed by her husband while in a state of intoxication produced by liquor furnished by defendant, proof that defendant several times, both before and since the cause of action arose, had been convicted of selling liquor without license, is admissible for the purpose of affecting the weight of his testimony.—Morenus v. Crawford, 51 Hun, 89, 5 N. Y. Supp. 453.

[ww] (N. Y. 1893) In habeas corpus to remove a child from the custody of a person alleged to be the keeper of a house of ill fame, the record of defendant's conviction was read in evidence. Afterwards he testified in his own behalf. *Held*, that the admission of the record was not prejudicial error; since under Code Civ. Proc. § 832, it was competent evidence as to defendant's credibility as a witness.—People v. Paschal, 68 Hun, 344, 22 N. Y. Supp. 881.

[x] (N. Y. 1894) Judgment for penalty under a city ordinance for doing an act which is also a misdemeanor under the state law is not a conviction of a misdemeanor which may be shown (Code Civ. Proc. § 832) for the purpose of affecting the credibility of such person as a witness.—Arhart v. Stark (Super. Buff.) 6 Misc. Rep. 579, 27 N. Y. Supp. 301.

[xx] (Ohio, 1876) A conviction, which under Cr. Code, § 139, may be shown to affect the credibility of witness, is such only as, independently of said section, would have rendered the convict incompetent to testify; and proof that one charged with assault with intent to rob had on several occasions been arrested and convicted for violations of city ordinances cannot be introduced for the sole purpose of affecting his credibility.—Coble v. State, 31 Ohio St. 100.

[y] (R. I. 1885) Pub. St. c. 214, § 38, provides that a person who has been convicted of a felony may testify like any other witness, except that such conviction may be shown to affect his credibility. Section 39 provides that "No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent." *Held*, that the record of a former conviction may be shown to affect the credibility of a defendant in a criminal proceeding, who testifies in his own behalf.—State v. McGuire, 15 R. I. 23, 22 Atl. 1118.

[yy] (Tex. 1893) It is error to impeach a witness' credibility by evidence that he has been fined in the city court, in the absence of any showing that such fines were imposed for any offense carrying with it the idea of moral turpitude.—Goode v. State, 32 Tex. Cr. R. 505, 24 S. W. 102.

[z] (Tex. 1893) A witness may be impeached by showing on cross-examination, or by record evidence, that he has been convicted of a misdemeanor under an indictment charging him with felonious theft.—Chambless v. State (Cr. App.) 24 S. W. 899, following Carroll v. State (1893) 32 Tex. Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 786, and Goode v. State (1893) 32 Tex. Cr. R. 505, 24 S. W. 102.

[zz] (Wash. 1893) Under Code Proc. § 1647, providing that no witness shall be excluded by reason of conviction of a crime, but such conviction may be shown to affect his credibility, only those crimes which, as infamous, were formerly ground for exclusion, may be shown to impeach a witness' credit, and of these petit larceny is not one.—State v. Payne, 6 Wash. 563, 34 Pac. 317.

§ 1128. —— Effect of pardon or acquittal on new trial.

Admissibility of pardon to sustain witness, see post, § 1168 [l].

[a] (Mich. 1884) In an action against one alleged to have negligently caused a collision in a highway, evidence that he had been convicted of murder and of assault with intent to kill, but that on retrials he was acquitted, was inadmissible for the purpose of either affecting his credibility as a witness or to show his disposition to do violence.—Pigott v. Lilly, 55 Mich. 150, 20 N. W. 879.

[aa] (N. H. 1870) The record of conviction is admissible as affecting the credit of a person for veracity, although he has been pardoned.—Curtis v. Cochran, 50 N. H. 242.

[b] (N. Y. 1843) Though a pardon restores the competency of a witness, yet the conviction may be used to affect the credibility of the witness.—Baum v. Clause, 5 Hill, 196.

[c] (Tex. 1887) In a prosecution for larceny defendant produced a witness who had served a term in the penitentiary on account of the commission of a felony, but who had been pardoned. He was allowed to testify, but in his argument the counsel for the prosecution insisted that the witness was not worthy of credit. To these remarks exception was taken. *Held*, that though the pardon of one convicted of felony will in general restore his competency as a witness, yet the conviction may still be used to affect his credit.—Bennett v. State, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. Rep. 875.

[d] (Tex. 1887) If a witness has been convicted of a felony, but pardoned, the record of the conviction is competent evidence for the pur-

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pose of attacking his credibility.—Dudley v. State, 24 Tex. App. 163, 5 S. W. 649.

[e] (Tex. 1895) The credibility of a witness who has been convicted of a felony and pardoned, and against whose reputation for truth and veracity there is testimony, is for the jury.—Douglass v. State (Cr. App.) 33 S. W. 228.

(b) ACCUSED IN CRIMINAL PROSECUTION.

CHARACTER AND REPUTATION IN GENERAL, § 1129.
REPUTATION AS TO VERACITY, §§ 1130.
PARTICULAR ACTS OR FACTS, § 1131.
FORMER CONVICTION OF CRIME, § 1132.

Cross-examination of accused, see post, §§ 1144–1148.

Privilege, see ante, §§ 1042–1046.

Right to impeach in general, see ante, § 1113.

§ 1129. Character and reputation in general.

[a] (Ala. 1893) Where a defendant in a criminal trial testifies in his own behalf, evidence as to his general character is "material" to show what credit he is entitled to as a witness.—McDaniel v. State, 97 Ala. 14, 12 South. 241.

[b] (Ala. 1894) Evidence of the "general character" of a defendant, who testifies in his own behalf, is admissible to impeach him.—Byers v. State, 105 Ala. 31, 16 South. 716.

[c, d] (Ind. 1881) Acts 1881, pp. 157, 158, § 230, providing that "in all cases affecting the credibility of a witness, his general moral character may be given in evidence," applies to a defendant in a criminal prosecution who testifies in his own behalf.—Morrison v. State, 76 Ind. 335.

[e] (Ind. 1890) Where the accused becomes a witness, his general character may be shown as bearing upon his credibility.—Keyes v. State, 122 Ind. 527, 23 N. E. 1097.

[f] (Ind. 1890) When the defendant in a criminal case testifies in his own behalf, the state may introduce evidence as to his general bad moral character.—Drew v. State, 124 Ind. 9, 23 N. E. 1098.

[g, h] (Ky. 1888) Where defendant becomes a witness in his own behalf, as permitted by act May 1, 1886, his credibility may be impeached by testimony assailing his general moral character.—Lockard v. Commonwealth, 87 Ky. 201, 8 S. W. 266.

[i] (Ky. 1889) Evidence of bad moral character of defendant is competent to impeach his testimony in his own behalf.—Hasson v. Commonwealth, 11 S. W. 286.

[j] (Ky. 1892) Defendant, in a homicide case, having testified in her own behalf, evidence of her reputation for morality and virtue was properly admitted.—Crump v. Commonwealth, 20 S. W. 390.

[k] (Ky. 1895) Where an accused, testifying in his own behalf, has not put his character in issue, it is error to permit the commonwealth to adduce proof as to his general character and moral standing in the community.—Montgomery v. Commonwealth, 30 S. W. 602.

[l] (Ky. 1895) Where accused testified as a witness, it was competent to prove that his general moral character was bad, though he did not introduce testimony as to his character.—Barton v. Commonwealth, 32 S. W. 171.

[m, n] (La. 1893) If a defendant in a criminal case, jointly indicted and tried with another defendant, testifies in his own behalf, and incriminates his codefendant, he is to be treated as any other witness, and his character for honesty may be put at issue by his codefendant in an examination as to his general character for truth and veracity.—State v. Taylor, 45 La. Ann. 605, 12 South. 927.

[o] (Mo.) In impeaching the accused as a witness, evidence of his reputation for general moral character is admissible.—(1878) State v. Cox, 67 Mo. 392; (1886) Same v. Palmer, 88 Mo. 568; (1887) Same v. Beaucleigh, 92 Mo. 490, 4 S. W. 666.

[p] (Mo.) Where defendant in a criminal case testifies in his own behalf, evidence of his general reputation for truth and veracity, chastity and morality, may be introduced by the state.—(1886) State v. Rider, 90 Mo. 54, 1 S. W. 825; (1888) Id., 95 Mo. 474, 8 S. W. 723.

[q] (Mo. 1888) Where it is sought to impeach defendant as a witness, the state may introduce evidence of his general moral character, and not alone as to the trait of character involved in the offense.—State v. Parker, 96 Mo. 382, 9 S. W. 728.

[r] (Mo. 1889) Where defendant in a criminal case is a witness, evidence as to his general reputation or character for morality is admissible.—State v. Day, 100 Mo. 242, 12 S. W. 365.

[s] (Mo. 1891) Where, in a prosecution for assault with intent to rape, the accused has testified on his own behalf, he may be impeached by proof that his general reputation for virtue and chastity is bad.—State v. Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344.

[t] (Mo. 1894) Evidence tending to impeach the moral character of defendant, after he has testified, is admissible.—State v. Smith, 125 Mo. 2, 28 S. W. 181.

[u] (Mo. 1895) On a prosecution for defiling a female confided to one's care, evidence that defendant's general character for chastity was bad was not admissible to impeach him as a witness.—State v. Sibley, 131 Mo. 519, 33 S. W. 167.

[v] (Mo. 1896) Where defendant in a criminal case testifies in his own behalf, evidence of his general moral character among his neighbors is admissible, as affecting his credibility, its weight being for the jury.—State v. Weeden, 133 Mo. 70, 34 S. W. 473.

[w] (N. C. 1881) Where the defendant in a criminal case avails himself of Acts 1881, c. 110, and becomes a witness in his own behalf, he thereby subjects himself to all the disadvantages of that position in the same manner as any other witness, and may be discredited by proof of his general bad moral character.—State v. Effler, 85 N. C. 585.

[x] (S. C. 1887) Where a defendant in a criminal case testifies in his own behalf, his character for truth and veracity may be impeached, but not his general moral character.—State v. Robertson, 26 S. C. 117, 1 S. E. 443.

[y] (Tenn. 1888) A defendant in a criminal prosecution, who voluntarily takes the stand in his own behalf, subjects himself to the same rules as other witnesses; and in impeaching his credit the inquiry is not restricted to his general reputation for veracity, but involves his whole moral character.—Peck v. State, 86 Tenn. (2 Pickle) 259, 6 S. W. 389.

§ 1130. Reputation as to veracity.

[a] (Ala. 1893) In a criminal trial, where the credibility of defendant's evidence is not attacked, evidence sustaining his reputation for "truth and veracity" is not admissible.—Funderberg v. State, 100 Ala. 36, 14 South. 877.

[b] (Cal. 1881) If a defendant in a criminal case offers himself as a witness, the prosecution may introduce testimony to show that his general reputation for truth, honesty, and integrity is bad.—People v. Beck, 58 Cal. 212.

[c] (Cal. 1888) Testimony as to defendant's character for truth and veracity by a witness

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knowing his general reputation in that regard is admissible to impeach him.—People v. Bentley, 77 Cal. 7, 18 Pac. 799, 11 Am. St. Rep. 225.

[d] (Cal. 1896) Where accused testifies in his own behalf, to discredit him, testimony as to his general reputation in the community for "truth, honesty, and integrity" is admissible.—People v. Hickman, 113 Cal. 80, 45 Pac. 175.

[e] (Ind.) Where, on the trial of a criminal action, the defendant testifies in his own behalf, the state may give evidence to impeach him by showing that his character for truth is bad.—(1875) Mershorn v. State, 51 Ind. 14; (1879) State v. Beal, 68 Ind. 345, 34 Am. Rep. 263.

[f] (Ky. 1887) While the general rule prevails that the state cannot place the character of the accused in issue unless the latter shall have first attempted to establish his character by proof, yet, where the accused offers himself as a witness, his general character for truth and veracity may be impeached by the state, like that of any other witness.—McDonald v. Commonwealth, 86 Ky. 10, 4 S. W. 687.

[g] (Pa. 1886) A defendant, claiming the privilege to testify under Act May 21, 1885, may have his character for truthfulness attacked, though it may tend to prejudice the jury against him.—Commonwealth v. Duckworth, 2 Pa. Co. Ct. R. 443.

§ 1131. Particular acts or facts.

[a] (Ind. 1886) On a murder trial, it is not error to instruct the jury that if the defendant has voluntarily testified that he has committed burglary, that fact may be considered in determining the credibility of his testimony, that being the law of the state since 1852.—Boyle v. State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

[b] (Tenn. 1896) In a criminal case the records of indictments against defendant for other and distinct offenses are inadmissible, where he has been acquitted therein or nolle prosequi has been entered, for the purpose of affecting his credibility.—Ryan v. State, 97 Tenn. (13 Pickle) 206, 36 S. W. 930.

[c] (Tex. 1896) On a trial for unlawfully carrying a pistol, evidence that defendant, who was a witness, was charged with a number of other offenses, was properly admitted.—Rutherford v. State (Cr. App.) 34 S. W. 271.

§ 1132. Former conviction of crime.

Cross-examination, see post, § 1147.

[a] (Ala. 1892) Under Code 1886, § 2766, providing that the objection that a witness has been convicted of an infamous crime goes to his credibility, and not to his competency, it is proper, where the accused testifies in his own behalf, to introduce evidence of a previous conviction of another crime, for the purpose, only, of attacking his credibility, if the evidence is expressly so limited by the court.—Prior v. State, 99 Ala. 196, 13 South. 681.

[b] (Ala. 1895) In a prosecution for larceny, evidence of a former conviction of defendant for another crime is admissible to impeach his credibility as a witness.—McQueen v. State, 108 Ala. 54, 18 South. 843.

[c] (Me. 1876) The provision of Rev. St. c. 82, § 94, that the record of a previous conviction of a witness for a felony may be shown to affect his credibility, applies to a case where a party offers himself as a witness in his own behalf in a criminal proceeding, although no evidence of his previous good character has been offered.—State v. Watson, 65 Me. 74.

[d] (Me. 1892) On a trial for keeping a liquor nuisance, it is no objection to the admission in evidence of an ancient record of the conviction of the accused of being a common seller of intoxicating liquors, for the purpose of discrediting him as a witness in his own behalf, that the chief purpose in introducing it is to create prejudice against him.—State v. Farmer, 84 Me. 436, 24 Atl. 985.

[e] (Me. 1892) The record of the conviction of the accused 27 years ago of being a common seller of intoxicating liquors is admissible to impeach his credibility as a witness in his own behalf, notwithstanding its age.—State v. Farmer, 84 Me. 436, 24 Atl. 985.

[f] (Minn. 1890) Where defendant in a criminal action became a witness in his own behalf, evidence of his conviction of assault several years previous was admissible as affecting his credibility under Pen. Code, § 531, providing that the record of any crime may be so received.—State v. Sauer, 42 Minn. 258, 44 N. W. 115.

[g] (Mo. 1887) On a trial for petit larceny, the court allowed the state to put in evidence a record showing a previous conviction of defendant for petit larceny. *Held* that, inasmuch as defendant had been examined on his own behalf, the evidence was properly admitted for the purpose of affecting his credibility.—State v. Loehr, 93 Mo. 103, 5 S. W. 696.

[h] (Mo. 1889) While it is not competent to attack the character of a defendant in a criminal cause, unless he puts in evidence of a good character, yet, as affecting his credibility as a witness in his own behalf, it is admissible to show his conviction of a former felony.—State v. Nelson, 98 Mo. 414, 11 S. W. 997.

[i] (Mo. 1894) Evidence of a prior conviction for an assault and battery is inadmissible to impeach defendant.—State v. Smith, 125 Mo. 2, 28 S. W. 181.

[j] (N. Y. 1885) On an indictment for uttering forged checks, evidence that defendant was arrested about a year before for disorderly conduct, followed by proof that she was convicted and fined therefor, is admissible, where she testifies in her own behalf, as bearing on the weight of her evidence.—People v. Elmore, 3 N. Y. Cr. R. 264.

[k] (Tex. 1893) On criminal trial, as bearing on his credibility, former convictions of defendant may be shown.—Childs v. State (Cr. App.) 22 S. W. 1039.

[l] (Tex. 1894) On trial for robbery, where defendant testifies on his own behalf, evidence that he has been convicted of other offenses is admissible, if the court charge that it can be considered only as affecting his credibility.—Thompson v. State (Cr. App.) 26 S. W. 1081.

3. CONDUCT OF WITNESS WITH REFERENCE TO CAUSE.

IN GENERAL, § 1133.
CONDUCT INCONSISTENT WITH TESTIMONY, § 1134.

Manner of testifying, see ante, § 1078.

§ 1133. In general.

[a] (U. S. 1887) The fact that post office inspectors resorted to test or decoy letters in order to bring to justice a person suspected of using the mails for the circulation of obscene literature does not operate to discredit their testimony upon the trial of that person for that offense.—United States v. Slenker (D. C.) 32 Fed. 691.

[b] (Ark. 1891) On trial for assault with intent to kill, it appeared that, on the occasion of defendant's assault upon A., but two shots were fired, one by each of the parties. There

were no witnesses to the shooting, but the shots were heard by certain persons, who distinguished the order of firing by the character of the reports. Defendant offered to prove that before the trial it was proposed to A. that the guns used be fired in the hearing of the persons, so they might determine which gun was first fired, and that such proposition was declined. *Held*, that the experiment was not calculated to furnish a true test of the matter, and the rejection of the proposition by A. was not such evidence of falsehood as to warrant the admission of the testimony to discredit him.—Felker v. State, 54 Ark. 489, 16 S. W. 663.

[c] (Ga. 1893) The prosecuting witness in a criminal case may explain the delay of several months in instituting the prosecution, where defendant seeks to draw an inference from such delay unfavorable to him as a witness.—Fussell v. State, 93 Ga. 450, 21 S. E. 97.

[d] (Ill. 1857) The fact that a witness left court after his examination, and that an attachment, issued against him, is returned "not found," does not, as a presumption of law, necessarily prejudice his credibility, as raising a presumption that he avoided further examination.—Couglin v. People, 18 Ill. (8 Peck) 266, 68 Am. Dec. 541.

[e] (Ill. 1869) In an action to compel a conveyance of lands to which complainant claimed title through assignments of a certificate of purchase, the answer denied the assignment of the certificate by defendant, or by any assignee of defendant, and alleged that such assignments were fraudulent. It appeared that the witness for complainant, by whom the validity of the assignments was attempted to be proved, had written two letters in which he strongly intimated that, for a consideration, he would swear in favor of defendant; that there was money in it; and that the termination of the case depended upon his evidence. It also appeared that the assignee of defendant had left the state, and was absent at the time the assignment by him to complainant bore date. *Held*, that the court was justified in discrediting the testimony of the witness under such circumstances.—Richardson v. Mercer, 51 Ill. 263.

[f] (Ind. 1890) When there has been no issue joined as to a champertous agreement between plaintiff and her attorney, the agreement is a collateral matter, and a witness cannot be impeached in regard to it.—City of Elkhart v. Witman, 122 Ind. 538, 23 N. E. 796.

[g] (Iowa, 1877) An intentional suppression of material facts by a witness may be considered by the jury as affecting his credibility.—Lee v. Town of Cresco, 47 Iowa, 499.

[h] (Me. 1878) In assumpsit on an account annexed, plaintiff's refusal to show his books of account already in court, after refreshing his recollection in testifying, by an alleged memorandum therefrom, was a proper fact for the jury in determining his credibility.—Davie v. Jones, 68 Me. 393.

[i] (Mass. 1864) In replevin of goods obtained from their owner by fraud and false pretenses against one who claims under a subsequent purchase, it may be shown by cross-examination of the plaintiff that a few days before the trial he made a complaint against the person who obtained the goods from him, for obtaining them under false pretenses, and caused him to be arrested on the morning of the trial for the purpose of discrediting plaintiff's testimony.—Easter v. Allen, 90 Mass. (8 Allen) 7.

[j] (Mich. 1877) A vendor's testimony may be discredited by proof of his unexplained failure to take any steps to forfeit the contract or dispossess the vendee or demand further payment at a time when there were several unpaid and past-due installments, if the vendor's version of the contract is correct, and where he accepted several payments of considerably less amounts than he asserts to have been then due.—Rogers v. Odell, 36 Mich. 411.

[k] (Mich. 1892) In replevin for hogs seized under an attachment against plaintiff's vendor, where the attachment creditor attacks the bona fides of plaintiff's purchase, and claims that he informed plaintiff, before the latter purchased, that he owned a half interest in them, plaintiff may show that on the trial of the attachment suit the creditor abandoned all claim to the hogs, and based his right to judgment on other grounds.—Daniels v. Weeks, 90 Mich. 190, 51 N. W. 273.

[l] (Mo. 1882) A letter, suggesting to the grantor in a deed attacked as fraudulent to make false representations for the purpose of obtaining a fictitious credit, and offering to assist therein, is competent to discredit the writer as a witness.—Clark v. Finn, 12 Mo. App. 583.

[m] (N. H. 1845) On a trial for perjury, evidence that the principal witness had offered the prisoner to withdraw on receiving a certain sum of money is inadmissible.—State v. Gates, 17 N. H. 373.

[n] (N. Y. 1833) Evidence that the prosecutor had offered to leave court, and not appear as a witness against the party charged, in case he would settle with him the subject-matter of the charge, is not admissible.—People v. Genung, 11 Wend. 18, 25 Am. Dec. 594.

[o] (N. Y. 1848) Where, by a statute, a relative of the person killed is entitled to recover damages of the person killing, proof that the father had attempted by negotiation to obtain damages is no impeachment of him as a witness.—People v. Austin, 1 Parker, Cr. R. 154.

[p] (N. Y. 1889) In an action for damages for personal injuries, evidence that plaintiff offered a witness a sum of money to swear that the accident was caused by a corporation first sued for the same injury, together with plaintiff's denial and explanation, should be left to the jury to determine the amount of weight to give to plaintiff's evidence, and it is not error to refuse to charge that, if he made the offer, he is unworthy of belief.—O'Connor v. National Ice Co., 56 N. Y. Super. Ct. (24 Jones & S.) 410, 4 N. Y. Supp. 537, judgment affirmed (1890) 121 N. Y. 662, 24 N. E. 1092.

[pp] (Tex. 1889) In a prosecution for homicide, testimony of a state's witness that on the day after the homicide the defendant's brother, who was present at the killing, told the witness, in the absence of defendant, that he held deceased while defendant stabbed him, is admissible to impeach the testimony of the brother.—Foster v. State, 28 Tex. App. 45, 11 S. W. 832.

[q] (Tex. 1894) Evidence that a witness for plaintiffs, alleged to have participated in a fraudulent conveyance to them, in making his deposition consulted plaintiff's attorney before answering, and was assisted by one of plaintiffs in answering, was competent.—Blum v. Jones, 86 Tex. 492, 25 S. W. 694, affirming (1893) (Civ. App.) 23 S. W. 844.

[r] (Vt. 1894) In trespass for assault on an infant, the father testified that defendant assaulted plaintiff, and broke his arm. *Held*, that the fact that before the suit the father offered to compromise for what he had paid out for doctor's bills incurred in treating the infant is not admissible to impeach him.—Neal v. Thornton, 67 Vt. 221, 31 Atl. 296.

[s] (Wis. 1864) A witness, and especially a party to the action, who has testified on his own behalf, may be impeached by showing that he has attempted to procure another person to give false evidence in the same suit.—Martineau v. May, 18 Wis. 54.

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§ 1134. Conduct inconsistent with testimony.

Omissions in former testimony, see post, § 1227.

[a] (Ala. 1855) When female relatives of the defendant, whose evidence is material to his defense, are examined on his behalf at the trial, they cannot be impeached by proof that they were present at the examination before the committing magistrate, and were not then examined as witnesses, although the same evidence was then adduced against him as upon the trial.—Brock v. State, 26 Ala. 104.

[b] (Ga. 1885) If what a landlord said about dealings with his tenants and croppers is admissible, it is also permissible to impeach him by showing his acts contradictory of his statements.—Burruss v. Smith, 75 Ga. 710.

[c] (Ga. 1893) In an action on a note against a maker and indorser, judgment was rendered against the indorser, but in favor of the maker on a plea of payment. A new trial was granted as against the maker, but the judgment stood against the indorser, and the latter was permitted to testify on the new trial that the maker had paid the note to him, and that he had paid the same to plaintiff, in cotton, before the suit was brought. *Held*, that it was error to reject, as evidence tending to affect the credit of the witness, the judgment rendered against him, where there was other evidence tending to show that he had made no defense, had acquiesced in the judgment, and had made no motion for a new trial, or otherwise attempted to set the same aside; since the testimony of a witness may be attacked by showing conduct on his part, in the nature of admissions inconsistent with such testimony, as well as by proof of contradictory statements.—Whitney v. Butts, 91 Ga. 124, 16 S. E. 649.

[d] (Ind. 1888) A question, asked the prosecuting witness on cross-examination, whether she had not voluntarily submitted to sexual intercourse a short time before the alleged rape, with one of defendants, who, according to her testimony, had participated in the rape, is relevant, as bearing upon her credit; and a refusal to compel her to answer is error, though the indictment had been nolle prossed as to such defendant, and the fact of such intercourse had been testified to by him.—Bedgood v. State, 115 Ind. 275, 17 N. E. 621.

[e] (Me. 1874) Where a witness testified that a deed was delivered to her by her husband for his minor son, the fact that many years after she joined with her husband in a warranty deed in which she released to a third person dower in part of the land included in the deed to her son, he being then a minor, and his deed (for aught appearing) being in her possession, may be regarded as inconsistent with her testimony and is admissible for the purpose of contradicting it.—Worthing v. Worthing, 64 Me. 335.

[f] (Mass. 1861) If a witness, who is not called as an expert, has testified to facts tending to show that a party to a contract was, at the time of making it, incompetent to contract by reason of mental imbecility, and his own opinion is not asked for or given in evidence, it is not competent to show, by way of contradiction of his testimony, that he has done acts indicating that he considered such party to be of sound mind.—Hubbell v. Bissell, 84 Mass. (2 Allen) 196.

[g] (Mass. 1886) The failure of an executor to claim that a testator was of unsound mind, in a conversation about a mortgage deed, will not be evidence tending to impeach his testimony that the testator was incompetent to execute the mortgage deed.—Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265.

[h] (Mass. 1889) In an action by a priest against the archbishop of his diocese for removing plaintiff from his office, defendant testified that he had the power to remove priests for misconduct. Plaintiff having testified that he had visited a house of ill fame, not knowing its character, and for an innocent purpose, evidence of his acts at such house, prior to the misconduct charged by defendant, which tends to contradict him, is admissible.—Fitzgerald v. Williams, 148 Mass. 462, 20 N. E. 100.

[i] (Mass. 1896) To impeach the testimony of a witness who testified that he laid gas pipes in a certain street in a proper manner, evidence that he laid pipes in another street in a different manner is admissible.—Lewis v. Boston Gaslight Co., 165 Mass. 411, 43 N. E. 178; Goodnow v. Same, Id.

[j] (Mich. 1883) In replevin by a wife for property claimed by her, but seized on execution against her husband, there was evidence that the husband had given a chattel mortgage on it; but, being called as a witness for his wife, he testified that he did not remember doing so. *Held* proper to put the mortgage in evidence to test his recollection, as well as credibility.—Gavigan v. Scott, 51 Mich. 373, 16 N. W. 769.

[k] (N. H. 1880) The conduct of a witness, supposed to be feigning an injury, when she supposed she was not observed, may be shown.—Chamberlin v. Ossipee, 60 N. H. 212.

[l] (N. Y. 1874) In an action against defendant as indorser of a note, where the defense was that the indorsement was a forgery, evidence that a certain witness called by plaintiff had been instrumental in causing the indictment of the maker of such note for such forgery was properly excluded as irrelevant and immaterial, when offered on the theory that it impaired the opinion of such witness, previously given in evidence, to the effect that the indorsement was genuine.—Marks v. King, 67 Barb. 225.

[m] (N. Y. 1880) Where, in an action by plaintiff, who claimed to be the widow of the decedent, to recover dower, her marriage with decedent was disputed, and her sister testified that plaintiff was married at a certain time, it was competent to show that after the date of such alleged marriage such sister executed a receipt for plaintiff and signed it with plaintiff's maiden name, since such act was inconsistent with her testimony, and was evidence for the jury's consideration on the credibility of such sister in connection with her explanation thereof.—Clark v. St. James' Church Soc., 21 Hun, 95.

[n] (N. C. 1886) The rule that an admission of the truth of a statement, made by another in the presence of a party to an action, will be inferred from his silence, applies to the prosecutor in a criminal action.—State v. Burton, 94 N. C. 947.

[o] (N. C. 1890) The rejection of the testimony of a witness for defendant that on the night of the murder other persons, and not defendant, were accused of the murder in the presence of a person who testified to receiving a letter threatening the deceased, and that he said nothing, was error, as his silence tended to show that he did not then know of the facts testified to by him.—State v. Morton, 107 N. C. 890, 12 S. E. 112, 10 L. R. A. 527.

[p] (Pa. 1822) A witness called to impeach a will on the ground of the incapacity of the testator may be asked on cross-examination whether he has not accepted a devise under the will.—Irish v. Smith, 8 Serg. & R. 573, 11 Am. Dec. 648.

[q] (Vt. 1861) The acts of a witness, and also his silence where good faith requires a disclo-

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sure of his knowledge, when such acts and such knowledge are inconsistent with his testimony, may be given in evidence for the purpose of affecting his credibility.—Cady v. Owen, 34 Vt. 598.

4. CROSS-EXAMINATION FOR PURPOSE OF IMPEACHMENT.

(a) WITNESSES IN GENERAL, §§ 1135-1142.
(b) ACCUSED AS WITNESS IN CRIMINAL PROSECUTION, §§ 1144-1148.
(c) CONCLUSIVENESS OF ANSWERS ON CROSS-EXAMINATION AND CONTRADICTORY EVIDENCE, § 1149.

Cross-examination to impeach impeaching witness, see post, § 1159.
Refusal to answer, see ante, § 1069.

(a) WITNESSES IN GENERAL.

IN GENERAL, § 1135.
CHARACTER AND REPUTATION IN GENERAL, § 1136.
PARTICULAR TRAITS OF CHARACTER OR HABITS, AND OCCUPATION, § 1137.
CHASTITY, § 1138.
PARTICULAR ACTS OR FACTS, § 1139.
ACCUSATION OR INDICTMENT FOR CRIME, § 1140.
CONVICTION OR IMPRISONMENT, § 1141.
—— NECESSITY OF RECORD OF CONVICTION AS BEST EVIDENCE, § 1142.
REDIRECT EXAMINATION, § 1143.

§ 1135. In general.

[a] (U. S.) A party, in cross-examining a witness, has not a right to ask him any question tending to degrade him, unless it be in relation to a fact in issue in the record.—(1836) United States v. White, Fed. Cas. No. 16,676 [5 Cranch, C. C. 53]; (1838) Id., Fed. Cas. No. 16,679 [5 Cranch, C. C. 457].

[b] (U. S. 1837) A witness, upon cross-examination, is not to be questioned as to any fact tending to disgrace him which the party would not be permitted to prove aliunde.—United States v. Hudland, Fed. Cas. No. 15,411 [5 Cranch, C. C. 309].

[c] (Ark. 1853) On cross-examination of the prosecutrix of a slave for an attempt to commit a rape, the prisoner's counsel asked her if she had not proposed, before the institution of the proceedings, to take $200 from the master of the prisoner not to prosecute him. The state objecting, the question was ruled incompetent. *Held*, that the question was competent for the purpose only of impeaching her credibility.—Pleasant v. State, 13 Ark. (8 Eng.) 360.

[d] (Cal. 1890) It is proper on cross-examination of defendant's witness to allow a question whether she had not on a former occasion tried to induce another person to grant a request, involving a collateral matter, by promising that she would not testify for defendant, where the only object of the question is to show that she had been willing on a former occasion to suppress the testimony just given, and so to impeach her.—Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1.

[e] (Ga. 1884) Where an administrator seeks to set aside an agreement of his intestate on the ground that the deceased was of insufficient mental capacity, and the administrator has testified that the deceased was always very deficient in business ability, and for many years previous to the agreement incompetent to make trades, it may be shown on cross-examination that five years before he had himself made trades with the deceased involving large interests.—Anderson v. Brown, 72 Ga. 713.

[f] (Ill. 1868) A cross-question to a detective in a capital case, "What is the character of your associates, in your business of a detective?" *held* objectionable, as irrelevant.—Yoe v. People, 49 Ill. 410.

[g] (Mass. 1890) A witness for the prosecution having testified on cross-examination that he had appeared in court before, a question as to the court in which he appeared was irrelevant in the absence of any record with which to identify the witness.—Commonwealth v. Mullen, 150 Mass. 394, 23 N. E. 51.

[h] (Mich. 1895) On a trial for murder, where a witness testified that deceased had tried to hire him to kill defendant, and admitted on cross-examination that he married his wife from a house of prostitution, the asking in good faith of the question whether she was a prostitute was not prejudicial to defendant, when the answer was excluded.—People v. Palmer, 105 Mich. 568, 63 N. W. 656.

[i] (Minn. 1867) In an action on a promissory note a witness was asked, on cross-examination for the purpose of affecting his credibility: "Have you more than one wife living at this time?" *Held*, on appeal, that the admission or exclusion of his answer, the witness not claiming any privilege, was matter of discretion with the court below, and would not be reviewed, unless abuse was shown.—McArdle v. McArdle, 12 Minn. 98 (Gil. 53).

[j] (N. H. 1877) The range of a cross-examination in disparagement of the character of the witness is within the discretion of the judge presiding at the trial.—Gutterson v. Morse, 58 N. H. 165.

[k] (N. Y. 1865) The court in which a cause is tried, in the exercise of its discretion, may exclude disparaging questions, not relevant to the issue, on the cross-examination of a witness, though put for the avowed purpose of impairing his general credit; and this may be done on the objection of the party without putting the witness to his claim of privilege.—Third Great Western Turnpike Road Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311.

[l] (N. Y. 1866) The extent of cross-examination of a witness for the purpose of impeaching his character is within the discretion of court, but should be rejected with great caution.—La Beau v. People, 34 N. Y. 223.

[m] (N. Y. 1891) Upon the cross-examination of the petitioner in a proceeding to appoint a committee for a person alleged to be of unsound mind, it is material and proper to ask the witness if he had not offered to settle the matter and drop the case for a money consideration.—In re Mason, 60 Hun, 46, 14 N. Y. Supp. 434.

[n] (N. Y. 1895) Where witnesses who testified in support of a charge against a policeman for receiving a bribe stated that at the time of the transactions narrated by them they were keeper and inmate, respectively, of a house of prostitution, it is error to refuse to allow them to be cross-examined as to their present whereabouts and occupations, and such refusal cannot be justified on the ground that they had reformed, and should be protected from exposure as to their past lives.—In re Cross, 85 Hun, 343, 32 N. Y. Supp. 933.

[o] (N. D. 1896) For the purpose of affecting the credibility of a witness, it is proper to ask him on cross-examination questions the answers to which may tend to degrade, disgrace, or criminate him, though he may refuse to answer any question the answer to which will tend to criminate him.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[p] (Ohio, 1870) The limit to which a witness may be cross-examined on matters not relevant to the issue, for the purpose of judging of his character and credit from his own voluntary ad-

missions, rests in the sound discretion of the court trying the cause.—Wroe v. State, 20 Ohio St. 460.

[q] (S. C. 1895) On a criminal trial it is error to rule that the only way to discredit a witness for the state is to put witnesses on the stand to prove that he is not worthy of belief, as the witness may be discredited by cross-examination.—State v. Wallace, 44 S. C. 357, 22 S. E. 411.

[r] (Utah, 1895) It is not error to refuse to permit a witness to be asked on cross-examination, for the purpose of discrediting her testimony, whether her husband was not in the habit of whipping her, and whether she had not had trouble with him in regard to another woman.—People v. Thiede, 11 Utah, 241, 39 Pac. 837.

§ 1136. Character and reputation in general.

[a] (U. S. 1883) Questions affecting the character of a witness are not incompetent, and may be properly allowed on cross-examination.—Brockett v. New Jersey Steamboat Co. (C. C.) 18 Fed. 156.

[b] (Iowa, 1888) No just complaint can be made when it happens that, as an incidental consequence of his answers to competent questions concerning his residence and occupation, a witness discloses facts that impair his credibility as a witness, or impeach his moral character.—State v. Pugsley, 75 Iowa, 742, 38 N. W. 498.

[c] (Mo. 1891) A witness cannot be required to testify concerning the immorality of his previous life, where such testimony does not tend directly to prove some issue.—State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

[d] (N. H. 1851) A witness on cross-examination was asked, "Do your neighbors call you 'lying Josh'?" *Held*, that the question was inadmissible.—Herson v. Henderson, 23 N. H. (3 Fost.) 498.

[e] (N. D. 1896) When it is sought to impair the credibility of a witness on cross-examination by showing bad moral character, the interrogatories should be confined to specific facts, and should be so framed that the witness can squarely admit or deny.—State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[f] (Vt. 1868) No exception lies to the refusal of the presiding judge to admit evidence of the general bad reputation of a prosecutor for truth and veracity on his recross-examination by the defendant.—Pratt v. Rawson, 40 Vt. 183.

§ 1137. Particular traits of character or habits, and occupation.

Scope of inquiry, in general, see ante, §§ 1116–1120.

[a] (Ala. 1853) A witness may be cross-examined as to his habits of drinking.—Campbell v. State, 23 Ala. 44.

[b] (Cal. 1895) In a criminal case, it is error to allow the prosecution to ask one of defendant's witnesses whether he is connected with a gambling house, when the question is not called for by anything the witness has testified to.—People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

[c] (Mich. 1892) Where a witness for defendant testified that plaintiff had been discharged for drunkenness, it was improper to ask, on cross-examination, if witness was a total abstainer.—Fox v. Peninsular White Lead & Color Works, 92 Mich. 243, 52 N. W. 623.

[d] (Mich. 1895) The court may allow a witness to be cross-examined as to his habits.—Johnston v. Farmers' Fire Ins. Co. of York, 106 Mich. 96, 64 N. W. 5.

[e] (Mont. 1895) It was proper to refuse to permit a witness to be asked, for the purpose of affecting her credibility, whether she was addicted to the morphine habit, unless it was intended to show that she was under the influence of the drug at the time the events happened about which she was testifying, or that her powers of recollection were impaired thereby.—State v. Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

[f] (N. Y. 1889) On the cross-examination of defendant in a criminal case, he may be interrogated as to his possession of certain dies and plates, and as to whether he had not visited an engraver to obtain a die for a certain figure, in order to impeach his credibility by connecting him with a nefarious occupation.—People v. Giblin, 115 N. Y. 96, 21 N. E. 1062, 4 L. R. A. 757.

[g] (N. Y. 1893) It is competent to ask a witness who testifies for defendant, and who was an eyewitness of the homicide, as to her habit of using opium, as tending to affect her credibility.—People v. Webster, 68 Hun, 11, 22 N. Y. Supp. 634, judgment affirmed (1893) 139 N. Y. 73, 34 N. E. 730.

[h] (S. C. 1891) A witness who testified for the defense that the deceased was of a violent character, and the accused of a peaceable character, may be asked, on cross-examination, as to his own character for violence, for the purpose of showing his ability to judge concerning that of others.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

§ 1138. Chastity.

Scope of inquiry, see ante, § 1121.

[a] (Ala. 1871) A female witness in a criminal case may be asked on cross-examination whether she is not a person of such ill fame as to exclude her from society, where such ill fame arises from a want of veracity or chastity, as such facts render her less worthy of belief.—Boles v. State, 46 Ala. 204.

[b] (Iowa, 1895) Where, on a murder trial, a witness for the state testified only that defendant was at a certain house on the night of the homicide, defendant was not prejudiced by the exclusion of questions on cross-examination as to whether the house was not a sporting house, and the witness a prostitute, where it was not disputed that defendant was at the house at the time testified to, or that he was present when deceased was killed.—State v. Weems, 96 Iowa, 426, 65 N. W. 387.

[c] (Tex. 1895) In an action to determine the right to administer upon an estate it was competent to inquire of a witness, on cross-examination, concerning her character for chastity, to show the proper weight to be given her testimony.—Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56.

[d] (Tex. 1896) It may be shown on cross-examination, to discredit the witness, that she was the kept woman of a codefendant.—Thompson v. State, 35 Tex. Cr. R. 511, 34 S. W. 629.

[e] (Va. 1848) On a trial for felony, the counsel for the prisoner will not be allowed, on the cross-examination of a female witness for the commonwealth, to ask her "whether she is not generally reputed in the country to be a woman of unchaste habits, or whether she was not, or had not been, unchaste."—Howel v. Commonwealth, 5 Grat. 664.

[f] (Wash. 1891) For the purposes of impeachment a witness may be asked on cross-examination if she is a prostitute.—State v. Coella, 3 Wash. St. 99, 28 Pac. 28.

§ 1139. Particular acts or facts.

Privilege of witness, see ante, §§ 1018–1037.

Right to show particular act or facts in general, see ante, §§ 1125, 1131.

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[a] (U. S. 1895) The credibility of a witness cannot be impeached by asking her whether she has not had some difficulty with her husband.—Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237.

[aa] (U. S. 1875) A customs officer, who has given evidence for defendant on a prosecution for smuggling, cannot be interrogated as to violations by him of the revenue laws not connected with the charge in question, for the purpose of discrediting him.—United States v. Harris, Fed. Cas. No. 15,314 [12 Blatchf. 434].

[b] (Ala. 1853) An unmarried woman may be asked on cross-examination, although she has a right to refuse an answer, whether she has any children.—Campbell v. State, 23 Ala. 44.

[bb] (Ala. 1882) A witness may be asked on cross-examination, for the sake of affecting his credibility, whether, two years before, in another county, his character had not been shown to be that of a hog thief.—Baker v. Trotter, 73 Ala. 277.

[c] (Ark. 1855) In a criminal prosecution the prosecutrix cannot be compelled to answer questions tending to criminate and discredit her.—Pleasant v. State, 15 Ark. 624.

[cc] (Cal. 1861) In a suit for divorce by husband against his wife, her adultery with one C. was alleged. *Held*, that on cross-examination of C., questions as to the conduct of himself and defendant toward each other when traveling, and as to their intimacy since suit brought, were proper, as affecting his credit and enabling the jury to see what effect these things had, or might have had, upon his evidence.—Fuller v. Fuller, 17 Cal. 605.

[d] (Cal. 1888) A witness cannot be asked whether he was not impeached as a witness on the trial of another cause, under Code Civ. Proc. §§ 2051, 2052, providing that witnesses may be impeached by contradiction, evidence of general reputation or conviction of felony, and former statements about which he has first been questioned.—Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318.

[dd] (Cal. 1888) A witness cannot be asked on cross-examination, whether she is not in the habit of playing cards for money, and asking for money from her daughter for that purpose, under Code Civ. Proc. § 2051, providing that evidence of a particular wrongful act is not admissible to impeach a witness.—People v. Bowers, 18 Pac. 660.

[e] (Cal. 1889) Since a witness cannot be impeached by evidence of particular wrongful acts, it is not proper to question the witness as to such matters on cross-examination.—Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

[ee] (Cal. 1895) On a prosecution for vagrancy, defendant cannot be required to testify as to whether he had at another time and place passed under an assumed name.—People v. Denby, 108 Cal. 54, 40 Pac. 1051.

[f] (Conn. 1881) It is not error to permit defendant's witness to be asked against defendant's objection as to whether he lived with a woman who kept a house of ill fame when the court instructs the witness that he may answer the question or not as he chooses.—State v. Ward, 49 Conn. 429.

[ff] (Dak. 1887) The defendant in a murder trial insisted that he was acting in self-defense. The only witness who was present at the shooting was the wife of the deceased, and her testimony was in direct opposition to that of the defendant. On her cross-examination, the defense offered to prove by her that she had previously been married to one man, from whom she had never been divorced; that she then lived with another, who, by reason of her conduct, became jealous, and shot her, afterwards killing himself; that she and the deceased lived together as man and wife until the previous fall, and that they were married by reason of the regulations governing the military reservation on which they lived. This offer was rejected. *Held* error; the rejected questions were proper cross-examination for the purpose of impeaching her testimony.—United States v. Wood, 4 Dak. 455, 33 N. W. 59.

[g] (Ind. 1885) On cross-examination a witness cannot be discredited by eliciting proof of specific acts of misconduct or immorality.—Bessette v. State, 101 Ind. 85.

[gg] (Ind. 1890) Defendant asked a witness for plaintiff on cross-examination if his general reputation for truth had not been impeached in a previous case, and if a suit for damages was not pending against him on account of his false swearing in that case. *Held*, that an objection to said question was properly sustained, as it was not proper cross-examination, was in regard to an irrelevant matter, and was not a proper method of impeachment.—Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439.

[h] (Ind. 1895) A witness cannot be impeached by showing particular acts of good or bad conduct; and, although it may be proper under extraordinary circumstances to ask a witness questions on cross-examination for the purpose of showing his character and antecedents, this is a matter resting in the discretion of the court.—Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

[hh] (Iowa, 1866) It is improper to ask a witness on cross-examination if he was not successfully impeached as a witness on the trial of another case.—State v. Wooderd, 20 Iowa, 541.

[i] (Iowa, 1886) On an issue as to the satisfaction of notes, the testimony of a witness was based mainly on his examination of the books of the plaintiff, whose bookkeeper he was. When asked, on cross-examination, if he had not embezzled his employer's funds and falsified the books to conceal his embezzlement, he refused to answer. *Held*, that neither the questions nor refusal to answer should go to the jury.—Slocum v. Knosby, 70 Iowa, 75, 30 N. W. 18.

[ii] (La. 1846) Where a witness, to whom a question had been propounded while under cross-examination, for the purpose of impeaching his credibility, by showing that he had been guilty of gross fraud on another occasion, voluntarily answers it, and thereby admits his own turpitude, notwithstanding the objections of the party by whom he was introduced, his answer cannot be excluded on the ground of irrelevance.—Fink v. Lewis, 1 La. Ann. 395.

[j] (Mass. 1858) A witness who testifies that he absconded to avoid arrest for debt cannot be cross-examined upon the amount of money in his possession at the time of his flight, in order to show that he ran away through fear of a criminal prosecution, and thus to affect his credibility.—Quinsigamond Bank v. Hobbs, 77 Mass. (11 Gray) 250.

[jj] (Mass. 1859) A party to an action, who is called as a witness, cannot be asked on cross-examination, in order to affect his credibility, about his part in transactions irrelevant to the issue on trial.—Holbrook v. Dow, 78 Mass. (12 Gray) 357.

[k] (Mass. 1888) On trial of one charged with illegal sales of liquors, the state having introduced evidence tending to prove that, although defendant was an employé, he had sometimes assumed control during absence of the proprietor, it was not error to ask a witness for the defense, who testified that he had often visited the saloon, and that the proprietor was always there, if witness was not drunk, at about the time in question, in the vicinity of

the saloon.—Commonwealth v. Brady, 147 Mass. 583, 18 N. E. 568.

[kk] (Mich. 1878) A lawyer was arrested for feloniously entering a court building and removing public records. A policeman testified that the prisoner had asked him to leave the courtroom door unlocked so that he could get the papers, and that after consulting with his superior officer he had consented, and afterwards lay in wait for him. *Held* proper to ask him whether he had not previously had improper dealings with the prisoner and put in false swearing for him.—Saunders v. People, 38 Mich. 218.

[l] (Mich. 1883) It is improper, on a criminal prosecution, to ask the wife of the accused on cross-examination if she was not concerned in the larceny of a pair of shoes.—People v. Wolcott, 51 Mich. 612, 17 N. W. 78.

[ll] (Mich. 1892) Where defendant's case rests almost entirely on the testimony of a single witness, the plaintiff cannot ask such witness questions on cross-examination tending to prove perjury on the part of the witness, and an attempt to swindle him in other transactions.—Clink v. Gunn, 90 Mich. 135, 51 N. W. 193.

[m] (Mich. 1892) On a trial for larceny a witness for the people admitted that, though not the wife of defendant, she had been living with him as such, and was so doing when she testified that he committed the offense charged. On cross-examination, to show her bad moral character, she was asked if she had ever been married or ever had a child; if she had not been in a family way in her mother's house, some time ago; and if she did not have a child there. To each question she answered, "No." The court refused to permit any further questions in that line. *Held*, that the court did not abuse its discretion.—People v. Harrison, 93 Mich 594, 53 N. W. 725.

[mm] (Mich. 1895) Questions to a prosecuting witness on cross-examination as to whether he had been arrested for being drunk, and how many times he had been drunk, since the trouble, are properly excluded as irrelevant.—People v. Sutherland, 104 Mich. 468, 62 N. W. 566.

[n] (Minn. 1871) Allowing irrelevant questions to be put to a witness on cross-examination, tending to criminate, is within the discretion of the trial court.—State v. McCartey, 17 Minn. 76 (Gil. 54).

[nn] (Mo. 1893) It is proper cross-examination, as bearing on the credibility of a witness, to ask her if she had not kept girls for the purpose of prostitution.—State v. Hack, 118 Mo. 92, 23 S. W. 1089.

[o] (Mo. 1895) The court may, in its discretion, refuse to compel a witness to answer questions concerning his relations to his wife before their marriage, for the purpose of discrediting his testimony.—Goins v. City of Moberly, 127 Mo. 116, 29 S. W. 985.

[oo] (N. H. 1879) It is proper to refuse to permit a witness to be cross-examined as to his religious belief for the purpose of discrediting his testimony.—Free v. Buckingham, 59 N. H. 219.

[p] (N. Y. 1857) On the trial of an indictment for rape, it is not competent to prove acts of illicit sexual intercourse between the prosecutrix and persons other than defendant, though the prosecutrix had previously been asked on cross-examination in relation to such illicit acts and had denied them, as the character of a prosecutrix for chastity cannot be impeached by particular facts.—People v. Jackson, 3 Parker, Cr. R. 391.

[pp] (N. Y. 1859) The court has a discretionary power to interfere, and protect witnesses against any inquiries not relevant to the issues, as, for example, concerning a single act of bad conduct on their part.—Varona v. Socarras, 8 Abb. Prac. 302.

[q] (N. Y. 1866) In an action for damages for assault and battery, plaintiff could not be asked on cross-examination whether a certain person had not obtained a verdict against him for assault and battery, as the inquiry, if permissible, should have been as to the specific act of the witness, and not as to the litigation.—Yager v. Person, 42 Hun, 400.

[qq] (N. Y. 1867) It is within the discretion of the court to permit counsel on cross-examination to ask a witness whether he has not sworn falsely in a particular suit, or on some occasion, but not whether third persons have accused him of swearing falsely.—Hannah v. McKellip, 49 Barb. 342.

[r] (N. Y. 1867) Where, in an action on a promissory note, the question was whether it was given in settlement of the charge of rape, and the person on whom the offense was alleged to have been committed gave evidence tending to show that it was not given in settlement of the criminal offense, it was *held* to be competent to inquire of the witness whether at the trial of the indictment therefor she did not admit hanging out signals to induce the prisoner to visit her; such acts being proper for the consideration of the jury in estimating her character.—Shepard v. Parker, 36 N. Y. 517.

[rr] (N. Y. 1889) On a trial for assault in the first degree, defendant's counsel, for the purpose of impeaching the credibility of the complaining witness, asked him, on cross-examination, whether he had not procured the discharge of 30 workmen, which was proposed to be followed by testimony showing that he had done so by giving false information to their employer. *Held* properly disallowed.—People v. Ryan, 55 Hun, 214, 8 N. Y. Supp. 241, 7 N. Y. Cr. R. 448.

[s] (N. Y. 1890) At the trial of an action to recover damages for loss of services of plaintiff's infant daughter by reason of her seduction by defendant while a domestic in his family, where it appears that the girl made no disclosure to her parents for 18 months, and not until after she had been accused of taking things from defendant's residence, it is prejudicial error to prevent defendant from fully cross-examining her in respect to the articles which she was charged with taking, for the purpose of impairing her credibility as a witness.—Zopfi v. Smith, 55 Hun, 547, 8 N. Y. Supp. 876.

[ss] (N. Y. 1892) In an action to recover damages for an assault, it is improper to ask defendant, on cross-examination, "How many rows have you had within five or six years?"—Depan v. Wallace, 63 Hun, 632, 18 N. Y. Supp. 274.

[sss] (N. Y. 1895) Disparaging questions put to a witness called by plaintiff, as to his relations with plaintiff in regard to the misappropriation of moneys collected by him as agent, are not admissible.—Doolittle v. Gambee, 88 Hun, 364, 34 N. Y. Supp. 861, following Third Great Western Turnpike Road Co. v. Loomis (1865) 32 N. Y. 127, 88 Am. Dec. 311.

[t] (N. Y. 1895) The extent to which a witness may be cross-examined in regard to the commission of crimes for which he has not been tried, for the purpose of impeaching his credibility, is largely within the discretion of the trial court.—People v. Williams, 92 Hun, 354, 36 N. Y. Supp. 511.

[tt] (N. Y. 1896) It is not competent, on cross-examination, to ask a witness, for the purpose of impeaching him, if he had not recently been taken out of his sulky, at a certain race course, for "crooked driving," as such question is in respect to the acts of third persons.—

Lindsley v. Miller, 8 App. Div. 127, 39 N. Y. Supp. 393.

[ttt] (N. C. 1854) A witness, on cross-examination, may be asked, in order to discredit him, if he had not committed perjury in another state.—State v. March, 46 N. C. 526.

[u] (N. C. 1886) A woman was on trial for adultery with A. The principal witness for the prosecution was B. The woman swore that B. had had sexual intercourse with her. This B. denied. *Held*, that he could not be asked, for the purpose of discrediting him, whether, since his marriage, he had at any time had sexual intercourse with any other woman than his wife.—State v. Gay, 94 N. C. 814.

[uu] (N. C. 1891) On a trial for slandering an "innocent woman," after the examination of the prosecutrix, the court refused to allow defendant to ask her how many times she and her husband had separated, and the cause. *Held* that, since defendant had fair opportunity for cross-examination, it was discretionary with the court to allow this question.—State v. Morris, 109 N. C. 820, 13 S. E. 877.

[uuu] (N. C. 1893) In an action for slander, defendant may be asked, on cross-examination, if he did not compromise an action by him for slander, for $175, without requiring defendant in that action to retract the charge, as such question is competent as tending to impeach him as a witness to show he had put a low estimate on his own character.—Byrd v. Hudson, 113 N. C. 203, 18 S. E. 209.

[v] (Or. 1867) No error lies to the refusal below to permit the following question on cross-examination of a state witness on trial of an indictment for a murder alleged to have been committed in an affray: "Were you present at a public meeting called for the purpose of hanging these prisoners without a trial?"—State v. Fitzhugh, 2 Or. 227.

[vv] (Or. 1886) A witness may be cross-examined as to certain of his acts in order to lay the foundation for impeaching his testimony, where, if the facts elicited were true, the witness' acts were inconsistent with his testimony. —Krewson v. Purdom, 13 Or. 563, 11 Pac. 281.

[vvv] (Or. 1889) On a murder trial a witness was asked, on cross-examination, "Did you not kill a man in Chicago, and flee from there?" *Held*, that it was within the discretion of the court to exclude such inquiry.—State v. Chee Gong, 17 Or. 635, 21 Pac. 882.

[w] (Pa. 1857) A witness cannot be asked on cross-examination whether, on the trial of another cause, he had committed willful and corrupt perjury.—Elliott v. Boyles, 31 Pa. (7 Casey) 65.

[ww] (Tenn. 1896) A witness may be questioned on cross-examination as to recent specific acts of moral turpitude on his part, not involving a criminal offense, for the purpose of affecting his credibility.—Zanone v. State, 97 Tenn. (13 Pickle) 101, 36 S. W. 711, 35 L. R. A. 556.

[www] (Tex. 1889) A question asked of a witness on cross-examination, as to whether witness did not, on the trial of one for rape, endeavor to get this defendant to procure false testimony against the defendant in the rape case, was properly disallowed, as immaterial.—McCoy v. State, 27 Tex. App. 415, 11 S. W. 454.

[x] (Tex. 1892) Where defendant called a witness, who contradicted plaintiff in regard to the accident, it was error for the court to require the witness to state, over defendant's objection, that he (the witness) was a deserter from the United States army, since the testimony was irrelevant, and not the proper way to impeach the witness.—Gulf, C. & S. F. Ry. Co. v. Johnson, 83 Tex. 628, 19 S. W. 151.

[xx] (Tex. 1894) On indictment for rape, defendant's wife, having testified in his behalf, may be asked if she had not lived with defendant before marriage as his mistress.—Exon v. State, 33 Tex. Cr. R. 461, 26 S. W. 1088.

[xxx] (Tex. 1895) On prosecution for rape, prosecutrix's father, who was a witness for the state, may be asked, on cross-examination, if he did not offer, on payment of a certain sum, to leave the state, and not prosecute defendant, for the purpose of discrediting his testimony.—Jenkins v. State, 34 Tex. Cr. R. 201, 29 S. W. 1078.

[y] (Tex. 1895) The cross-examination of a witness for the purpose of affecting his credibility as to embezzlements committed by him ten years previously may be properly excluded on the ground that such embezzlements are too remote.—Linz v. Skinner, 11 Tex. Civ. App. 512, 32 S. W. 915.

[yy] (Tex. 1895) On a criminal trial the state may ask a witness for the defense, for the purpose of impeachment only, if she had had an illegitimate child.—Exon v. State (Cr. App.) 33 S. W. 336.

[yyy] (Va. 1848) On a trial for felony, the counsel for the prisoner will not be allowed, on the cross-examination of a female witness for the commonwealth, to ask the witness "if she had not been found with stolen goods in her possession."—Howel v. Commonwealth, 5 Grat. 664.

[z] (Va. 1848) On a trial for felony, the counsel for the prisoner having, on the cross-examination of a female witness, asked her if she was married, to which she answered in the negative, will not be allowed to ask her how old her youngest child was, or whether the said child was not a bastard.—Howel v. Commonwealth, 5 Grat. 664.

[zz] (W. Va. 1871) It is improper to ask a female witness—even with a view to impeach her upon her statement that she has been twice married, and that her first husband is dead—whether she did not marry her last husband before the death of the first.—Forney v. Ferrell, 4 W. Va. 729, following Howel v. Commonwealth (1848) 5 Grat. 664.

[zzz] (Wis. 1857) On trial of an indictment for adultery, a witness for the prosecution cannot be required on cross-examination to answer the question whether defendant or any other person had ever produced an abortion on her.—Ketchingman v. State, 6 Wis. 426.

[zzzz] (Wis. 1890) In an action for libel for sending demands for the payment of a debt through the mail, inclosed in envelopes on which was printed the words "For collecting bad debts," plaintiff was asked, on cross-examination, "How many men in this city did you owe besides defendant?" *Held*, that the question was incompetent because of its specific nature, instead of being directed to plaintiff's character and reputation.—Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

§ 1140. Accusation or indictment for crime.

Cross-examination with reference to record for purpose of identification, see post, § 1162.

Right to show accusation or indictment in general, see ante, § 1126.

[a] (U. S. 1887) Plaintiff's husband was asked, on cross-examination, whether he was not out upon bail, charged with an assault with intent to murder. *Held*, that such question was within the discretion of the court, and its exclusion could not be claimed as error.—Plinsky v. Germania Fire & Marine Ins. Co. (C. C.) 32 Fed. 47.

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[b] (Ala. 1894) On trial for assault with intent to murder, where it appeared that the prosecution was not begun for several months after the commission of the offense, and the one assaulted testified that he began it immediately after being informed by one who was a witness on the trial that she heard defendant and another, on the night of the assault, conspiring to rob him, evidence obtained on cross-examination of such witness that, a short time prior to giving such information, she had been arrested on a criminal charge preferred by defendant, is admissible to impair the credibility of her testimony in regard to the conspiracy.—Yarbrough v. State, 105 Ala. 43, 16 South. 758.

[c] (Cal. 1874) When a witness, called by the people in a criminal case, on his cross-examination, testifies that he is in jail, and, for the purpose of affecting his credibility, is then asked if he is not in jail charged with housebreaking, it is in the discretion of the court either to overrule or sustain an objection to the question; and if there are no facts which show an abuse of this discretion, a new trial will not be granted.—People v. Ah Who, 49 Cal. 32.

[d] (Cal. 1884) A witness' reputation cannot be attacked by asking him if he has ever been "arrested" for any crime.—People v. Elster, 3 Pac. 884.

[e] (Iowa, 1882) Code 1873, §§ 3648, 3649, providing that a witness may be interrogated as to his previous conviction of felony, and that his general moral character may be shown, for the purpose of impeaching his credibility, will not admit of his being asked whether he has been indicted for assault and battery, since that does not necessarily impair his moral character.—Kitteringham v. Dance, 58 Iowa, 632, 12 N. W. 612.

[f] (Ky. 1892) On a prosecution for murder, it is proper, in order to discredit a witness for the state, to ask him if he had not been indicted for a robbery and confessed the crime, if he did not stand indicted for conspiracy, and if he had not offered to swear for accused if he were assisted to get rid of the conspiracy charge.—Roberts v. Commonwealth, 20 S. W. 267.

[g] (Mass. 1854) An attorney at law, who testifies on the trial of an action on a promissory note to the time when the defendant's signature was affixed to the note, cannot be asked on cross-examination whether he has not been expelled from the bar, after a hearing before the court, because he had committed perjury, and whether the judge, upon whom the hearing was had, did not intimate to him that he had sworn falsely.—Smith v. Castles, 67 Mass. (1 Gray) 108.

[h] (Mich. 1881) In trover for converting pension money collected by defendant, a witness for plaintiff cannot be cross-examined as to whether he had ever been arrested for conspiring to procure fraudulent pensions.—Marx v. Hilsendegen, 46 Mich. 336, 9 N. W. 439.

[i] (Mich. 1882) A witness may be cross-examined, within the proper discretion of the court, not only as to whether he has ever been convicted of crime, but as to any serious charge brought against him.—Driscoll v. People, 47 Mich. 413, 11 N. W. 221.

[ii] (Mich. 1882) In a civil action for an indecent assault it is proper to cross-examine defendant as to whether he was ever arrested on a criminal charge made by a woman, and whether he settled it by payment of money.—Leland v. Kauth, 47 Mich. 508, 11 N. W. 292.

[j] (Mich. 1883) In a criminal prosecution it is improper to ask a witness for accused if he did not know that a warrant had been issued for him, and to permit him to be taken in custody as he was leaving the stand, as such proceeding was entirely unnecessary to any proper purpose.—People v. Wolcott, 51 Mich. 612, 17 N. W. 78.

[k] (Mich. 1883) In a criminal prosecution it is improper to ask a witness for the accused if he had ever been arrested and if he did not know that a warrant had been issued for his arrest.—People v. Wolcott, 51 Mich. 612, 17 N. W. 78.

[l] (Neb. 1894) On a trial for murder, it is not an abuse of discretion to permit a witness for defendant to be asked, on cross-examination, if he had been arrested for vagrancy, drunkenness, and other misdemeanors.—Hill v. State, 42 Neb. 503, 60 N. W. 916.

[m, n] (N. Y. 1885) A witness cannot be asked whether he has ever been indicted.—Kober v. Miller, 38 Hun, 184.

[o] (N. Y. 1886) A witness who, on cross-examination, admits that he has been arrested, cannot be asked on what charge.—Smith v. Mulford, 42 Hun, 347.

[p] (N. Y. 1888) In an action against a street car company for injury to a passenger, the driver, having been called to contradict the testimony of plaintiff, may be asked whether he had not been discharged by a previous employer for embezzling money, as tending to show bad moral character, and break down his credibility.—Allen v. Dry Dock, E. B. & B. R. Co. (City Ct. N. Y.) 2 N. Y. Supp. 738.

[q] (N. Y. 1891) It was not competent, on an accounting, to discredit defendant by asking him if he was under indictment for perjury.—Van Bokkelein v. Berdell, 130 N. Y. 141, 29 N. E. 254, reversing (1888) 33 Hun, 605, 3 N. Y. Supp. 333.

[r] (N. Y. 1891) After the impeaching evidence was in, defendant testified that there was much ill feeling between him and certain of the impeaching witnesses—as to one of them, that a false report had been circulated that defendant had slandered his daughter; also that he had slandered other girls; and that these false reports had created bitter feeling in the vicinity. *Held*, that it was proper to ask him on cross-examination if he had not also been charged with having committed adultery with a girl there.—Van Bokkelein v. Berdell, 50 Hun, 605, 3 N. Y. Supp. 333, judgment reversed (1891) 130 N. Y. 141, 29 N. E. 254.

[s] (N. Y. 1891) Evidence was given tending to impeach defendant, and he was asked if he had not been indicted for perjury, and if certain suits had not been decided against him. He admitted the indictment, and denied the result of the suits as claimed. *Held*, that the evidence was harmless.—Van Bokkelein v. Berdell, 50 Hun, 605, 3 N. Y. Supp. 333, judgment reversed (1891) 130 N. Y. 141, 29 N. E. 254.

[t] (N. Y. 1892) While, on cross-examination, a witness may be required to testify that he has been convicted of a crime, it is not competent to compel him to testify that he has been indicted, simply.—Sullivan v. Newman, 63 Hun, 625, 17 N. Y. Supp. 424.

[u] (N. Y. 1892) In an action on a note an objection to the question, "Were you ever arrested?" propounded to a witness, was properly sustained, since the mere fact of an arrest could not lessen his credibility.—V. Loewer's Gambrinus Brewery Co. v. Bachman (Com. Pl.) 18 N. Y. Supp. 138.

[v] (Or. 1886) Subject to the discretion of the court, and to the witness' right to claim his privilege, he may be compelled to answer on cross-examination, whether he had not been arrested for robbery.—State v. Bacon, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8.

[w] (Tex. 1893) For the purpose of impeaching a witness, he may be asked if he is not under indictment for theft, and the fact that he has been released on bail does not relieve

him from answering the question.—Carroll v. State, 32 Tex. Cr. R. 431, 24 S. W. 100, 40 Am. St Rep. 786.

[x] (Tex. 1895) The statement of a witness on cross-examination, that he had been indicted for embezzlement, and was then in jail awaiting trial, was admissible as bearing on his credibility.—Texas & P. Coal Co. v. Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843.

[y] (Utah, 1893) Where a witness for the defense testified that defendant was a peaceable, law-abiding man, it was competent to interrogate such witness as to whether he (witness) had ever been indicted, in order to test his credibility.—People v. Hite, 8 Utah, 461, 33 Pac. 254.

[z] (Va. 1848) On the cross-examination of a female witness for the commonwealth, on a trial for felony, the witness was asked if, while she lived with A., she was not accused of stealing or taking things not her own, and whether, when she left there, she was not followed, and the things taken from her. *Held*, that it was proper for the court to inform the witness that she was not bound to answer the question unless she thought proper.—Howell v. Commonwealth, 5 Grat. 664.

[zz] (Wis. 1891) The question to a witness, whether he was ever arrested for fast driving in a certain place, and an offer to show by the record that he had pleaded guilty to a violation of the ordinance of that place against fast driving, are properly excluded, since the question is not sufficiently definite to lay a foundation for the introduction of the record to contradict the witness if he should deny the fast driving.—Sieber v. Amunson, 78 Wis. 679, 47 N. W. 1126.

§ 1141. Conviction or imprisonment.

Right to show conviction or imprisonment, in general, see ante, § 1127.

[a, b] (Cal. 1886) A party seeking to impeach a witness may ask him with respect to a judgment in a prosecution for felony against him, and this includes the right to ask him whether he was convicted of felony, and, if so, what sentence was imposed on him.—People v. Rodrigo, 69 Cal. 601, 11 Pac. 481.

[c] (Cal. 1886) A witness cannot be asked, upon cross-examination, for the purpose of discrediting him, whether he has been arrested and convicted of a misdemeanor, as Code Civ. Proc. § 2051, limits such evidence to conviction of felony.—People v. Carolan, 71 Cal. 195, 12 Pac. 52.

[d] (Cal. 1890) Under Code Civ. Proc. § 2051, providing that a witness cannot be impeached by evidence of particular wrongful acts, it is improper to ask a witness, on cross-examination, whether he is not the person who was arrested for beating a woman of the town, and who appeared, pleaded guilty, and paid a fine therefor.—Jones v. Duchow, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256.

[e] (Cal. 1893) A witness cannot on cross-examination, for the purpose of impeaching him, be asked as to his having been in jail, etc., as, under Code Civ. Proc. § 2051, he cannot be questioned as to particular wrongful acts.—Clements v. McGinn, 33 Pac. 920.

[f] (Cal. 1895) In order to impeach the credibility of a witness, he may be asked if he was ever convicted of a felony, and, under Code Civ. Proc. § 2051, the name of the particular felony may be mentioned.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[g] (Ga. 1889) The court did not err in admitting the answer of defendant's witness, who of his own motion answered that he had served time in the penitentiary, though defendant's counsel had objected to the question.—Taylor v. State, 83 Ga. 647, 10 S. E. 442.

[h] (Ill. 1889) Under Rev. St. c. 51, § 1, providing that the fact of a conviction of a witness for a crime may be proven like any fact not of record, either by the witness himself or by any other witness cognizant of such conviction, as impeaching testimony, on a claim for services sought to be collected from the estate of a deceased person, it is proper as affecting the credibility of the claimant to allow him to be interrogated on cross-examination as to whether he was ever convicted of a crime or confined in the penitentiary.—Handlin's Estate v. Law, 34 Ill. App. 84.

[i] (Iowa, 1888) Under Code 1873, § 3648, providing that "a witness may be interrogated as to his previous conviction for a felony," etc., the question, "Were you ever convicted of a crime?" is improper, a crime not necessarily being a felony.—Hanners v. McClelland, 74 Iowa, 318, 37 N. W. 389.

[j] (Iowa, 1890) A witness may be questioned on cross-examination as to his past and present residence, even though such questioning elicit the fact that he has been an inmate of the county jail.—State v. Row, 81 Iowa, 138, 46 N. W. 872.

[k] (Mich. 1867) It is competent, within the discretion of the presiding judge, on cross-examination, to ask the witness whether he has ever been confined in the state prison, and to sift thoroughly his character and antecedents.—Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203.

[l] (Minn. 1890) Under Pen. Code, § 531, providing that for the purpose of discrediting a witness his conviction of a crime may be shown by the record or by cross-examination, a witness may be asked on cross-examination whether he has been convicted of a crime in a certain court at a given date.—State v. Adamson, 43 Minn. 196, 45 N. W. 152.

[m] (Mo. 1893) In a criminal prosecution a witness may be asked whether he has been convicted of a crime, to discredit his testimony.—State v. Taylor, 22 S. W. 806, following State v. Miller (1890) 100 Mo. 606, 13 S. W. 832, 1051.

[n] (Mo. 1894) For the purpose of discrediting a witness, he may be asked if he has not been in jail for stealing.—State v. Pratt, 121 Mo. 566, 26 S. W. 556.

[o] (Mo. 1894) So, it may be asked him if he was not put in jail for assaulting and beating a woman.—State v. Pratt, 121 Mo. 566, 26 S. W. 556.

[p] (Neb. 1884) Under Code Civ. Proc. § 330, providing that facts which have hitherto caused the exclusion of testimony may be shown to lessen its credibility, and section 338, providing that "a witness may be interrogated as to his previous conviction of a felony," a witness cannot be asked whether he had previously "pleaded guilty" of a penitentiary offense.—Marion v. State, 16 Neb. 349, 20 N. W. 289.

[q] (Nev. 1876) The rule that a witness may be questioned as to matters that impair his credit, subject to his right to refuse to answer, does not extend to asking if he has been convicted of assaults and batteries; for this does not legitimately affect his credibility.—State v. Huff, 11 Nev. 17.

[r] (N. J. 1807) A witness need not answer a question as to whether he had been convicted and punished for larceny.—State v. Bailey, 2 N. J. Law (1 Penning.) 415.

[s] (N. Y. 1869) A witness cannot be asked whether he has been convicted and sentenced to the penitentiary, although he does not himself object.—In re Real, 55 Barb. 186, 7 Abb Prac. (N. S.) 26.

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[t] (N. Y. 1870) A witness upon cross-examination may be asked whether he has been in jail, the penitentiary, or state prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places. The extent of the cross-examination of this character is somewhat in the discretion of the court, and must necessarily be so to prevent abuse. This discretion should be liberally exercised with a view to arrive at truth.—Real v. People, 42 N. Y. 270.

[u] (N. Y. 1871) A witness cannot be questioned on cross-examination as to his having been convicted of crime, for the purpose of impeaching his testimony.—Tifft v. Moor, 59 Barb. 619.

[v] (N. Y. 1889) Under Pen. Code, § 714, which permits a witness' conviction of a crime to be shown upon cross-examination, without production of the record, a witness who has stated how long it is since he came out of prison may be asked what crime he was convicted of.—Spiegel v. Hays, 118 N. Y. 660, 22 N. E. 1105.

[w] (S. C. 1891) It is competent, on cross-examination, for the purpose of attacking the witness' credibility, to ask him whether he has ever been convicted of larceny.—State v. Merriman, 34 S. C. 16, 12 S. E. 619; Id., 34 S. C. 576, 13 S. E. 328.

[x] (Tex. 1886) For the purpose of discrediting him, a witness may be asked if he has not been in the penitentiary, and was not sent there from a certain county.—Lights v. State, 21 Tex. App. 308, 17 S. W. 428, overruling State v. Ezell (1874) 41 Tex. 35.

[y] (Tex. 1895) A witness may be impeached by asking him on cross-examination as to whether he is at the time working out a fine for theft.—Sentell v. State, 34 Tex. Cr. R. 260, 30 S. W. 226.

[z] (Va. 1882) The question to a witness, "Were you not arrested, tried, and convicted?" before a certain magistrate's court, no offense being specified, does not indicate that he was convicted of any offense involving his character, nor his truth on oath: and such question was improper.—Langhorne v. Commonwealth, 76 Va. 1012.

[zz] (Wis. 1853) It is not proper to ask a witness whether he has ever been convicted of a felony.—Kirschner v. State, 9 Wis. 140.

§ 1142. —— Necessity of record of conviction as best evidence.

Accused as witness in criminal prosecution, see post, § 1148.

[a] (Ala. 1877) A witness may be asked on cross-examination if he had not pleaded guilty of stealing from a store in a certain place, where it appears that the plea referred to was before a justice of the peace, and it is not shown that any record was made of it.—Childs v. State, 58 Ala. 349.

[b] (Ga. 1873) It is not competent to show by a witness, for the purpose of degrading and impeaching him, that he had, during the term of the court then in session, pleaded guilty to a criminal offense. The record of the plea of guilty is the highest and best evidence.—Johnson v. State, 48 Ga. 116.

[c] (Md. 1894) A witness may be asked, for the purpose of impairing his credibility, if he had been convicted of any crime, without first introducing the record evidence of such conviction.—McLaughlin v. Mencke, 80 Md. 83, 30 Atl. 603.

[d] (Mass. 1855) The fact that a witness has been in the house of correction cannot be proved by cross-examination of the witness, but must be proved by the record of his conviction.—Commonwealth v. Quin, 71 Mass. (5 Gray) 478.

[e] (Mass. 1894) A witness cannot be asked, for the purpose of impeachment, whether he has ever been in jail, unless the record of a conviction be produced.—Commonwealth v. Sullivan, 161 Mass. 59, 36 N. E. 583.

[f] (Mo. 1890) It was not error to ask a witness whether he had not been in the penitentiary two or three times. When the purpose is only to discredit the witness, it is not necessary to produce the record to prove a previous conviction.—State v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; Id., 14 S. W. 311.

[g] (Mo. 1893) For the purpose of discrediting a witness he may be asked whether he has not been arrested and sent to jail for stealing, as, in such case, it is not necessary to produce the records.—State v. Taylor, 118 Mo. 153, 24 S. W. 449.

[h] (Mo. 1894) It is proper in a criminal cause to ask a witness, for the purpose of discrediting his testimony, how often he has been in the county jail on sentence for crime, and it is unnecessary in such case to produce the record of convictions.—State v. Martin, 124 Mo. 514, 28 S. W. 12.

[i] (Mo. 1895) The record of a conviction is the best evidence thereof; and questions to a witness as to whether he had been convicted, or did not plead guilty, of hog theft, are properly excluded.—Berman v. Hoke, 61 Mo. App. 376, 1 Mo. App. Rep'r, 629.

[j] (N. H. 1842) On the cross-examination of a witness, it is improper to ask him, and he need not answer, whether he has been a convict in a state prison; as the record of his conviction is the best evidence, and should be produced, if the party desires to prove the fact.—Clement v. Brooks, 13 N. H. 92.

[k] (N. Y. 1862) Where a witness is asked whether he has not been convicted of petit larceny, though he do not himself object to answer, yet objection may be taken by the counsel for the party interested in the answer, who may claim that the fact, if admissible at all in evidence, must be proved by record.—Newcomb v. Griswold, 24 N. Y. 298.

[l] (N. Y. 1869) The court in a criminal prosecution cannot properly permit a witness, whose testimony for the prisoner is material, to be asked if he had been convicted of a criminal offense and sentenced to the penitentiary, for the purpose of impeaching his testimony, since the conviction could only be proved by the record.—In re Real, 55 Barb. 186.

[m] (Tenn. 1895) That one offered as a witness has been convicted of an infamous crime cannot be shown by cross-examining him, but the record of his conviction must be introduced.—Boyd v. State, 94 Tenn. (10 Pickle) 505, 29 S. W. 901.

§ 1143. Redirect examination.

[a] (N. Y. 1895) A witness who testified on cross-examination that he was once in prison, may, on redirect examination, state the crime for which he was imprisoned.—Carlson v. Winterson, 147 N. Y. 652, 723, 42 N. E. 347.

(b) ACCUSED AS WITNESS IN CRIMINAL PROSECUTION.

IN GENERAL, § 1144.
PARTICULAR ACTS OR FACTS, § 1145.
FORMER ACCUSATION OR INDICTMENT FOR CRIME, § 1146.
FORMER CONVICTION OR IMPRISONMENT, § 1147.
—— NECESSITY OF RECORD AS BEST EVIDENCE, § 1148.

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Privilege of accused as witness, see ante, §§ 1043–1046.

Scope and inquiry as to character, in general, see ante, §§ 1129–1132.

§ 1144. In general.

[a] (Mont. 1895) The prosecution has no right to examine defendant so as to elicit testimony reflecting on her moral character, where it was not proper cross-examination, and did not legitimately tend to impair her credibility.—State v. Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

[b] (N. Y. 1878) Where on a criminal trial the prisoner offers himself as a witness in his own behalf, he may be asked questions on cross-examination disclosing his past life and conduct to impeach his credit, though tending to show he has been guilty of the same crime for which he is on trial.—People v. Casey, 72 N. Y. 393.

[c] (S. D. 1894) In the absence of statutory limitation as to the extent to which an accused person testifying in his own behalf can be cross-examined, a defendant who testifies in his own behalf, without reservation on all the issues, may, within the discretion of the court, be cross-examined concerning matters which tend to impugn his moral character, or lay the foundation for impeachment.—State v. Phelps, 5 S. D. 480, 59 N. W. 471.

[d] (Utah, 1893) Defendant having testified in his own behalf, it was competent to inquire of him what his business and antecedents were for 20 years past, and to interrogate him as to past transactions to test his recollection, and to bring to light conduct that would affect his credibility.—People v. Hite, 8 Utah, 461, 33 Pac. 254.

§ 1145. Particular acts or facts.

[a] (Ala. 1885) Defendant, testifying for himself, cannot be asked on cross-examination whether he did not belong to the "Jesse James gang."—Clarke v. State, 78 Ala. 474, 56 Am. Rep. 45.

[b] (Ark. 1894) One charged with murder cannot be cross-examined to show that he had left another state five years before because he had committed rape there, and was afraid to remain.—Holder v. State, 58 Ark. 473, 25 S. W. 279.

[c] (Cal. 1885) A defendant who has testified on his own behalf cannot be asked on cross-examination concerning the unlawful nature of the business carried on at the place where he was doorkeeper.—People v. Hamblin, 68 Cal. 101, 8 Pac. 687.

[d] (Cal. 1888) On trial for embezzling $550 received by defendant on a certain state warrant, it is not error to cross-examine him as to whether he had received money on other state warrants, as tending to convict him of another crime.—People v. McCarthy, 18 Pac. 862.

[e] (Cal. 1889) On the trial for an assault with intent to commit murder, it is error to permit the prosecution to ask defendant, on cross-examination, whether he had not assaulted certain other persons with a deadly weapon, as to which he had not been examined in chief, and an objection that such evidence is immaterial is sufficient.—People v. Bishop, 81 Cal. 113, 22 Pac. 477.

[f] (Cal. 1890) On a trial for burning property with intent to defraud the insurers, where the keeper of a bawdy house testifies to admissions made by defendant to her within a few days after the fire, it is error to permit defendant to be cross-examined as to whether or not he was at the house on a day six months after the fire, as such evidence is clearly immaterial, and evidently offered for the sole purpose of degrading his character, and prejudicing the jury against him.—People v. Tiley, 84 Cal. 651, 24 Pac. 290.

[g] (Cal. 1894) Where, in a prosecution for forgery, defendant's direct examination is confined entirely to the document which he is charged with forging, it is error to permit him, against objection, to be cross-examined concerning a similar document, also claimed to have been forged.—People v. Baird, 104 Cal. 462, 38 Pac. 310.

[h] (Cal. 1895) On a trial for assault, it is error to allow the prosecuting attorney to question defendant as to whether he lived in a house of prostitution; and the fact that his answers are in the negative, or objections to the questions are sustained, does not cure the error.—People v. Un Dong, 106 Cal. 83, 39 Pac. 12.

[i] (Ill. 1877) On a trial for rape, it is error to compel the defendant to state on cross-examination that he had visited houses of ill fame and had connection with the inmates.—Gifford v. People, 87 Ill. 210.

[j] (Ill. 1880) A defendant, on trial for murder, was compelled, against objection, to testify on cross-examination that he had frequented saloons, and at divers times drank, and played cards and billiards in saloons. *Held* error.—Hayward v. People, 96 Ill. 492.

[k] (Iowa, 1890) A witness who testifies on his own behalf may, in order to impeach him, be questioned on cross-examination as to his former offenses.—State v. O'Brien, 81 Iowa, 93, 46 N. W. 861.

[l] (Kan. 1894) Allowing an extended cross-examination of defendant with reference to his conduct 15 years before the homicide, as to acts of adultery that had no connection with the offense charged, was error.—State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

[m] (Ky. 1892) Upon trial for assault with a dangerous weapon, the accused, after he had been examined by his counsel and directed to take his seat, announced to the jury that he was a peaceable citizen, and had no idea of shooting the prosecuting witness; whereupon the state's attorney asked him whether he had had trouble with many other neighbors. *Held*, that although this method of cross-examination was improper, yet, as the defendant had placed his character as a peaceable man in issue, the error was not sufficient to reverse the judgment.—Taylor v. Commonwealth, 18 S. W. 852.

[n] (Me. 1876) In a murder trial, counsel for the state was permitted, against objection, to ask the prisoner as a witness in his own behalf whether he had not, while drunk, assaulted certain persons named. These matters had not been brought out in the examination in chief, nor had any defense of good character been set up. *Held* error.—State v. Carson, 66 Me. 116.

[o] (Me. 1876) Where one on trial for murder is a witness in his own behalf, it is not proper to ask him about committing other crimes.—State v. Carson, 66 Me. 116.

[p] (Mass. 1891) In a prosecution for keeping intoxicating liquors with intent to sell, defendant's attorney stated, in opening the case, that defendant had previously been engaged in the business of liquor keeping, and was convicted of the same. *Held*, in consequence of such statement, that the prosecution was properly allowed to ask defendant, on cross-examination, if he had not sold intoxicating liquors at his hotel in another place four or five years ago.—Commonwealth v. Goodnow, 154 Mass. 487, 28 N. E. 677.

[q] (Neb. 1892) On a trial for larceny of horses, it is reversible error for the prosecuting attorney, in his cross-examination of defendant, to ask him whether it is not a fact that he stole a horse in another place and on another

occasion, and whether he does not know that the sheriff has a warrant for him for stealing horses at such place, though such questions are answered in the negative.—Elliott v. State, 34 Neb. 48, 51 N. W. 315.

[r] (N. H. 1874) Although an accused is under no obligation by his testimony to criminate himself concerning any collateral matters, even though he volunteers to become a witness in chief, yet where he voluntarily testifies on cross-examination that he has been guilty of a felony, such testimony is competent as affecting his credit as a witness.—State v. Archer, 54 N. H. 465.

[s] (N. M. 1895) Where, on a prosecution for larceny, defendant appears herself as a witness, it is proper, on cross-examination, to draw from her, as affecting her credibility, the fact that she was living in adultery.—Territory v. De Gutman, 8 N. M. 92, 42 Pac. 68.

[t] (N. Y. 1876) Where accused testified in his own behalf, it was proper to show on cross-examination that he had committed other offenses of the kind charged, to affect his credit as a witness.—Maine v. People, 9 Hun, 113.

[u] (N. Y. 1884) Upon the trial of an indictment for an assault, when defendant in his own behalf had given material testimony, conflicting with that given by the prosecution, he might be asked if he had not committed an assault on another person.—People v. Irving, 95 N. Y. 541, reversing (1884) 31 Hun, 614.

[v] (N. Y. 1884) In a prosecution for arson for the purpose of securing the insurance on the property burned, defendant, for the purpose of discrediting his testimony, may be questioned as to his connection with other fires, and the insurance on the buildings burned.—People v. Hooghkirk, 96 N. Y. 149, 67 How. Prac. 256.

[w] (N. Y. 1887) On the trial for an indictment for murder, the accused does not suffer any prejudice by being cross-examined as to having shot a man on another occasion, where his counsel, during the examination of accused's father, has already proved that fact, and that accused had been honorably acquitted.—People v. Ogle, 104 N. Y. 511, 11 N. E. 53, affirming (1886) 4 N. Y. Cr. R. 349.

[ww] (N. Y. 1892) On the cross-examination of one indicted for murder, the question whether, some months before the homicide, he did not draw a pistol on two disreputable women in a saloon, and threaten to shoot them, is admissible as affecting defendant's credibility.—People v. McCormack, 135 N. Y. 663, 32 N. E. 26.

[x] (S. C. 1891) An accused person, who becomes a witness in his own behalf, assumes the position of an ordinary witness; and where he has put his character for peaceableness in issue, he may be cross-examined as to particular acts of violence which he is alleged to have committed.—State v. Merriman, 34 S. C. 16, 12 S. E. 619, affirmed (1891) 34 S. C. 576, 13 S. E. 328.

[y] (S. C. 1891) He may also be asked whether he ever told persons named of an act of violence which he at one time purposed, but was prevented from consummating, with a view to contradicting him by the evidence of the persons named.—State v. Merriman, 34 S. C. 16, 12 S. E. 619, affirmed (1891) 34 S. C. 576, 13 S. E. 328.

[yy] (S. C. 1892) One accused of crime, who takes the stand in a criminal case, places himself in the position of an ordinary witness, and may be interrogated, therefore, as to his disbelief in religion, or as to any other matter tending to affect his credibility.—State v. Turner, 36 S. C. 534, 15 S. E. 602.

[z] (Tex. 1892) A defendant in a criminal case, who has testified in his own behalf, may be asked by the state, for purpose of impeachment, if he did not secretly send a letter while he was confined in jail, though he had not testified about any letter when examined in his own behalf.—White v. State, 30 Tex. App. 652, 18 S. W. 462.

[zz] (Wis. 1881) Where the testimony of a defendant in a criminal action on material points was in direct conflict with that of the prosecuting witness, and also showed that he was a married man, and had not been with his wife for some weeks, it was not error to sustain an inquiry, on cross-examination, as to the length of time since he had lived with her, as the answer might have had some bearing on his credibility.—Yanke v. State, 51 Wis. 464, 8 N. W. 276.

§ 1146. Former accusation, or indictment for crime.

Cross-examination with reference to record of conviction, see post, § 1162.

Right to show former accusation or indictment, in general, see ante, § 1132.

[a] (Ala. 1885) A defendant, testifying for himself, cannot be cross-examined, against his objection, as to former indictments against him for other offenses.—Smith v. State, 79 Ala. 21.

[b] (Ark. 1895) It was improper to ask accused, on cross-examination, if he had not previously been three times indicted for felony, and his answer that he had been each time acquitted did not cure the error.—Bates v. State, 60 Ark. 450, 30 S. W. 890.

[c] (Cal. 1885) A defendant who has testified on his own behalf cannot be asked, on cross-examination, whether he had not been arrested for shooting at people.—People v. Hamblin, 68 Cal. 101, 8 Pac. 687.

[d] (Ind. 1894) A defendant on a trial for murder, who testifies in his own behalf, may be cross-examined as to past arrests and prosecutions against him, to discredit his testimony.—Parker v. State, 136 Ind. 284, 35 N. E. 1105.

[e] (La. 1893) On a trial for larceny, where defendant testifies in his own behalf, but does not put his character in issue, the state, not for the purpose of attacking his character as a defendant, but in order to test his credibility as a witness, may ask him on cross-examination whether he had ever been arrested for stealing.—State v. Murphy, 45 La. Ann. 958, 13 South. 229.

[f] (La. 1893) Where defendant, in his own behalf, in a criminal case, testifies, his credibility may be attacked by interrogating him in reference to his having been previously prosecuted or criminally punished.—State v. Alexis, 45 La. Ann. 973, 13 South. 394.

[g] (La. 1896) It is competent to ask the defendant, who is a witness in his own behalf, if he is charged with other offenses, and whether there are other bills pending against him.—State v. Southern, 48 La. Ann. 628, 19 South. 668.

[h] (Mich. 1882) Where a person on trial for crime voluntarily offers himself as a general witness in his own behalf, it is discretionary with the trial judge to allow him to be cross-examined as to whether he has been arrested before, or has not been in the state prison.—People v. Cummins, 47 Mich. 334, 11 N. W. 184, 186.

[i, j] (Mich. 1892) It is permissible, as affecting his credibility, to show, on cross-examination of defendant, that he has before been arrested for another crime.—People v. Foote, 93 Mich. 38, 52 N. W. 1036.

[k] (N. J. 1896) Upon the trial of an indictment for keeping a disorderly house, the defendant was permitted to be asked on cross-

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Privilege of accused as witness, see ante, §§ 1043–1046.

Scope and inquiry as to character, in general, see ante, §§ 1129–1132.

§ 1144. In general.

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[b] (N. Y. 1878) Where on a criminal trial the prisoner offers himself as a witness in his own behalf, he may be asked questions on cross-examination disclosing his past life and conduct to impeach his credit, though tending to show he has been guilty of the same crime for which he is on trial.—People v. Casey, 72 N. Y. 393.

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[w] (N. Y. 1887) On the trial for an indictment for murder, the accused does not suffer any prejudice by being cross-examined as to having shot a man on another occasion, where his counsel, during the examination of accused's father, has already proved that fact, and that accused had been honorably acquitted.—People v. Ogle, 104 N. Y. 511, 11 N. E. 53, affirming (1886) 4 N. Y. Cr. R. 349.

[ww] (N. Y. 1892) On the cross-examination of one indicted for murder, the question whether, some months before the homicide, he did not draw a pistol on two disreputable women in a saloon, and threaten to shoot them, is admissible as affecting defendant's credibility.—People v. McCormack, 135 N. Y. 663, 32 N. E. 26.

[x] (S. C. 1891) An accused person, who becomes a witness in his own behalf, assumes the position of an ordinary witness; and where he has put his character for peaceableness in issue, he may be cross-examined as to particular acts of violence which he is alleged to have committed.—State v. Merriman, 34 S. C. 16, 12 S. E. 619, affirmed (1891) 34 S. C. 576, 13 S. E. 328.

[y] (S. C. 1891) He may also be asked whether he ever told persons named of an act of violence which he at one time purposed, but was prevented from consummating, with a view to contradicting him by the evidence of the persons named.—State v. Merriman, 34 S. C. 16, 12 S. E. 619, affirmed (1891) 34 S. C. 576, 13 S. E. 328.

[yy] (S. C. 1892) One accused of crime, who takes the stand in a criminal case, places himself in the position of an ordinary witness, and may be interrogated, therefore, as to his disbelief in religion, or as to any other matter tending to affect his credibility.—State v. Turner, 36 S. C. 534, 15 S. E. 602.

[z] (Tex. 1892) A defendant in a criminal case, who has testified in his own behalf, may be asked by the state, for purpose of impeachment, if he did not secretly send a letter while he was confined in jail, though he had not testified about any letter when examined in his own behalf.—White v. State, 30 Tex. App. 652, 18 S. W. 462.

[zz] (Wis. 1881) Where the testimony of a defendant in a criminal action on material points was in direct conflict with that of the prosecuting witness, and also showed that he was a married man, and had not been with his wife for some weeks, it was not error to sustain an inquiry, on cross-examination, as to the length of time since he had lived with her, as the answer might have had some bearing on his credibility.—Yanke v. State, 51 Wis. 464, 8 N. W. 276.

§ 1146. Former accusation, or indictment for crime.

Cross-examination with reference to record of conviction, see post, § 1162.

Right to show former accusation or indictment, in general, see ante, § 1132.

[a] (Ala. 1885) A defendant, testifying for himself, cannot be cross-examined, against his objection, as to former indictments against him for other offenses.—Smith v. State, 79 Ala. 21.

[b] (Ark. 1895) It was improper to ask accused, on cross-examination, if he had not previously been three times indicted for felony, and his answer that he had been each time acquitted did not cure the error.—Bates v. State, 60 Ark. 450, 30 S. W. 890.

[c] (Cal. 1885) A defendant who has testified on his own behalf cannot be asked, on cross-examination, whether he had not been arrested for shooting at people.—People v. Hamblin, 68 Cal. 101, 8 Pac. 687.

[d] (Ind. 1894) A defendant on a trial for murder, who testifies in his own behalf, may be cross-examined as to past arrests and prosecutions against him, to discredit his testimony.—Parker v. State, 136 Ind. 284, 35 N. E. 1105.

[e] (La. 1893) On a trial for larceny, where defendant testifies in his own behalf, but does not put his character in issue, the state, not for the purpose of attacking his character as a defendant, but in order to test his credibility as a witness, may ask him on cross-examination whether he had ever been arrested for stealing.—State v. Murphy, 45 La. Ann. 958, 13 South. 229.

[f] (La. 1893) Where defendant, in his own behalf, in a criminal case, testifies, his credibility may be attacked by interrogating him in reference to his having been previously prosecuted or criminally punished.—State v. Alexis, 45 La. Ann. 973, 13 South. 394.

[g] (La. 1896) It is competent to ask the defendant, who is a witness in his own behalf, if he is charged with other offenses, and whether there are other bills pending against him.—State v. Southern, 48 La. Ann. 628, 19 South. 668.

[h] (Mich. 1882) Where a person on trial for crime voluntarily offers himself as a general witness in his own behalf, it is discretionary with the trial judge to allow him to be cross-examined as to whether he has been arrested before, or has not been in the state prison.—People v. Cummins, 47 Mich. 334, 11 N. W. 184, 186.

[i, j] (Mich. 1892) It is permissible, as affecting his credibility, to show, on cross-examination of defendant, that he has before been arrested for another crime.—People v. Foote, 93 Mich. 38, 52 N. W. 1036.

[k] (N. J. 1896) Upon the trial of an indictment for keeping a disorderly house, the defendant was permitted to be asked on cross-

examination whether he had not been indicted for keeping a disorderly house at another place. *Held* error.—Roop v. State, 58 N. J. Law (29 Vroom) 479, 34 Atl. 749.

[l] (N. Y. 1870) Where the plaintiff in error, on her trial for grand larceny, was sworn as a witness in her own behalf, and, on her cross-examination, was asked, "Have you ever been arrested before for theft?" and the question was objected to as an attack upon her character, which she had not herself put in issue, *held*, that the question was a proper one; and, no suggestion of privilege having been made, the objection was properly overruled.—Brandon v. People, 42 N. Y. 265.

[ll] (N. Y. 1876) Upon the trial of an indictment, the prisoner was asked, on cross-examination, with a view of impeaching his character, "How many times have you been arrested?" *Held*, that the question was improper, as the mere fact of his arrest had no tendency to impeach his character in any particular.—Brown v. People, 8 Hun, 562.

[m] (N. Y. 1879) On trial of an indictment for burglary and larceny, a cross-question to the prisoner as to whether he had not been arrested on a charge of bigamy was incompetent for any purpose whatever.—People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302, affirming Crapo v. People (1878) 15 Hun, 269.

[n] (N. C. 1887) A defendant in a criminal action who offers himself as a witness in his own behalf, under Code, § 1353, may be asked if he was accused of the commission of a criminal offense in the state from which he came, and what such offense was.—State v. Thomas, 98 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351.

[o] (Tenn. 1896) It is not error to ask a defendant, when on the stand, for the purpose of discrediting his testimony, if he has not been indicted for other crimes.—Ryan v. State, 97 Tenn. (13 Pickle) 206, 36 S. W. 930.

[p] (Tex. 1894) A defendant who makes himself a witness may, like any other witness, on cross-examination have his credibility attacked by questions as to whether he had not been previously arrested for crimes.—Jackson v. State, 33 Tex. Cr. R. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30.

[q] (Tex. 1894) Where the defendant, in a prosecution for assault with intent to kill, takes the witness stand in his own behalf, he may be asked, to impeach his credibility, if he has not been before arraigned on a similar charge.—Hutchins v. State, 33 Tex. Cr. R. 298, 26 S. W. 399.

[r] (Tex. 1894) Defendant, charged with theft, having testified in his own behalf, may be asked if there was not an indictment against him for other offenses.—Warren v. State, 33 Tex. Cr. R. 502, 26 S. W. 1082.

[s] (Tex. 1894) A defendant who testifies in his own behalf may be asked, for the purpose of attacking his credibility, if he has been accused of other crimes.—Oliver v. State, 33 Tex. Cr. R. 541, 28 S. W. 202.

[t] (Tex. 1895) On a trial for murder the prosecuting attorney asked defendant whether he had not before been indicted for murder, and, receiving the answer, "No," asked defendant, after relating the circumstances of the murder, whether he recollected it, to which the defendant replied that he did, but that his brother was the person indicted. *Held* proper cross-examination.—Craft v. State (Cr. App.) 31 S. W. 367.

[u] (Tex. 1896) One accused of burglary may be asked if he was not under indictment for the same offense in another case, in order to attack his credibility, by showing moral turpitude.—Peryda v. State (Cr. App.) 35 S. W. 981.

[v] (Utah, 1894) Where a defendant has testified in his own behalf he may be asked on cross-examination, for the purpose of affecting his credibility, whether he had been previously arrested for a similar offense.—People v. Larsen, 10 Utah, 143, 37 Pac. 258.

§ 1147. Former conviction or imprisonment.

Right to show former conviction or imprisonment, in general, see ante, § 1132.

[a] (Ark. 1894) It is proper to ask defendant if he was confined in the penitentiary in another state, in order to attack his credibility.—Holder v. State, 58 Ark. 473, 25 S. W. 279.

[aa] (Ark. 1894) An accused may be asked on cross-examination if he had not been confined in the penitentiary.—Baker v. State, 58 Ark. 513, 25 S. W. 603.

[b] (Cal. 1881) Under Code Civ. Proc. § 2051, providing that a witness may not be impeached by evidence of particular wrongful acts, except that it may be shown by his examination or the record of the judgment that he had been convicted of a felony, and Pen. Code, § 102, declaring that rules of evidence in civil actions are applicable also in criminal actions, one indicted for a felony may be asked, on cross-examination, whether he had been convicted of a felony.—People v. Johnson, 57 Cal. 571.

[c] (Cal. 1884) Former conviction of felony may be shown by examination of defendant, when testifying on his own behalf.—People v. Abbott, 4 Pac. 769.

[d] (Cal. 1888) Pen. Code, § 1323, provides that defendant in a criminal action cannot be compelled to be a witness against himself; but, if he offer himself as witness, may be cross-examined as to all matters about which he was examined in chief. Defendant testified in chief merely that he had been drinking, and, as he was walking along, fell over something, and the first thing he knew somebody grabbed him. Questions, on cross-examination, if he had ever gone under an alias, or had ever been convicted of felony, *held* permissible.—People v. Meyer, 75 Cal. 383, 17 Pac. 431.

[e] (Cal. 1893) Though Pen. Code, § 1323, authorizes the cross-examination of defendant in a criminal case only as to matters about which he was examined in chief, still, under Code Civ. Proc. § 2051, providing that, for the purpose of impeaching "a witness," it may be shown by the examination of the witness that he has been convicted of a felony, a defendant in a criminal case may, on cross-examination, be asked if he has been convicted of a felony.—People v. Crowley, 100 Cal. 478, 35 Pac. 84.

[f] (Ind. 1877) Where no evidence has been introduced in support of the general moral character of the defendant in a criminal cause, it is error to allow counsel for the state, in cross-examining the defendant while testifying as a witness, to ask him whether he had ever been convicted of a crime.—Farley v. State, 57 Ind. 331.

[g] (Kan. 1886) A codefendant who voluntarily became a witness, and has not appealed, was asked by the state, on cross-examination, if he had not recently been tried and convicted several times for the unlawful sale of intoxicating liquors, and, over objection, was allowed to give an affirmative answer. *Held* to be no error.—State v. Pfefferle, 36 Kan. 90, 12 Pac. 406.

[h] (Kan. 1891) A defendant in a criminal prosecution who voluntarily becomes a witness in his own behalf is subject to the same rule as any other witness, and may be asked by the state, on cross-examination, if he had not been convicted of larceny at the previous term of the same court in which he was being tried.—

State v. Probasco, 46 Kan. 310, 26 Pac. 749, following Same v. Pfefferle (1886) 36 Kan. 90, 12 Pac. 406.

[i] (Ky. 1890) A defendant who testifies in his own behalf may be required on cross-examination to state whether he has been in state prison.—Mitchell v. Commonwealth, 14 S. W. 489.

[j] (Ky. 1892) On a trial for larceny, where the defendant had testified in his own behalf, it was proper, for the purpose of discrediting him, to ask him on cross-examination whether he had ever been convicted of stealing, and whether he had been arrested for breaking into a house and stealing coffee, and sent to the workhouse therefor.—Burdette v. Commonwealth, 93 Ky. 76, 18 S. W. 1011.

[k] (Mich. 1895) On a trial for assault, defendant was asked if he had not been convicted before for assault on the complaining witness, and on his admission that he had the prosecuting attorney asked other questions in regard to the details of that assault; but the court held them inadmissible, and instructed the jury that the sole use for which such conviction was admitted was to affect defendant's credibility as a witness. *Held*, that defendant had no cause for complaint.—People v. Conley, 106 Mich. 424, 64 N. W. 325.

[l] (Minn. 1888) Under Pen. Code, § 531, providing that a person convicted of crime is a competent witness, but the conviction may be proved by the record or cross-examination, a defendant in a criminal case, sworn as a witness in his own behalf, may, on cross-examination, be asked if he has been convicted of crime.—State v. Curtis, 39 Minn. 357, 40 N. W. 263.

[m] (Mo. 1881) It is error to compel a defendant in a criminal case to answer a question as to whether or not he had been previously convicted of another crime and sent to the penitentiary under another name.—State v. McGraw, 74 Mo. 573.

[n] (Mo. 1890) On the trial of indictment for a felonious assault, where defendant is a witness in his own behalf, it is error to require him, upon cross-examination, to answer the question, "Were you not convicted of a felony in this state?"—State v. Brent, 100 Mo. 531, 13 S. W. 874.

[o] (Mont. 1894) Where defendant in a criminal case testifies, it is proper, for the purpose of discrediting him, to ask him whether he has been convicted of a felony.—State v. Black, 15 Mont. 143, 38 Pac. 674.

[p] (N. Y. 1883) A defendant in a criminal case may be asked, upon cross-examination, how many times he has been in prison.—People v. Hovey, 29 Hun, 382.

[q] (N. Y. 1883) On an indictment for selling lottery tickets, the prisoner, on cross-examination, may be asked whether he had been in that business and had been convicted of mailing lottery circulars.—People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128.

[r] (N. C. 1883) A defendant who avails himself of the privilege of testifying in his own behalf may be asked, on cross-examination, whether he has been convicted of a certain criminal offense, with a view to affect his standing as a witness.—State v. Lawhorn, 88 N. C. 634.

[s] (Tex. 1893) On a trial for robbery, it is not error for the court to permit the state to prove by defendant, who had taken the stand in his own behalf, that he had been convicted of an attempt to commit burglary; such evidence being admissible to affect the credit of the witness.—Clayton v. State (Cr. App.) 22 S. W. 404.

[t] (Tex. 1894) One indicted for murder, having testified in his own behalf, may be asked on cross-examination whether he had not been convicted for murder of another man, though the conviction was set aside, and upon a new trial he was acquitted; Code Cr. Proc. art. 783, providing that, on granting a new trial, there shall be no presumption of guilt from the former conviction, or allusion thereto in argument, applying only when defendant is on trial a second time for the same offense.—Hargrove v. State, 33 Tex. Cr. R. 431, 26 S. W. 993.

[u] (Tex. 1894) Defendant cannot be asked, for the purpose of impeaching him as a witness, if he was not convicted of the offense for which he is on trial at a former trial.—Richardson v. State, 33 Tex. Cr. R. 518, 27 S. W. 139.

§ 1148. —— Necessity of record as best evidence.

Necessity of record in general, see ante, § 1142.

[a] (Cal.) A defendant examined as a witness in his own behalf, cannot be asked on cross-examination whether he had not been convicted of certain offenses, over objection that the record of the conviction was the best evidence.—(1870) People v. Reinhart, 39 Cal. 449; (1884) Same v. Schenick, 65 Cal. 625, 4 Pac. 675; (1884) Same v. Buckner, 4 Pac. 489.

[b] (Mass. 1867) Under St. 1866, c. 260, allowing a defendant in a criminal proceeding to become a witness in his own behalf at his own election, a defendant who testifies may be asked on cross-examination, for the purpose of affecting his credibility as a witness, if he has been in the house of correction for any crime, on a waiver of objection that the record is the best evidence thereon.—Commonwealth v. Bonner, 97 Mass. 587.

[c] (Tex. 1895) For the purpose of impeaching defendant he may be asked on cross-examination whether he had been convicted of a felony, and it is not necessary to introduce the record of the conviction.—Bratton v. State, 34 Tex. Cr. R. 477, 31 S. W. 379.

(c) CONCLUSIVENESS OF ANSWERS ON CROSS-EXAMINATION AND CONTRADICTORY EVIDENCE.

§ 1149. In general.

Right to contradict collateral matters in general, see post, § 1278.

[a] (Mich. 1890) When a witness denies his former conviction, it may be shown by the record under How. Ann. St. § 7543, providing that no person shall be disqualified as a witness by reason of crime, but conviction of crime may be shown to affect his credibility.—Helwig v. Lascowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 377.

[b] (N. J. 1887) A witness, who, on cross-examination, is asked if he had not at one time committed larceny, and denies it, cannot be contradicted in regard thereto.—Pullen v. Pullen, 43 N. J. Eq. (16 Stew.) 136, 6 Atl. 887.

[c] (N. Y. 1838) Where a witness is sought to be impeached on a cross-examination, his answer, if favorable to himself, is conclusive against the party.—People v. Rector, 19 Wend. 569.

[d] (N. Y. 1873) On cross-examination of a material witness for the accused, she was asked whether she had taken things not belonging to her, when she left a place where she had been at service, to which she answered, "No." *Held*, that the matter being collateral, the prosecution was bound by the answers of the witness; and to allow rebutting evidence was error.—Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492.

[e] (N. Y. 1893) The statements of a witness for defendant, on cross-examination, as to her

use of opium, being in regard to a collateral fact, and for the purpose of affecting her credibility, cannot be contradicted by other witnesses; but where defendant's guilt is clearly proved, the admission of such contradictory evidence is not prejudicial error, under Cr. Code, § 542, which requires judgment to be given on appeal "without regard to technical errors, or to exceptions which do not affect the substantial rights of the parties."—People v. Webster, 68 Hun, 11, 22 N. Y. Supp. 634, judgment affirmed (1893) 139 N. Y. 73, 34 N. E. 730.

[f] (N. D. 1893) While a party to an action cannot object to questions asked a witness on cross-examination, tending to elicit proof that the witness had been guilty of practices that would affect his credit before the jury, yet, when such matters are purely collateral to the issue, the answer of the witness is final, and it is not proper to introduce contradicting evidence.—State v. McGahey, 3 N. D. 293, 55 N. W. 753.

[g] (Ohio, 1876) The state, asking an accused on cross-examination how many times he has been arrested, for the purpose of affecting his credibility, is bound by his voluntary answer, stating a certain number of times, and cannot contradict him by showing that he has been arrested a greater number of times.—Coble v. State, 31 Ohio St. 100.

[h] (Pa. 1879) Where a defendant in a criminal cause testifies in his own behalf, and states in his examination in chief that he has never been charged with any crime, and on cross-examination says that he has never been charged with a particular larceny, not the one on trial, the commonwealth may show that he has been charged with such larceny.—Commonwealth v. Murray, 13 Phila. 454.

[i] (Pa. 1896) When a witness states, in answer to a question, that he was never sent to the penitentiary from a certain county, testimony that he was missing for a year directly after one of exactly the same name was convicted of larceny and sent to the penitentiary, and that he was the only person of that name in that part of the country, was admissible.—Eifert v. Lytle, 172 Pa. 356, 33 Atl. 573, 37 Wkly. Notes Cas. 416.

[j] (S. C. 1887) In a trial for murder a witness for the state denied, when asked about the same, that he had been accused and taken up on charge of stealing cotton. *Held* not error for the trial court to reject testimony offered to prove that he had been so accused and taken up, where there is no record of a conviction or other legal proceedings as to the larceny.—State v. Prater, 26 S. C. 198, 613, 2 S. E. 108.

[k] (S. C. 1891) Where an accused person, who testifies in his own behalf, on cross-examination denies that he was arrested and convicted of a larceny before a justice of the peace, his conviction may be proved by the record of such case.—State v. Wise, 33 S. C. 582, 12 S. E. 556.

[l] (Tenn. 1892) One on trial for carrying a weapon having on cross-examination answered in the affirmative a question as to whether or not he had been "charged with stealing money," and then denied the truth of the charge, his denial was conclusive on the state, and the court should not have stated that the charge was to be considered in determining his credibility.—Hill v. State, 91 Tenn. (7 Pickle) 521, 19 S. W. 674.

[m] (Tex. 1896) Where, on cross-examination, it is brought out that the witness has been rendered infamous by a conviction for murder, the party bringing out such evidence is bound by the witness' further statement that he had been pardoned.—St. Louis S. W. Ry. Co. v. Campbell (Civ. App.) 34 S. W. 186.

[n] (Tex. 1896) On trial for murder, where defendant testified that he had not been charged with an assault with intent to murder, it was proper to introduce an indictment for such offense, to impeach him.—Floyd v. State (Cr. App.) 35 S. W. 969.

[o] (Wash. 1893) The state, having asked defendant on cross-examination whether he has ever been confined in the county jail, and whether he has ever been convicted of crime before, cannot rebut his negative by proof that he has been so convicted and confined.—State v. Payne, 6 Wash. 568, 34 Pac. 317.

5. IMPEACHING EVIDENCE.

LAYING FOUNDATION FOR IMPEACHING EVIDENCE, § 1150.
NOTICE OF INTENTION AS PREREQUISITE TO EVIDENCE, § 1151.
COMPETENCY OF IMPEACHING EVIDENCE IN GENERAL, § 1152.
COMPETENCY OF IMPEACHING WITNESSES, § 1153.
—— KNOWLEDGE OR MEANS OF KNOWLEDGE, § 1154.
—— NUMBER OF PERSONS HEARD TO DISCUSS CHARACTER OF WITNESS, § 1155.
—— TIME TO WHICH KNOWLEDGE RELATES, § 1156.
EXAMINATION OF IMPEACHING WITNESS, § 1157.
—— OPINION OR BELIEF, § 1158.
CROSS-EXAMINATION, § 1159.
REDIRECT EXAMINATION, § 1160.
EVIDENCE OF ACCUSATION OR CONVICTION OF CRIME, § 1161.
—— IDENTIFICATION OF WITNESS AS PERSON NAMED IN RECORD, § 1162.
CUMULATIVE TESTIMONY, § 1163.
SUFFICIENCY OF EVIDENCE, § 1164.

Scope of inquiry, see ante, §§ 1114–1132.
Prosecutions for perjury in testimony affecting character or credit of witness, see "Perjury," vol. 39, cc. 621, 622, § 51.

§ 1150. Laying foundation for impeaching evidence.

[a] (Ill. 1888) Evidence that a brother of prosecutrix, who was a witness for the people, had, soon after the alleged offense, proposed defendant as a leader of the village band, is not admissible for any purpose, where no ground for the impeachment of such witness had been laid.—Bean v. People, 124 Ill. 576, 16 N. E. 656.

[b] (Mo. 1888) A party to impeach the testimony of an adverse party by showing that he attempted to tamper with a witness must first lay a foundation for such evidence by asking the party whether he has made such an attempt.—Bates v. Holladay, 31 Mo. App. 162.

[c] (N. Y. 1880) A question to A., who had testified that B.'s character for veracity was bad, "Did B. state to you that he regarded it as no wrong to swear falsely against such a man as C.?" *held* to be improper; it calling for a specific declaration upon a collateral matter to which the attention of B. (the plaintiff) had not been called on his cross-examination.—Wilder v. Peabody, 21 Hun, 376.

[d] (N. C. 1880) Evidence offered to prove an independent collateral matter affecting the credit of the prosecuting witness on a trial for larceny, not elicited by an inquiry addressed to him, but by the testimony of another person, is incompetent.—State v. Johnston, 82 N. C. 589.

[e] (Wis. 1864) A party to an action having testified in his own behalf, an attempt was made to impeach him by showing that he had

attempted to procure another person to give false evidence in the same suit. The impeaching evidence was received without any previous examination of the party as to the alleged transaction, and without giving him first an opportunity to explain, but afterwards he was called and testified on the subject as fully as he desired. *Held*, that the mere disregard of the order of time in which the testimony should have been heard furnished no ground for a reversal of the judgment.—Martineau v. May, 18 Wis. 54.

[f] (Wis. 1864) Where it is sought to impeach a witness by showing that he has attempted to procure another person to give false evidence in the same suit, it is necessary as a general rule to interrogate him as to such attempt before introducing the impeaching evidence, so that he may have an opportunity to explain the transaction.—Martineau v. May, 18 Wis. 54.

[g] (Wis. 1881) In a trial for assault with intent to kill, where, without any previous foundation therefor in the testimony of the prosecuting witness, a witness for the defense was asked whether the prosecuting witness had requested him to "bail out" defendant, there was no error in ruling out such question.—Yanke v. State, 51 Wis. 464, 8 N. W. 276.

§ 1151. Notice of intention as prerequisite to evidence.

[a] (Md. 1868) Where a party to a cause has been sworn as a witness, the opposite party may offer evidence impeaching his veracity without first giving notice of such intention.—Knight v. House, 29 Md. 194, 96 Am. Dec. 515.

[b] (N. Y. 1818) Where, after publication passed, a party files articles and gives notice of examination of witnesses to impeach the credit of former witnesses as to their general character for veracity, a copy of the articles filed with the notice of examination to discredit the witness must be served on the adverse party within 14 days after obtaining a copy of the deposition.—Troup v. Sherwood, 3 Johns. Ch. 558.

§ 1152. Competency of impeaching evidence in general.

Opinions, see post, § 1158.

Privileged communication to physicians, see ante, § 773 [n].

Admission of incompetent evidence to impeach accused ground for new trial in criminal prosecution, see "Criminal Law," vol. 15, c. 45, § 2207 [k].

[a] (U. S. 1884) Where a suit is brought by plaintiff against the administrator of deceased and others to recover his share of deceased's estate, the testimony of a witness as to the admissions and conduct of deceased cannot be impeached by statements of deceased to a third person as to the character of the witness.—Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822.

[b] (Ala. 1891) Bad character may be proved against a witness for the purpose of impeaching his credibility, though the witnesses who testify as to his character fail to state that his character or reputation is such that he would not be believed when testifying on his oath.—Mitchell v. State, 94 Ala. 68, 10 South. 518.

[c] (Ark. 1874) Under Gantt's Dig. § 2524, providing that a witness may be impeached by evidence that his general reputation for truth and immorality rendered him unworthy of belief, it is improper to exclude testimony of an impeaching witness that he knew the witness for a number of years, and knew his general character for immorality in the community in which he lived, and that his general character as such was very bad; and that from his general character he would not believe him on oath.—Majors v. State, 29 Ark. 112.

[d] (Ark. 1894) Defendant's credibility as a witness on his own behalf cannot be attacked by showing that he left another state because of debt.—Holder v. State, 58 Ark. 473, 25 S. W. 279.

[e] (Ga. 1866) A. gave in evidence declarations of a testator, which tended to show a covert illegality in his will. *Held*, that to discredit A. as a witness evidence of other declarations of the testator, showing his distrust of A., was admissible.—Cobb v. Battle, 34 Ga. 458.

[f] (Ga. 1891) The fact that a person was induced by others to prosecute for a criminal offense should not discredit his testimony before the jury, nor should the trial judge allow the fact to be proven for that purpose.—Allgood v. State, 87 Ga. 668, 18 S. E. 569.

[g] (Iowa, 1879) It is error, in proving one's reputation for truth and veracity, to limit it to his reputation among business men with whom he deals; but where there is other competent evidence as to his good reputation the admission of such improper evidence is not ground for reversal.—Bays v. Herring, 51 Iowa, 286, 1 N. W. 558.

[h] (Ky. 1894) The character of a witness for veracity can be impeached only by direct testimony of those who are acquainted with his reputation, and not by showing the bad reputation of the neighborhood of his residence.—White v. Commonwealth, 96 Ky. 180, 28 S. W. 340.

[i] (Me. 1852) A deposition impeaching the reputation of a witness for truth and veracity cannot be excluded because it appears from the deposition that such reputation was founded upon the witness' neglect to perform his agreement.—Hapgood v. Fisher, 34 Me. 407, 56 Am. Dec. 663.

[j] (Mass. 1861) If a medical witness, on cross-examination, has identified certain medical advertisements as his, they may be read to the jury as a portion of the cross-examination, for the purpose of affecting his credit, but the newspaper in which they are contained cannot be laid before the jury.—Commonwealth v. Hersey, 84 Mass. (2 Allen) 173.

[k] (Mass. 1888) The prosecution, to discredit an expert witness called for defendant, introduced a letter written by the witness more than three years previously, and containing suggestions derogatory to his own character. The letter had no relation to the case on trial, and the witness had no opportunity to object to or explain it. *Held*, that defendant was entitled to a new trial, as the effect of the letter might have been to impeach the character of the witness.—Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280.

[l] (Mich. 1891) In a contest of a will on the ground of testatrix's mental incompetency, where a deposition of a person whom testatrix was visiting showed actions on the part of testatrix which, in their nature, should have been communicated to her husband at the time, it was error to exclude letters written at the time by deponent to testatrix's husband, as bearing on the credibility of deponent.—Prentis v. Bates, 88 Mich. 567, 50 N. W. 637.

[m] (Minn. 1872) Where suit was brought on a promissory note by an indorsee, after maturity, evidence that the transfer was made by the payee for the purpose of having suit brought in the name of the indorsee is not competent to affect the credibility of the testimony of such payee; it appearing that he is liable as indorser.—Wilder v. De Cou, 18 Minn. 470 (Gil. 421).

[n] (Minn. 1890) On an indictment for forgery, a letter written by one jointly indicted

with defendant to a witness proposing that he shall testify in support of a certain line of defense, which proposal corresponds to the testimony actually given by such witness, and which appears on its face to be a mere fabrication, is admissible to impeach such witness.—State v. Tall, 43 Minn. 273, 45 N. W. 449.

[o] (Minn. 1895) Letters written by a witness to one of the parties in reference to matters involved in the suit, which tended to show a corrupt disposition to conceal or pervert the truth, for a money consideration, as to the matters to which he testified, should have been admitted to impeach the witness.—Alward v. Oaks, 63 Minn. 190, 65 N. W. 270.

[p] (Neb. 1884) Evidence of what two persons had said about the dishonesty of a witness, who had been their employé, should not be admitted in an attempt to impeach the testimony of such witness.—Taylor v. Ryan, 15 Neb. 573, 19 N. W. 475.

[q] (N. J. 1875) The credit of a witness cannot be impeached by proof that he testified, on a former trial, to the same facts, and the jury discredited his testimony.—Schenck v. Griffin, 38 N. J. Law (9 Vroom) 462.

[r] (N. Y. 1808) Where the plaintiff having filed a bill in chancery for a divorce for adultery, suborned a witness to prove the fact, and upon discovery of this subornation withdrew his bill and filed another, charging adultery with another person, these facts cannot be given in evidence to impeach the credibility of a witness produced to prove such second fact of adultery.—Doe v. Roe, Anth. N. P. 80.

[s] (N. Y. 1882) Upon the question of general repute of the plaintiff in a civil action for assault to rape, witness will not be allowed to state what he heard certain people say or what stories he had heard.—Gulerette v. McKinley, 27 Hun, 320.

[t] (Or. 1876) The rule that a witness is to be impeached by proof of general bad reputation, and not of particular acts of immorality, forbids introducing a letter written by the witness, the language of which might evince a depraved or unchaste character.—Leverich v. Frank, 6 Or. 212.

[u] (Pa. 1871) Where a witness has testified that she has seen the execution of a note by a decedent and the circumstances attending it, the evidence of the declarations of decedent was admissible on the question of her credibility.—Burkholder's Ex'rs v. Plank, 69 Pa. (19 P. F. Smith) 225.

[v] (S. C. 1833) The credit of a witness may be attacked by proof that he had said that on some occasions he would swear to a lie.—Anonymous, 1 Hill, Law, 251.

[w] (Tex. 1879) The reputation of a witness cannot be impeached by evidence based on the matter under investigation—as, for instance, that of the subscribing witness to a will contested for alleged forgery, by the opinion of the community arising from the transaction.—Johnson v. Brown, 51 Tex. 65.

§ 1153. Competency of impeaching witnesses.

Competency of husband or wife of witness sought to be impeached, see ante, § 135.
—— *of sustaining witness, see* post, § 1170.

[a] (Ind. 1878) An impeached witness is not an incompetent witness to impeach a witness by whom he was impeached, his impeachment merely affecting his credibility.—Citizens' Fire & Marine Ins. Co. v. Short, 62 Ind. 316.

[b] (Iowa, 1891) A witness to character is not shown to be incompetent by his stating on cross-examination: "I am able to judge of a man's character by his business dealings, and what I know of him. I pay attention to people's character only as I deal with them."—State v. Farrell, 82 Iowa, 553, 48 N. W. 940.

[c] (Pa. 1837) A witness who has prejudices may still be competent to testify as to the character of another.—Cook v. Miller, 6 Watts, 507.

[d] (Pa. 1847) An attorney for plaintiff was not competent as a witness to impeach the credit of one of defendant's witnesses by detailing a conversation he had with the witness after the attorney had been retained in the case.—Mishler v. Baumgardner, 4 Clark, 266.

§ 1154. —— Knowledge or means of knowledge.

Examination as to knowledge or means of knowledge, see post, § 1157.
Knowledge of sustaining witness, see post, § 1171.

[a] (U. S. 1838) The general reputation of a witness for veracity cannot be proven by the testimony of a juror as to what witnesses testified to at a former trial.—United States v. White, Fed. Cas. No. 16,679 [5 Cranch, C. C. 457].

[b] (U. S. 1883) Evidence that a witness is acquainted with the character of another is not sufficient to authorize him to state that he would not believe such a witness under oath. It is necessary that he should say that he knew the character of the witness for truth and veracity.—Marks v. Fox (C. C.) 18 Fed. 713.

[c] (Ala. 1846) A person who states he has no knowledge of the general character of a witness, save only as connected with some "alleged frauds," cannot be examined for the purpose of impeaching his credibility.—Sorrelle v. Craig, 9 Ala. 534.

[d] (Ala. 1846) The testimony of a witness, who stated that he was acquainted with the general character of one who had been examined on the other side, but disavowed all knowledge of the estimation in which he was held in the neighborhood of his residence, is inadmissible to discredit the latter, it not appearing that the impeached witness had changed his residence or that his employment was such as to cause his reputation to be as well known elsewhere as in the vicinity of his home.—Sorrelle v. Craig, 9 Ala. 534.

[e] (Ala. 1854) A witness may testify to the general character of an impeached witness for truth and veracity, both from his own knowledge and from what he has heard from other persons; and he may state that it is "very unfavorable."—Martin's Ex'x v. Martin, 25 Ala. 201.

[f] (Ala. 1854) A person who removed into the neighborhood of an impeached witness about the time the latter left is competent to testify to his general reputation in that neighborhood at that time.—Martin's Ex'x v. Martin, 25 Ala. 201.

[g] (Ala. 1876) Where a witness states that he does not know the general reputation of a person in the neighborhood, although he has known him all his life, he is not competent to testify as to his character.—Hadley v. State, 55 Ala. 31.

[gg] (Ala. 1885) A witness who states that he knows the character of the person inquired about "in the upper portion of the neighborhood in which he lives, but not in the lower," is competent to testify as to his character.—Jackson v. State, 78 Ala. 471.

[h] (Ala. 1894) One witness may testify to the good character of another in the neighborhood in which both have lived, though at the time of the trial they lived in different neighborhoods.—Prater v. State, 107 Ala. 26, 18 South. 238.

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[hh] (Ark. 1894) Before a witness should be allowed to impeach another on the ground of his reputation for truth, it should be first shown that he has sufficient knowledge of such person's general character to base an opinion thereon.—Cole v. State, 59 Ark. 50, 26 S. W. 377.

[i] (Cal. 1884) If a witness called to impeach the character of another has any knowledge of the witness' character, he is qualified to speak, no matter what the quality or quantity of such knowledge may be, and it is for the jury to determine the value of his testimony.—Heath v. Scott, 65 Cal. 548, 4 Pac. 557.

[ii] (Cal. 1891) Where the witness has stated the reputation of another for veracity from what he has heard of it in the neighborhood, it is error for the court to state that he can only testify to what he knows of it of his own personal knowledge.—People v. Webster, 89 Cal. 572, 26 Pac. 1080.

[jj] (Ga. 1892) Witnesses who testify that they do not know that they are acquainted with the general character of the prosecutor, but that they have been acquainted with him for a long time, and that they have never heard any one speak ill of him, show substantially that they do know his general character sufficiently to qualify them to swear that they would believe him on oath.—Hodgkins v. State, 89 Ga. 761, 15 S. E. 695.

[jj] (Ill. 1859) The impeaching witness must be able to state what is generally said of the person to be impeached, among his associates.—Crabtree v. Kile, 21 Ill. (11 Peck) 180.

[k] (Ill. 1894) An impeaching witness who testifies that he is not acquainted with the general reputation of another witness is not competent to testify further on the subject.—Overstreet v. Dunlap, 56 Ill. App. 486.

[kk] (Iowa, 1882) A witness called to testify to the general reputation of plaintiff for truth and veracity said, "I have heard it questioned, and can only give my opinion on the subject." *Held*, that he was not competent.—Kitteringham v. Dance, 58 Iowa, 632, 12 N. W. 612.

[l] (Kan. 1892) A person who states that he is not much acquainted with the general reputation for veracity of a witness in the community where he lived, and that he cannot say exactly what his reputation is, is not competent to testify as to his reputation.—Redden v. Tefft, 48 Kan. 802, 29 Pac. 157.

[ll] (Ky. 1878) A witness who testified that he was acquainted with another witness, that he knew her neighbors, and that he knew her character through rumor, cannot testify as to her character for truth.—Furnish v. Commonwealth, 77 Ky. (14 Bush) 180.

[m] (Mass. 1863) If a witness who is called to impeach another witness testifies, in reply to a question as to the general reputation of the latter for truth and veracity, that he has heard it called in question to a limited extent, it is no error to submit this evidence, with proper instructions as to the weight to which it is entitled, to the consideration of the jury.—Rundell v. La Fleur, 88 Mass. (6 Allen) 480.

[mm] (Mich. 1856) A witness having sworn that he did not know the general reputation for truth and veracity of a prior witness where he resided, it was *held* that a subsequent question, whether he "had heard people acquainted with him speak of such character," was inadmissible.—Webber v. Hanke, 4 Mich. 198.

[n] (Minn. 1883) The character of a witness for truth and veracity cannot be impeached by evidence of the individual opinions or declarations of the party calling them, or of others, to the effect that he is unworthy of belief.—Horton v. Chadbourn, 31 Minn. 322, 17 N. W. 865.

[nn] (Mo. 1894) One who is acquainted with another's general reputation for truth in the neighborhood in which he (other) lives may testify as to such other's general character.—State v. Fairlamb, 121 Mo. 137, 25 S. W. 895.

[o] (Neb. 1888) An impeaching witness who testifies that he knows the general reputation of the person attacked for truth and veracity will not be excluded from giving testimony as to such reputation at the time of the trial.—Long v. State, 23 Neb. 33, 36 N. W. 310.

[oo] (N. H. 1879) A belief in the want of veracity of a witness, founded on personal dealings with him, is not admissible to impeach him.—Sargent v. Wilson, 59 N. H. 396.

[p] (N. J. 1864) A stranger sent by a party to the neighborhood of a witness to learn his character will not be permitted to testify as to the result of his inquiries.—Reid v. Reid, 17 N. J. Eq. (2 C. E. Green) 101.

[pp] (N. Y. 1862) Where a witness testified that he made inquiries in the place of the impeached witness' residence to satisfy himself as to his character, but did not himself know the townspeople of whom he inquired, his testimony upon reputation was ruled inadmissible.—Curtis v. Fay, 37 Barb. 64.

[q] (N. Y. 1862) A witness to impeach or sustain the character of another witness can testify to his reputation only when he has a knowledge thereof founded upon acquaintance and intercourse with the neighbors and acquaintances of the witness in question, extending over some length of time, sufficient to enable him to gather the general estimation in which he is held by the community where he resides.—Curtis v. Fay, 37 Barb. 64.

[qq] (N. Y. 1877) One who has given evidence importing an acquaintance with the associates of an impeached witness, and a knowledge of his character, which he had heard questioned, is competent to say whether he would believe such witness under oath.—Adams v. Greenwich Ins. Co., 70 N. Y. 166.

[r] (N. Y. 1887) Where a witness called by the prosecution to impeach the general character of the defendant for truth and veracity testified that he had known defendant in his boyhood and had seen him more or less for the last two years, perhaps half a dozen times, and that he had had conversations about the defendant with persons who knew him, associated with him, and had business with him, but his testimony did not show that he had any acquaintance with the speech of people generally concerning the defendant's character, it was error to permit him to testify.—People v. Ouley, 7 N. Y. St. Rep. 794.

[rr] (N. Y. 1891) Where the testimony of witnesses as to their knowledge of the reputation of a party is sufficient at least to make its credibility a question for the jury, they may be allowed to testify thereto.—Morrison v. Press Pub. Co., 59 N. Y. Super. Ct. (27 Jones & S.) 216, 14 N. Y. Supp. 131, affirmed (1892) 133 N. Y. 538, 30 N. E. 1148.

[s] (N. Y. 1891) Where defendant fails to identify the principal witness for the people, whom he wishes to impeach, as the same person about whose reputation the impeaching witness is prepared to testify, the only approach to identification being that the impeaching witness knew of a person of the same name as the witness for the prosecution, who lived at the same house, where many others lived, but that he did not know the witness personally, it is not error to exclude the testimony of such impeaching witness.—People v. Smiler, 125 N. Y. 717, 26 N. E. 312.

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[ss] (N. Y. 1892) A witness may testify that from his personal knowledge of another he would believe him under oath, though he knows nothing of the reputation of such person among others for truth and veracity.—National Bank v. Scriven, 63 Hun, 375, 18 N. Y. Supp. 277.

[t] (N. Y. 1894) Before a witness can testify to the general reputation of another witness it must be shown that he is familiar therewith. —Carlson v. Winterson (Com. Pl.) 10 Misc. Rep. 388, 31 N. Y. Supp. 430, affirming judgment (City Ct. N. Y. 1894) 9 Misc. Rep. 711, 29 N. Y. Supp. 1142, and judgment affirmed (1895) 147 N. Y. 652, 723, 42 N. E. 347.

[u] (N. C. 1889) Defendant's witness, having, to his inquiry, denied knowledge of his general character, cannot be further asked by him as to his general character for truth.—State v. Wheeler, 104 N. C. 893, 10 S. E. 491.

[uu] (N. C. 1894) A witness cannot testify as to character till he qualifies by stating that he knows the general reputation of the person in question.—State v. Coley, 114 N. C. 879, 19 S. E. 705.

[v] (Ohio, 1878) The reputation of a witness for veracity cannot be shown by the testimony of another, which is based on his personal knowledge, rather than the general reputation of the witness sought to be discredited.—Cowan v. Kinney, 33 Ohio St. 422.

[vv] (Pa. 1817) One who has derived his knowledge of another's general character for truth and veracity from common report may testify as to such character.—Kimmel v. Kimmel, 3 Serg. & R. 336, 8 Am. Dec. 655.

[w] (S. C. 1892) The fact that one does not know another personally does not preclude him from testifying to the general reputation of such person for the purpose of impeachment.—State v. Turner, 36 S. C. 534, 15 S. E. 602.

[ww] (S. C. 1892) Where one testifies to a knowledge of the general reputation of another, and to having "heard general conversations" in regard to his character, and the court admits him as having shown sufficient knowledge for the purpose of impeachment, the ruling of the court will not be disturbed.—State v. Turner, 36 S. C. 534, 15 S. E. 602.

[x] (Tex. 1859) It is not necessary that a man's character should have been matter of discussion among his neighbors to enable a witness to speak of his reputation for truth.—Boon v. Weathered's Adm'r, 23 Tex. 675.

[xx] (Tex. 1864) A witness introduced for the purpose of contradicting the testimony and impeaching the character of another witness does not show himself qualified to testify with reference to the character of the witness for truth and veracity merely from a belief based upon his individual opinion and feelings, and not upon any knowledge of the reputation of the witness in the community in which he lived, as to which he was wholly uninformed.—Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657.

[y] (Tex. 1882) A witness is not competent to testify as to the general character of persons for peace or violence simply on his statement that he was well acquainted with them and had lived in their community for several years. —Brownlee v. State, 13 Tex. App. 255.

[yy] (Tex. 1888) Where the cross-examination of impeaching witnesses shows that they know nothing of the reputation of the witness for truth and veracity in the neighborhood in which he lives, their testimony should be excluded.—Clapp v. Engledow, 72 Tex. 252, 10 S. W. 462.

[z] (Wis. 1883) A witness who is called to testify as to the reputation for truth and veracity of another witness is not incompetent simply because he does not live in the immediate neighborhood of the witness sought to be impeached, although this fact may affect his credibility.—Wallis v. White, 58 Wis. 26, 15 N. W. 767.

§ 1155. —— Number of persons heard to discuss character of witness.

Cross-examination, see post, § 1159.

[a] (Ala.) A witness who states that he is acquainted with the general character of the impeached witness, although he may never have heard it canvassed, is competent to testify in reference to it.—(1856) Ward v. State, 28 Ala. 53; (1876) Childs v. Same, 55 Ala. 28.

[b] (Ala. 1876) A witness may be competent to testify as to the character of a person in the neighborhood in which he lives, though he has never heard it discussed.—Hadley v. State, 55 Ala. 31.

[c] (Ala. 1895) A witness introduced to impeach T. stated that he had lived for 10 or 12 years about 25 miles from T., and that the only way he knew his character in the community was that a year or two ago a man who lived about 12 miles from T. told witness that T. was "the same old lying T." *Held*, that the witness was incompetent to testify as to T.'s character.—Buchanan v. State, 109 Ala. 7, 19 South. 410.

[d] (Cal. 1889) One may testify as to the reputation of a witness for truth and honesty, although he may never have heard such reputation discussed.—First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748.

[e] (Fla. 1878) A witness, called as to the reputation of another for truth and veracity, in order to impeach him, need not necessarily know what the majority of the neighbors or associates say or think of his character for truth. —Robinson v. State, 16 Fla. 835.

[f] (La. 1876) That a witness who has testified relative to the reputation of another witness for truth and veracity has not heard a majority of the people in the neighborhood express an opinion of the character of the witness whom it is sought to impeach is not ground for a charge directing the jury to disregard the impeaching testimony.—State v. Thomas, 28 La. Ann. 827.

[g] (La. 1889) When a witness, properly introduced to impeach the reputation for chastity of the prosecutrix in a rape case, has stated positively that he knew her general reputation, his competency is not destroyed because, on cross-examination as to the nature of his knowledge, he states that he has heard 10, 15, or 20 persons speak of her character in that respect, and say that it was bad.—State v. Reed, 41 La. Ann. 581, 7 South. 132.

[h] (Md. 1883) An impeaching witness, who states that he never heard the character for truth of the witness sought to be impeached discussed, except by one person, but that he thinks he would have heard it, if there was any general talk on the subject of such character, is not qualified to testify to the general reputation for truth in the community of the impeached witness.—Sloan v. Edwards, 61 Md. 89.

[i] (Mass. 1883) A witness, who knows of another's reputation for truth and veracity only from what he has heard said of the latter on two specified occasions, is not competent to testify thereto.—Commonwealth v. Rogers, 136 Mass. 158.

[j] (Miss. 1884) It is sufficient, if the impeaching witness knows what the neighbors of the proposed witness generally think of him as a man of truth, regardless of any definite number. It is not enough that he state what he has heard others, who may be but few, say in this regard.—Pickens v. State, 61 Miss. 563.

[k] (Neb. 1877) Evidence to impeach must go to the general estimation in which the witness is held in his community. Proof of opinions of two or three persons is not competent.—Matthewson v. Burr, 6 Neb. 312.

[l] (Tenn. 1872) In order competently to testify on cross-examination touching character, the witness must have heard a sufficient number of persons speak of the assailed to be able to express the well-founded opinion that he believes he knows what a majority would say, if called on to speak.—Poole v. State, 61 Tenn. (2 Baxt.) 288.

§ 1156. —— Time to which knowledge relates.

Place and time of acquiring reputation, see ante, § 1124.

[a] (U. S. 1859) Where a witness replied, in answer to a question as to what was the reputation of another witness for truth and veracity, that he had no means of knowing, not having had any transaction with him for five years, the question was properly excluded, within the discretion of the trial court, on the ground that the period was too remote.—Teese v. Huntingdon, 64 U. S. (23 How.) 2, 16 L. Ed. 479.

[b] (Ala. 1878) The character of a witness may be impeached by the testimony of a person who three years before, and previously, lived in the same neighborhood with him, and knew his past and present general reputation there, though such person knows nothing of it in another neighborhood, to which the witness removed, and where he then resided.—Kelly v. State, 61 Ala. 19.

[c] (Ala. 1893) Evidence of the character of a witness, when it appeared that the one testifying thereto had lived with such witness for 20 years in the community, but had not seen him for 7 or 8 years, is competent to prove the present character of the witness in the community.—Jones v. State, 104 Ala. 30, 16 South. 135.

[d] (Ind. 1870) Where a witness has resided in a distant state for two years before he testified, the evidence of persons who have known him only before his removal, and do not pretend to be acquainted with his general reputation for truth in the neighborhood where he then resides, will not be admitted for the purpose of impeaching his testimony.—Chance v. Indianapolis & W. Gravel Road Co., 32 Ind. 472.

[e] (Kan. 1878) The fact that an impeaching witness knows nothing of the reputation for veracity, etc., except what he has learned since the commencement of the action, affects the weight, but not the competency, of the impeaching testimony.—Fisher v. Conway, 21 Kan. 18, 30 Am. Rep. 419.

[f] (Md. 1887) In the impeachment of a witness, the want of recent opportunity for knowledge as to his character in respect to truth and veracity is a matter which goes to the effect of the evidence, rather than the question of its admissibility.—Wagoner v. Wagoner, 10 Atl. 221.

[g] (Mich. 1856) A witness testified that he knew a previous witness in the old country, and that said witness had resided in this country about five years. The question then asked, whether he knew his character for truth and veracity in the old country, was *held* improper.—Webber v. Hanke, 4 Mich. 198.

[h] (Miss. 1858) A witness, who never heard about the character of another witness until after the controversy arose, is yet competent to state what he knows of it.—Mask v. State, 36 Miss. 77.

[i] (N. Y. 1865) Persons who have known nothing of a witness for eight or ten years prior to the trial are nevertheless competent to impeach him by testifying that in former years his character was bad, and by testifying they would not believe him under oath; for no certain limit in point of duration can be laid down for such inquiries.—Graham v. Chrystal, *41 N. Y. (2 Keyes) 21, 2 Abb. Dec. 263, 37 How. Prac. 279.

[j] (Tenn. 1846) The general reputation of a witness, as connected with his credibility in a court of justice, is the estimate his neighbors place upon his veracity; and an impeaching witness must state whether he knows the general reputation of the person in question, what that reputation is, and whether, from his knowledge of such reputation, he would believe him in a court of justice.—Ford v. Ford, 26 Tenn. (7 Humph.) 92.

[k] (Tex. 1889) Persons who for a long while lived in the same neighborhood with a witness are competent to testify to his reputation at that time for truth and veracity, though he moved from such neighborhood 18 months before the trial in which he is offered as a witness.—Thurmond v. State, 27 Tex. App. 347, 11 S. W. 451.

[l] (Tex. 1894) Where defendant, who had been in the state but two years, put his character in evidence, a witness who up to three years before had known him in another state may testify that he knew his general reputation there, and that it was not good.—Thomas v. State, 33 Tex. Cr. R. 607, 28 S. W. 534.

[m] (Tex. 1895) A person's reputation for truth and veracity may be shown by witnesses who had a long acquaintance with him, though they have not seen him for several years, and are ignorant of the place of his present residence.—Brown v. Perez (Civ. App.) 32 S. W. 546.

§ 1157. Examination of impeaching witness.

[a] (U. S. 1873) Where the purpose of testimony is to impeach a witness for want of veracity, it is not improper to ask the person on the stand what is the general "reputation" for truth of the witness sought to be impeached. It is even more proper than to ask what is his general "character" for truth, though the question is sometimes asked in the latter form; the word "character" then being synonymous with "reputation."—Knode v. Williamson, 84 U. S. (17 Wall.) 586, 21 L. Ed. 670.

[b] (U. S. 1837) The usual questions asked, in order to discredit a witness, are: What is the witness' general reputation for truth? Is it good or bad?—Gass v. Stinson, Fed. Cas. No. 5,261 [2 Sumn. 605].

[c] (Ala. 1843) Where articles of impeachment are filed, and an order granted permitting the party to examine witnesses on general interrogatories as to the credit of the person whose testimony is sought to be impeached on such examination, no fact material to the matter in issue can be inquired into; but, if the witness has voluntarily stated a fact falsely not in issue between the parties, it may be contradicted, and whether the impeachment is made in this mode, or under the forty-fourth rule of chancery practice, dispensing with the filing of articles of impeachment, and permitting the testimony of witnesses to be impeached by deposition in the usual mode, the examination must be confined to the credit of the witness sought to be impeached.—Evans v. Bolling, 5 Ala. 550.

[d] (Ala. 1893) Evidence as to whether or not the witness had heard of any "improvement in the character or reputation for truth and veracity of the witness Pool" is inadmissible, in the absence of evidence of his previous character.—Jones v. State, 104 Ala. 30, 16 South. 135.

[e] (Ark. 1855) Before the opinion of a witness can be asked as to the truth and veracity of another witness whose testimony is impeached, he must be interrogated as to his knowledge of the witness' reputation among his neighbors.—Pleasant v. State, 15 Ark. 624.

[f] (Ark. 1855) A question as to the rumor and belief of people about a witness whose impeachment is attempted will not be allowed in that form.—Pleasant v. State, 15 Ark. 624.

[g] (Cal. 1884) To impeach a witness, the question, "Do you know the general reputation of Morss for truth and 'integrity' in the community in which he resides?" is proper.—Heath v. Scott, 65 Cal. 548, 4 Pac. 557.

[h] (Conn. 1856) Where a witness is called to impeach the character of another witness, the proper inquiry is, "Are you acquainted with the character of the witness?" If the witness responds in the affirmative, the further inquiry may be made as to whether his character for truth and veracity is equal to that of mankind in general.—State v. Randolph, 24 Conn. 363.

[i] (Fla. 1878) If a witness testifies that he knows the reputation for truth and veracity of a party to be impeached where he lives, questions as to whether that reputation is good or bad, and whether from that reputation he would believe him under oath, are proper.—Robinson v. State, 16 Fla. 835.

[j] (Fla. 1893) It is not error for the trial court to refuse to permit a party who has called an impeaching witness to ask him on the direct examination if he had ever heard the reputation of the witness sought to be impeached discussed, since the usual practice is to leave it to the cross-examination to enter primarily upon a test of the knowledge from which the impeaching witness has spoken.—Wood v. State, 31 Fla. 221, 12 South. 539.

[k] (Ga. 1853) On the trial of a cause witnesses called to impeach the credibility of a former witness testified that they had known him eight or ten years in the county of Russell, Ala., and that he was generally known and had a reputation in said county. They were then asked: "Do you know the general character of A. for truth and veracity in the county of Russell?" *Held*, that the question, under the preliminary proof, was proper.—Boswell v. Blackman, 12 Ga. 591.

[l] (Ill. 1861) The question, to an impeaching witness, "whether he is acquainted with the general reputation of the witness sought to be impeached among his friends, neighbors, and associates," is competent.—Crabtree v. Hagenbaugh, 25 Ill. (15 Peck) 233, 79 Am. Dec. 324.

[m] (Ill. 1887) Where a witness is called to impeach the credit of another witness, he must state that he knows the reputation for truth and veracity of the person impeached among his neighbors, and that such reputation is bad.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

[n] (Ind. 1877) Evidence of the general moral character of a witness, introduced for the purpose of impeaching him, must be confined to the time at which he testifies and to the neighborhood wherein he then resides. The question, "Are you acquainted with the general moral character of M?" is too broad.—Rawles v. State, 56 Ind. 433.

[o] (Ind. 1879) A question asked for the purpose of impeaching the character of a witness for truth and veracity should be directed to his "general" character for truth, etc.—Meyncke v. State, 68 Ind. 401.

[p] (Kan. 1891) The omission, from questions to witnesses as to the reputation for truth and veracity of a previous witness, of the word "general," does not render their testimony on the subject incompetent, where their answers show that they understood the question in a general sense, and the answers themselves are sufficiently general.—Coates v. Sulau, 46 Kan. 341, 26 Pac. 720.

[pp] (Ky. 1859) The regular mode of inquiring into the reputation of a witness is to ask of those introduced for that purpose whether they know the general reputation of the person in question among his neighbors, and what that reputation is. The inquiry must be as to his general reputation where he is best known, or with those among whom he dwells.—Henderson v. Hayne, 59 Ky. (2 Metc.) 342.

[q] (La. 1848) A party may be interrogated as to a witness' character; but the questions must be such as could be put to any other witness.—Gilmore v. Brenham, 3 La. Ann. 32.

[qq] (Me. 1841) A witness introduced to impeach the credit of another should be examined as to the general character of the witness for truth and veracity. The proper inquiry is whether the witness knows the general character of the witness attempted to be impeached, and, if so, what is his general reputation for truth?—Inhabitants of Phillips v. Inhabitants of Kingfield, 19 Me. (1 App.) 375, 36 Am. Dec. 760.

[r] (Md. 1883) A witness called to prove character should be interrogated as to his means of knowledge of the general reputation of the person in question among his neighbors, and what that reputation is, and the evidence must be confined to general reputation.—Sloan v. Edwards, 61 Md. 89.

[rr] (Mass. 1849) Where a witness is called to testify against the reputation of another witness for truth and veracity, he can only be inquired of as to what he has heard, and cannot be asked, "Whether, from the treatment and conduct of the community generally toward the witness sought to be impeached, he knows enough about his general character to say what it is for truth and veracity."—Bates v. Barber, 58 Mass. (4 Cush.) 107.

[s] (Mass. 1866) After a witness, called to impeach another, had been asked as to the general reputation of the latter for truth, and had answered that he had not heard it "talked of a great deal," it was *held* that no exception lay to the refusal of the judge to permit the following additional questions: "Have you heard his character for truth and veracity called in question?" "If you have heard his character for truth and veracity called in question, state what the common speech of people is as to his character for truth and veracity." "What is the general reputation of C. for truth and veracity among those who speak of it at all?"—Commonwealth v. Lawler, 94 Mass. (12 Allen) 585.

[ss] (Mass. 1870) The omission of the preliminary question to an impeaching witness, whether he knows the reputation of the witness for truth, etc., is within the discretion of the presiding judge.—Wetherbee v. Norris, 103 Mass. 565.

[t] (Mo. 1885) The admission of testimony in a criminal case relative to the general reputation of one of the defendant's material witnesses, without any showing as a foundation that the witness giving the testimony was acquainted with such reputation, was error.—State v. Brady, 87 Mo. 142.

[tt] (N. H. 1860) In impeaching a witness by showing his generally bad reputation for truth, it must appear that the impeaching witnesses are acquainted with the general reputation of such witness for truth among his neighbors before they are inquired of as to what that reputation is. The particular form of the question is immaterial, if all the necessary facts be made to appear.—Kelley v. Proctor, 41 N. H. 139.

[u] (N. Y. 1890) A witness called to impeach another testified that he had been in the same

business as the latter for 18 years, and had had dealings with him, and was then asked what was the reputation of such witness for truth and veracity, and whether he would believe him under oath. *Held*, that it was not error to exclude the question for want of proper foundation.—Healey v. Terry, 16 Daly, 117, 9 N. Y. Supp. 519.

[uu] (N. C. 1843) The party impeaching a witness cannot inquire of the attacking witnesses, simply, "in what estimation the witness impeached was held in his neighborhood."—State v. O'Neale, 26 N. C. 88.

[v] (N. C. 1849) Though an impeaching witness may be examined as to the general moral character of the witness impeached, and also as to his character for truth when on oath and when not on oath, it is not necessary to put such questions in any particular order.—State v. Dove, 32 N. C. 469.

[vv] (N. C. 1888) A question put to a witness whether there were not some hard reports concerning the character of another witness in his neighborhood is unprejudicial where the answer is, "I have heard of none."—Blackwell's Durham Tobacco Co. v. McElwee, 100 N. C. 150, 5 S. E. 907.

[w] (Ohio, 1816) An impeaching witness should be first examined as to his knowledge of the character of the witness sought to be impeached, and then asked if that character for truth and veracity is as good as that of men in general.—Mallory v. Smith, Tapp. 108.

[ww] (Ohio, 1851) The proper question to be put to an impeaching witness is as to the general reputation of the witness sought to be impeached for truth and veracity, and not what his character for truth and veracity is.—Bucklin v. State, 20 Ohio, 18.

[x] (Ohio, 1853) When a witness is called to impeach another witness, it is not error to ask: "Are you acquainted with A.'s reputation for truth and veracity? If so, what is it?" By the word "reputation" will be intended the general repute of the witness sought to be impeached.—French v. Millard, 2 Ohio St. 44.

[xx] (Ohio, 1855) Any form of words may be used which will ascertain if the witness has sufficient knowledge of the public estimation for truth in which the witness to be impeached is held.—Craig v. State, 5 Ohio St. 605.

[y] (S. C. 1887) When a witness is offered for the purpose of impeaching or sustaining the general character of another, there is no set form of words which must be followed with rigid exactness in interrogating such witness.—State v. Prater, 26 S. C. 198, 613, 2 S. E. 108.

[yy] (Tenn. 1851) There is no objection to the form of question put to a witness in support of an impeached witness' credit in the following manner: "Are you acquainted with the general character of the witness?"—Hancock v. Stephens, 30 Tenn. (11 Humph.) 507.

[z] (Tex. 1880) An objection as to the extent to which the examination of impeaching witness should be permitted cannot be legitimately raised for the first time either in argument or by a charge to the jury, but should be raised on the examination of the witness.—Holbert v. State, 9 Tex. App. 219, 35 Am. Rep. 738.

[zz] (Wis. 1879) Where a party's character is in question, such character may be shown by witnesses well acquainted with him in the neighborhood where he lives, without asking them if they knew his character. It is not merely a matter of reputation, but of actual knowledge.—Dufresne v. Weise, 46 Wis. 290, 1 N. W. 59.

§ 1158. —— Opinion or belief.

[a] It is competent to ask an impeaching witness, who has testified that the general reputation of another witness for truth and veracity in the vicinity in which he lives is bad, whether he would give him full credit upon his oath.

—(Kan. 1888) State v. Johnson, 40 Kan. 266, 19 Pac. 749;

(Mich. 1875) Keator v. People, 32 Mich. 484;

(Ohio, 1875) Hillis v. Wylie, 26 Ohio St. 574;

(Pa. 1850) Commonwealth v. McLain, 4 Clark, 462;

(S. C. 1826) Dollard v. Dollard's Ex'r, Harp. 564;

(Wis. 1854) Wilson v. State, 3 Wis. 798.

[b] The question as to whether a witness would believe another witness on oath cannot be asked, unless he testifies to a knowledge of the general reputation of the witness sought to be discredited.

—(La. 1851) Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596;

(N. Y. 1894) Carlson v. Winterson (Com. Pl.) 10 Misc. Rep. 388, 31 N. Y. Supp. 430, affirming judgment (City Ct. N. Y. 1894) 9 Misc. Rep. 711, 29 N. Y. Supp. 1142, and judgment affirmed (1895) 147 N. Y. 652, 42 N. E. 347;

(Tex. 1877) Spence v. State, 1 Tex. App. 541.

[c] The proper question to be put to a witness called to impeach another is as to whether he would believe him on oath.

—(Ky. 1819) Mobley v. Hamit, 8 Ky. (1 A. K. Marsh.) 590;

(N. Y. 1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[d] (U. S. 1827) When a witness is produced to testify as to the credibility of another witness, the proper questions to be put to the witness are: "Do you know the common reputation of the witness for veracity among the generality of his acquaintance? From your knowledge of his general reputation for veracity, would you believe him on his oath?"—Patriotic Bank v. Coote, Fed. Cas. No. 10,807 [3 Cranch, C. C. 169].

[e] (U. S. 1840) An impeaching witness, under examination, may be asked whether, from his knowledge of the general character of the witness, he would believe him under oath.—United States v. Vansickle, Fed. Cas. No. 16,609 [2 McLean, 219].

[f] (Ala. 1853) The individual opinion of a witness, founded on rumor, respecting the guilt of another witness of the crime of murder, is not admissible for the purpose of impeaching the latter.—Campbell v. State, 23 Ala. 44.

[g] (Ark. 1874) An impeaching witness may testify as to his belief.—Snow v. Grace, 29 Ark. 131.

[h] (Ark. 1888) A witness testified that he knew the principal witness for the state; that he had lived near her for seven years, and knew that her general reputation for truth and morality in the neighborhood was not good; that he considered it bad. *Held*, that witness should have been permitted to answer whether, taking such a reputation as a basis, he would believe her under oath.—Hudspeth v. State, 50 Ark. 534, 9 S. W. 1.

[i] (Ark. 1888) Under Mansf. Dig. § 2902, allowing a witness to be impeached by evidence of his general reputation for truth or immorality, an inquiry as to whether one, from his knowledge of his "reputation for truth and veracity, morality, and chastity," would believe him on oath, is not permissible.—Cline v. State, 51 Ark. 140, 10 S. W. 225.

[j] (Cal. 1859) An impeaching witness may swear he would not believe the other witness on oath.—Stevens v. Irwin, 12 Cal. 306.

[k] (Cal. 1868) It is not essential to the successful impeachment of a witness' character for truth that the impeaching witness should state that he would not believe him under oath. —People v. Tyler, 35 Cal. 553.

[l] (Colo. 1889) In impeaching the credibility of a witness, the question asked, "From what you know of his truth and veracity, would you believe him under oath?" is incompetent, as calling for the opinion of a witness, based upon his personal knowledge, and not upon the general reputation of the witness sought to be impeached.—Benesch v. Waggner, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254; Same v. Mitchelson, 12 Colo. 539, 21 Pac. 708.

[m] (Fla. 1851) An impeaching witness may be asked if he has the means of knowing the general character of the witness sought to be impeached, and, if so, from such knowledge, whether he would believe him on oath.—Porter v. Ferguson, 4 Fla. 102.

[mm] (Ga. 1855) The regular mode of examining into general character is to inquire of the witnesses whether they have the means of knowing the former witness' general character, and whether, from such knowledge, they would believe him on his oath.—Stokes v. State, 18 Ga. 17.

[n] (Ill. 1858) Where it is shown that the general character of a witness among his neighbors for truthfulness is bad, it is erroneous to refuse to let the impeaching witness answer whether he would believe such witness upon oath.—Eason v. Chapman, 21 Ill. (11 Peck) 33.

[nn] (Ill. 1882) Instead of the question usual in such cases, witnesses were asked if, in a case where defendant was personally interested, they would believe him on oath, and they answered that if he was interested they would hesitate to believe him. In the result of the case on trial defendant was personally interested, the suit being upon a note the signature to which he denied to be his, and his testimony consisted of such denial. *Held*, that the question was inadmissible.—Massey v. Farmers' Nat. Bank, 104 Ill. 327.

[o] (Ill. 1884) One called to impeach a witness need not necessarily be asked whether he would believe the witness under oath.—Laclede Bank v. Keeler, 109 Ill. 385.

[oo] (Ind. 1882) In a criminal case, a witness examined to impeach another cannot be asked whether he would believe the other under oath. —Walton v. State, 88 Ind. 9.

[p] (Iowa, 1882) Under Code 1873, § 3649, providing that "the general moral character of a witness may be proved for the purpose of testing his credibility," the word "character" means "reputation," and it is not competent for one to testify as to his individual opinion of the witness' moral character.—State v. Egan, 59 Iowa, 636, 13 N. W. 730.

[pp] (La. 1843) To discredit a witness, the proper question is whether, from a knowledge of his general character, he would be believed on oath.—Stanton v. Parker, 5 Rob. 108, 39 Am. Dec. 528.

[q] (La. 1843) A witness, who states he does not know the general character of another, cannot be asked whether he would believe the latter on oath. One is presumed not always ready to explain particular actions, but always to have within reach evidence of his general good character.—Stanton v. Parker, 5 Rob. 108, 39 Am. Dec. 528.

[qq] (La. 1892) Where witnesses introduced by defendant to impeach a witness for the state testify that they know the latter's general reputation for truth and veracity in the community in which he lives, and that it is bad, it is error to refuse to permit them to answer whether, from their knowledge of his general reputation for truth and veracity, they would believe him under oath.—State v. Christian, 44 La. Ann. 950, 11 South. 589, following Stanton v. Parker (1843) 5 Rob. 108, 39 Am. Dec. 528, and Paradise v. Sun Mut. Ins. Co. (1851) 6 La. Ann. 596.

[r] (Md. 1868) Where an impeaching witness has testified that a party's general reputation for truth and veracity in the community where he lives is unfavorable, he may be asked "whether, from that reputation, he [the witness] would believe him on oath in a matter in which he was interested."—Knight v. House, 29 Md. 194, 96 Am. Dec. 515.

[rr] (Mo. 1883) A witness cannot be asked whether he would believe another witness on oath.—State v. Rush, 77 Mo. 519.

[s] (N. H. 1838) Where witnesses are called to impeach the general character of a witness for truth, the proper inquiries are as to what is the general reputation of the witness as to truth, and whether, from such general reputation, the person testifying would believe such witness under oath as soon as men in general. —State v. Howard, 9 N. H. 485.

[ss] (N. J. 1869) A statement by the witness testifying that, from what he knew of the reputation of the witness impeached, he would not believe him under oath, is not sufficient. —King v. Ruckman, 20 N. J. Eq. (5 C. E. Green) 316.

[t] (N. Y. 1838) An impeaching witness may be required to declare whether the character of the principal witness is so very bad that, in his opinion, the witness is utterly unworthy of credit on oath.—People v. Rector, 19 Wend. 569.

[tt] (N. C. 1843) A witness, who is introduced for the purpose of discrediting another witness in the cause, must profess to know the general reputation of the witness sought to be discredited, before he can be heard to speak of his own opinion, or of the opinion of others, as to the reliance to be placed on the testimony of the impeached witness.—State v. Parks, 25 N. C. 296.

[u] (N. C. 1856) An impeaching witness, after he has stated that the character of another witness is bad, cannot be asked whether, from his knowledge of that character, he would, if he were a juror, believe the witness upon his oath.—Hooper v. Moore, 48 N. C. 428.

[uu] (N. C. 1878) It is not permissible to ask a witness, relative to another witness whose evidence it is sought to impeach, whether, from the latter's general character in the neighborhood, he would believe him on oath.—State v. Caveness, 78 N. C. 484.

[v] (Ohio, 1851) When a witness is called to impeach the character for truth and veracity of a witness called by the other side, such impeaching witness can only speak of the general reputation in the community of the witness sought to be impeached, and cannot give his own opinion of his character.—Bucklin v. State, 20 Ohio, 18.

[vv] (Pa. 1864) To discredit a witness, the first inquiry of the witnesses called for that purpose must be as to their acquaintance with him and his general character for truth and veracity in the neighborhood where he resides; next, what that reputation is; then the question may be asked whether, from their knowledge of his general reputation for truth, they would believe him under oath.—Bogle's Ex'rs v. Kreitzer, 46 Pa. (10 Wright) 465.

[w] (Pa. 1868) A witness must state his own knowledge of another's general good reputation for truth before he will be permitted to say he would believe him on oath.—Lyman v. City of Philadelphia, 56 Pa. (6 P. F. Smith) 488.

[ww] (S. C. 1896) It is not error to permit a witness to testify that he would not believe

another witness under oath where he states that he knows his general reputation, though he is unable to state the particular reputation of the witness for veracity.—State v. Murphy, 48 S. C. 1, 25 S. E. 43.

[x] (Tenn. 1858) The proper questions to be put to the impeaching witness are whether he knows the general reputation of the person whose credibility is in question, what that reputation is, and whether, from such knowledge, the witness would believe him upon his oath.—Gilliam v. State, 38 Tenn. (1 Head) 38, 73 Am. Dec. 161.

[xx] (Tex. 1878) In impeaching the credibility of a witness, the inquiry should be restricted to his general reputation for veracity in the community where he is best known. The impeaching witness is not to be asked whether, from such reputation, he would believe the impugned witness, but whether that reputation is such as entitles him to belief.—Marshall v. State, 5 Tex. App. 273.

[y] (Tex. 1880) In attempting to impeach the credibility of a witness by proof of his general character, the impeaching witness is first to be interrogated upon his knowledge of the general reputation for truth of the assailed witness where the latter resides or is best known. If the impeaching witness appears sufficiently acquainted with such reputation, he should next be asked whether it is good or bad; and, if he states that it is bad, he may be further asked whether, in view of such reputation, the assailed witness is worthy of belief on his oath, but not whether he (the impeaching witness) would believe him.—Holbert v. State, 9 Tex. App. 219, 35 Am. Rep. 738.

[yy] (Tex.) After a witness has stated that he knows the general reputation for truth of the person whom it is sought to impeach, he may be asked whether, from that reputation, he is worthy of belief. This is not equivalent to asking the witness whether he would believe him.—(1882) Bluitt v. State, 12 Tex. App. 39, 41 Am. Rep. 666; (1893) Mayes v. State, 33 Tex. Cr. R. 33, 24 S. W. 421.

[z] (Tex. 1888) Questions as to the reputation of an impeached witness for truth and veracity, and whether he is entitled to be believed under oath, are improper, as calling for the opinion of the witness and not restricted to general character and reputation.—Griffin v. State, 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. Rep. 460.

[zz] (W. Va. 1881) A witness who states that he is acquainted with the general reputation for truth and veracity of another witness, and that it is bad and he would not believe him on oath, is competent, and what his opinion is founded on only affects the weight of the evidence.—State v. Meadows, 18 W. Va. 658.

§ 1159. Cross-examination.

Conclusiveness of answer on cross-examination, see post, § 1275.

[a] (U. S. 1827) Where a witness is produced to testify as to the credibility of another witness, and such impeaching witness testifies that the persons who are acquainted with the witness say that his reputation for veracity is not good, the impeaching witness will not be required to state the names of the persons from whom he has learned the general reputation of the witness for veracity.—Patriotic Bank v. Coote, Fed. Cas. No. 10,807 [3 Cranch, C. C. 169].

[b] (Ala. 1889) Where a person has testified to his friendship for a witness whose character he is called to impeach, it is competent, on cross-examination, to ask him if he did not once go to arrest the witness with a gun, on a warrant sworn out by himself, since the evidence sought to be elicited tends to contradict his previous testimony.—Barnett v. State, 89 Ala. 165, 7 South. 414.

[c] (Ala. 1890) A witness to character may be cross-examined as to what he has heard in the community touching the character in question.—Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

[d] (Ala. 1890) A witness who states on cross-examination that he has heard much adverse criticism as to the character of the person in question cannot testify that he has heard people say that they would not believe him under oath.—Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

[e] (Conn. 1849) A witness, called to impeach the character for veracity of another witness who had given material testimony, swore that the character of the last-mentioned witness was not upon a par with that of mankind in general, and was asked, on cross-examination, what individual he had heard speak against the character of that witness. *Held*, that this question was a proper one.—Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249.

[f] (Fla. 1878) The opposing party is entitled, on cross-examination of an impeaching witness, to ascertain the extent of the information of the witness and the source of his knowledge.—Robinson v. State, 16 Fla. 835.

[g] (Fla. 1893) Where a witness, offered to impeach the character of another for veracity, testifies that he knows the general reputation of the party to be impeached in the neighborhood in which such party lives for truth and veracity, the foundation for proving what that reputation is has been sufficiently laid, and the witness should be permitted to go on and testify as to what the reputation is, and whether he would believe such party under oath, and he cannot be cross-examined to test the extent and sources of his information until he has been turned over in regular order for cross-examination in general at the close of the examination in chief.—Nelson v. State, 32 Fla. 244, 13 South. 861.

[h] (Ky. 1814) Where witnesses are introduced to discredit others, and testify that their general character is bad, the adverse party will be permitted to ask as to their character in point of veracity.—Noel v. Dickey, 6 Ky. (3 Bibb) 268.

[i] (Ky. 1886) Where the character of a witness is in question, it is improper, on the cross-examination of an impeaching witness, to ask if the witness has any personal knowledge of any particular act of bad conduct on the part of the witness whose character is being assailed.—Fox v. Commonwealth, 1 S. W. 396.

[j] (Ky. 1896) A witness called by the state to impeach the character of defendant's witness may testify on cross-examination as to the character and reputation of other witnesses for the state.—Jackson v. Commonwealth, 34 S. W. 901.

[k] (Me. 1841) On the cross-examination, the inquiry should be limited to the witness' opportunity for knowing the character of such witness, for how long a time and how generally such unfavorable reports have prevailed, and from what sources they have been derived. It is not allowable to ask the impeaching witness whether he would believe the witness attempted to be impeached on oath.—Inhabitants of Phillips v. Inhabitants of Kingfield, 19 Me. (1 App.) 375, 36 Am. Dec. 760.

[l] (Mass. 1849) An impeaching witness may be asked, on cross-examination, to state the names of all persons whom he has heard speak against the reputation of the witness impeached.—Bates v. Barber, 58 Mass. (4 Cush.) 107.

[m] (Mich. 1865) Where a witness has testified that the reputation of another witness for truth and veracity was bad, and on cross-examination had testified that he had heard A. speak against him before the commencement of the suit, it was *held* that the question, "What did A. say?" was competent.—Annis v. People, 13 Mich. 511.

[n] (Mich. 1885) Cross-examination of an impeaching witness, to show that he is himself disreputable, may be restricted, in the discretion of the trial judge; and, where the offer was to show that he was a procurer and blackmailer, it is properly excluded.—Hollywood v. Reed, 57 Mich. 234, 23 N. W. 792.

[o] (Mich. 1894) A witness who had testified to defendant's good character could properly be asked if, after the crime, he did not say to another witness that he knew defendant to be dangerous; that he had had trouble with him before this.—People v. Pyckett, 99 Mich. 613, 58 N. W. 621.

[p] (Mich. 1895) When defendant brought out the fact that plaintiff had been arrested for a criminal offense, it was proper, on defendant's cross-examination, on the question of animus, to ask him whether he had not caused plaintiff's arrest.—Burt v. Long, 106 Mich. 210, 64 N. W. 60.

[q] (Miss. 1884) An impeaching witness, who states that he knows the general reputation of another witness, may be cross-examined as to the sources and extent of such information.—Pickens v. State, 61 Miss. 563.

[r] (Mo. 1879) A liberal cross-examination is allowable, where a witness impeaches another by testimony as to general character.—State v. Miller, 71 Mo. 89.

[s] (N. H. 1838) On cross-examination of impeaching witnesses, inquiries as to the means of knowledge of the character of the witness, the origin of reports against him, how generally such reports have prevailed, and from whom and when they heard them, are admissible.—State v. Howard, 9 N. H. 485.

[t] (N. H. 1851) A witness, being called to impeach another witness, and having testified that from his general reputation he would not believe him under oath, may be asked what his testimony would be, laying aside the impressions which he received at a previous trial referred to.—Titus v. Ash, 24 N. H. (4 Fost.) 319.

[u] (N. Y. 1827) Where a witness states that the general reputation of a witness previously sworn is bad in point of truth and veracity, he may be asked, in cross-examination, to name the persons he has heard impeach the character of the witness.—Lower v. Winters, 7 Cow. 263.

[v] (N. Y. 1829) A witness, testifying as to the character of another witness, may be asked on what circumstances he founds an unfavorable impression as to his character.—Fulton Bank v. Benedict, 1 N. Y. Super. Ct. (1 Hall) 480.

[vv] (N. Y. 1886) The right to test evidence that the general character of a witness is not good, by cross-examination, goes to the inquiry of the particular charges heard by the impeaching witness and the character of such specific imputations, but not to the question as to whether or not they are true.—Mather v. Freelove, 3 N. Y. St. Rep. 424.

[w] (N. Y. 1887) Where a witness in plaintiff's behalf had testified that the reputation of the plaintiff in the community in which he lived was good, it was competent to ask him on cross-examination if he had heard certain things repeated concerning the plaintiff, showing that his reputation was not good.—Calkins v. Colburn, 10 N. Y. St. Rep. 778.

[ww] (N. Y. 1893) A witness examined to impeach plaintiff's character testified that he would not believe plaintiff under oath "as soon as he would men in general." On cross-examination witness was asked if good men were not spoken ill of there (meaning the town where plaintiff lived), and if he had not heard as good men as plaintiff berated. *Held* that, though such questions might properly have been excluded, their admission was not such error as would require a reversal of the verdict.—Davis v. Willis, 67 Hun, 650, 22 N. Y. Supp. 339.

[x] (N. C. 1869) An impeaching witness may be impeached by cross-examination.—State v. Cherry, 63 N. C. 493.

[xx] (N. C. 1872) When a witness swears to the general bad character of another witness, he may be asked upon cross-examination to name the individuals whom he heard speak disparagingly of the witness, and what was said.—State v. Perkins, 66 N. C. 126.

[y] (Ohio, 1817) An impeaching witness may be cross-examined as to how he formed his opinion, and may be asked whom he heard give the witness a bad character.—Gleason v. Williams, Tapp. 174.

[yy] (Tex. 1880) An impeaching witness is amenable to cross-examination in like manner and to the same extent as other witnesses.—Holbert v. State, 9 Tex. App. 219, 35 Am. Rep. 738.

[z] (Vt. 1858) It is not proper for counsel to inquire, upon the cross-examination of one witness who has testified to the bad character of another for truth, whether he would believe the latter on oath.—Willard v. Goodenough, 30 Vt. 393.

[zz] (W. Va. 1881) An impeaching witness, testifying to the general reputation for truth and veracity of the witness sought to be impeached, and as to whether he would believe him under oath, may be asked whether his opinion is formed from his own knowledge or from what he has heard his neighbors say, and whether he ever heard a majority of his neighbors speak of the character of the impeached witness.—State v. Meadows, 18 W. Va. 658.

§ 1160. Redirect examination.

[a] (Ala. 1853) If a witness be introduced for the purpose of impeaching another by proof of his general character, and on cross-examination testifies that public rumor imputed to the impeached witness "a bad moral character as to drinking, fighting, murder, shooting at men, and certain publications, reputed false, in his newspaper," he cannot be asked, on re-examination in chief, "what other moral delinquencies public rumor attributed to him," nor "what rumor said in regard to those publications," nor "whether he did not know, of his own knowledge, that they were false."—Campbell v. State, 23 Ala. 44.

[b] (Ind. 1895) On a criminal trial, after defendant had testified in his own behalf, a witness for the prosecution testified that defendant's general reputation for morality was bad, and on cross-examination he was asked if he ever heard any one besides the prosecuting attorney state that defendant's general reputation for morality was bad, and his answer was that he could not name any specific person. *Held*, that the prosecution, on redirect examination, had no right to question the witness as to specific charges of moral delinquency made against defendant.—Griffith v. State, 140 Ind. 163, 39 N. E. 440.

[c] (Ky. 1886) Where the character of a witness is in question, it is improper, on redirect examination of an impeaching witness, to ask if the witness has any personal knowledge of any particular act of bad conduct on the part of the witness whose character is being assailed.—Fox v. Commonwealth, 1 S. W. 396.

[d] (S. C. 1884) Where, in a criminal case, a witness for defendant, offered to impeach the general character of the prosecutor for veracity, is permitted on cross-examination to testify as to certain offenses with which such prosecutor has been charged, defendant may in reply examine such witness further as to such offenses. —State v. Hicks, 20 S. C. 341.

§ 1161. Evidence of accusation or conviction of crime.

Contradiction of record of conviction, see post, § 1169.

Cross-examination to show accusation or conviction, see ante, §§ 1142, 1148.

[a] (U. S. 1880) Conviction of an infamous crime, going to the credibility of a witness, must be shown by the record.—United States v. Biebusch (C. C.) 1 Fed. 213, 1 McCrary, 42.

[b] (Cal. 1870) Since the record is the best evidence of the previous conviction of a witness for crime, it is not competent to prove that fact by parol against the objection of the opposite party.—People v. Reinhart, 39 Cal. 449; Same v. Melvane, Id. 614; Same v. McDonald, Id. 697.

[c] (Cal. 1877) Under Code Civ. Proc. § 2051, allowing a cross-examiner to ask a witness if he has been convicted of a felony, a witness on cross-examination may be asked whether he has been convicted of a felony, or such fact may be proved by the record of the conviction, as such section continues the right to prove such fact by the record as was the rule before the Code. —People v. Chin Mook Sow, 51 Cal. 597.

[d] (Conn. 1862) Under Rev. St. tit. 1, § 141, providing that the conviction of a person may be shown for the purpose of affecting his credit as a witness, a conviction of crime can be proved against a witness for the purpose of affecting the credibility of his testimony only by the record of his conviction.—Hall v. Brown, 30 Conn. 551.

[e] (Ga.) The record of the conviction of a witness of larceny is admissible in evidence to impeach him.—(1884) Georgia R. R. v. Homer, 73 Ga. 251; (1894) Coleman v. State, 94 Ga. 85, 21 S. E. 124.

[f] (Ga. 1888) To prove a conviction in another court, an incomplete transcript is not sufficient. Exemplification of docket entry, plea of guilty, and judgment thereon, is not admissible to discredit a witness as a convict, without either a transcript of the accusation or indictment, or, if lost, some evidence of their contents.—Doggett v. Simms, 79 Ga. 253, 4 S. E. 909.

[g] (Ill. 1882) Where defendant in a criminal case testifies, and an attempt is made to discredit him by showing that he has been convicted of an infamous crime, legal proof of the conviction must be made; it is not enough to show authority to detain him in the penitentiary. The prison record, therefore, is inadmissible in evidence in such a case.—Bartholomew v. People, 104 Ill. 601, 44 Am. Rep. 97.

[h] (Ill. 1888) It is error to admit a copy of only a part of record of previous conviction, consisting of the final judgment order only, for the purpose of affecting the credit of a witness. —Kirby v. People, 123 Ill. 436, 15 N. E. 33.

[i] (Mass. 1891) A witness having admitted conviction of larceny, and the record of the conviction being in evidence, he cannot be asked as to the circumstances connected with the transaction.—Commonwealth v. Galligan, 155 Mass. 54, 28 N. E. 1129; Same v. Taber, Id.

[j] (Mich. 1882) The credit of a witness cannot be impeached or assailed by the direct testimony of other witnesses to any charge of criminality formerly made against him, unless he has been adjudged guilty; and this must be shown by a record of the judgment.—Driscoll v. People, 47 Mich. 413, 11 N. W. 221.

[k] (Mo. 1883) A witness' conviction of crime cannot be proved by parol against objection.—State v. Douglass, 81 Mo. 231.

[l] (Mo. 1885) Proof by oral evidence of the previous conviction of a witness of a crime is competent if such evidence is not objected to.—State v. Rockett, 87 Mo. 666.

[m] (Mo. 1893) Where defendant is a witness in his own behalf, it is not error to permit the state to read in evidence a certified copy of the records of the court of another county, showing his conviction therein for assault with intent to rape, for the purpose of affecting his credibility as a witness.—State v. Minor, 117 Mo. 302, 22 S. W. 1085.

[n] (Neb. 1888) Where the fact that a witness has been convicted of a felony appears beyond question from his own testimony, and other evidence introduced, the refusal of the court to admit the record of such conviction is error without prejudice.—Long v. State, 23 Neb. 33, 36 N. W. 310.

[o] (N. Y. 1871) A recital in a bond, signed by a witness, that he has been charged with perjury, and that there was probable cause to believe him guilty, is no evidence whatever against the credibility of such witness.—Berner v. Mittnacht, 82 N. Y. Super. Ct. (2 Sweeny) 582.

[p] (N. Y. 1875) Where on a trial for rape the prisoner is sworn and testifies in his own behalf, a record of his conviction of petit larceny is admissible as affecting his credit.—People v. Satterlee, 5 Hun, 167.

[q] (Tex. 1895) Where defendant, over his objection, when asked if he was under indictment for certain other offenses, stated that he had been served with some papers, but, if he was indicted for the offenses, he did not know it, it was proper to admit the indictments in evidence, where the court charged that they could be considered only on the question of defendant's credibility.—Brazos v. State (Cr. App.) 33 S. W. 540.

[r] (Vt. 1894) A record of conviction which merely shows that a witness was charged with having found stolen property, and that he was found guilty and fined, is not admissible to impeach the witness, as it does not show that he was convicted of any crime.—Norton's Adm'r v. Perkins, 67 Vt. 203, 31 Atl. 148.

§ 1162. —— Identification of witness as person named in record.

[a] (Ala. 1893) Where a justice's docket is introduced to prove defendant's prior conviction of petit larceny, to affect his credibility (Code, § 2766), the state may be allowed to recall defendant, who has testified for himself, and examine him as to his identity with the person so convicted.—Thompson v. State, 100 Ala. 70, 14 South. 878.

[b] (Mass. 1889) Under Pub. St. c. 169, § 19, providing that the conviction of a witness of a crime may be shown to affect his credibility, when the defendant testifies in his own behalf, the record of his conviction of a crime is admissible, and he can be asked questions tending to identify him with the person named in the record. — Commonwealth v. Sullivan, 150 Mass. 315, 23 N. E. 47.

§ 1163. Cumulative testimony.

[a] (Tex. 1892) The fact that a defendant has already successfully attacked the character of the state's witness for truth and veracity would not preclude him from introducing cumulative testimony.—Browder v. State, 30 Tex. App. 614, 18 S. W. 197.

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§ 1164. Sufficiency of evidence.

[a] (U. S. 1849) Where there are conflicting statements in regard to the credibility of a witness, which are equally balanced for and against his credibility, the jury should throw out his testimony.—Ray v. Donnell, Fed. Cas. No. 11,590 [4 McLean, 504].

[b] (Ala. 1866) If witnesses, called to discredit the character of another witness, testify that they are acquainted with his character, and would not believe him on oath, and on cross-examination they make admissions tending to show that they do not understand what is meant by character, and do not speak of his general reputation, this evidence will not be excluded.—Bullard v. Lambert, 40 Ala. 204.

[c] (Cal. 1883) The general reputation of a witness for truth, honesty, and integrity cannot be established by his reputation as to those particulars among the police officers of a small town.—People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700.

[d] (Ga. 1882) Where a witness, when asked the reputation of another witness for truth and veracity, answered incoherently, obscurely and contradictorily, not apprehending, evidently, the point of the inquiry, *held*, that his answers were properly submitted to the jury for what they were worth.—Sims v. State, 68 Ga. 486.

[e] (Iowa, 1884) When the general moral character of a witness has been stated to be bad, such impeaching evidence cannot be wholly destroyed by showing on cross-examination that the reports referred to his character relative to a particular vice.—State v. Woodworth, 65 Iowa, 141, 21 N. W. 490.

[f] (N. Y. 1862) Where, in the attempt to impeach a witness, she is shown to be of bad moral character, reputed dishonest, untruthful, thievish, unchaste, a keeper of a drinking shop for low characters, the court cannot instruct the jury that the impeaching evidence is of no force, simply on the ground that the impeaching witnesses were not asked if they would believe her on oath.—Wright v. Paige, 36 Barb. 438, affirmed (1868) *42 N. Y. (3 Keyes) 581, 33 How. Prac. 618, note, 3 Trans. App. 134.

[g] (Pa. 1889) Where the reputation of a witness is impeached, a charge that in weighing the impeaching testimony the jury are to consider whether the persons giving it know the witness well, and the community in which he lives, and whether they are able to judge as to what his general reputation in the neighborhood is, and that the individual opinions of such persons do not go to make up a man's character, is proper.—Oberholtzer v. Heist, 16 Atl. 804.

[h] (Tex. 1876) To impeach a witness for truth and veracity, his character must be shown to be notoriously bad in that respect; and while this may be done by one witness, yet, in weighing the testimony, one witness will not, ordinarily, be satisfactory.—Wafford v. State, 44 Tex. 439.

[i] (Tex. 1877) Bad character for truth must be notorious in the neighborhood of the witness' residence, but it may be proved by one witness, as the law does not fix any required number.—Butler v. State, 3 Tex. App. 48.

[j] (Tex. 1888) An impeachment of the reputation for truth and veracity of one of the state's witnesses by the testimony of a single witness is not sufficient to require a special instruction on the matter.—Rider v. State, 26 Tex. App. 334, 9 S. W. 688.

[k] (Vt. 1882) The weight of testimony as to a witness' reputation just before the commencement of a pending suit is lessened if the reports impeaching his reputation grew out of the subject-matter of the suit.—Amidon v. Hosley, 54 Vt. 25.

6. EVIDENCE TO SUSTAIN CHARACTER OF WITNESS OR TO IMPEACH IMPEACHING WITNESS.

NATURE OF ATTACK OR SUFFICIENCY OF IMPEACHMENT TO AUTHORIZE EVIDENCE OF GOOD CHARACTER, § 1165.
REBUTTAL OF EVIDENCE IMPEACHING CHARACTER, § 1166.
EVIDENCE TO SUSTAIN CHARACTER OF WITNESS IMPEACHED, § 1167.
—— OF WITNESS ACCUSED OR CONVICTED OF CRIME, § 1168.
—— CONTRADICTION OF RECORD OF CONVICTION, § 1169.
COMPETENCY OF SUSTAINING WITNESS, § 1170.
—— KNOWLEDGE OR MEANS OF KNOWLEDGE, § 1171.
EXAMINATION OF SUSTAINING WITNESS, § 1172.
CROSS-EXAMINATION, § 1173.
IMPEACHMENT OF IMPEACHING WITNESSES, § 1174.
SUSTAINING IMPEACHING WITNESS, § 1175.

Corroboration of impeached witness, see post, §§ 1284–1289.
Evidence of good character of contradicted witness, see post, § 1282.
—— *of interested or prejudiced witness, see* post, § 1206.
—— *of unimpeached witness, see* ante, § 1086.
—— *of witness impeached by inconsistent statements, see* post, § 1259.

§ 1165. Nature of attack, or sufficiency of impeachment to authorize evidence of good character.

[a] (Conn. 1833) Evidence of the general good character of a witness is inadmissible, where his general character has not been impeached, although an attempt has been made to prove facts inconsistent with his testimony, and to show that he had been privy to a fraud in a deed, under which the plaintiff claimed title.—Rogers v. Moore, 10 Conn. 13.

[b] (Ind. 1894) Where a replevin action and an action by the wife of the defendant in replevin and by another for the return of the property are consolidated, and the wife denies having made admissions against her ownership, which had been introduced in evidence, it is error to admit evidence of the wife's reputation for veracity, as, her admissions being only admissible against her, evidence thereof was original, and not impeaching, testimony.—Gaar, Scott & Co. v. Shaffer, 139 Ind. 191, 38 N. E. 811.

[c] (Ky. 1890) On trial for murder, where witnesses for the state in their chief examination disclose the fact that they were bawds at the time of the occurrence to which they are testifying, and defendant on cross-examination elicits and emphasizes the same fact, it is competent for the commonwealth, in support of their credibility, to introduce evidence that the women have since abandoned their evil ways, and are leading respectable lives.—Carter v. Commonwealth, 13 S. W. 921.

[d] (La. 1892) On a murder trial, evidence as to the character of one of the state's witnesses for peace and quiet is irrelevant, when such witness was in no manner connected with the homicide, though he was with deceased at the time of its occurrence.—State v. Jackson, 44 La. Ann. 160, 10 South. 600.

[e] (La. 1892) The state may offer evidence of the good reputation for truthfulness of its own witness, in case his veracity is attacked by defendant's counsel in course of his cross-interrogation.—State v. Fruge, 44 La. Ann. 165, 10 South. 621.

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[f] (Me. 1861) Where plaintiff has introduced evidence of declarations by the defendant unfavorable to the character for truth and veracity of one of his own witnesses, this amounts to an impeachment of the witness, and the defendant may testify to his good character for truth and veracity.—Prentiss v. Roberts, 49 Me. 127.

[g] (Mass. 1856) Proof that a witness had made material false statements, which are relied on as proving him unworthy of credit, will not authorize the party calling him to introduce evidence of his general reputation for truth.—Brown v. Mooers, 72 Mass. (6 Gray) 451.

[h] (Mass. 1856) An attempt to impeach a witness, by asking another witness what was his character for truth, warrants the introduction of evidence to support his character, although the answer to the question was that his character was good.—Commonwealth v. Ingraham, 73 Mass. (7 Gray) 46.

[i] (Mo. 1893) Evidence that plaintiff attempted to suborn witnesses is not impeaching evidence, but an admission against plaintiff's interest; and therefore the introduction of such evidence will not justify plaintiff in introducing proof of his general reputation for veracity.—Fulkerson v. Murdock, 53 Mo. App. 151.

[j] (N. Y. 1851) That a witness admitted on his cross-examination that he had been prosecuted, but not tried, for perjury, does not authorize the party calling him to give evidence of his general good character.—People v. Gay, 1 Parker, Cr. R. 308, affirmed (1852) 7 N. Y. (3 Seld.) 378.

[k] (N. Y. 1852) Where a witness, on cross-examination, testified that he had been prosecuted before a magistrate on a charge of perjury, and committed for trial, it was *held* that this was not such impeachment of his character as to authorize the admission of witnesses to sustain it.—People v. Gay, 7 N. Y. (3 Seld.) 378.

[l] (N. C. 1869) If a question put to a witness is an imputation on his character and is calculated to degrade him before the jury, evidence as to his character is admissible by the other party.—State v. Cherry, 63 N. C. 493.

[m] (Tex. 1885) A witness whose character has been attacked without success may defend it.—Wilson v. State, 17 Tex. App. 525.

[n] (Tex. 1893) Where defendant for the purpose of impeaching the state's witness voluntarily introduces evidence tending to impeach his own witness, he cannot afterwards introduce testimony to show that the reputation of his witness for truth and veracity was good, since the necessity for such testimony, if any existed, was voluntarily made by defendant himself.—Mealer v. State, 32 Tex. Cr. R. 102, 22 S. W. 142.

[o] (Tex. 1893) To entitle a party to introduce witnesses in support of his character for truth it is not necessary that his general character be first impeached, but it is sufficient that his veracity as a witness has been fairly challenged, especially where he is a stranger at the place of trial.—Texas & P. Ry. Co. v. Raney (Civ. App.) 23 S. W. 340.

[p] (Tex. 1893) Evidence that defendant conspired to defraud plaintiff by having goods procured for defendant by an irresponsible person charged to the latter is an attack on defendant's character, and he may prove his reputation for truth and honesty.—Loomis v. Stuart (Civ. App.) 24 S. W. 1078.

[q] (Tex. 1894) In an action for personal injuries, plaintiff could show his reputation for truth and honesty, where defendant cross-examined plaintiff, showed that he paid a physician for dressing his injuries and received a receipt, and then offered in evidence the receipt and plaintiff's bond for costs, to enable the jury, from comparison of the writings, to determine whether plaintiff wrote the receipt.—Texas & P. Ry. Co. v. Raney, 86 Tex. 363, 25 S. W. 11.

[r] (Tex. 1894) Where the fact that a witness for defendant was jointly indicted with him for the robbery is kept prominently before the jury, thereby affecting his credibility, he should be allowed to testify that he was acquitted.—Jackson v. State, 33 Tex. Cr. R. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30.

[s] (Vt. 1848) It is now well settled that whenever the character of a witness for truth is attacked in any way, whether by cross-examination, or by general evidence of want of character for truth, or by proving statements made by him out of court different from those sworn to, it is competent for the party calling him to give general evidence of his good character.—Paine v. Tilden, 20 Vt. 554.

[t] (Vt. 1892) Where no attempt is made to impeach or discredit a witness, except to show by cross-examination that the facts were otherwise than as testified to by her, sustaining evidence as to her character for truth and veracity is inadmissible.—Stevenson v. Gunning's Estate, 64 Vt. 601, 25 Atl. 697.

[u] (Va. 1895) In an action for personal injuries alleged to have been due to a fall from defendant's car, that plaintiff, on cross-examination, was asked as to other injuries received by him, to show that his present condition was not the effect of his fall, is not an attack on his credibility, so as to entitle him to evidence of his reputation for veracity.—Reynolds v. Richmond & M. Ry. Co., 92 Va. 400, 23 S. E. 770.

[v] (Wis. 1847) Where a party on cross-examination attempts to weaken or impair the testimony of a witness, the party calling him may prove that his character for truth and veracity is good.—Eaton v. White, 2 Pin. 42.

§ 1166. Rebuttal of evidence impeaching character.

[a] (Ark. 1855) After an attempt to impeach the testimony of a witness, former witnesses may be recalled to offer rebutting testimony.—Pleasant v. State, 15 Ark. 624.

[b] (Md. 1883) A witness having equal means of knowledge with the impeaching witness may contradict his statement that the general reputation of the impeached witness for truth was bad.—Sloan v. Edwards, 61 Md. 89.

[c] (S. C. 1888) When the state attacks the character of a witness for the defense, a new issue is then raised, which could not have been before presented; and upon such issue the defense has the right to offer testimony, as it could not before have been offered.—State v. Jones, 29 S. C. 201, 7 S. E. 296.

§ 1167. Evidence to sustain character of witness impeached.

[a] (U. S. 1871) Where, on cross-examination of a witness, collateral facts are called out from him tending to create distrust of his integrity, fidelity, or truth, it is competent for the adverse party to ask of the witness an explanation which may show the consistency of such facts with his integrity, fidelity, and truth, although circumstances may thus be proved which are foreign to the principal issue, and which, but for such previous cross-examination, would not be permitted to be proved.—United States v. Eighteen Barrels High Wines, Fed. Cas. No. 15,033 [8 Blatchf. 475].

[b] (Ala. 1839) A witness, whose credibility is impeached, is sufficiently sustained by proof that his general character was good, and that he was entitled to full credit on his oath.—McCutchen's Adm'r v. McCutchen, 9 Port. 650.

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[c] (Conn. 1830) After the testimony of the principal witness, who was deaf and dumb, on the trial of a prosecution for an attempt to commit a rape, was attempted to be discredited, by proving that she had given different accounts of the transaction, and after she had sworn that she had concealed the transaction more than a year on account of the threats and influence of the prisoner and through fear of him, the prosecutor offered to prove by an instructor of the deaf and dumb, who had been her teacher, that the deaf and dumb generally have a sense of inferiority to other people, and, as a class, are easily intimidated; that they are credulous, sincere, and submissive; and that, from his acquaintance with the witness, he believed such to be her character. *Held*, that such evidence was inadmissible, as opening a door for inquiries in their nature interminable, without producing any satisfactory result.—State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90.

[d] (Ga. 1874) When a witness has been impeached by proof of general bad character, one who is called to sustain him should, if not able to say that his general character is not bad, at least be required to state that it is not such as to render him unworthy of credit on his oath, and that, from this character, the sustaining witness would believe him on his oath.—Artope v. Goodall, 53 Ga. 318.

[e] (Ga. 1892) An impeached witness may be sustained by evidence going to his character generally, but not by evidence disproving particular facts brought out on cross-examination of the impeaching witness.—Surles v. State, 89 Ga. 167, 15 S. E. 38.

[f] (Ind. 1850) Defendant gave evidence of the bad character of two of plaintiff's witnesses. *Held*, that plaintiff might be permitted, in her rebutting evidence, as to the characters of said witnesses, to prove that they were good before the suit was commenced.—King v. Kersey, 2 Ind. (2 Cart.) 402.

[g] (Ind. 1870) After the defendant in a criminal action had closed his evidence, the prosecution introduced evidence as to the character of one of the defendant's witnesses. *Held*, that after the prosecution had closed its rebutting testimony, the defendant was entitled to introduce evidence to sustain the character of the witness.—Clackner v. State, 33 Ind. 412.

[h] (Iowa, 1880) Evidence that a witness is industrious and attentive to business, offered in rebuttal of testimony impeaching his veracity, is irrelevant and incompetent.—Herzman v. Oberfelder, 54 Iowa, 83, 6 N. W. 81.

[i] (Iowa, 1882) Where a witness' reputation for truth and morality is assailed, the negative testimony of his neighbors that they never heard anything said about his character, good or bad, is competent to show a good reputation.—State v. Nelson, 58 Iowa, 208, 12 N. W. 253.

[j] (Iowa, 1884) Evidence as to the moral character of a witness must be confined to his general reputation when it is sought thus to impeach him; and, while he may limit and define, by cross-examination, the character of the bad reports against him, and by evidence in chief may show his general moral character to be good, he may not show the foundation of the bad reports, and then show that he was not guilty of a particular wrong act of which he was suspected.—State v. Woodworth, 65 Iowa, 141, 21 N. W. 490.

[k] (La. 1885) After the accused has elicited evidence tending to discredit a state's witness who swore that his reason for not sooner informing against defendant was because he feared him, evidence may be introduced to sustain his credibility by proving that he had declared his fears of defendant at the time, and that such fears were reasonable, owing to the character and conduct of defendant.—State v. Redmond, 37 La. Ann. 774.

[l] (Md. 1849) The plaintiff, with a view to rebut the evidence given by the defendant to impeach the integrity of the plaintiff, offered to give evidence that the plaintiff had always been reputed and considered among all his acquaintances as a man of integrity. *Held*, that the court below erred in admitting this testimony.—Dorsey v. Whipps, 8 Gill, 457.

[m] (Mass. 1858) After a party has introduced evidence that the reputation of a witness for truth is bad, the party who called him may introduce evidence that his reputation was good until his failure in business some months previous, although bad since.—Quinsigamond Bank v. Hobbs, 77 Mass. (11 Gray) 250.

[n] (Mo. 1895) Where the character of a witness for truth is attacked, the party calling him can prove his good character.—Walker v. Phœnix Ins. Co., 62 Mo. App. 209, 1 Mo. App. Rep'r, 478.

[o] (N. H. 1844) Where the character of a witness for truth and veracity is impeached, the party calling him cannot, for the purpose of sustaining his credit, cumulate evidence on an immaterial fact as to which such witness has testified.—McClintock v. Whittemore, 16 N. H. 268.

[p] (N. Y. 1838) Where the general moral character of a witness is impeached on his own cross-examination, evidence may be introduced in support of his character for truth and veracity.—People v. Rector, 19 Wend. 569.

[q] (N. Y. 1856) Where it is sought to impeach the credibility of witness by his cross-examination, letters from the adverse party, showing his high esteem, are admissible.—Stacy v. Graham, 14 N. Y. (4 Kern.) 492.

[r] (N. Y. 1867) Evidence of the general good character of a witness, or of good reputation for truth and veracity, is incompetent to rebut proof of particular facts against him elicited from his own statements.—Hannah v. McKellip, 49 Barb. 342.

[s] (N. Y. 1878) In an action by a woman for assault and battery it appeared that plaintiff and her sister, who was a witness for plaintiff, were engaged in business, and defendant offered evidence that their moral character was bad. *Held*, that it was not competent for plaintiff to testify that she enjoyed the patronage of the better class of ladies in the town.—Hagadorn v. Kearney, 13 Hun, 236.

[t] (Tenn. 1891) In an action for seduction and breach of promise of marriage, plaintiff's stepmother, who was also defendant's sister, testified that she allowed plaintiff to go to defendant's house after she knew of the improper relations between them, and that plaintiff was 21 years old when her child was born. In reply to a question whether a previous statement of witness that plaintiff was a child was not incorrect, witness stated that "she was a child in ways and manners, and as innocent as a child"; defendant "almost raised her, and I taught her to love and respect him." *Held* admissible to explain why witness allowed plaintiff to go to defendant's house, the sufficiency of the explanation being a question for the jury.—Graham v. McReynolds, 90 Tenn. (6 Pickle) 673, 18 S. W. 272.

[u] (Tex. 1894) Where evidence has been offered to impeach a witness, evidence to establish his general reputation for truth and veracity is admissible.—Howard v. Galbraith (Civ. App.) 30 S. W. 689.

[v] (Tex. 1895) Where the character for veracity of an accomplice who testified for the prosecution is attacked, it may be sustained in the same manner as if the witness was not an

accomplice.—Anderson v. State, 34 Tex. Cr. R. 546, 31 S. W. 673, 53 Am. St. Rep. 722.

[w] (Vt. 1845) Where defendant in an action for slander attempted to impeach the credit of the witnesses by whom the speaking was proved, the plaintiff was entitled to prove, as tending to sustain the credibility of the witnesses, that the witnesses resided in another state, and that the defendant had, by solicitation, money, and threats, endeavored to induce them to decline attending court and testifying in the case. —Kirkaldie v. Paige, 17 Vt. 256.

[x] (Va. 1877) A party whose witness is impeached may sustain him by evidence of his general reputation for truth.—George v. Pilcher, 28 Grat. 299, 26 Am. Rep. 350.

[y] (Wash. 1896) Where the reputation of a witness has been attacked, evidence as to his reputation in a city five miles from the place of his residence, acquired in the course of business dealings or otherwise, is admissible.—State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

§ 1168. —— Of witness accused or convicted of crime.

[a] (Cal. 1875) If the defendant proves that a witness, called and examined by the prosecution, has been convicted of a felony, it is an assault upon the character of the witness for integrity and truth, and the prosecution may, in rebuttal, examine witnesses to prove that the reputation of the witness for truth and integrity is good in the community where he resides.—People v. Amaracus, 50 Cal. 233.

[b] (Cal. 1895) On a trial for murder committed in an affray, defendants introduced evidence showing that a certain witness for the state was an active friend of deceased during the fight, and was arrested, shortly after the murder, for carrying concealed weapons, and had such weapons on his person at the time. *Held*, that it was proper for the state to show in rebuttal that the charge against said witness was subsequently dismissed.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[c] (Colo. 1893) Where a witness for plaintiff testified that one of defendant's witnesses had been arrested for a certain crime, but was immediately released, it was not prejudicial error to allow the witness to prove his innocence.—Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

[d] (Ga. 1889) Where plaintiff in an action for personal injuries is asked, on cross-examination, if he was not arrested for stealing from his employer some years before, and his employer testifies that he was so arrested, he may put in evidence of his general good character; it having been subjected to such an attack as might discredit his testimony, if it were not sustained by such evidence.—Central Railroad & Banking Co. v. Dodd, 83 Ga. 507, 10 S. E. 206.

[e] (Ky. 1893) Where, on a trial for murder, defendant's witness has been asked if he was not under indictment for perjury, it is competent, as tending to explain the discrediting circumstances, to show by the witness that certain relatives and friends of the deceased, who were prosecuting defendant, had procured it.—Roberts v. Commonwealth, 94 Ky. 499, 22 S. W. 845.

[f] (Mass. 1854) On the trial of an action brought by a corporation against one of its agents to recover money fraudulently taken from it by the defendant, when the successor of the defendant in the same office has been called as a witness, and is sought to be impeached on the ground that he committed the acts with which the defendant is charged, evidence that money had been taken from the office while the defendant was employed there, prior to the time embraced in the plaintiff's specification of claim, is admissible for the purpose of sustaining the credit of the witness.—Boston & W. R. Corp. v. Dana, 67 Mass. (1 Gray) 83.

[g] (Mass. 1856) Testimony of a witness, on cross-examination, that he had been tried for a crime in another state and acquitted, does not authorize the party calling him to introduce evidence of his general character for truth and integrity. Whether such evidence would be admissible, if it had not appeared that he was acquitted on that trial, quære.—Harrington v. Inhabitants of Lincoln, 70 Mass. (4 Gray) 563, 64 Am. Dec. 95.

[h] (Mass. 1884) To rebut evidence of a witness' conviction of crime, his present character and reputation for truth may be shown, but not his innocence of the crime.—Gertz v. Fitchburg R. Co., 137 Mass. 77, 50 Am. Rep. 285.

[i] (Mo. 1891) Where to impeach a witness parol evidence is given of his arrest and imprisonment in another county, testimony of the district attorney of the acquittal of such person is admissible in rebuttal.—Wills v. Cape Girardeau S. W. R. Co., 44 Mo. App. 51.

[j] (N. Y. 1842) An admission by a witness, called on behalf of a prisoner, that he himself had been complained of and bound over upon a charge of passing counterfeit money, does not prevent the prisoner's giving testimony of the witness' good character.—Carter v. People, 2 Hill, 317.

[k] (N. Y. 1863) After it has been proved by the record that a witness has been convicted of larceny, it is not competent to give evidence explanatory of the conviction and in favor of the innocence of the witness.—Gardner v. Bartholomew, 40 Barb. 325.

[l] (N. Y. 1891) On a direct conflict between the testimony of plaintiff and that of defendants, an exemplified copy of a record of conviction of defendants of perjury was admitted in evidence, containing at the end a statement under a certain date, "Copy of pardon filed." *Held*, that testimony of defendants showing the promptitude with which the pardon was granted, the reasons why it was granted, and the time when it was discharged, was admissible.—Sisson v. Yost, 58 Hun, 609, 12 N. Y. Supp. 373.

[m] (Ohio, 1876) Although evidence cannot be given to prove an infamous crime against a witness, of which he has not been convicted, for the purpose of impeaching his credit, yet, where the question as to whether the witness is guilty of such crimes becomes the legitimate subject of inquiry on the trial, his reputation for truth may be proved, to rebut the imputation of guilt which the evidence makes against him.—Webb v. State, 29 Ohio St. 351.

[n] (Ohio, 1894) Where a witness, on cross-examination, admits his conviction and confinement in a penitentiary for a crime involving moral turpitude, the party who called him may establish his good character for truth.—Wick v. Baldwin, 51 Ohio St. 51, 36 N. E. 671.

[o] (Tex. 1874) When the district attorney was allowed by the court to ask the defendants' witnesses where they came from when they came on the witness stand, to which they answered, that they came from jail, *held*, that it was error not to allow them to state on what charge and under what circumstances they were committed to jail; they could not be discredited by such means.—State v. Ezell, 41 Tex. 35.

[p] (Tex. 1895) Where the credibility of a witness is attacked by proof that he has been arrested for a felony, evidence of his good character for truth is admissible.—Farmer v. State, 35 Tex. Cr. R. 270, 33 S. W. 232.

[q] (Tex. 1895) Where defendant claims that a certain witness for the state committed the

murder, and the state claims that if he did he was a tool of defendant and another, it is not error to permit the state to show that such witness had a good reputation in the community in which he lived for being a quiet and peaceable man.—Kidwell v. State, 35 Tex. Cr. R. 264, 33 S. W. 342.

§ 1169. —— Contradiction of record of conviction.

[a] (Me. 1876) Under Rev. St. c. 82, § 94, providing that the record of a previous conviction of a witness for felony may be shown to affect his credibility, the record of a previous conviction is conclusive evidence that he was guilty of such previous offense.—State v. Watson, 65 Me. 74.

[b] (Mass. 1878) If, in a criminal case, the defendant testifies, and the record of his prior conviction and sentence in another case is put in evidence to impeach him, such record is conclusive evidence of such conviction and sentence; and his testimony that he was innocent, and that the officer who made the complaint in that case afterwards told him that he was satisfied of his innocence, is immaterial.—Commonwealth v. Gallagher, 126 Mass. 54.

[c] (N. Y. 1878) S. having testified in a civil action in New York as a witness in his own behalf, the opposite party offered in evidence a record of the conviction of S. in Ohio for having counterfeit money in his possession, and the same was received; whereupon S.'s counsel asked him if he was guilty of the offense, but the question was excluded. *Held*, that this was error.—Sims v. Sims, 75 N. Y. 466.

[d] (N. Y. 1891) When it appears, upon the cross-examination of a witness, that he has been convicted of a criminal offense affecting his credit, he may, upon the redirect examination, testify as to his innocence thereof, though the record of his conviction be produced.—Wolkoff v. Tefft, 59 N. Y. Super. Ct. (27 Jones & S.) 52, 12 N. Y. Supp. 464.

§ 1170. Competency of sustaining witness.

Competency of impeaching witness, see ante, § 1153.

[a] (Ga. 1888) It was error to allow plaintiff, testifying in his own favor, to say that his character for truth had never been attacked, and that he boarded with K., who could testify to his good character.—Savannah, F. & W. Ry. Co. v. Harrigan, 80 Ga. 602, 7 S. E. 280.

§ 1171. —— Knowledge or means of knowledge.

Knowledge of impeaching witness, see ante, § 1154.

[a] (Ala. 1848) A witness, called to prove the general reputation of another witness for truth, stated that he was acquainted with some of his neighbors, but not with all, that he lived 12 miles from him, and that he had never heard the witness' character called in question on that point. *Held*, that he was a competent witness to that point.—Hadjo v. Gooden, 13 Ala. 718.

[b] (Ala. 1894) A witness whose general character and character for truth are assailed cannot be sustained by evidence of an opinion of him based on witness' individual dealings with him.—Jackson v. State, 106 Ala. 12, 17 South. 333.

[c] (Ga. 1854) Where the reputation of witnesses for truthfulness among their neighbors was impeached, the testimony of other witnesses that they knew the character of the impeached witnesses for truthfulness in their neighborhood, and from such knowledge would believe them, though they had never heard anything for or against their truthfulness, is proper to be considered by the jury in connection with the impeaching evidence.—Taylor v. Smith, 16 Ga. 7.

[d] (Ga. 1888) Witness testified that she knew the general character of the prosecutrix; that she had never heard any one say anything against it; that she was not testifying from what people said, but from her own knowledge. *Held* admissible.—Flemister v. State, 81 Ga. 768, 7 S. E. 642.

[e] (Ill. 1860) Witnesses called to sustain another must swear that they know his general character for truth and veracity, or they cannot be heard.—Cook v. Hunt, 24 Ill. (14 Peck) 535.

[f] (Ill. 1891) Where the testimony of a witness has been impeached, and others testified that they knew the witness, but were unacquainted with his reputation for truth and veracity, though they had never heard it assailed, the testimony of such others does not tend to disprove the evidence of the impeaching witnesses.—Magee v. People, 139 Ill. 138, 28 N. E. 1077.

[g] (Mich. 1878) One who testifies that he does not know a witness' reputation for truth and veracity may, if he was called to support said witness, be asked if he has ever heard it questioned.—Lenox v. Fuller, 39 Mich. 268.

[h] (Mich. 1881) After a witness, called to sustain the credit of a defendant, has testified that he is acquainted with him and has lived in his neighborhood for many years, but does not know his reputation for veracity, he may also testify whether he has ever heard it questioned.—McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256.

[i] (N. Y. 1839) A witness, called to sustain the character of an impeached witness, testifying that he has known him for a number of years, and that he knows his associates, but is not acquainted with his general character for truth and veracity, will be permitted to testify that he would believe him on his oath.—People v. Davis, 21 Wend. 309.

[j] (Va. 1880) A witness, asked if he knew the general character of the plaintiff for truth and veracity, replied that he had known him for six or seven years, and knew his general character for truth and veracity as well as any other man's character against whom he had never heard anything alleged; that he had never heard plaintiff's character called in question. *Held* proper evidence to go to the jury.—Davis v. Franke, 33 Grat. 413.

[k] (W. Va. 1874) In an action on a bond, the plaintiff having examined a witness to impeach the character of M., another witness, for truth and veracity, the defendant in rebuttal introduced a witness whom he asked if he knew the character of M. for truth and veracity among his neighbors, to which the witness answered, "I cannot say I do." The witness then proceeded to state that he lived four or five miles from M., had known him four or five years, and had never heard a word against him as a man of truth and veracity. Defendant then asked him "whether he would or would not believe said M. on oath." *Held*, that refusal of the court to allow an answer to the question was not error.—Clay v. Robinson, 7 W. Va. 348.

§ 1172. Examination of sustaining witness.

[a] (Ill. 1893) Where the evidence of the state, in a trial for rape, depends almost entirely upon the testimony of the prosecutrix, and evidence has been introduced tending to show her bad character for truth and veracity, it is reversible error to allow a witness to testify that her character is good, where the witness is merely asked, as a preliminary question, whether he knows "what her reputation

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among the people where she lived at that time was, for truth and veracity," instead of asking him whether he knew her general reputation among her neighbors for truth and veracity.—Gifford v. People, 148 Ill. 173, 35 N. E. 754.

[b] (Me. 1863) Where a party attempted to impeach the character of a witness for truth, and it appeared that the witness had lived many years in a certain town, the other party was allowed to inquire of witnesses introduced to sustain his character, "What is his general character for truth in that town?" It was *held* that the form of the question, in respect to reputation and locality, must depend on the testimony in regard to the position and business of the witness.—Woodman v. Churchill, 51 Me. 112.

[c] (N. Y. 1837) Where a witness called to sustain an impeached witness states, on his direct examination, that he has heard the character of the witness spoken against, the party calling him may ask the names of the persons referred to by him.—Bakeman v. Rose, 18 Wend. 146, affirming (1835) 14 Wend. 105.

§ 1173. Cross-examination.

[a] (Ga. 1892) In the cross-examination of a witness who has testified in support of the character and credit of another witness, it is not error to refuse to allow him to be asked the question, "Would you believe him upon his oath if he were to swear to something different from what you did?"—Ramsey v. State, 89 Ga. 198, 15 S. E. 6.

[b] (Ind. 1878) Where a witness has testified as to the good reputation of another, he may be asked on cross-examination what constitutes reputation.—Hutts v. Hutts, 62 Ind. 214.

[c] (Ind. 1884) Where A. testifies that the reputation for truth and veracity of B., a witness whom it is sought to impeach, is good, the court, in its discretion, may permit A. to be asked on cross-examination whether he had heard of B.'s arrest for grand larceny, if he had heard a discussion of charges of robbery against him, etc.—Wachstetter v. State, 99 Ind. 290, 50 Am. Rep. 94.

[d] (Iowa, 1880) Where a witness testified in support of the reputation of H. for truth, and on cross-examination his attention was called to a newspaper article written by him, assailing the moral character of H., he was properly allowed to explain the circumstances under which the article was written, showing that the attack did not involve H.'s character for veracity.—Smith v. Weeks, 54 Iowa, 411, 6 N. W. 592.

[e] (Mich. 1874) Where a witness testifies that another witness, whose testimony had been impeached, had a good reputation for truth and veracity, such witness may be asked on cross-examination if he would believe the other witness on oath.—Hamilton v. People, 29 Mich. 173.

[f, g] (N. C. 1888) After a witness has voluntarily testified as to his own immoral acts, it is unobjectionable to ask another witness, who testifies as to the other's good character, whether he would allow the former to visit his family; the obvious purpose being to ascertain the latter's estimate of a good character.—State v. Brown, 100 N. C. 519, 6 S. E. 568.

[h] (Va. 1880) A plaintiff, for the purpose of sustaining his character for truth and veracity, introduced a witness who had lived near him, and who testified that he had never heard anything against his veracity until this and a former suit by one of the defendants against plaintiff had been instituted. On cross-examination, defendant asked witness "if he had not heard a number of plaintiff's neighbors testify in both suits that they were acquainted with plaintiff's character for truth and veracity; that it was bad, and they would not believe him on oath." *Held*, that the answer to this question was properly excluded from the jury.—Davis v. Franke, 33 Grat. 413.

§ 1174. Impeachment of impeaching witnesses.

[a] (Ind. 1882) An impeaching witness may be himself impeached.—Phillips v. Thorn, 84 Ind. 84, 43 Am. Rep. 85.

[b] (Ind. 1896) An impeaching witness cannot himself be impeached by showing that the statements of others, on which he testified that his knowledge of the reputation of the impeached person was based, were never made by them.—Brower v. Ream, 15 Ind. App. 51, 42 N. E. 824.

[c] (Iowa, 1862) An impeaching witness giving material testimony may be impeached.—State v. Brant, 14 Iowa, 180.

[d] (Iowa, 1868) On a criminal trial, the state, in rebuttal, may introduce witnesses to attack the character of impeaching witnesses, introduced by the defendant to impeach witnesses in behalf of the state.—State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776.

[e] (N. Y. 1847) A party has a right to impeach the general character of a witness for his adversary, though the testimony which such witness had given related solely to the general character of another witness.—Starks v. People, 5 Denio, 106.

[f] (N. C. 1869) Where a defendant calls for a statement from a witness for the prosecution, and then attacks him with an impeaching witness, if the prosecution attempts to impeach the impeaching witness, defendant cannot object on the ground that the matter called for is collateral.—State v. Kirkman, 63 N. C. 246.

[g] (N. C. 1869) An impeaching witness may be impeached by proof of general character.—State v. Cherry, 63 N. C. 493.

§ 1175. Sustaining impeaching witness.

[a] (N. C. 1869) Where an impeaching witness is impeached by proof of general character, the impeaching witness may be supported by proof of general character.—State v. Cherry, 63 N. C. 493.

7. EFFECT OF IMPEACHMENT.

Instructions as to purpose and effect of impeaching evidence, see "Criminal Law," vol. 14, cc. 2646–2649, § 1875.

§ 1176. In general.

[a] (Ala. 1884) The impeachment of a witness' character for veracity is rendered less important in the weight of its influence by the facts that he has no interest in the result of the suit, and that he is corroborated by all the intrinsic probabilities of the case.—May v. Wilkinson, 76 Ala. 543.

[b] (Ala. 1894) It is proper to refuse to charge that the jury cannot convict on the testimony of a witness against whom impeaching testimony has been given.—Spicer v. State, 105 Ala. 123, 16 South. 706.

[c] (Cal. 1881) Under Code Civ. Proc. § 2051, providing that a witness may not be impeached by evidence of particular wrongful acts, except that it may be shown by his examination that he had been convicted of a felony, and Pen. Code, § 102, declaring that the rules of evidence in civil actions are applicable also in criminal actions, evidence that a witness had been previously convicted of a felony goes only to his credibility.—People v. Johnson, 57 Cal. 571.

[d] (Ga. 1894) A verdict of guilty will not be disturbed because it was rendered on the evi-

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dence of a witness who had been guilty of a crime involving moral turpitude, and who was shown to have a general bad character, where the jury evidently did not believe that the witness was effectually impeached.—Davis v. State, 94 Ga. 399, 19 S. E. 243.

[e] (Ga. 1895) A jury is not constrained to discard all of the testimony of even a corrupt witness when he is satisfactorily corroborated on material points by circumstances, or by other unimpeached evidence, although the corroboration may not extend to the main issue in the case.—Duncan v. State, 97 Ga. 180, 25 S. E. 182.

[f] (Ga. 1895) The testimony of a witness attacked by proof of general bad character, though not specifically corroborated, should not be wholly disregarded by the jury, if, from the deportment on the witness stand, or the probability of the truth of what he states, when considered in connection with all the evidence in the case, they feel justified in believing him without such corroboration.—Duncan v. State, 97 Ga. 180, 25 S. E. 182.

[g] (Ind. 1857) An instruction that, if the witnesses for defendant are credible and all swear that they know the general character of the prosecuting witness to have been bad and that judging from that character they would not believe her on oath, the jury cannot go further than such witnesses and should not confide in the prosecuting witness, is properly refused, as the jury are not bound by the opinions of the impeaching witnesses, and could believe or disbelieve the prosecuting witness on their own judgment of the facts bearing on the point.—Spivey v. State, 8 Ind. 405.

[h] (Ind. 1885) The credibility of a witness is not destroyed by the impeachment of his character so as to preclude the court or jury from believing his testimony.—Overton v. Rogers, 99 Ind. 595.

[i] (Ind. 1885) Where an attempt has been made to impeach a witness by testimony regarding his reputation for truth and veracity, the court may instruct the jury that they are to determine his credibility under all the facts and circumstances proved, and that if he gave a fair, candid, and honest statement of the whole transaction under controversy, they should not disregard his testimony.—McCasland v. Kimberlin, 100 Ind. 121.

[j] (Iowa, 1878) In an action for divorce, wherein the defendant denied the marriage, his confession of seduction to escape the consequences of bigamy *held* to cause a forfeiture of any claim to credit as a witness.—Borton v. Borton, 48 Iowa, 697.

[k] (Iowa, 1880) An instruction to the jury in a criminal trial that, where it is shown that the reputation for truth of a witness is bad, his evidence is not necessarily destroyed, but is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, is correct.—State v. Miller, 53 Iowa, 209, 4 N. W. 1083.

[l] (Iowa, 1896) That a witness' moral character and reputation for truth and veracity has been impeached does not require that the jury disregard his testimony if unsupported by corroborating evidence.—State v. Van Vliet, 97 Iowa, 387, 66 N. W. 748.

[m] (Kan. 1866) The testimony of a woman is not to be rejected by the jury merely because she is a common prostitute.—Craft v. State, 3 Kan. 450.

[n] (Minn. 1871) Whether evidence tends directly to prove a fact, or merely raises a presumption that it is so, can never depend on the bad character of the witness.—State v. Beebe, 17 Minn. 241 (Gil. 218).

[o] (Neb. 1890) Where the general reputation of a witness for truth and veracity in the neighborhood where he resides is proven bad, the jury may entirely disregard the testimony of such witness, except in so far as he is corroborated by other credible testimony.—Watson v. Roode, 30 Neb. 264, 46 N. W. 491.

[p] (N. J. 1866) Where the character of a witness, in a judicial proceeding, is questionable, he is to be relied on only so far as his testimony is intrinsically probable, or is corroborated by circumstances.—Adams v. Adams, 17 N. J. Eq. (2 C. E. Green) 324.

[q] (N. Y. 1866) Where a witness is impeached as to his character for truth and veracity, the court may submit his credit to the jury and instruct them that though they thought him unworthy of credit they might believe him so far as he was corroborated by other testimony.—Lee v. Chadsey, 3 Abb. Dec. 43.

[r] (N. Y. 1878) The testimony of a witness who is impeached, although it is uncontradicted, cannot be taken as conclusive; and the fact which such testimony is intended to establish must be submitted to the jury.—Gildersleeve v. Landon, 73 N. Y. 609.

[s] (N. Y. 1883) Where, in a suit for dissolution and accounting between partners, their testimony is contradictory, and it appears that one has in several instances misused the partnership moneys and has admitted it in a letter to his co-partner, his testimony, when it contradicts that of the other partner, should be rejected as unworthy of belief.—Kehr v. Stauf, 12 Daly, 115.

[t] (N. Y. 1886) In an action against a bank, the jury were at liberty to reject as untrue statements made by a witness who, as it appeared by his examination, had been the president of the bank and had been using the funds of the bank in speculation and had misappropriated its funds, been indicted, convicted, and imprisoned therefor, and was awaiting sentence for the misappropriation.—Bingham v. Marine Nat. Bank, 41 Hun, 377, 17 Abb. N. C. 431.

[u] (N. Y. 1887) Since convicts are made competent witnesses by Code Civ. Proc. § 832, the weight to be given to their testimony is for the jury.—Lindeman v. York Cent. & H. R. R. Co., 11 N. Y. St. Rep. 837.

[v] (Or. 1892) A court is not bound to disregard the evidence of an impeached witness, but it should be compared with the other evidence in the case, and given such weight as it is entitled to under the circumstances.—Wimer v. Smith, 22 Or. 469, 30 Pac. 416.

[vv] (Pa. 1878) A justice of the peace who took and formally certified the acknowledgment of a married woman to a mortgage afterwards testified that her execution was not voluntary. Ten witnesses swore that he could not be believed on oath. *Held*, that the effect of such impeachment of his testimony was to destroy the effect of his certificate, as well as the credibility of his testimony.—Beam v. Hamilton, 10 Lanc. Bar, 69.

[w] (Pa. 1878) The rule of law is that, when the character of any witness is successfully impeached, his testimony should be discredited, unless it is corroborated by other unimpeached testimony in the case.—Commonwealth v. Burton, 1 Sus. Leg. Chron. 66.

[ww] (S. C. 1869) When a witness is successfully impeached, on the score of character, his evidence should not be altogether disregarded, but should be allowed such weight as it may be entitled to under the circumstances.—Belcher v. Conner, 1 S. C. (1 Rich.) 88.

[x] (Tenn. 1848) Where a witness is discredited by the testimony of other witnesses that because of her general character they would not believe her on oath, her testimony should not be relied on, unless corroborated in those points which are relied on, and it is not suffi-

cient that the corroboration goes generally to the main question at issue.—Troxdale v. State, 28 Tenn. (9 Humph.) 411.

[xx] (Tenn. 1869) Where the character of a witness for his veracity has been put in issue, the jury must determine whether the witness has been overthrown or sustained, and what degree of credit is to be given to his testimony; and it was error for the court to instruct the jury that evidence of good character in this respect in refutation of evidence of bad character would reinstate the witness as though he had not been impeached.—Graves v. Fitzgerald, 46 Tenn. (6 Cold.) 643.

[y] (Tex. 1854) Where the character for truth and veracity of a witness is impeached by one witness, the jury may compare the testimony of the former with other facts proved, and give to it such weight as they deem it entitled to.—Jernigan v. Wainer, 12 Tex. 189.

[yy] (Tex. 1877) The credibility of a witness, though impeached, is for the jury, and the court should not instruct them to disregard his testimony.—Kelly v. State, 1 Tex. App. 628.

[z] (Tex. 1886) The statute prohibiting a conviction on the uncorroborated testimony of an accomplice does not apply to the uncorroborated testimony of an ex-convict, whose competency to testify has been restored by pardon.—Thornton v. State, 20 Tex. App. 519.

[zz] (Tex. 1896) On a prosecution for murder, it is not error to charge that, notwithstanding testimony had been introduced tending to impeach the witnesses, the credibility of such witnesses was a question for the jury.—Trotter v State, 37 Tex. Cr. R. 468, 36 S. W. 278.

(C) INTEREST AND BIAS OF WITNESS.

1. IN GENERAL, §§ 1177-1191.
2. CROSS-EXAMINATION TO SHOW INTEREST OR BIAS, AND RE-EXAMINATION, §§ 1192-1199.
3. IMPEACHING EVIDENCE, §§ 1200-1206.
4. EVIDENCE TO SUSTAIN WITNESS OR REBUT EVIDENCE OF INTERFST OR BIAS, §§ 1204-1207.
5. EFFECT OF IMPEACHMENT FOR INTEREST OR BIAS, § 1208.

Credibility as question of law or of fact, see "Trial," vol. 46, cc. 1160–1165, § 335.
Instructions, see "Trial," vol. 46, c. 1504, § 533.
—— *in criminal prosecution, see* "Criminal Law," vol. 14, cc. 2508, 2509, § 1780.

1. IN GENERAL.

INTEREST AS GROUND OF IMPEACHMENT IN GENERAL, § 1177.
SHOWING INTEREST OR BIAS OF ONE'S OWN WITNESS, § 1178.
INTEREST OF PARTY OF RECORD IN CIVIL ACTION OR PROCEEDING, § 1179.
—— PARTY CALLED AS WITNESS BY ADVERSARY, § 1180.
INTEREST OF PROSECUTING WITNESS, § 1181.
INTEREST OF DEFENDANT IN CRIMINAL PROSECUTION, § 1182.
INTEREST OF ACCOMPLICE OR CODEFENDANT, § 1183.
INTEREST IN EVENT OF WITNESS NOT PARTY TO RECORD, § 1184.
POLICE OFFICERS, DETECTIVES, AND OTHER PERSONS EMPLOYED TO TESTIFY OR PROCURE EVIDENCE, § 1185.
RELATIONSHIP TO PARTY, § 1186.
EMPLOYMENT BY OR OTHER CONTRACTUAL RELATION WITH PARTY, § 1187.
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FRIENDLY OR UNFRIENDLY RELATIONS WITH OR FEELINGS TOWARD PARTY, § 1189.
BIAS OR PREJUDICE OF IMPEACHING WITNESS TOWARD WITNESS IMPEACHED AS TO CHARACTER, § 1190.
RELEASE OF INTEREST, § 1191.

§ 1177. Interest as ground of impeachment in general.

[a] (U. S. 1864) Evidence of disinterested witnesses in favor of libelant is not overcome by testimony of an equal number of interested witnesses for respondent.—Laing v. The G. L. Buckman, Fed. Cas. No. 7,988.

[b] (U. S. 1872) Where witnesses are not excluded on account of interest in the event of the suit, the rule still applies that their veracity or impartiality may be affected by such interest.—Andrews v. Hyde, Fed. Cas. No. 377 [3 Cliff. 516].

[c] (U. S. 1886) In a case of collision, where all upon one vessel are lost, the narrative of those on the other, considering the natural bias of the witnesses, should be received with caution, and not adopted beyond what is consistent, rational, and probable.—The Columbia (D. C.) 27 Fed. 704.

[d] (U. S. 1889) In weighing the testimony of witnesses as to trade usage, the jury should consider the extent to which any of the witnesses may have an interest in the result of the litigation which might color their evidence.—Dodge v. Hedden (C. C.) 42 Fed. 446.

[e] (U. S. 1892) Where testimony is conflicting, the jury should consider, in determining what weight to attach to the testimony of the witnesses, the interest they may have in the result of the suit.—United States v. Ybanes (C. C.) 53 Fed. 536.

[f] (Ill. 1878) In an action for damages claimed by reason of the grading of streets, it was competent to show the bias of feeling of witnesses, and in what direction were their sympathies.—City of Elgin v. Eaton, 2 Ill. App. (2 Bradw.) 90.

[g] (Ind. 1867) Under the statutes of this state, the interest of witnesses in the result of the trial may be regarded by the jury in considering their credibility.—Dailey v. State, 28 Ind. 285.

[h] (Ind. 1872) It is not error to charge that "an interested witness will not usually be as honest and candid as one that is not interested."—Carver v. Louthain, 38 Ind. 530.

[i] (Ind. 1877) An instruction in relation to the evidence that, "if the witness is interested in the result of the prosecution, this tends to discredit" him, is erroneous. At most this is only matter for the consideration of the jury.—Pratt v. State, 56 Ind. 179; Veatch v. Same, Id. 584, 26 Am. Rep. 44.

[j] (Iowa, 1855) It is not error to instruct the jury that the position of a witness and his feelings may be such that his testimony for one party may be entitled to more credit than that in favor of the other party, and that the jury are to judge from all the circumstances and relations of the witness and the parties and his appearance what part of his testimony is true and what false.—McCrary v. Crandall, 1 Iowa (1 Clarke) 117.

[k] (La. 1831) It is the interest of men exercising a particular art or profession, e. g., architects, physicians, etc., to value their services at the highest rate possible; and there is sometimes an esprit de corps among them formidable to those with whom they come in colli-

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sion. The truth will be generally found in the lowest estimate of any one of them.—Villalobos v. Mooney, 2 La. 331.

[l] (Mich. 1889) It is proper to show the relation which a witness bears to a party to an action, and what interest or part he has taken in its prosecution or defense, as bearing on his credibility.—Michigan Condensed Milk Co. v. Wilcox, 78 Mich. 431, 44 N. W. 281.

[m] (N. Y. 1830) Where, at the time of the transfer of a note, the negotiability of which has been destroyed by an insolvent discharge granted to the maker, it was agreed between the payee and the assignee that the payee should be a witness to prove a new promise by the maker subsequent to the discharge, and the transfer was made expressly upon such understanding, though it seems that such agreement did not render the payee an incompetent witness, still the jury ought to be instructed that it went far to impeach his credibility.—Moore v. Viele, 4 Wend. 420.

[n] (N. Y. 1868) The feelings of the witness, and the motives and temper governing or influencing him in the particular matter or transaction, are the proper subjects of inquiry, and are not regarded as collateral to the issue.—Nation v. People, 6 Parker, Cr. R. 258.

[o] (N. Y. 1871) Where a witness has an interest in the question at issue, the jury are not bound to refrain from exercising their judgment and to adopt the statements of such witness.—Elwood v. Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140.

[p] (N. Y. 1875) Where a witness who testified upon proceedings upon the probate of a will would secure, under the will, the supervision and control of the decedent's property, *held*, that that fact of itself was sufficient to justify a close scrutiny of his statements, and might reasonably induce the court before which his evidence was given to reject it as unreliable, if deemed improbable.—Rollwagen v. Rollwagen, 3 Hun, 121, 5 Thomp. & C. 402.

[q] (Tex. 1848) The competency of a witness is always a question for the court, and his credibility for the jury; any testimony, therefore, affecting his credibility, is competent to go to the jury. Though an interest in the question may not affect the competency of a witness, it may be shown to enable the jury to judge of his credibility.—Jones v. McCoy's Widow & Heirs, 3 Tex. 349.

[r] (Tex. 1890) Impeaching testimony offered for the purpose of showing the animus and ill will of the witness is relevant and admissible.—Bennett v. State, 28 Tex. App. 539, 13 S. W. 1005.

§ 1178. Showing interest or bias of one's own witness.

[a] (Miss. 1859) A party cannot ask his own witness, after cross-examination, whether he is not interested in the suit, for the purpose of impeaching his credit.—Fairly v. Fairly, 38 Miss. 280.

[b] (N. Y. 1829) A plaintiff who has called and had the benefit of the testimony of a witness cannot afterwards object to him on the ground of interest.—Fulton Bank v. Stafford, 2 Wend. 483.

[c] (N. Y. 1890) A party producing and examining a witness cannot afterwards impeach him by evidence showing his bias or interest in favor of the adverse party.—In re Mellen's Estate, 56 Hun, 553, 9 N. Y. Supp. 929.

[d] (Tenn. 1817) If a party once calls on a witness and examines him as competent, he cannot afterwards discredit him as being interested.—Roundtree v. Tibbs, 5 Tenn. (4 Hayw.) 108.

[e] (Va. 1893) A question put by the commonwealth to its own witness, inquiring as to his relationship to defendant, is not objectionable on the ground that it was an effort by the former to discredit its own witness.—Snodgrass v. Commonwealth, 89 Va. 679, 17 S. E. 238.

§ 1179. Interest of party of record in civil action or proceeding.

[a] (U. S. 1895) Where nephews who had taken possession of their uncle's lands under a written lease, and had made improvements at their own expense, claimed, after his death, that there was a parol agreement that on his death they were to have the lands, *held*, that while their own testimony was admissible as against devisees of their uncle, the court would not decree in their favor on their testimony alone, but would do so on sufficient corroboration.—Harman v. Harman, 70 Fed. 894, 17 C. C. A. 479.

[b] (U. S. 1845) The testimony of the libelants themselves in an action in rem, the one for the other, although legally admissible, ought to be narrowly scrutinized, and received with caution.—Graham v. Hoskins, Fed. Cas. No. 5,669 [Olcott, 224].

[c] (U. S. 1846) The testimony of a ship's crew, being joint libelants, each swearing for the other, will be received with great caution. The court will be more inclined to credit the master of the vessel, when the evidence between them is contradictory, and he has no interest in the action.—The Swallow, Fed. Cas. No. 13,665 [Olcott, 334].

[d] (U. S. 1866) The interest of a party in the result should be considered on the question of his credibility as a witness.—White v. Commonwealth, Fed. Cas. No. 17,544.

[e] (U. S. 1890) Where a witness swears that the expense of his steamer while undergoing repairs was a certain sum, and is not cross-examined as to the items, and there is nothing to throw suspicion on the charge, there is no reason for disallowing any portion thereof.—The North Star (D. C.) 44 Fed. 492.

[f] (Colo. 1890) Where the parties to the action and one of the attorneys of record are sworn as witnesses, in weighing the testimony the jury are at liberty to take into consideration the interest of each in the result of the action, so far as such interest is disclosed by the evidence.—Stewart v. Kindel, 15 Colo. 539, 25 Pac. 990.

[g] (Ga. 1871) Parties interested in a suit, who are introduced as witnesses under the provisions of the act of 1866, are lifted out of the general rule as to the weight to be given to testimony, and the jury may exercise their judgment on the credit of such witnesses from the fact of their interest, irrespective of other impeachment or attack.—Laramore v. Minish, 43 Ga. 282.

[h] (La. 1885) The unsupported testimony of the plaintiff will not justify a judgment against the estate of a deceased person.—Cutler v. Succession of Collins, 37 La. Ann. 95.

[i] (Me. 1874) The rule that a failure to contradict testimony given in a judicial proceeding imports no admission of the truth of the assertions is inapplicable since the passage of the statutes making parties witnesses.—Blanchard v. Hodgkins, 62 Me. 119.

[j] (Mo. 1893) It is not error to tell the jury, in passing on the question of whether defendant was of age at the time of making the note in controversy, that they might consider his testimony in relation thereto, his interest in the result and his motive, if any, for his testimony.—Lovell v. Davis, 52 Mo. App. 342.

[k] (N. Y. 1875) Under the provisions of the Code permitting parties to offer themselves as witnesses, they occupy the same position as other witnesses, and their testimony, if conflicting, presents a question of their credibility

for the jury.—Stilwell v. Carpenter, 2 Abb. N. C. 238.

[l] (N. Y. 1879) The rule that, where a witness is unimpeached and his evidence not contradicted, his testimony cannot be disregarded by the court or jury, does not apply where such witness is a party, and the credibility of such party is always a question for the jury, and a verdict may be found against his uncontradicted evidence.—Nicholson v. Conner, 8 Daly, 212.

[m] (N. Y. 1889) The evidence of a plaintiff may be discredited on account of his interest in the result, though uncontradicted, and a referee is therefore justified in disallowing items of an account supported only by his testimony.—Ract v. Duviard-Dime, 51 Hun, 639, 4 N. Y. Supp. 156.

[n] (N. Y. 1889) The fact that the referee believed in regard to some matters the testimony of witnesses who were parties to the suit, and interested in the result, did not affect his right to reject as untrustworthy their testimony in regard to another matter which more nearly affected their interests.—Chester v. Jumel, 53 Hun, 629, 5 N. Y. Supp. 822.

[o] (N. Y. 1890) In an action for trespass, the defense was that plaintiff had no title, and defendant introduced in evidence a deed from plaintiff and wife to a third person. Plaintiff having testified that the deed, although absolute in its terms, was in fact a mortgage, defendant requested the court to instruct that they were not bound to believe plaintiff's statements, because he was an interested witness. *Held*, that it was prejudicial error to refuse so to charge.—Dean v. Metropolitan El. Ry. Co. 119 N. Y. 540, 23 N. E. 1054.

[p] (N. Y. 1891) In an action for damages for personal injuries alleged to have been sustained by plaintiff from the negligence of defendant's employés, it was proper to instruct that the jury were not bound to give to the evidence of plaintiff the same credence they would give to a disinterested witness.—Uransky v. Dry Dock, E. B. & B. R. Co., 59 Hun, 626, 13 N. Y. Supp. 670.

[q] (N. Y. 1892) In an action against an elevated railroad company to recover damages for personal injuries, the jury have the right to reject plaintiff's testimony because of interest.—Meeteer v. Manhattan Ry. Co., 63 Hun, 533, 18 N. Y. Supp. 561.

[r] (N. Y. 1893) The denial by a party to a contract, who had been in a business for a number of years, of knowledge of a well-known and prevalent custom in that trade, being that of a party in interest, is not conclusive.—De Cernea v. Cornell (Com. Pl.) 3 Misc. Rep. 241, 22 N. Y. Supp. 941.

[s] (N. Y. 1894) The testimony of a party to an action in his own behalf may be disregarded, though it is uncontradicted.—Olsen v. Ensign (Com. Pl.) 7 Misc. Rep. 682, 28 N. Y. Supp. 38.

[t] (N. Y. 1894) Where plaintiff is a witness in his own behalf, and is neither contradicted nor corroborated, a verdict in favor of defendant will not be disturbed on appeal as against the weight of evidence, as the uncontradicted testimony of a party to an action is not controlling.—O'Neil v. Third Ave. R. Co., 78 Hun, 183, 28 N. Y. Supp. 917.

[u] (Tex. 1890) In an action against a railroad company for injuries to a passenger, the conductor of the train was joined as a defendant. During the argument counsel for plaintiff remarked that he was an interested witness, being a defendant against whom a judgment was asked. After the arguments, the cause was dismissed as to the conductor, but without the knowledge of the company's counsel. *Held*, that the dismissal did not affect the credibility of the conductor's testimony, so far as that might be affected by his interest in the action.—Texas & P. Ry. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

§ 1180. —— Party called as witness by adversary.

[a] (N. Y. 1853) Where a party calls his adversary, and examines him as a witness against himself, the legislature must have intended, in regard to the witnesses thus admitted, to give the tribunals that weigh their testimony a wide discretion as to the credit to be given to them.—Roberts v. Gee, 15 Barb. 449.

[b] (N. Y. 1894) Where plaintiffs called the adverse party as a witness, they are not bound by all of his testimony; but the jury may believe so much as is favorable to plaintiffs, and reject that which is unfavorable, because of the interest of the witness.—Schwabeland v. Holahan (Com. Pl.) 10 Misc. Rep. 176, 30 N. Y. Supp. 910, affirming judgment (City Ct. N. Y. 1894) 6 Misc. Rep. 623, 26 N. Y. Supp. 880.

[c] (S. C. 1843) Where partners are sued within the summary jurisdiction, and one of them is examined by the plaintiffs on interrogatories, to prove their claim, and his codefendants examine him as a witness, without objection by him or the plaintiffs, his answers have the same weight as other testimony.—Allen v. Owens, 2 Speers, 170.

[d] (Tex. 1874) Where a party offers himself as a witness, and, on being cross-examined on subjects different from his direct examination, testifies as to matters material for his case, the jury need not believe him, but may, considering the entire case, disregard such statements, though not contradicted.—Pridgen v. Walker, 40 Tex. 135.

§ 1181. Interest of prosecuting witness.

Credibility of prosecutrix in bastardy proceedings, see "Bastards," vol. 6, c. 1940, § 158.

[a] (N. Y. 1822) Less credit ought to be given to the testimony of a prosecutor than to a disinterested witness.—People v. McMurray, 1 Wheeler, Cr. Cas. 62.

§ 1182. Interest of defendant in criminal prosecution.

Credibility of accused as question of law or fact, see "Criminal Law," vol. 14, cc. 2444, 2445, § 1722.

Instructions as to credibility of accused, see "Criminal Law," vol. 14, cc. 2517–2525, §§ 1786–1789.

[a] (Ala. 1888) On a trial for rape the court properly refused defendant's request to charge that "while the jury, in considering the evidence of the defendant, may look to the fact that he is a party to the suit, yet being a defendant or party to the suit does not render him any less credible than he would be if he were not a party to the suit."—Dick v. State, 87 Ala. 61, 6 South. 395.

[b] (Cal. 1892) On a trial for murder, defendant testified in his own behalf, and then requested the court to charge that "defendant is a competent witness in this case, and it is the duty of the jury to weigh, examine, and take into consideration the testimony of defendant, and give it due consideration; the same as it does the testimony of all the other witnesses in the case." *Held*, that the charge was properly modified by striking out the last clause.—People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

[c] (Conn. 1893) Accused testified in his own behalf, and the court charged the jury to regard accused "as every other witness is to be regarded," and to consider his appearance, the

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reasonableness of his story, and, "above all, the fact that he is the accused." *Held*, that the use of the words, "above all," was not prejudicial to the accused.—State v. Fiske, 63 Conn. 388, 28 Atl. 572.

[d] (Ill. 1885) On the trial of two persons for robbery there were four witnesses—the two defendants for themselves, and two others for the prosecution. All were present when the alleged crime was committed, and all had the same knowledge of the facts. The court charged as to each that, while defendant was a competent witness in his own behalf, his credibility and the weight to be given his testimony were for the jury; and that, while they should not disregard it through mere caprice, they were not bound to believe him, or to treat his testimony the same as that of other witnesses, but might take into consideration his interest, and give his testimony the weight to which they might think it entitled. *Held* erroneous in charging that the jury were under no obligation to treat defendants' testimony like that of other witnesses, whereas in fact they should have been led only to consider their interest, and to treat their testimony the same as other testimony, after it had been subjected to the tests employed to elicit truth from interested witnesses.—Sullivan v. People, 114 Ill. 24, 28 N. E. 381.

[e] (Ill. 1886) Where the accused testifies in his own behalf, the jury are authorized, under the statute, to consider to what extent that circumstance should affect his credibility.—Bressler v. People, 117 Ill. 422, 8 N. E. 62.

[f] (Iowa, 1880) The fact that certain testimony in a criminal case is that of the defendants may be called to the attention of the jury as one of the facts which would formerly have caused its exclusion, and which, therefore, may still be shown, under Code 1873, § 3637, for the purpose of lessening its credibility.—State v. Moelchen, 53 Iowa, 310, 5 N. W. 186.

[g] (Iowa, 1887) In a murder trial, where the accused had testified in his own behalf, the court instructed the jury that he was a competent witness, and that, in determining the question of his guilt or innocence, they must consider his testimony, but that he was an interested witness, and, as such, they should consider his testimony, and give it such weight, in connection with all the circumstances and other testimony in the case as they thought it entitled to, and no more. *Held* not error.—State v. Sterrett, 71 Iowa, 386, 32 N. W. 387.

[h] (Miss. 1890) Where the defendant testifies in his own behalf, it is error to charge that, if the jury believed "that any witness who has testified in this case has any feeling or interest in the result of this trial, then the jury should consider such feeling or interest, in connection with all the evidence in the case, in determining how far, if at all, they will believe such witness, or consider such testimony."—Woods v. State, 67 Miss. 575, 7 South. 495.

[i] (Miss. 1892) It is error, in a criminal case, where defendant, though not the only witness in his own behalf, was still the only one interested, to charge that the jury might consider the interest of any witness, in connection with all the evidence, in determining how far, if at all, they would believe him, as this was in effect to single out and mark defendant for discredit.—Townsend v. State, 12 South. 209, following Buckley v. State (1885) 62 Miss. 705, and Woods v. State (1890) 67 Miss. 575, 7 South. 495.

[j] (Mo. 1880) The fact that a witness is the defendant may be shown in order to affect his credibility, and the court may so instruct the jury.—State v. Zorn, 71 Mo. 415.

[k] (Mo. 1882) As affecting the credibility of a witness in a criminal case, the jury may consider the fact that he is the defendant.—State v. Sanders, 76 Mo. 35.

[l] (Neb. 1878) The interest which a witness has in the result of a trial may always be shown as affecting the value of his testimony, and it is not error for the court, in referring to the testimony of the prisoner given in his own behalf, to tell the jury that they are "at liberty to consider the great interest which he has in the result."—St. Louis v. State, 8 Neb. 405, 1 N. W. 371.

[m] (Neb. 1891) When, in a criminal case, the defendant testifies in his own behalf, it is not error to charge that, in weighing his testimony, the jury may consider his interest in the result.—Davis v. State, 31 Neb. 247, 47 N. W. 854.

[n] (N. M. 1892) Where defendant was a witness in his own behalf, the court properly instructed the jury that they might take into consideration defendant's special interest in the case, in deciding what weight should be given to his testimony.—Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905.

[o] (N. Y. 1885) A charge on a trial for homicide, stating that defendant, who had testified, "has, doubtless, every interest in this world to falsify, if falsifying would bring any immunity to him, and he is undoubtedly to be judged bearing that in mind, but he is not to be discredited for that reason," is not error.—People v. Kiernan, 3 N. Y. Cr. R. 247.

[p] (N. Y. 1885) A person in charge of a canal lock, who has suffered arrest for his careless conduct, is to be heard with suspicion, when, upon a repetition of such conduct, he endeavors to cast the blame on the party complaining.—Sipple v. State, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657.

§ 1183. Interest of accomplice or codefendant.

Credibility and effect of testimony of accomplices in criminal prosecutions, see "Criminal Law," vol. 14, cc. 1797–1799, § 1111.

Question of law or fact, see "Criminal Law," vol. 14, cc. 2443, 2444, § 1720.

[a] (N. D. 1895) As bearing on the credibility of an accomplice whose testimony shows that he committed the murder at the instigation of defendant, defendant may show that no prosecution against the accomplice has been instituted, though several months have elapsed since his confession of the crime.—State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

[b] (Ohio, 1859) The prisoner has a right to impeach the testimony of an accomplice by showing that if he is convicted the witness expects not to be prosecuted; and it is not essential that the expectation should be well founded, if the witness really entertains it.—Allen v. State, 10 Ohio St. 287.

§ 1184. Interest in event of witness not party to record.

Cross-examination to show interest, see post, §§ 1192–1198.

[a] (U. S. 1853) Although the pilot is a witness deserving great consideration in respect to the course of his own vessel, he is not, from the necessity he is under to attend especially to his own peculiar duties, a witness whose testimony is reliable in respect to the position and course of approaching vessels, on a dark and cloudy night.—The Globe, Fed. Cas. No. 5,485.

[b] (U. S. 1890) In an action to recover duties paid on an alleged mistaken classification, where the witnesses for plaintiff, who testified as to the true classification of the articles in controversy, admit that they are themselves

prosecuting precisely similar suits, the jury in weighing their testimony should consider the extent of their interest, pecuniary or otherwise, in the result of the action.—Sidenberg v. Robertson (C. C.) 41 Fed. 763.

[c] (Ala. 1893) In an action to recover money paid defendant on a check payable to plaintiff, the latter claimed that his indorsement was procured by defendant's fraud, while defendant claimed that it was indorsed to him to pay for services rendered plaintiff in effecting a settlement of a suit between plaintiff and a certain company, in pursuance of a contract, and a witness for defendant testified that he acted for the company in effecting a settlement which was made through defendant acting as attorney for plaintiff. He further testified that defendant did not represent the company, as claimed by plaintiff, and gave testimony tending to disprove plaintiff's charge that the defendant had received compensation from the stockholders for services rendered in the compromise, and gave also his opinion as an attorney as to the value of defendant's services. *Held*, that evidence that the witness owned 15 shares in the company, that he paid 25 per cent. on his subscription, and that he sold his stock before the compromise with plaintiff was effected, furnished no ground for discrediting or imputing bias to his testimony in favor of plaintiff.—Brown v. Prude, 97 Ala. 689, 11 South. 838.

[d] (Ill. 1888) In a liquor prosecution, the principal witness for the people is not shown to be biased or interested by the fact that he wrote to the W. C. T. U., telling them of the approaching session of the court, and that if they had any interest in this case they should attend to it; that he asked two or three persons what they knew of it; or by his answer to the question if his object was to make out a case for the people, viz.: "If the evidence—Yes, the same as any other person would; just that much interest as a citizen. I have lived 30 years in this county and propose to obey the law."—Kammann v. People, 26 Ill. App. 48.

[e] (Ill. 1892) In an action on a note alleged by defendant to be a forgery, the fact that witnesses hold similar notes, which are also claimed to be forgeries, cannot be shown as affecting their credibility, since it does not give them any direct interest in the result of the action.—Bevan v. Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679, affirming (1891) 30 Ill. App. 577.

[f] (La. 1858) Although it is not a good objection to the competency of a witness that he is a creditor of the party for whom he is called to testify, yet the fact may be shown as affecting his credibility.—McClure v. King, 13 La. Ann. 141.

[g] (Mass. 1882) On trial of a libel for divorce, the mother of the libelee was a material witness in her favor. *Held*, that libelant had no ground of exception to the exclusion of evidence that libelee had been a witness for her mother in a divorce suit by her husband.—Pond v. Pond, 132 Mass. 219.

[h] (Miss. 1893) On an issue as to a boundary line, defendant relied on an agreement adopting a certain line as the boundary, which agreement, plaintiff claimed, was merely temporary. A witness occupying land adjoining defendant's on the other side testified for defendant that the boundary line so agreed on was to be permanent. *Held*, that it was competent for plaintiff to prove that, by virtue of such alleged agreement, witness' land would gain 14 chains, since such evidence tended to show that he had a direct interest in the result of the suit.—Archer v. Helm, 70 Miss. 874, 12 South. 702.

[i] (N. Y. 1883) It may be shown that a witness has an interest in the result of a suit, as, for instance, that defendant owes him money which he would be the less likely to get if plaintiff should obtain a judgment.—Meltzer v. Doll, 91 N. Y. 365.

[j] (N. Y. 1883) Notwithstanding the general rule that when a witness testifies positively to a fact, and his testimony is uncontradicted and unimpeached, it is to be credited, an exception exists where the interest of the witness is likely to affect his credibility, and especially where his testimony, if believed, would shield him from a charge of crime. In such a case his testimony should be submitted to the jury in like manner as if it had been contradicted.—Wohlfahrt v. Beckert, 92 N. Y. 490, 12 Abb. N. C. 478.

[k] (N. Y. 1889) A creditor of the assignors, who was placed in the third class of preferred creditors named in the assignment, is not an interested witness for plaintiff, in an action brought by an attaching creditor, not named in the assignment, to set such assignment aside.—Kennedy v. Wood, 52 Hun, 46, 4 N. Y. Supp. 758.

[l] (N. Y. 1889) The owners of property abutting on a street where an accident occurred testified on behalf of the defendant city. The evidence showed that the accident was caused by plaintiff's stepping from a part of the sidewalk which was several inches higher than the adjoining part down to the lower level, but it did not appear that either, or, if one of the owners, which one, had the right or lawful level in front of his property. *Held*, that the court properly refused to charge, for the purpose of indicating the interest the witnesses might be supposed to have in defeating the action, that "the defendant has a right of action over against the owner of the property in front of which the accident occurred for the reimbursement of any verdict rendered against it, and which it may be called upon to pay."—Hillesum v. City of New York, 56 N. Y. Super. Ct. (24 Jones & S.) 596, 4 N. Y. Supp. 806.

[m] (N. Y. 1890) In an action for insurance on a dredge, the fact that there was still due a witness a small amount on a bill for several thousand dollars for repairing the dredge showed no interest on his part which would discredit his testimony, where there was no evidence that the owner was not good for the balance, nor that the witness did not so regard him.—Plyer v. German-American Ins. Co., 121 N. Y. 689, 24 N. E. 929, reversing (1888) 48 Hun, 618, 1 N. Y. Supp. 395.

[n] (N. Y. 1896) Where defendant's witness testifies on cross-examination that plaintiff paid full value for the note in suit, in the usual course of business, and without notice that it had been diverted, the facts that the witness was a customer of plaintiff bank, and had sold to it the note in suit, do not make his credibility a question for the jury.—American Exch. Nat. Bank v. New York Belting & Packing Co., 148 N. Y. 698, 43 N. E. 168, affirming (1893) 74 Hun, 446, 26 N. Y. Supp. 822.

[o] (Tenn. 1872) Where there is a material discrepancy between the statements of witnesses, the fact that one has an interest in forestalling a prosecution against himself while the other is free from any apparent motive may be taken into consideration in weighing the testimony.—Maxwell v. State, 50 Tenn. (3 Heisk.) 420.

[p] (Va. 1874) On a bill by a surety against a creditor to be relieved on the ground that the creditor had authorized the sheriff to release the property levied on under the execution, the creditor answered and denied explicitly the allegations of the bill in this respect. *Held*, that the sheriff was a doubtful witness to sustain the bill, and though he testified that the creditor directed him not to sell, he not being sustained by strong corroborating

circumstances, relief would be denied.—Shannon v. McMullin, 25 Grat. 211.

§ 1185. Police officers, detectives, and other persons employed to testify or procure evidence.

Cross-examination, see post, §§ 1196, 1197.

[a] (U. S. 1896) Witnesses hired by the manufacturer of a proprietary medicine to secure evidence against suspected infringers are not disinterested, and their testimony should be scrutinized with unusual caution.—Hostetter Co. v. Bower (C. C.) 74 Fed. 235.

[aa] (Ala. 1893) On the trial of a person charged with offering another money to induce him to commit perjury, it is error to exclude evidence offered by defendant that the witnesses against him were professional witnesses in gaming cases, and that they had been hired by third persons to work up and prosecute such cases for money.—Rivers v. State, 97 Ala. 72, 12 South. 434.

[b] (Ark. 1890) On an indictment for arson, evidence that a material witness for the state had said that he was working for a reward for discovering the criminal is admissible to show bias by reason of pecuniary interest.—Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41.

[c] (Del. 1892) In a criminal prosecution the testimony of detectives and police officers should be cautiously scrutinized in connection with all the circumstances proven.—State v. Miller, 9 Houst. 564, 32 Atl. 137.

[d] (Ill. 1873) The testimony of a private detective hired by a husband to watch his wife, with a view of learning facts upon which to base a suit for a divorce, will be regarded with much suspicion, especially where it does not appear that his pay does not depend upon the successful effect of his evidence.—Blake v. Blake, 70 Ill. 618.

[e] (Ill. 1892) The fact that a witness is a detective, and was employed to aid in bringing criminals to justice, will not discredit his testimony.—Burns v. People, 45 Ill. App. 70.

[f] (Iowa, 1890) Where counsel for both parties enter into a stipulation as to what a distant witness would testify if examined, and agree that the statement shall be received in evidence as the testimony of such person, and have the same force and effect as if it were his deposition, the court has no right to discredit such evidence because uncorroborated, on the ground that the witness had been engaged for pay in looking up the evidence, and was not submitted to cross-examination.—Dickenson v. Bently, 80 Iowa, 482, 45 N. W. 903.

[g] (Iowa, 1890) The fact that a person is employed to visit places and purchase whisky in order to ascertain if saloons are illegally kept, is no ground for discrediting his testimony in a suit against the vendors for maintaining a liquor nuisance.—Dickenson v. Bently, 80 Iowa, 482, 45 N. W. 903.

[h] (Mich. 1895) The fact that the witnesses for the state on a prosecution for selling liquors unlawfully were hired to procure evidence of violation of the law may be considered by the jury in determining the credit to be given to their evidence.—People v. Whitney, 105 Mich. 622, 63 N. W. 765.

[i] (Mich. 1895) Defendant's arrest for violating the local option law having been caused by complainant, who purchased liquor from him with that object in view, it was unnecessary for the court to do more than inform the jury that such fact, if proved, was to be considered in determining the credit due to complainant's testimony.—People v. Bennett, 107 Mich. 430, 65 N. W. 280.

[j] (Neb. 1886) Where a detective, in the guise of a friend, obtained a confession of a crime from a suspected party, without inducement of any kind, except, at his request, he said that he had consulted an attorney for the prisoner, who said "he [the prisoner] had better tell the facts of the case, and that they would be likely to do him as much good as anything he could do; that there was no use of lying about it, and he had better tell the truth"—*held*, that the credibility of a witness who, by deceit, misrepresentation, and other disreputable means, has obtained an alleged confession from a prisoner, is for a jury, who should be specially instructed on that point.—Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835.

[k] (N. C. 1887) In a trial for the larceny of goods from a store, a witness testified to a confession made to him by one of the defendants of his participation in the crime. It was shown that witness was himself a great thief, and that he had been promised immunity from punishment for his own crimes if he would tell all he knew about defendant. *Held*, that his testimony was properly allowed to go to the jury.—State v. Mitchener, 98 N. C. 689, 4 S. E. 26.

[l] (Tex. 1885) A conviction had on the testimony of a single witness who testified in consideration of being bailed out of jail should be set aside.—McGuire v. State, 19 Tex. App. 467.

§ 1186. Relationship to party.

As affecting competency of witness, see ante, §§ 119–123.

[a] (Ala. 1891) Where a person conveys to his wife land, in which he holds only an equitable interest, and is then called by the wife as a witness in ejectment, it is competent for the defendant to show the interest of the witness, and his relationship to the party in whose favor he is called.—Jernigan v. Flowers, 94 Ala. 508, 10 South. 437.

[b] (Cal. 1887) It is proper for the court, upon a trial for murder, to allude to the fact of the relationship of certain of defendant's witnesses to him, as affecting their credibility.—People v. Bush, 71 Cal. 602, 12 Pac. 781.

[c] (Del. 1892) In a criminal prosecution the testimony of the relatives of the accused should be cautiously scrutinized in connection with all the circumstances proven.—State v. Miller, 9 Houst. 564, 32 Atl. 137.

[d] (Ga. 1849) It is error in the court to discredit the testimony of relatives merely as such, relationship being a circumstance only from which the jury are at liberty to infer a bias, but are not obliged to do so.—Potts v. House, 6 Ga. 324, 50 Am. Dec. 329.

[e] (Ga. 1886) The relationship of witnesses to parties may be taken into consideration by the jury in estimating the credit to be given to them.—Simpson v. State, 78 Ga. 91.

[f] (Ill. 1865) Although a witness has not been impeached, the jury may disregard his testimony, if, from his relationship to the parties, his evident bias, or from any other cause, the conclusion is warranted that he is unworthy of credit.—Corgan v. Frew, 39 Ill. 31, 89 Am. Dec. 286.

[g] (Iowa, 1858) Where the wife is admitted as a witness for the husband, under Code, § 2391, providing that a husband and wife may, in all criminal prosecutions, be witnesses for each other, her credibility is to be tested by the same rules which are applicable to other witnesses.—State v. Guyer, 6 Iowa (6 Clarke) 263.

[h] (Iowa, 1859) The testimony of a wife, when called as a witness for her husband in a criminal case, is not to be distinguished from that of other witnesses; she is entitled to be regarded as others are, and to stand free and unembarrassed on her own character.—State v. Rankin, 8 Iowa (8 Clarke) 355.

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[i] (Iowa, 1871) Under Rev. St. 1860, §§ 3978–3980, rendering classes competent as witnesses who were not so before, but providing that facts which had theretofore caused their exclusion might be proved to lessen their credibility, it was proper to instruct the jury, in an action for breach of a promise to marry, in which the plaintiff's father was a witness in her behalf, that they might consider the affection a father would have, and that any interest manifested by him should be considered as affecting his credibility, and for no other purpose.—Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208.

[j] (La. 1839) A witness' credibility is not destroyed by the fact that he is clerk of one plaintiff and brother of the other.—Frost v. Bebout, 14 La. 104.

[k] (La.) Near relationship of witnesses to parties litigant affects their credibility.—(1852) Ward v. Valentine, 7 La. Ann. 183; (1854) Tardif v. Baudoin, 9 La. Ann. 127.

[l] (Mo. 1890) Under Rev. St. 1879, § 1918, providing that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the * * * husband or wife of the accused, but any such facts may be shown for the purpose of affecting the credibility of such witness," an instruction to the jury that they may take into consideration the fact that a witness is the wife of the accused, in determining the weight to be given to her testimony, is proper.—State v. Parker, 39 Mo. App. 116.

[m] (Mo. 1895) It is proper to charge that, in considering the weight of evidence given by defendant and his wife, the jury may consider their interest in the case and the marital relation.—State v. Lingle, 128 Mo. 528, 31 S. W. 20.

[n] (N. H. 1860) The state of feeling, and the relationship of a witness toward a party, may properly be shown, to be weighed with his testimony.—Carr v. Moore, 41 N. H. 131.

[o] (N. Y. 1877) The rule that a witness not impeached or contradicted is to be believed, and the fact he swears to treated as established, does not apply where the sole witness for plaintiff is his son, and pecuniarily interested in the recovery toward which he testifies, particularly if his statement is improbable.—Kavanagh v. Wilson, 70 N. Y. 177.

[p] (N. Y. 1893) Plaintiff's wife is an interested witness where a decision adverse to plaintiff would tend to convict her of a fraud against defendant, and her testimony is subject to discredit, though not contradicted, and though her veracity may not have been impeached.—Coyle v. Metropolitan Life Ins. Co. (Com. Pl.) 5 Misc. Rep. 586, 25 N. Y. Supp. 90.

[q] (N. Y. 1896) The trial justice is not required to believe the testimony of a brother-in-law of defendant, who aided defendant all he could in the trial, in preference to the testimony of plaintiff.—Delise v. Palladino (Sup.) 16 Misc. Rep. 74, 37 N. Y. Supp. 705.

[r] (N. C. 1860) There is no rule of law that the fact that a witness stands in the relation of mother to one of the parties naturally gives a bias to her statement so as to affect the accuracy of her recollection; but such relation is a matter for the consideration of the jury alone.—Wiseman v. Cornish, 53 N. C. 218.

[s] (N. C. 1888) The testimony of near relatives in behalf of a defendant charged with a crime is to be weighed with great caution.—State v. Byers, 100 N. C. 512, 6 S. E. 420.

[t] (Pa. 1850) The fact of the near relationship of a witness to one of the parties is to be weighed in a doubtful case; but where the witness swears positively, and is unimpeached, his credit ought not to be destroyed on that ground.—In re Gangwere's Estate, 14 Pa. (2 Harris) 417, 53 Am. Dec. 554.

§ 1187. Employment by or other contractual relation with party.

[a] (U. S. 1834) In a suit for seamen's wages, the proctor for the libelant, though not legally incompetent as a witness for his client, has a bias which is to be regarded in weighing the credit to be given to his testimony.—Granon v. Hartshorne, Fed. Cas. No. 5,689 [1 Blatchf. & H. 454].

[b] (U. S. 1893) On a question whether the cargoes of certain sealing schooners were transferred to a steamer within 12 miles of the shore, so as to violate the revenue laws, the testimony of the masters of the schooners that the transfer was made more than that distance should be received with caution, if not wholly rejected, where it is contradicted by other evidence, or rendered improbable by circumstances, since they stand much in the light of accomplices in the wrong charged.—United States v. The Coquitlam (D. C.) 57 Fed. 706.

[c, d] (Ala. 1894) It is within the discretion of the trial court to allow plaintiff to ask one of defendant's witnesses whether his father has not been in the employ of defendant's father.—Long v. Booe, 106 Ala. 570, 17 South. 716.

[e] (Ga. 1892) Where the evidence of an employé of one of the parties to an action conflicts with that of other witnesses, the jury may take in consideration the employment as a fact which may affect his credibility.—Central Railroad & Banking Co. v. Maltsby, 90 Ga. 680, 16 S. E. 963.

[f] (Ill. 1885) The jury may consider the fact that the relation of employer and employé existed between a witness and a corporation that is defendant in the action to see if, from his manner in testifying, such relation influenced his testimony, and determine what effect is to be given to his testimony.—Illinois Cent. R. Co. v. Haskins, 115 Ill. 300, 2 N. E. 654.

[g] (Mich. 1880) There is no legal presumption against testimony given by an employé of a corporation, a party to the suit, and it is improper for the court to suggest that such evidence should be looked on with disfavor.—Marquette H. & O. R. Co. v. Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453.

[h] (Mich. 1891) The fact that a physician, who is employed to examine a person injured through the negligence of another, was employed for the express purpose of giving his testimony in a suit to be brought for such injury, may be considered as affecting his credibility.—Jones v. Village of Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437.

[i] (Mich. 1894) Evidence of the business relations between a party and his witness is admissible as affecting his credibility.—Totten v. Burhans, 103 Mich. 6, 61 N. W. 58.

[j] (N. Y. 1891) In an action for damages for personal injuries alleged to have been sustained by plaintiff from the negligence of defendant's employés, it was not proper to instruct that defendant's employés were not disinterested witnesses, and their evidence should be subjected to as severe a criticism as plaintiff's, as it was for the jury to determine in considering all the probabilities of the case how much credit such witnesses were entitled to receive in their statements.—Uransky v. Dry Dock, E. B. & B. R. Co., 59 Hun, 626, 13 N. Y. Supp. 670.

[k] (N. Y. 1892) The general manager of a corporation, who purchases goods for it in the course of his management of its affairs, is so far identified with it in interest that his testimony that the goods were not as warranted may be rejected as testimony of an interested witness, though wholly uncontradicted.—A. B.

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Cleveland Co. v. A. C. Nellis Co. (Com. Pl.) 18 N. Y. Supp. 448.

[l] (N. Y. 1895) The fact that a witness, as agent for plaintiff, made the contract sued on, does not furnish any ground for discrediting his testimony.—Johnson v. Doll (Com. Pl.) 11 Misc. Rep. 345, 32 N. Y. Supp. 132.

[m] (N. Y. 1895) The fact that, of nine witnesses who testified for defendant railroad company that the bell was rung and whistle sounded on the train by which plaintiff's intestate was injured at a crossing, the greater part were employés of defendant, is not alone sufficient to discredit them, where the only testimony to the contrary was that of three witnesses who testified that they did not hear any signal.—Durkee v. President, etc., of Delaware & H. Canal Co., 88 Hun, 471, 34 N. Y. Supp. 978.

[n] (N. Y. 1895) In an action to recover commissions for procuring a purchaser of real estate at an agreed price, evidence that the purchaser, who testified for plaintiff, is in fact attorney for plaintiff, and interested in the result of the suit, is admissible.—Cohn v. Kahn (City Ct. N. Y.) 14 Misc. Rep. 255, 35 N. Y. Supp. 829.

[o] (Pa. 1881) In ejectment against a railroad company, the court properly refused to allow a witness to be asked whether he was not a witness in a number of cases against the railroad company, in order to show his bias or prejudice.—Pennsylvania & N. Y. Canal & R. Co. v. Roberts, 2 Walk. 482.

[p] (Pa. 1891) The court charged that the engineer and fireman of the train by which plaintiff was injured, who testified on the trial, had an interest in the case because of the question of their own responsibility which was involved, which weighed against their own credibility, and was a matter for the consideration of the jury in determining the value of their testimony. *Held* not to be error.—Ellis v. Lake Shore & M. S. R. Co., 138 Pa. 506, 21 Atl. 140, 27 Wkly. Notes Cas. 145, 21 Am. St. Rep. 914.

[q] (Tex. 1894) Though evidence is admissible to show that at the time a witness, who was the original attorney for plaintiff, testified on a former trial he was interested in the suit, it is not reversible error to strike out his testimony to the effect that he had been interested, when he did not state at what time he had such interest.—Trinity County Lumber Co. v. Denham (Civ. App.) 29 S. W. 553.

§ 1188. Partner of party.

[a] (La. 1858) The testimony of a partner who has transferred his interest to his copartner, notwithstanding a release by the plaintiffs, must always be received with grave suspicions.—McLaughlin v. Sauve, 13 La. Ann. 99.

[b] (N. Y. 1896) A partner of defendant is not a disinterested witness, so as to require the jury to believe his testimony, though uncontradicted and in no way discredited.—Newcombe v. Hyman (Sup.) 16 Misc. Rep. 25, 37 N. Y. Supp. 649.

§ 1189. Friendly or unfriendly relations with or feelings toward party.

[a] (U. S. 1880) Statements of a witness made before trial, of facts which, if true, would tend to show bias on his part in favor of defendant, are properly admissible in evidence as to his credibility.—United States v. Schindler (C. C.) 10 Fed. 547.

[b] (Ala. 1878) The enmity or unfriendliness of a witness to the person against whom he testified may be shown to enable the jury the better to determine in connection with other evidence, what weight should be accorded to the witness; but it is not permissible to prove the details of a quarrel or difficulty which gave rise to the enmity or unfriendliness.—Polk v. State, 62 Ala. 237.

[c] (Ala. 1878) Persons observant of, and familiar with, the intercourse between others, and conversant with the state of feeling, as shown by their conduct and conversation, may testify as to the fact whether or not enmity or ill feeling existed between them.—Polk v. State, 62 Ala. 237.

[d] (Ala. 1881) The fact of enmity, but not the circumstances of a particular quarrel, are admissible to show bias on the part of a witness.—Munden v. Bailey, 70 Ala. 63.

[e] (Ala. 1885) Defendant may show a previous difficulty between himself and a witness for the state, to affect his credibility, but the particulars of such difficulty are inadmissible.—Jordan v. State, 79 Ala. 9.

[f] (Ala. 1885) On indictment for assault, to affect the credibility of a witness, his feelings towards the parties to the difficulty may be shown, but not his feelings towards a third person, who did not take part in the difficulty.—Henry v. State, 79 Ala. 42.

[g] (Ark. 1879) A witness for the state may be shown to be prejudiced against the accused, but the facts and circumstances causing such prejudice cannot be stated in detail.—Butler v. State, 34 Ark. 480.

[h] (Cal. 1894) Insulting remarks by defendant, made concerning a witness, which were repeated to the witness, and statements by the witness showing prejudice against defendant, are admissible as affecting her credibility.—People v. Anderson, 105 Cal. 32, 38 Pac. 513.

[i] (Conn. 1830) Evidence may be received to show the bias under which a witness labors who has given his deposition ex parte in a case.—Daggett v. Tallman, 8 Conn. 168.

[j] (Conn. 1874) In order to impeach the credit of a witness, it may be shown that there has been a quarrel between him and the party against whom he testifies, although not relating to the subject-matter of the suit.—Beardsley v. Wildman, 41 Conn. 515.

[k] (Ga. 1877) Ill will in a witness does not, ipso facto, work an impeachment, nor does it necessarily weaken the force of his testimony.—Skipper v. State, 59 Ga. 63.

[l] (Ill. 1869) In an action for malicious prosecution, it appeared that the prosecution complained of was instituted by defendants, who were proprietors of a foundry wherein their operatives were employed contrary to the rules of the Molders' Union, and that certain members of the union conspired to entice away the said employés. The proprietors of the foundry brought suit against the alleged conspirators, and caused plaintiff to be arrested and imprisoned and held to bail as one of the conspirators. The action brought by said proprietors was subsequently dismissed without being brought to trial. *Held*, that it was competent to show on cross-examination of a witness who was introduced to exonerate plaintiff as one of the conspirators that witness had become a member of the union after he had left defendant's employment; though it appeared to technically pertain to the matter of the direct examination, it was competent as showing the influences under which the witness was placed by joining the union.—Collins v. Hayte, 50 Ill. 337, 99 Am. Dec. 521.

[m] (Ind. 1882) It is proper to show that a witness entertains malice or ill will toward the party against whom he testifies, though the witness be one of several who are jointly sued.—Colton v. Vandervolgen, 87 Ind. 361.

[n] (Ky. 1895) In an action by an employé for personal injuries, it is error to refuse to allow defendant to prove by one witness that an-

other witness called by plaintiff had been discharged from defendant's employment.—Louisville & N. R. Co. v. Berry's Adm'x, 96 Ky. 604, 29 S. W. 449.

[o] (Ky. 1895) Where three persons were indicted for the crime, but as to one the indictment was dismissed, and he became a witness for the state, evidence of the influence which two detectives exercised over this witness was competent, as bearing upon the weight to be given to his testimony.—Breckenridge v. Commonwealth, 97 Ky. 267, 30 S. W. 634.

[p] (Me. 1887) Testimony of the libelee on cross-examination as to acts of alleged cruelty not set out in the libel or bill of particulars is admissible to show his feeling and disposition as bearing on his credibility.—Thompson v. Thompson, 79 Me. 286, 9 Atl. 888.

[q] (Md. 1877) While bias of a witness against a prisoner may be shown, the causes of such bias cannot be inquired into.—Chelton v. State, 45 Md. 564.

[r] (Md. 1877) A question asked by his counsel of one charged with larceny, as to whether the father of two persons named had made any threats against the family of defendant's father, is inadmissible where one of such persons has not been examined as a witness, and there is no evidence tending to show that the other, who was a witness for the prosecution, had any knowledge of such threats when he gave his testimony.—Chelton v. State, 45 Md. 564.

[s] (Miss. 1859) It is competent to prove facts showing the witness' feeling toward the parties, as that she told the prisoner some time before that if he did not kill the deceased she would not own him for her son.—Newcomb v. State, 37 Miss. 383.

[t] (N. H. 1853) The relation in which a witness stands to a party, whether of peculiar friendship or hostility, is material, and may always be shown, either by the testimony of the witness whose testimony is to be affected by it, or by other witnesses.—Drew v. Wood, 26 N. H. (6 Fost.) 363.

[u] (N. Y. 1859) If the jury believe that R. B. attempted to assassinate the prisoner before his arrest upon the charge of poisoning his wife, and that he entertained feelings of animosity and hatred toward him, and if the jury believe that S. and F. B. are also hostile toward the prisoner, and have quarreled with him, then they should consider these matters in weighing the degree of credit which is to be given to their testimony.—Stephens v. People, 4 Parker, Cr. R. 396.

[v] (N. Y. 1864) In an action by an administrator to recover a debt due his intestate, a witness in behalf of the defendant testified that she had had a claim against the estate which had been settled, but not to her satisfaction. The plaintiff then introduced evidence of the claim, and how it was settled. *Held* that, as the witness was evidently under an unfriendly bias toward the plaintiff, it was proper that all the facts connected with the claim and settlement should be laid before the jury, that they might judge of the extent and the cause of the bias. It affected the defendant in no other way than as showing the influences under which the witness testified.—Dubois v. Baker, 30 N. Y. 355.

[w] (N. Y. 1878) Evidence of a witness' unfriendly feeling toward a party must be restricted to the time of the trial.—Higham v. Gault, 15 Hun, 383.

[x] (N. Y. 1881) Evidence of threats made by a plaintiff to "get even with" the defendants are admissible in evidence: the plaintiff having testified in his own behalf.—Starr v. Cragin, 24 Hun, 177.

[y] (N. Y. 1893) Evidence that a witness for the defense was in intimate and affectionate relations with defendant's household is competent for the prosecution.—People v. Webster, 139 N. Y. 73, 34 N. E. 730, affirming (1893) 68 Hun, 11, 22 N. Y. Supp. 634.

[yy] (Tex. 1886) Where a woman testified that the person assaulted advanced with an axe in a threatening manner to within two or three steps of defendant before defendant drew his revolver and fired, evidence that the woman was separated from her husband and was living with defendant was competent to show her bias and motives.—Crist v. State, 21 Tex. App. 361, 17 S. W. 260.

[z] (Vt. 1862) It is always admissible, for the purpose of affecting the credibility of a witness, to prove his friendly relations to the party calling him, and hostility to the party against whom he testifies, notwithstanding that he may have been questioned upon those matters on the cross-examination.—Hutchinson v. Wheeler, 35 Vt. 330.

[zz] (W. Va. 1886) On an indictment for uttering a forged writing, the bias of witnesses in favor of the person whose name was forged is immaterial, and evidence that a witness is indebted to him is inadmissible, for the purpose of affecting the credit of the witness testifying.—State v. Henderson, 29 W. Va. 147, 1 S. E. 225.

§ 1190. Bias or prejudice of impeaching witness toward witness impeached as to character.

[a] (Iowa, 1891) Testimony impeaching the character of the accused cannot be stricken out because the cross-examination of the witnesses shows that they are interested in the prosecution.—State v. Farrell, 82 Iowa, 553, 48 N. W. 940.

[b] (Md. 1876) Where one party produced witnesses to impeach the other party as a witness, it was proper to prove that he had a personal difficulty with such witnesses about the building of some houses which resulted in a law suit.—Wyeth v. Walzl, 43 Md. 426.

[c] (Minn. 1891) Testimony that impeaching witnesses belonged to a village "faction" opposed to that to which the person impeached belonged, is too vague and remote.—Holston v. Boyle, 46 Minn. 432, 49 N. W. 208.

§ 1191. Release of interest.

[a] (U. S. 1864) Where a man transfers all his interest in property which is about to become the subject of suit, for the purpose of making himself a witness in such suit, while his testimony is to be carefully and perhaps suspiciously scrutinized, when contradicting the positive statements made by a defendant in equity responsively to the complainant's bill, such testimony is still to be judged of by the ordinary rules which govern in the law of evidence, and to be credited or discredited accordingly.—Tobey v. Leonard, 69 U. S. (2 Wall.) 423, 17 L. Ed. 842.

[b] (Ky. 1820) A release of interest by a party, not made until after his deposition has been taken, detracts greatly from the credibility of the evidence.—Steele's Heirs v. Payne's Heirs, 9 Ky. (2 A. K. Marsh.) 187.

[c] (N. Y. 1850) A party who assigns a claim, and becomes a witness to prove it, places himself in a position where his testimony will be looked at with more doubt than in other cases, and when contradicted in a material point, he cannot complain if credit is withheld from him.—Watkins v. Cousall, 1 E. D. Smith, 65.

[d] (S. C. 1817) If a witness, incompetent on the score of interest, releases his interest, it is for the jury to judge of the degree of credit to which he is entitled.—Kinloch v. Palmer, 1 Mill, Const. 216.

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2. CROSS-EXAMINATION TO SHOW INTEREST OR BIAS, AND RE-EXAMINATION.

IN GENERAL, § 1192.
INQUIRY AS TO PARTICULAR ACTS OR FACTS TENDING TO SHOW INTEREST OR BIAS, § 1193.
— STATEMENTS OR DECLARATIONS, § 1194.
— EMPLOYMENT OF COUNSEL OR PAYMENT OF EXPENSE OF LITIGATION, § 1195.
— COMPENSATION OR REWARD FOR TESTIMONY, § 1196.
CROSS-EXAMINATION OF POLICE OFFICERS AND DETECTIVES, § 1197.
CONCLUSIVENESS OF ANSWERS ON CROSS-EXAMINATION, § 1198.
RE-EXAMINATION, § 1199.

§ 1192. In general.

[a] A party is entitled to cross-examine a witness for the purpose of showing interest or bias.

—(Ga. 1861) Floyd v. Wallace, 31 Ga. 688;
(Ind. 1885) Barnett v. Feary, 101 Ind. 95;
(Kan. 1872) Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. 477;
(Neb. 1894) Blenkiron v. State, 40 Neb. 11, 58 N. W. 587;
(N. Y. 1883) Miles v. Sackett, 30 Hun, 68;
(S. D. 1895) Hanson v. Minnehaha County, 7 S. D. 38, 63 N. W. 156;
(Tex. 1853) Wentworth v. Crawford, 11 Tex. 127;
(Wis. 1873) Suit v. Bonnell, 33 Wis. 180.

[b] It is proper, on cross-examination of a witness, to ask him questions tending to show the state of his feelings toward the parties.

—(Ala. 1858) McHugh v. State, 31 Ala. 317;
(Cal. 1885) People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. 859;
(Ill. 1860) Ray v. Bell, 24 Ill. (14 Peck) 444;
(La. 1885) State v. Melton, 37 La. Ann. 77;
(Mo. 1880) State v. Miller, 71 Mo. 590;
(Or. 1885) State v. Mackey, 12 Or. 154, 6 Pac. 648.

[c] (Ala. 1853) The prisoner's witnesses may be questioned, on cross-examination, as to their relations with the prisoner, whether they were on terms of friendly intimacy, their means of knowing the facts to which they testify, and as to any liens or prejudices which might influence them.—Campbell v. State, 23 Ala. 44.

[d] (Ala. 1876) On a trial for arson, the prosecuting witness was asked, "What was the state of feeling between you and the accused at the time of the burning?" and the witness answered, "It was not good." *Held*, that the form of neither the question nor the answer was objectionable.—Hinds v. State, 55 Ala. 145.

[e] (Ark. 1852) It is not proper on cross-examination to ask a witness if he is not prejudiced against the defendant.—Cornelius v. State, 12 Ark. (7 Eng.) 782.

[ee] (Cal. 1867) When a witness is a material one on the part of the party introducing him, and has been intimately associated with him in the matters directly connected with questions of fact involved in the action, the opposite party has the right to test his credibility on cross-examination by any mode of examination which is calculated to illustrate his relation to the parties and the subject-matter of the action.—Harper v. Lamping, 33 Cal. 641.

[f] (Cal. 1885) Where a witness has testified to immaterial matters only, the party against whom he has testified cannot, on cross-examination, show prejudice or hostility of such witness.—Luhrs v. Kelly, 67 Cal. 289, 7 Pac. 696.

[ff] (Cal. 1886) A party is not injured by cross-examination of a witness to show that ill feeling at one time existed between them, if the witness, on the direct examination, has testified favorably to the party.—Hartman v. Rogers, 69 Cal. 643, 11 Pac. 581.

[g] (Cal. 1888) In a trial for murder, when the mother of deceased testifies, on her cross-examination: "I heard the Goldensons [the family of defendant] were of such a character that I did not wish my daughter to go to their house"—it is not error to disallow a question by defendant as to the nature of the character referred to. The testimony of the witness showed that she was prejudiced against defendant's family, and the reason therefor was immaterial.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[gg] (Cal. 1891) Where a tenant, in an action against his landlord, produces a written statement of account, made nearly a year before the trial, the exclusion of an inquiry, on cross-examination, as to what his feelings towards the landlord were at the time he made the statement, is not prejudicial; since it was material, only, what his feelings were at the time he testified.—Salle v. Mayer, 91 Cal. 165, 27 Pac. 513.

[h] (Cal. 1894) On a prosecution for murder, a witness for the state may, on cross-examination, be asked if deceased was not her lover, to show her spite against defendant.—People v. Worthington, 105 Cal. 166, 38 Pac. 689.

[hh] (Colo. 1890) The admission by the defendant while testifying as a witness of the existence of prejudice against the plaintiff does not preclude a cross-examination as to the character of such prejudice.—Stewart v. Kindel, 15 Colo. 539, 25 Pac. 990.

[i] (Conn. 1827) Where a party has excepted to a witness as interested in the event of the suit, and has made an unsuccessful attempt to prove such interest by the evidence of other witnesses, he cannot, on the cross-examination of the witness excepted to, make any inquiry of him to show interest, for the purpose of impeaching his credibility.—Chance v. Hine, 6 Conn. 231.

[ii] (Ga. 1850) A witness may be interrogated as to the state of his feelings toward a party, in order to show the bias under which he testifies; it is not admissible, however, to inquire into the cause of his hostility.—Bishop v. State, 9 Ga. 121.

[j] (Ill. 1885) Although there should be an extension and not an abridgment of the right to cross-examine a witness, where the evidence tends to show that there has been some difficulty between him and the accused, yet in the absence of a clear showing of abuse of discretion prejudicial to the accused, the exercise of the trial court's discretion in that regard will not be disturbed on appeal.—Birr v. People, 113 Ill. 645.

[jj] (Ind. 1859) It is always proper to ask a witness as to his relationship to the parties, and the state of his feelings toward them, with a view that the jury may judge of the impartiality of his testimony.—Bersch v. State, 13 Ind. 434, 74 Am. Dec. 263.

[k] (Ind. 1881) In a prosecution instituted by the owner of a dog against one who has maliciously killed the animal, it is competent for the state, on cross-examination, to ask the defendant's witness relative to his relations with the owner, for the purpose of showing prejudice or bias of the witness for or against him.—Kinsman v. State, 77 Ind. 132.

[kk] (Ind. 1889) In a prosecution under Rev. St. 1881, § 2087, providing for the punishment of any one allowing minors to play billiards, etc., on cross-examination of the minor as a witness, the question whether he was not the same person "who had been a witness in several

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liquor cases" is improper.—Kiley v. State, 120 Ind. 65, 22 N. E. 99.

[l] (Ind. 1890) The extent of cross-examination to show feeling and bias rests in the sound discretion of the trial court.—Hinchcliffe v. Koontz, 121 Ind. 422, 23 N. E. 271, 16 Am. St. Rep. 403.

[ll] (Ind. 1896) In a prosecution the state may, on cross-examination, bring out the relation between defendant and a female witness testifying in his behalf, as affecting bias in his favor on her part.—Smith v. State, 143 Ind. 685, 42 N. E. 913.

[m] (Kan. 1884) On cross-examination, an adverse witness may be questioned as to his intimacy with a person whom the party he is testifying against caused to be arrested, if followed by evidence tending to show a conspiracy between witness and such person to furnish evidence.—State v. Krum, 32 Kan. 372, 4 Pac. 621.

[mm] (Kan. 1885) A witness who admits ill will or prejudice against one of the parties to an action may nevertheless be cross-examined as to the extent and character of that prejudice.—State v. Collins, 33 Kan. 77, 5 Pac. 368.

[n] (La. 1859) In a cross-examination of a witness for the state, the question was asked the witness "if he was not anxious that the defendant should be convicted." *Held*, that the question was a proper one, and might be asked to show bias on the mind of the witness, and that it was competent for the jury to decide from his answer to what extent his credibility may have been affected by it.—State v. Adams, 14 La. Ann. 620.

[nn] (La. 1884) After a witness for the state has been asked whether he is not anxious to have the accused convicted, and has answered in the negative, the court may exclude further questions tending to intimidate the witness.—State v. Kane, 36 La. Ann. 153.

[o] (La. 1896) The state has the right, on cross-examination of defendant's witnesses, to cross-examine them in respect to their relations with the accused, in order to affect the weight and credibility of their evidence; and this though the examination may cover matters not touched on by the witnesses in their direct examination.—State v. Johnson, 48 La. Ann. 437, 19 South. 476, following State v. Willingham (1881) 33 La. Ann. 537; State v. Gregory, Id. 737.

[oo] (Mass. 1852) A witness who is called to discredit another witness, and defeat the effect of his testimony by showing that he had made statements at variance therewith, may be asked whether he has had a quarrel with such other witness.—Long v. Lamkin, 63 Mass. (9 Cush.) 361.

[p] (Mich. 1878) A witness, who on cross-examination to affect his credibility by showing that he is interested in certain property as a purchaser states that although he once agreed to purchase it the sale was never completed or carried out, should not be further questioned as to why he did not complete the sale in the absence of any showing that his answer will show interest or affect his credibility.—Sager v. Tupper, 38 Mich. 258.

[pp] (Mich. 1892) Where a defendant's case rests almost entirely upon the testimony of one witness, plaintiff may, on cross-examination of the witness, show the latter's ill feeling toward him.—Clink v. Gunn, 90 Mich. 135, 51 N. W. 193.

[q] (Mo. 1859) It is competent in a criminal case, as affecting the credibility of a witness, to inquire into the state of his mind in respect to the party against whom he is called; but this inquiry cannot be made concerning the witness' feelings in regard to the husband of such party.—State v. Montgomery, 28 Mo. 594.

[qq] (Mo. 1894) The extent to which the temper and disposition of a witness may be shown on cross-examination is largely within the discretion of the trial court.—Czezewzka v. Benton-Bellefontaine Ry. Co., 121 Mo. 201, 25 S. W. 911.

[r] (Neb. 1881) Any interest that a witness may have in the result of the trial of a criminal case in which he is testifying, whether pecuniary or other, may be called out on his cross-examination, as affecting his credibility.—Olive v. State, 11 Neb. 1, 7 N. W. 444.

[rr] (Neb. 1892) Where a witness testified that he had felt unfriendly toward defendant at times, but that he no longer had such feeling, questions seeking to elicit that he bore ill will towards defendant more than three years before the trial were not proper.—Consaul v. Sheldon, 35 Neb. 247, 52 N. W. 1104.

[s] (N. Y. 1816) Counsel have no right to put a question to a witness the answer to which might impeach his own motives in procuring the institution of the prosecution. This must be done by other testimony.—In re Butler's Case, 1 City H. Rec. 66.

[ss] (N. Y. 1874) A witness on cross-examination may properly be interrogated as to his interest in the result of the trial. Although interest does not now disqualify a witness, it may be shown on cross-examination with a view to test his credibility. It is also competent to inquire how the witness understands the case as regards his interest.—Vaughan v. Westover, 4 Thomp. & C. 316.

[t] (N. Y. 1887) It is always competent to bring out, on cross-examination, what relations exist between a party and his witness, for the purpose of showing bias or prejudice on the part of the witness, and it is error to refuse to allow a question, looking to that end, to be put; but where the evidence in chief is wholly immaterial upon all the material issues of the case, such refusal is harmless error.—Teets v. Village of Middletown, 106 N. Y. 651, 12 N. E. 347, affirming (1884) 20 Wkly. Dig. 347.

[tt] (N. Y. 1891) In a prosecution for manslaughter, where defendant stood by aiding and encouraging the assault which resulted in the death of the assaulted person, where one who belonged to defendant's party, and stood by during the assault, is called as a witness in his behalf, the prosecuting attorney may, for the purpose of ascertaining if he is an impartial and unprejudiced witness, ask if he wanted to see deceased get a thrashing.—People v. Keating, 61 Hun, 260, 16 N. Y. Supp. 748.

[u] (N. Y. 1892) Where a witness was asked a question on cross-examination, with a view of showing a hostile feeling on her part towards defendant, but such question embraced other matters not admissible, and assumed facts not in evidence, an objection was properly sustained.—Cornwell v. Cogwin, 63 Hun, 624, 17 N. Y. Supp. 299.

[uu] (N. Y. 1893) In an action by the contractor for a balance due on a building contract, where a witness for defendant testified that, by agreement between the architect and plaintiff, alterations were made in the specifications to reduce the cost of the work to plaintiff, it is proper to show by cross-examination that witness is unfriendly to the architect.—Garnsey v. Rhodes, 138 N. Y. 461, 34 N. E. 199.

[v] (N. Y. 1893) It is competent to ask a witness who testifies for defendant, and who was an eyewitness of the homicide, as to her intimacy with defendant's wife, as tending to affect her credibility.—People v. Webster, 68 Hun, 11, 22 N. Y. Supp. 634, judgment affirmed (1893) 139 N. Y. 73, 34 N. E. 730.

[vv] (N. C. 1860) In order to weaken the force of a witness' evidence on cross-examina-

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tion, it was *held* competent to show his temper and feeling toward the cause independently of any prejudice or ill will toward the accused personally.—State v. Sam, 53 N. C. 150.

[w] (N. D. 1893) The state has the right, on cross-examination, to show the nature of the relations existing between a witness and the accused, so far as their relations are such as would create a bias on the part of the witness that might reasonably be supposed to affect his testimony, and this rule cannot be changed by the fact that these relations may be such as to prejudice the accused in the minds of the jury.—State v. McGahey, 3 N. D. 293, 55 N. W. 753.

[ww] (S. D. 1892) The latitude of inquiry in the cross-examination of an interested witness is submitted to the sound discretion of the trial court.—Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265.

[www] (S. D. 1892) Upon cross-examination, it is always allowable to ask any witness as to his relation to the subject-matter of his testimony, or to the parties whose interests are to be affected by it.—Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265.

[x] (Tex. 1854) A question put to a witness on cross-examination as to whether he did not desire that the party for whom he testified should recover is impertinent.—Thompson v. Thompson, 12 Tex. 327.

[xx] (Tex. 1880) A question in cross-examination of a prosecuting witness to show his hostility, "Don't you love the defendant?" *held* to be improper.—Blunt v. State, 9 Tex. App. 234.

[xxx] (Tex. 1881) In answer to a cross-interrogatory relative to his interest in the suit, a witness for the plaintiff replied that he had no more interest in the suit than he would have in any other which the plaintiff might be engaged in. *Held*, that fairly construed the answer established the negative of the question of interest.—Stillman v. Hurd, 10 Tex. 109.

[y] (Tex. 1886) The accused in a criminal prosecution has the right to prove by a state's witness the enmity which the witness entertains against him.—Lyle v. State, 21 Tex. App. 153, 17 S. W. 425.

[yy] (Vt. 1879) Only the general inquiry, without detail, whether a witness is friendly or otherwise to the party, is permitted.—State v. Glynn, 51 Vt. 577.

[z] (W. Va. 1879) A grand juror who is a witness on the trial of an indictment found by the grand jury of which he was a member cannot, with a view of showing his prejudice, be asked anything which occurred in the jury room.—State v. Baltimore & O. R. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[zz] (Wis. 1865) Where the defense to an action on a note is that the plaintiff is not the owner, the payee, who has testified for the defendant that he (witness) had assigned the note to a third person while the plaintiff held it for him, may be cross-examined to show his continued interest in the note, and that the assignment was without consideration, for the purpose of affecting his credit as a witness.—Phœnix Ins. Co. v. Sholes, 20 Wis. 35.

§ 1193. Inquiry as to particular acts or facts tending to show interest or bias.

[a] (Ala. 1862) In an action to recover the value of certain goods shipped by a steamer, it was proper for the court to allow defendant on cross-examination of a witness for plaintiff to show that the witness was a warehouseman, and that he received the goods from the boat and the bill of lading, as bearing on the question whether he himself had not been negligent, from the consequence of which a recovery by the plaintiff would contribute to relieve him.—Winston v. Cox, 38 Ala. 268.

[aa] (Ala. 1882) A witness in an action for breach of contract, who is shown to be an employé of the plaintiff, may not be questioned as to the amount of his salary to determine his interest in the suit.—Mason v. Alabama Iron Co., 73 Ala. 270.

[b] (Ala. 1887) A witness in a criminal case was asked on cross-examination if he did not tell the officer that he did not know where defendant was. *Held* admissible, as tending to show bias of the witness.—Burger v. State, 83 Ala. 36, 3 South. 319.

[bb] (Ala. 1887) It is permissible, on cross-examination of a witness, to prove his bias or prejudice by showing that he is defendant in another action, involving another portion of the property conveyed by the same mortgage, in which the same defense is set up.—Drum v. Harrison, 83 Ala. 384, 3 South. 715.

[c] (Ala. 1893) A witness for the state, after testifying that he is not hostile to the accused, cannot be asked, in order to contradict him, whether he did not once, when required to reduce the force working under him, discharge defendant in preference to a colored man also in his employ.—Carpenter v. State, 98 Ala. 31, 13 South. 534.

[cc] (Ala. 1895) To show interest of witness against defendant he may be asked, in an action for removing the body of plaintiff's child from its burying place, if plaintiff has brought an action against him on account of the same thing, and if it has been finally determined.—Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26.

[d] (Cal. 1886) On a trial for murder, it is not error to refuse to admit a question put to a witness as to whether he knew of the defendant's arrest for arson, and at whose instigation such arrest was made, if no offer was made to prove that the arrest for arson was instigated or brought about by any witness for the prosecution, or any organization or society hostile to the defendant with which any witness for the prosecution was connected; as in the absence of evidence, or any offer thereof, connecting the witnesses of the prosecution with such arrest, the answer to the question could not have tended to destroy the credibility of any of them.—People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323.

[dd] (Conn. 1828) A witness may be asked, on cross-examination, whether he has not had a controversy with the party against whom he testifies, and whether he has not threatened to be revenged upon him, for the purpose of discrediting his testimony.—Atwood v. Welton, 7 Conn. 66.

[e] (Fla. 1886) On trial for murder it is competent for defendant's counsel to ask a witness for the state whether he took part in an indignation meeting, and whether the meeting was hostile to defendant, for the purpose of showing the state of the witness' feelings towards defendant; but evidence as to the reasons for holding the meeting, or for witness' attending it, is inadmissible.—Selph v. State, 22 Fla. 537.

[ee] (Fla. 1890) In an action against a railroad company for killing plaintiff's mule, the engineer in charge of the engine had testified for the company, and on cross-examination was asked, "What would be the consequence if you should kill stock carelessly and negligently, and should report it to your company?" The question was objected to, on the ground that it was new matter, and was irrelevant and incompetent, but the court overruled the objection. *Held*, that the question was proper, as a means of furnishing the jury a test of the value of his evidence through his relation to the company, and his interest and inclination toward the parties.—Jacksonville, T. & K. W.

Ry. Co. v. Wellman, 26 Fla. 344, 7 South. 845.

[f] (Fla. 1891) It is competent to show as a fact feelings of hostility on the part of a witness, or the state of a witness' mind, in respect to the person against whom he testifies, and the jury may consider this hostility or bias in estimating his testimony; but an inquiry into the conduct and acts of parties producing hostility, not relating to the matters in issue, should not be permitted.—Eldridge v. State, 27 Fla. 162, 9 South. 448.

[ff] (Fla. 1894) In trespass to land, a question to plaintiff's witness, on cross-examination, if he had not testified in similar suits against defendant, to show bias, was properly excluded. —Jacksonville, T. & K. W. Ry. Co. v. Lockwood, 33 Fla. 573, 15 South. 327.

[g] (Ga. 1878) Where a witness for the defendant testified on cross-examination that he had unkind feelings toward the plaintiff, *held*, that he could not be asked the cause of those feelings.—Conyers v. Field, 61 Ga. 258.

[gg] (Ga. 1878) A witness for the defense, in a criminal trial, cannot be asked, on cross-examination, concerning the particulars of a difficulty between him and the prosecutor, when he has not denied ill feeling toward the latter. —Patman v. State, 61 Ga. 379.

[h] (Ill. 1860) On cross-examination of a witness for the purpose of showing the state of his feelings, it is proper to ask questions of him tending to show that on a previous trial the witness refused to give the name of a person within his knowledge, when directed to do so by the court.—Ray v. Bell, 24 Ill. 444.

[hh] (Ill. 1882) Where a witness for one party has stated enough to show the relation between him and the opposite party, it is harmless error to refuse to allow him, on cross-examination, to be asked if there had not been a feud or quarrel between his family and one of such opposite party's family.—Schmidt v. Sinnott, 103 Ill. 160.

[i] (Ind. 1891) Defendant's witness may be asked on cross-examination if he did not leave home in order to enable defendant to obtain a continuance, the question being competent as tending to show interest.—Sage v. State, 127 Ind. 15, 26 N. E. 667.

[ii] (Ind. 1892) As affecting his credibility, a witness may be cross-examined as to whether he is a volunteer witness.—Wabash R. Co. v. Ferris, 6 Ind. App. 30, 32 N. E. 112.

[j] (Iowa, 1876) In an action for seduction, a witness who had been himself a candidate for the woman's favor having testified that he went to her house, and saw her in the company of defendant in an equivocal position, it was competent to ask him what was the purpose of his visit to the house at the time about which he testified.—Dance v. McBride, 43 Iowa, 624.

[jj] (Iowa, 1887) On cross-examination, defendant's counsel asked a witness, in order to show prejudice against the defendant, whether he had not stated to one Sandford that he had whipped the defendant and his brother, and had applied certain opprobrious epithets to them, but could not get a fight out of them, to which the witness answered that no such conversation had taken place between him and Sandford; also that Sandford contradicted himself as to certain parts of the alleged statement. He was then asked: "How does he contradict himself?" *Held*, the question called for a mere expression of belief, and had no tendency to show hostility on the part of the witness, and was properly disallowed.—State v. Winter, 72 Iowa, 627, 34 N. W. 475.

[k] (Iowa, 1887) Upon the trial of defendant for forging a promissory note, the fact that a witness was one of defendant's bondsmen may be shown upon cross-examination, as affecting the weight and credibility of his testimony.— State v. Calkins, 73 Iowa, 128, 34 N. W. 777.

[kk] (Iowa, 1888) A witness testified that she had a claim against plaintiff for services during his illness consequent on the accident for which suit was brought. On cross-examination she was asked "whether she knew of any way of getting her pay, except through this suit." *Held* that, the witness having already admitted her interest, the exclusion of the question did not prejudice defendant.—Shannon v. Town of Tama City, 74 Iowa, 22, 36 N. W. 776.

[l] (Iowa, 1892) Cross-examination of an attorney who has taken the stand for a client, as to whether his compensation did not depend upon a recovery, is proper, as the witness, under the common law, would have been incompetent because of interest; Code 1873, § 3637, declaring that facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility.—Harrington v. City of Hamburg, 85 Iowa, 272, 52 N. W. 201.

[ll] (Ky. 1896) On cross-examination of a woman who was a witness for the defendant, it was admissible, as showing her interest and probable bias, to prove that she had been living with defendant, though not married to him. —Holly v. Commonwealth, 36 S. W. 532.

[m] (La. 1889) The accused has the right to show, on cross-examination of a witness for the state, the feeling of the witness towards him, and to ask him as to a particular act of hostile feeling shortly after the commission of the offense. If he refuses to answer, or answers evasively, the accused can prove the fact by any other competent witness.—State v. McFarlan, 41 La. Ann. 686, 6 South. 728.

[mm] (Md. 1855) On the cross-examination of a witness, he may be asked whether he is not now engaged in a bitter controversy with the plaintiff, and whether he does not entertain feelings of animosity and hostility toward him. —Blessing v. Hape, 8 Md. 31.

[mmm] (Md. 1887) In an action against county commissioners to recover damages for personal injuries caused by a defective highway, defendant, for the purpose of showing the bias of a witness who had testified as to the bad condition of the highway, asked him, on cross-examination, whether he was on "good terms" with the road supervisor in whose district the injuries alleged occurred, and whether there had not been a bitter controversy between him and the friends of the supervisor over the latter's appointment, and whether he did not entertain feelings of animosity towards the commissioners on account of such appointment. The question was excluded on the ground that the supervisor was not a party to the action. *Held*, that the question was proper to show animosity towards the commissioners, and as the commissioners could recover from the supervisor the amount recovered by plaintiff, the relation of the supervisor to the suit was such as made the whole question proper.— Somerset County Com'rs v. Minderlein, 67 Md. 566, 11 Atl. 57.

[n] (Mass. 1857) In an action against a husband for necessaries furnished to his wife while lawfully absent from his house, a son of the defendant, called as a witness by him, may be asked, on cross-examination, in order to impeach his testimony and show his interest, what was the consideration of a conveyance made to him by his father, and whether it was not fraudulent; and also if his father lived with him, and paid board to him.—Mayhew v. Thayer, 74 Mass. (8 Gray) 172.

[nn] (Mass. 1888) A witness having testified to certain facts tending to convict defendant of setting up and promoting a lottery, defendant's

counsel asked him if one A. had not charged him with proposing, on a previous occasion, to swear falsely against defendant, but it did not appear that witness had acquiesced in the charge, or that any such had, in fact, been made. *Held*, that the question was properly excluded, though witness might have been asked about the fact with which he was supposed to have been charged, and A. might have been produced to contradict him if he could do so.—Commonwealth v. Sullivan, 146 Mass. 142, 15 N. E. 491.

[nnn] (Mass. 1891) On cross-examination of plaintiff in an action for damages from an artificial pond, a conveyance to her by a former owner of the right of action for damages prior to conveyance of title to plaintiff is incompetent to show bias.—Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229, 25 Am. St. Rep. 608, 10 L. R. A. 210.

[o] (Mich. 1860) It is competent for defendant on the trial of an indictment for causing a public nuisance in keeping up a milldam, to show by the cross-examination of witnesses for the prosecution that they have commenced civil suits for injury caused by the same dam, and then agreed together to suspend action in such suits, and get defendant indicted, and, in that way, procure the removal of the dam.—Crippen v. People, 8 Mich. 117.

[oo] (Mich. 1888) On cross-examination of a witness for the state, who admits having had trouble with defendant, it is not error to refuse the further inquiry whether he and defendant's mother were not also at variance about a business matter.—People v. Macard, 73 Mich. 15, 40 N. W. 784.

[ooo] (Mich. 1888) In trover for the value of certain horses seized under a void attachment and delivered to the debtor, but claimed by plaintiff as purchased from the latter, in order to ascertain plaintiff's bias or interest, and test his credibility, it is proper to inquire, on his cross-examination, as to whether he knew the attachment was issued when he bought the horses, and whether he had not aided the debtor in other suits with the attachment plaintiff by becoming his surety.—Mears v. Cornwall, 73 Mich. 78, 40 N. W. 931.

[p] (Minn. 1859) Upon cross-examination of a witness, actual bias or prejudice existing on his part against the party cross-examining, as threats, quarrels, etc., may be shown; but evidence showing that there might be grounds or reason for such prejudice is incompetent.—State v. Bilansky, 3 Minn. 246 (Gil. 169).

[pp] (Miss. 1894) For the purpose of showing bias, a witness for the state may be asked whether at a former term of court he was not prepared to mob defendant if he was then acquitted.—Gibson v. State, 16 South. 298.

[ppp] (Mo. 1888) In an action against a railroad company for injuries caused by its negligence, the conductor of the train charged with having caused the accident, in testifying for defendant, stated that it was his duty to, and that he did, give notice to plaintiff of the approach of the car. On cross-examination he was asked whether, if he failed to give the notice, he would be discharged. *Held*, that the question was proper for the purpose of affecting the credibility of the witness by showing his interest in testifying to the giving of notice, and thus exonerating himself.—Gessley v. Missouri Pac. Ry. Co., 32 Mo. App. 413.

[q] (Mo. 1893) A witness for defendant may be asked on cross-examination if she did not offer the prosecuting witness money if he would go away and not testify against defendant.—State v. Hack, 118 Mo. 92, 23 S. W. 1089.

[qq] (N. J. 1874) A party offering himself as a witness may properly be asked whether he has made any agreement to share with any one what he may recover in the suit.—Delaware, L. & W. R. Co. v. Dailey, 37 N. J. Law (8 Vroom) 526.

[qqq] (N. Y. 1849) A witness called to prove a plaintiff's demand may be examined as to a transfer by him to plaintiff of the business out of which the demand arose, to show that it was a sham and fraudulent, and that witness was interested in the demand, so that the jury might regard it in estimating the weight of his evidence.—Hoyt v. Lynch, 4 N. Y. Super. Ct. (2 Sandf.) 328.

[r] (N. Y. 1855) A witness for the prosecution, in a trial for a riot, may be compelled to state, on cross-examination, whether he is a member of a secret society organized to repress a sect to which defendant belongs.—People v. Christie, 2 Abb. Prac. 256, 2 Parker, Cr. R. 579.

[rr] (N. Y. 1855) A witness may be cross-examined as to whether he belongs to a secret society—e. g., the order of United Americans—with a view to show that the principles and objects of such society are such that his testimony is liable to suspicion of unfairness.—People v. Christie, 2 Abb. Prac. 256.

[rrr] (N. Y. 1878) In an action for injuries caused by defendant's negligence, where one of plaintiff's attorneys is a witness and gives material testimony and testifies that his compensation depends in some degree on the result of the action, it is not error not to allow him to be asked "to what extent."—King v. New York Cent. & H. R. R. Co., 72 N. Y. 607.

[s] (N. Y. 1880) A cross-question to a witness for the accused, whether he (the witness) had been indicted for an assault and battery committed on that day, *held* to be competent to show bias.—Ryan v. People, 79 N. Y. 593, affirming (1879) 19 Hun, 188.

[ss] (N. Y. 1889) In an action against an indorser of a note, it was proper to show, on cross-examination of defendant, that the maker of the note had failed in business. The jury had a right to take into consideration the extent of the interest of the witness, and such fact would show that, in the event of defeat, the witness would have to pay the whole judgment without any prospect of reimbursement from the maker.—Cady v. Bradshaw, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557.

[sss] (N. Y. 1890) It is error to refuse to allow a question on cross-examination whether the plaintiff is the sole owner of a claim in suit, as that fact might affect his credibility.—Strawbridge v. Vandenburgh, 57 Hun, 589, 10 N. Y. Supp. 610.

[t] (N. Y. 1891) Where defendant in a proceeding to appoint a committee for an alleged lunatic sought by cross-examination of a witness to show that he had fraudulently procured admission to her house, against the will of those present, and in the absence of her physician, for the purpose of obtaining evidence of her state of mind, it was error to exclude such testimony, the defendant having a right to show by cross-examination of a witness conduct on his part tending to show unfriendliness and want of impartiality on his part to the defendant.—In re Mason, 60 Hun, 46, 14 N. Y. Supp. 434.

[tt] (N. Y. 1892) Where a witness, on being cross-examined as to his interest in a case, testifies that he has none, it is not error to refuse further examination as to whether, in the event of plaintiff's recovery, he does not expect repayment of advances made by him for funeral expenses of plaintiff's intestate.—Lustig v. New York, L. E. & W. R. Co., 65 Hun, 547, 20 N. Y. Supp. 477.

[ttt] (N. Y. 1892) Evidence of a witness for defendant that he offered plaintiff money to

settle was material, on the cross-examination of such witness, to show his relation to the controversy.—Cambeis v. Third Ave. R. Co. (Com. Pl.) 1 Misc. Rep. 158, 20 N. Y. Supp. 633.

[u] (N. Y. 1893) Where defendant's counsel, in a trial for murder, testifies as a witness, it is competent, as affecting his credibility, to show that he had made a wager on the result of the trial, and therefore was interested in such result.—People v. Parker, 137 N. Y. 535, 32 N. E. 1013.

[uu] (N. Y. 1895) In an action against a marshal for seizure of goods under execution against plaintiff's vendor, a witness who testified that he saw the execution debtor in possession of the goods as apparent owner after the alleged transfer may be asked, for the purpose of showing a pecuniary interest in the result of the action, whether he had indemnified the marshal, and if he knew that, if the marshal had to pay, he (witness) would be held responsible.—Goodman v. Myers (Com. Pl.) 11 Misc. Rep. 360, 32 N. Y. Supp. 239.

[uuu] (N. C. 1869) Where, in order to show the disposition of a witness toward the accused, he was asked whether the accused had not sworn against him for the same offense before the coroner's inquest, to which he replied that he did not hear the witness examined but had heard that the accused was a witness and swore against him, it was *held* to be competent.—State v. Harston, 63 N. C. 294.

[v] (N. C. 1890) A witness for the state testified, on cross-examination, that her feelings towards the defendants were not friendly, and was then asked if there was not a bitter feud between her family and that of defendants. *Held*, that the question was properly excluded.—State v. Berrier, 107 N. C. 856, 12 S. E. 251.

[vv] (N. C. 1896) Where a witness for the state admitted that he was a relative of, and friendly to, deceased, it is not reversible error to refuse to permit him to be asked, to show his bias against defendant, as to whether he had not been drunk with deceased many times.—State v. Mace, 118 N. C. 1244, 24 S. E. 798.

[vvv] (Or. 1889) In a criminal case the district attorney can cross-examine a witness for defendant as to anything that would show his interest in the result of the trial, and anything he did in aid of defendant about the trial, as affecting his credibility.—State v. Olds, 18 Or. 440, 22 Pac. 940.

[w] (Pa. 1881) A witness who testified on behalf of plaintiff whose land was taken by defendant company for railroad purposes will not be compelled to state whether he had not been a witness in a number of cases in which defendant company was interested in the matter of railroad damages.—Pennsylvania & N. Y. Canal & R. Co. v. Roberts, 2 Walk. 432.

[ww] (Pa. 1894) Defendant's witness may, for the purpose of affecting his credibility, be asked if he offered plaintiff's witness money to go away and not testify, though he may not be asked what defendant said or did in this connection.—Fitzpatrick v. Riley, 163 Pa. 65, 29 Atl. 783.

[www] (S. C. 1895) The state may ask a witness who has testified if she is the wife of defendant.—State v. Petsch, 43 S. C. 132, 20 S. E. 993.

[x] (Tex. 1878) On a trial for murder, upon the cross-examination of the prosecuting witness, the defendant, for the purpose of showing the animus of the witness, sought to elicit that the witness had reliable information of the whereabouts of defendant for several years before he had the defendant brought back upon requisition, which was not done until several witnesses upon whom the defendant relied for his defense were dead. *Held*, that this testimony was properly excluded as immaterial.—Carlson v. State, 5 Tex. App. 194.

[xx] (Tex. 1881) The rule allowing a cross-examination to develop anything that may affect the credit of a witness, applied on a trial of D. for theft, whereof the theory was that he had been assisted by W. *Held*, that W.'s wife, the principal witness, might be compelled to answer whether, after date of the alleged offense, she had not had a difficulty with both D. and W., and what was the cause and nature of the difficulty.—Daffin v. State, 11 Tex. App. 76.

[xxx] (Tex. 1884) The state may, as tending to show bias, elicit from witnesses on cross-examination the fact that they testified before the grand jury in the same case at the instance of defendant without being subpœnaed.—Ashlock v. State, 16 Tex. App. 13.

[y] (Vt. 1886) Although it is proper for a party to show the hostility of an opposing witness, he will not be allowed to go into the details of such hostility.—Stone v. Tupper, 58 Vt. 400, 5 Atl. 387.

[yy] (Va. 1882) A witness may be asked if he has any ill feeling toward the prisoner, but evidence of collateral facts—such as the pendency of a suit between them—is inadmissible.—Langhorne v. Commonwealth, 76 Va. 1012.

[yyy] (W. Va. 1881) An attorney testifying on behalf of his client may be questioned as to the amount of his fee to show his interest in the suit, and as affecting his credibility.—Moats v. Rymer, 18 W. Va. 642.

[z] (Wis. 1856) On the cross-examination of a witness, anything which shows his friendship or enmity to either of the parties to the suit, or that he is in a position to be tempted to swear falsely, is commonly a proper subject of inquiry.—Kellogg v. Nelson, 5 Wis. 125.

[zz] (Wis. 1856) On the cross-examination of a witness, the counsel may ask him if he (the witness) ever had made a wager that one of the parties would recover in the suit.—Kellogg v. Nelson, 5 Wis. 125.

[zzz] (Wis. 1881) The court permitted defendant city, in an action for personal injuries from a defective sidewalk, on cross-examination of plaintiff, to show that she had had some difficulty with the city about a sidewalk tax, but refused to allow further cross-examination as to the particulars of such difficulty. *Held* no abuse of discretion.—Luck v. City of Ripon, 52 Wis. 196, 8 N. W. 815.

§ 1194. —— Statements or declarations.

[a] (U. S. 1882) Where a witness is asked on cross-examination if he had not stated, in talking about the matter, that he wanted plaintiffs to recover because he would then get his pay, an objection because of the failure to specify time and place was properly sustained.—Standard Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319.

[b] (Ala. 1857) In an action on a written warranty of the soundness of a slave, the defendant introduced as a witness the auctioneer by whom the sale was made, who was asked, on cross-examination, if he had not been asked at the time of the sale whether this slave was sound; and he answered that the question was asked, and his reply was, "I believe she is sound; she is sound so far as I know." *Held*, that the evidence was admissible, on cross-examination, as tending to show that the witness, in making the sale, had somewhat connected himself with the question of the soundness of the slave.—Stoudenmeier v. Williamson, 29 Ala. 558.

[c] (Ala. 1866) A witness introduced by the plaintiff may be asked on cross-examination whether he has not declared an enmity to defendant.—Bullard v. Lambert, 40 Ala. 204.

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[d] (Ala. 1877) Though a witness in a criminal case admits hostility to or bias against defendant, the latter has a right on cross-examination to inquire as to particular declarations of hostility by the witness, that the jury may determine its extent and malignity; and where, in such case, the proper predicate has been laid, it is error to refuse to permit defendant to ask a witness on cross-examination, if he had not stated that he would give a certain sum of money to have defendant killed.—Fincher v. State, 58 Ala. 215.

[e] (Ala. 1882) A witness for the state may be asked on cross-examination whether he had not said a short time before the trial that he would give $1,000 to send defendant to the penitentiary.—Yarbrough v. State, 71 Ala. 376.

[f] (Ark. 1852) A witness may be cross-examined as to any particular acts or expression in reference to the accused from which the jury may infer unfriendly feeling or prejudice.—Cornelius v. State, 12 Ark. (7 Eng.) 782.

[g] (Ark. 1854) The question to a witness for the prosecution, on cross-examination, "whether the witness had stated to A., B., or C. that he was coming to Washington to see the prisoner hung," should not be rejected as an improper one.—Bixby v. State, 15 Ark. 395.

[h] (Cal. 1884) To show prejudice, a witness may be asked whether he had not said that defendant ought to have been hung.—People v. Wasson, 65 Cal. 538, 4 Pac. 555.

[i] (Cal. 1887) On the trial of an indictment for murder, where the theory of the defense is that there had been a controversy between two societies called the "Bo Sin Sear Society" and the "Guy Sin Sear Society," deceased and a prosecuting witness belonging to the former, and the defendant to the latter; that the members of the former society were specially hostile to the defendant; that the witness and deceased, as representatives of the former society, had met defendant and others, as representatives of the latter society, to settle the controversy; and that at the meeting the witness and deceased threatened the life of defendant,—it is proper, on cross-examination of such witness, and for the purpose of showing his hostility, to ask questions tending to prove such state of facts and threats, although such evidence may tend to prove a fact material to the defense.—People v. Lee Chuck, 74 Cal. 30, 15 Pac. 322.

[j] (Conn. 1793) Evidence that a witness had said that he would swear to anything is admissible to lessen his credit.—Newhal v. Wadhams, 1 Root, 504.

[k] (Fla. 1891) In an action for libel in publishing certain defamatory statements respecting the plaintiff on the information of her husband, it was proper on cross-examination of such husband to show that a short time before leaving his wife he stated his purpose to abandon her, and gave certain reasons therefor, for the purpose of showing the animus of the witness toward his wife, against whom he had testified.—Eldridge v. State, 27 Fla. 162, 9 South. 448.

[l] (Ill. 1878) It is not error, on the cross-examination of a witness on a murder trial, to exclude questions as to conversations held before the day of the homicide concerning the subject-matter of the dispute which terminated in the killing, and tending to show that the witness had bad feelings toward the accused, such feelings, if they existed, being the subject of direct proof.—Davison v. People, 90 Ill. 221.

[m] (Ill. 1883) A witness who admits, on cross-examination, an unfriendly feeling for one against whom he testifies, may be asked if he has not made certain remarks, to which his attention is particularly called, which show a bitter and revengeful feeling toward such party.—Phenix v. Castner, 108 Ill. 207.

[n] (Ind. 1892) It is proper for defendant to ask a witness for plaintiff, on cross-examination, a question as to a certain declaration made by him after a former trial, showing his hostility to defendant.—Robertson v. McPherson, 4 Ind. App. 595, 31 N. E. 478.

[o] (Ind. 1893) It is proper to show that a witness for the prosecution had said to certain persons who spoke of going on defendant's bail bond that he would not have any sympathy for them if they lost the whole amount for which they became bound thereby.—Pettit v. State, 135 Ind. 393, 34 N. E. 1118.

[p] (Iowa, 1860) A witness may be cross-examined as to prior conversations with third persons, which tend to show ill will on his part toward the party against whom he is testifying, both for the purpose of, in this manner, affecting his credibility, and also of laying the foundation for the contradiction of his testimony.—Powell v. Martin, 10 Iowa, 568.

[q] (Kan. 1873) It is incompetent to ask a witness, on cross-examination, a question concerning a conversation of his with some other person, where the conversation would not tend to show any bias or prejudice on the part of the witness.—Da Lee v. Blackburn, 11 Kan. 190.

[r] (Mass. 1875) In an action against a town for personal injuries resulting from a defect in a highway, a witness introduced by defendant admitted on cross-examination that he had said that he would spend his last dollar to beat plaintiff. *Held*, that it was competent for the defendant to ask him his reasons for so saying.—Brooks v. Inhabitants of Acton, 117 Mass. 204.

[s] (Minn. 1869) A witness may be asked, upon cross-examination, if he has not expressed feelings of hostility towards the party against whom he was called, and the particulars of such hostility, for the purpose of ascertaining its extent and nature.—State v. Dee, 14 Minn. 35 (Gil. 27).

[t] (Mo. 1890) It is competent on cross-examination in a criminal trial to introduce a letter written by witness to defendant after the offense, tending to show his sympathy and partisanship with him, with a view of affecting the witness' credibility, especially when the letter itself contains no statement of fact prejudicial to defendant's case.—State v. Turlington, 102 Mo. 642, 15 S. W. 141.

[u] (Mont. 1890) Defendant's counsel, for the purpose of showing prejudice on the part of a state's witness, deceased's widow, against defendant, asked her if she had not said she would commit suicide if defendant was acquitted. *Held* properly excluded, as it was immaterial whether or not she made the statement, especially as she had just admitted that she had ill feeling towards defendant.—State v. Jackson, 9 Mont. 508, 24 Pac. 213.

[v] (N. H. 1881) A witness may, to show his feeling toward the party against whom he is testifying, be asked, on cross-examination, whether he had not threatened to have the party arrested.—Watson v. Twombly, 60 N. H. 491.

[w] (N. Y. 1892) In an action against a street railroad for injuries sustained in being struck by a car, where the driver of another car, who saw the accident, was called for the purpose of showing that plaintiff was guilty of negligence, it was proper, for the purpose of affecting his credibility, to inquire, on cross-examination, as to whether he had not stated that the railroad would blacklist him if he gave his testimony according to the facts.—Pyne v. Broadway & Seventh Ave. R. Co. (Com. Pl.) 19 N. Y. Supp. 217, judgment affirmed (1893) 138 N. Y. 627, 33 N. E. 1083.

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[x] (S. C. 1891) On a trial for murder it is competent on cross-examination of a witness for the defense, for the purpose of showing bias of mind, to ask whether he did not say to a person named that the deceased could be better spared than any other man in the community.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[y] (Tex. 1881) In cross-examining A., state's witness against B., *held*, that A. might properly be asked if he had not told B. that he had been his friend, but was then his enemy, and intended to have him prosecuted on the charge of theft involved in the pending trial.—Sager v. State, 11 Tex. App. 110.

§ 1195. —— Employment of counsel or payment of expense of litigation.

[a] (U. S. 1896) Where witnesses for the prosecution have testified upon cross-examination by defendants that they, at their own expense, employed an attorney to assist in the prosecution, it is proper to exclude a further question asked of them, as to how much they paid such assistant.—Ball v. United States, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300.

[b] (Cal. 1864) Where the district attorney is assisted by other counsel in a criminal case, the defendant's counsel may ask the prosecuting witness whether he employed such counsel.—People v. Blackwell, 27 Cal. 65.

[c] (Cal. 1891) In an action for damages, and to restrain an alleged wrongful and excessive diversion of water from a stream, where the riparian rights had been conveyed to the M. Water Company, and an officer of the M. Valley Water Company testifies that the company is paying the expense of the litigation, the witness can be asked on cross-examination, "Why does the company pay the expense of this litigation?" as it is proper to show the witness' interest, though it does not appear that the last-named company is identical with or the successor of the other.—Gould v. Stafford, 91 Cal. 146, 27 Pac. 543.

[d] (Cal. 1893) A question to the prosecuting witness as to whether he employed the attorney who was assisting the district attorney in the prosecution was competent, as tending to show whether the witness was interested in the proceedings to the prejudice of defendant.—People v. Gillis, 97 Cal. 542, 32 Pac. 586.

[e] (Ga. 1892) Where, of three persons charged with the same offense, one is on trial, the state's counsel may, on cross-examination, ask a witness as to his friendly relations with the other two, and whether he has not lent money to another person, the father of one of these two and the grandfather of the other, to aid in the defense of the person who is on trial.—Futch v. State, 90 Ga. 472, 16 S. E. 102.

[f] (Ill. 1893) In an action under the dram shop act by a widow to recover for the death of her husband, the president of the Liquor Dealers' Association, a witness for defendant, was properly cross-examined as to his interest in the suit, and, where he testified that the association contributed to the defense, and would have to pay any judgment that might be recovered, the fact that he was mistaken, and that the association would not have to pay the judgment, does not affect the propriety of the cross-examination.—Marschall v. Laughran, 47 Ill. App. 29.

[g] (Ind. 1842) On the trial of an indictment for murder, the defendant was permitted to prove, by the son of the deceased, who had been sworn for the state, that he, the witness, and the widow of the deceased, who had also been examined for the state, had employed counsel to assist the prosecuting attorney in the cause, but was not permitted to prove that the fee to be given for such assistance was on condition of a conviction. *Held*, that there was no error in this part of the case.—Beauchamp v. State, 6 Blackf. 299.

[h] (Mich. 1880) Cross-examination of a witness as to his contribution to the expenses of the suit, or as to his interest in the subject-matter, is proper for the purpose of affecting his credibility.—Howard v. Patrick, 43 Mich. 121, 5 N. W. 84.

[i] (Mo. 1890) It is wrong not to allow a witness called as to the character of another to be cross-examined as to his having given money to aid in the prosecution; but, several others having testified that it was bad, and no effort being made to sustain it, the error does not require a reversal.—State v. Elkins, 101 Mo. 344, 14 S. W. 116.

[j] (Tex. 1894) In a murder case, where deceased's wife is a witness for defendant, the state may show by cross-examination that she has agreed to pay the fees of defendant's attorney, though she has admitted that she wanted to see defendant acquitted.—Magruder v. State, 35 Tex. Cr. R. 214, 33 S. W. 233.

[k] (W. Va. 1880) A prosecuting witness may be asked, on cross-examination, if he has employed counsel to aid the prosecution.—State v. Conkle, 16 W. Va. 736.

§ 1196. —— Compensation or reward for testimony.

As affecting credibility, in general, see ante, § 1185.

[a] (U. S. 1877) The fact that an expert requires payment for his opinions as such should not discredit him before the jury, as he is not bound to come into court and testify for ordinary witness fees.—Harvey v. Evansville, Etc., Steam Packet Co., Fed. Cas. No. 6,179 [8 Biss. 99].

[b] (Cal. 1883) On a trial for burglary, a witness, charged with the same offense in a separate information, may be asked on cross-examination whether he expects leniency in his own case in consequence of his becoming a witness for the prosecution.—People v. Langtree, 64 Cal. 256, 30 Pac. 813.

[c] (Cal. 1895) To discredit a witness for the prosecution, it may be shown that criminal charges are pending against him, as tending to show a desire to seek favor at the hands of the prosecution, by aiding in the conviction of the defendant.—People v. Dillwood, 39 Pac. 438.

[d] (Iowa, 1886) Where a witness, brought from without the state to testify for the state in a liquor case, testifies that there was no arrangement to pay him more than his legal fees, he may not be questioned, for the purpose of impairing his credibility, concerning inducements held out to him by citizens.—State v. Reinhartz, 69 Iowa, 224, 28 N. W. 566.

[e] (Iowa, 1892) On a trial for arson, a witness testified that he was employed to bring the guilty parties to justice, and as to certain admissions made by defendants on false representations made by him. Witness was asked by defendants' counsel how much salary he was to receive for his services as detective; if he had not stated that his compensation depended on his success in convicting defendants; and also if he had not stated that he was to receive 40 acres of land and $400 if they were convicted. *Held* proper cross-examination to impeach the witness.—State v. Carroll, 85 Iowa, 1, 51 N. W. 1159.

[f] (Mass. 1839) On a trial of an indictment, the defendant has a right to ask a witness whether any person, on behalf of the government, has made to the witness any offer of

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reward, in relation to the testimony which he should give in a certain class of cases, comprehending the case on trial.—Commonwealth v. Sacket, 39 Mass. (22 Pick.) 394.

[g] (Mich. 1884) An expert witness may be cross-examined as to what compensation he receives for his attendance as such.—Alford v. Vincent, 53 Mich. 555, 19 N. W. 182.

[h] (N. H. 1866) The government in a criminal prosecution may ask a witness whether the defendant has made to the witness any offer of reward in relation to the testimony he should give in a certain class of cases, comprehending the case on trial.—State v. Staples, 47 N. H. 113, 90 Am. Dec. 565.

[i] (Ohio, 1883) One jointly indicted with defendant, who testifies for the state contrary to his former statements, may be shown by defendant, on cross-examination, to have been offered money to so testify, although by one having no authority.—Tullis v. State, 39 Ohio St. 200.

[j] (Tex. 1881) The state having introduced P., a confessed thief and accomplice of H. in the theft, *held*, that H. might prove by P. that he was indicted for the same offense, and, by agreement with the county attorney to dismiss the prosecution as to him, had turned state's witness.—Hinds v. State, 11 Tex. App. 238.

[k] (Vt. 1891) A question asked plaintiff's witness whether he did not come to the trial on a pass is properly excluded where no offer is made to connect plaintiff with the furnishing of the pass.—Hobart v. Young, 63 Vt. 300, 21 Atl. 612, 12 L. R. A. 693.

§ 1197. Cross-examination of police officers and detectives.

Credibility, in general, see ante, § 1185.

[a] (Mich. 1894) A witness testified that he was employed to detect violations of the local option law, and had made a number of complaints, and been a witness in a number of cases. *Held*, that it was error not to permit defendants to show on cross-examination that A., another witness for the people, was employed for the same purpose; that the meetings between A. and the witness at various places were not accidental; that both had testified in other cases; and that A. had received pay for taking witness to different places.—People v. Rice, 103 Mich. 350, 61 N. W. 540.

[b] (Minn. 1879) On a prosecution for the unlawful sale of intoxicating liquors, the only testimony to the fact of the sale was that of a private detective. *Held*, that it was error to exclude the question on cross-examination whether the witness had received any money for acting as detective against the liquor sellers, and whether he expected to receive any.—State v. Tosney, 26 Minn. 262, 3 N. W. 345.

[c] (N. Y. 1891) In an action by a railroad conductor for wages due, defendant interposed as a defense that plaintiff had failed to account for fares collected, and introduced detectives as witnesses, one of whom stated on cross-examination that he did not buy a ticket because he got on for the purpose of paying a fare. *Held*, that it was proper to ask such witness on further cross-examination whether he did so for the purpose of reporting that he "had accomplished something."—Francis v. Rome, W. & O. R. Co., 59 Hun, 620, 12 N. Y. Supp. 939.

§ 1198. Conclusiveness of answers on cross-examination.

[a] (Ala. 1858) Where a witness for the prosecution denies on cross-examination any hostility to the plaintiff, such hostility may be established by proof of his previous acts and declarations.—McHugh v. State, 31 Ala. 317.

[b] (Ala. 1866) Where a witness introduced by the plaintiff denied on cross-examination that he has declared an enmity to the defendant, evidence of such declaration is admissible.—Bullard v. Lambert, 40 Ala. 204.

[c] (Ark. 1883) Where a material witness, who was asked on cross-examination if he had expressed to A. any hostility toward defendant, replied that he was on good terms with defendant, and they had always been friends, *held*, that exclusion of A.'s testimony offered by defendant to show that witness had told A. that he would swear defendant's life away, if necessary, was error.—Frazier v. State, 42 Ark. 70.

[d] (Cal. 1890) On cross-examination of defendant's witness, he was asked if he had not made statements to the effect that he was friendly to defendant, and would say nothing to hurt him; and on his denying this a witness was called who testified to such statements. *Held*, that if the testimony of defendant's witness was material and favorable to him, the impeaching testimony was properly admitted, and if the former testimony was immaterial defendant could not have been injured by the latter.—People v. Murray, 85 Cal. 350, 24 Pac. 666.

[e] (Conn. 1828) Where a witness is asked on cross-examination whether he has not had a controversy with the party against whom he testifies, and whether he has not threatened to be revenged on him, and the witness answers in the negative, he may be contradicted by other proof.—Atwood v. Welton, 7 Conn. 66.

[f] (Conn. 1874) Where a party asked a witness on cross-examination if there has not been a quarrel between him and the party against whom he testifies, he does not make the witness his own, so as to preclude him from contradicting him.—Beardsley v. Wildman, 41 Conn. 515.

[g] (Ill. 1883) Where a witness, who admits on cross-examination an unfriendly feeling for the party against whom he testifies, denies having made certain remarks to which his attention is particularly called, he may be contradicted by the persons to whom the remarks were made.—Phenix v. Castner, 108 Ill. 207.

[h] (Ill. 1892) The hostility of a witness to the party against whom he testifies may always be shown; and where, on cross-examination, he denies certain acts or words tending to show such hostility, he may be contradicted by other witnesses.—John Morris Co. v. Burgess, 44 Ill. App. 27.

[i] (Ind. 1878) Where, on cross-examination, a witness for the government denied having made a certain statement indicating hostility toward the defendant, it was *held* that he might be contradicted.—Scott v. State, 64 Ind. 400.

[j] (Ind. 1889) When, on cross-examination in a criminal prosecution, a witness has denied making any attempt to procure witnesses against accused, testimony may be introduced by accused to contradict his denial.—Skinner v. State, 120 Ind. 127, 22 N. E. 115.

[k] (Ind. 1892) Defendant, having cross-examined a witness for the plaintiff as to certain declarations made by him after a former trial showing hostility to defendant, may follow up such cross-examination by evidence of such declaration by a witness in whose presence it was made.—Robertson v. McPherson, 4 Ind. App. 595, 31 N. E. 478.

[l] (Ky. 1855) Where a witness for the prosecution on a trial for murder testified that he was not hostile to defendant, and denied having made certain statements showing that his feelings were hostile, evidence that he made such statements and of facts showing that his feelings were hostile to the defendant are admissi-

ble to impeach him.—Cornelius v. Commonwealth, 54 Ky. (15 B. Mon.) 539.

[m] (Mass. 1849) A witness having been asked whether he was not biased against the defendant, from the defendant's having testified against him in another suit to which the witness was a party, and whether he had not made use of threats of injury against him in that suit, and having denied any such bias or threats, it was *held* that evidence that the witness had offered to bribe the defendant not to testify in that suit was irrelevant and inadmissible.—Cooley v. Norton, 58 Mass. (4 Cush.) 93.

[n] (Mass. 1857) A witness testified on cross-examination that he had never expressed any hostile feelings toward the defendant. The defendant, for the purpose of contradicting him, offered evidence that the witness, in conversation with a third person about a note which had just been signed by the witness and then by the defendant, said that the defendant had never paid him for certain services, and that he was worth nothing himself, and had taken this course to get money out of the defendant. *Held*, that the exclusion of this evidence was no ground of exception.—Starks v. Sikes, 74 Mass. (8 Gray) 609, 69 Am. Dec. 270.

[o] (Mass. 1858) In an action of tort to recover damages for injuries, defendant testified in his own favor and was asked on cross-examination if he ever told one of the plaintiffs that if he prosecuted the suit the defendant would prove as bad a fellow as report said he was. Defendant testified that he never said so, and plaintiff was allowed to testify in contradiction that he did tell him so. *Held*, that the testimony introduced by plaintiff in reply was competent not for the mere purpose of contradiction, but to show the defendant's temper and disposition toward that plaintiff who had testified. — Brewer v. Crosby, 77 Mass. (11 Gray) 29.

[oo] (Mass. 1886) Where a witness for the government, in a prosecution for illegal sale of liquor, denied that she had been forbidden by defendant to come to his house, and denied that she had any ill will toward him, evidence that she was at one time ordered out of his yard was incompetent.—Commonwealth v. Fitzpatrick, 140 Mass. 455, 5 N. E. 272.

[p] (Mich. 1871) Where a witness, on cross-examination, has denied having had conversations with various persons concerning her expectation of receiving some profit out of the trial, her interest is relevant, and it may be shown by other witnesses that she did make the statements attributed to her.—Geary v. People, 22 Mich. 220.

[pp] (Mich. 1871) When a witness, on cross-examination, denies having any interest in the result of the trial, it is competent to show that such statements are actually false.—Geary v. People, 22 Mich. 220.

[q] (Mich. 1892) Where, with a view of showing the bias or interest of a witness, he was asked on cross-examination whether he made a certain statement in relation to the case at a specified time, and denied making the statement, it was proper to prove on rebuttal that he did make the statement. — Swift Electric Light Co. v. Grant, 90 Mich. 469, 51 N. W. 539.

[qq] (Miss. 1859) Where a witness denies having made a statement in relation to the subject-matter of the issue, and about which he may be legally examined for the purpose of showing his bias or feeling, then, for the purpose of discrediting him, other testimony may be introduced to contradict his answer.—Newcomb v. State, 37 Miss. 383.

[r] (Miss. 1887) In an action against a railroad company for damages for delay in delivering certain cattle, where the train conductor, as witness on cross-examination, has denied that he said before the trial that he would tell the best story possible for his employers, in order to keep his job, it is not error to allow the making of such statement to be proved by another witness, the purpose being to show motive or bias. The rule that a witness cannot be contradicted as to immaterial matter elicited on cross-examination does not apply.—Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 1 South. 765.

[rr] (N. H. 1852) The feelings and temper of a witness toward a party are proper subjects of inquiry, and if he denies any hostility, he may be contradicted by other witnesses.—Folsom v. Brawn, 25 N. H. (5 Fost.) 114; Martin v. Farnham, Id. 195.

[s] (N. H. 1859) The rule that answers to immaterial questions cannot be contradicted does not apply to questions respecting the state of feeling of the witness toward the party.—Combs v. Winchester, 39 N. H. 13, 75 Am. Dec. 203.

[ss] (N. Y. 1852) It is proper to ask a witness, on cross-examination, whether he had made certain remarks indicative of hostility to the opposite party; and if he denies making them, they may be proved.—Newton v. Harris, 6 N. Y. (2 Seld.) 345.

[t] (N. Y. 1888) In an action for personal injuries a witness for defendant was asked, on cross-examination, "Did you not say to J. that day after the accident that you had seen the accident, and that you were going to work a position out of it for yourself?" Also, "Did you not say that the defendants were going to appoint you a conductor?" Also, "Did you show a piece of paper to J., and say it was a check for $500, payable after the trial?" Also, "Didn't you say to him that he had better take you right to M. [plaintiff]; that you had seen the accident, and could be of some good to him?" Plaintiff then called J. and another to contradict the witness' answers to the questions. *Held*, that the admission of such latter evidence was reversible error, as raising a collateral issue, and as being incompetent to show the hostility of the witness. — McCallan v. Brooklyn City R. Co., 48 Hun, 340, 1 N. Y. Supp. 289.

[tt] (N. Y. 1892) On the trial of an action by one sister against another, administratrix of their deceased mother, to recover decedent's board, a third sister, witness for plaintiff, was asked if she had not advised plaintiff "to bring this suit, even if it was necessary to swallow up the whole estate in litigation," to which witness replied in the negative. *Held*, that the evidence sought to be elicited by such question went to the particular credit of the witness in that action, evincing hostility to defendant, and not to her general reputation for veracity, and therefore that defendant was not bound by her answer, and that the court erred in excluding evidence offered by defendant to contradict the witness.—Effray v. Masson, 28 Abb. N. C. 207, 18 N. Y. Supp. 353, reversing judgment (1891) 22 Civ. Proc. R. 59, 18 N. Y. Supp. 350.

[u] (N. C. 1842) A witness on the part of the state, on his cross-examination, was asked whether the prosecutor had not paid him for coming from another state to be a witness, and he answered that he had not. *Held*, that it was not competent for the defendant to introduce witnesses to prove his declaration that he had been so paid.—State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699.

[uu] (N. C. 1886) The answer of a witness, who is also a party to the action, to a question put with a view to disparage him by showing his interest in or relation to the controversy, cannot be contradicted, it being not only collateral, but irrelevant.—Kramer v. Thomson-Houston Electric Light Co., 95 N. C. 277.

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[v] (Pa. 1864) Where, on a trial for murder, a witness was asked on cross-examination whether he had not made certain threats against the murdered man, which he denied, evidence that he had made such threats was *held* to be admissible, as having a direct bearing to show the motives operating upon his mind when testifying.—Gaines v. Commonwealth, 50 Pa. (14 Wright) 319.

[vv] (Pa. 1886) In a criminal prosecution where a witness called for the defense is asked if she did not say the prosecution would fail because defendant had money, and she denies it, her answer is not conclusive, and evidence may be offered to show that she did say it.—Commonwealth v. Burk, 2 Pa. Co. Ct. R. 12.

[vvv] (Pa. 1886) On the trial of a defendant charged with fornication and bastardy, and also with adultery, it was not error to permit the commonwealth to ask the female with whom the alleged offenses were committed if defendant's wife told her she would fail in the prosecution because defendant and his wife had money, and she had none, as defendant's wife, who was sworn as a witness for the defense, had been asked the same question, and she denied having said it, and the question, which was material, was asked her for the purpose of showing the bias of the witness, and her interest in the cause.—Commonwealth v. Burk, 3 Lanc. Law Rev. 138.

[w] (Tex. 1877) Where a witness for the state, who had had trouble with defendant, had testified on cross-examination that he bore no ill will toward defendant, evidence was not admissible that the witness was a man of revengeful and relentless disposition.—Gay v. State, 2 Tex. App. 127.

[ww] (Tex. 1886) The animus—the motive or the ill will—of a prosecuting witness is never a collateral or irrelevant question in a criminal case; and it is error to reject testimony tending to show such bias, on the ground that the defense, by asking such witness on cross-examination, "Are you not unfriendly to the defendant?" had made the witness its own witness, and was bound by his answer in the negative.—Rosborough v. State, 21 Tex. App. 672, 1 S. W. 459.

[x] (Tex. 1890) Where, on cross-examination, a witness for defendant denied that he had at a certain time and place said that he would be willing to swear that white was black and black was white in order to defeat plaintiff's claim, plaintiff was properly allowed to prove by other witnesses that he had made that statement.—Texas & P. Ry. Co. v. Brown, 78 Tex. 397, 14 S. W. 1034.

[xx] (Tex. 1890) On indictment for murder, defendant asked a witness for the state whether he and deceased were not members of the same order, to which he replied that he was not. The nature of the order was not shown. *Held*, that the evidence was collateral, and it was not competent to impeach the witness in regard to it.—Surrell v. State, 29 Tex. App. 321, 15 S. W. 816.

[y] (Tex. 1895) Where a witness denied that he had held a conversation in which he admitted that he had been bribed to testify, it was proper to permit the party with whom such conversation was alleged to have been held to testify that it had in fact taken place as detailed.—Texas & P. Coal Co. v. Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843.

[yy] (Vt. 1869) A party may contradict a witness who has testified that there has been no difficulty between them. But it is impracticable for the supreme court by any general rule to fix a precise limit which should govern the admission of such evidence, and necessarily it must be left to a considerable extent to the discretion of the nisi prius court.—Ellsworth v. Potter, 41 Vt. 685.

[z] (Va. 1874) Where a witness for the state in a criminal case has denied having used, in the presence of a person whose name is not known, certain language showing a prejudice against the prisoner, the latter is entitled to prove that the witness used such language, although he cannot give the name of the person to whom it was used.—Little v. Commonwealth, 25 Grat. 921.

[zz] (Va. 1882) Where a witness denies any ill feeling toward the prisoner, he may be contradicted, his attention being first drawn to his acts or statements which are to be used in contradicting him.—Langhorne v. Commonwealth, 76 Va. 1012.

§ 1199. Re-examination.

[a] (Ala. 1853) A witness for the state, who, on cross-examination, testifies that he has taken an active part in the prosecution, and that he cherishes unfriendly feelings toward the prisoner, may be asked, on re-examination, whether he feels so unfriendly toward the prisoner as to wish to see an innocent man convicted.—Campbell v. State, 23 Ala. 44.

[b] (Ky. 1892) Where, in an action against a railroad company, a witness was asked by defendant on cross-examination if he did not then have a controversy with the company, and was not hostile to it, and on re-examination the court refused to allow the witness to state whether or not he had recovered a judgment for $12,500, defendant is not entitled to have the swearing of the jury set aside.—Kentucky Cent. Ry. Co. v. Smith, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63.

[c] (La. 1881) A state's witness, upon a criminal trial, having, upon cross-examination, admitted that his feelings toward the defendant were unfriendly, cannot, upon re-examination, be questioned as to the reasons for his unfriendly feelings.—State v. Gregory, 33 La. Ann. 787.

[d] (La. 1887) In a criminal prosecution it is not competent for the district attorney to question a state witness as to the cause of his unfriendly feelings against the accused, which he has admitted on his cross-examination by the defense without objection. The inquiry cannot be pressed further than the existence of the unfriendly feelings.—State v. Jackson, 39 La. Ann. 910, 3 South. 59, affirming Same v. Gregory (1881) 33 La. Ann. 787.

[e] (Mich. 1893) Where the principal witness for the people testified on cross-examination that he had some trouble with defendant after the larceny, and that he would like to get even with him, it was not error to permit the witness, on redirect examination, to explain the nature of such trouble.—People v. Hanifan, 98 Mich. 32, 56 N. W. 1048.

[f] (Miss. 1887) Where, in order to discredit a witness, in an action against a carrier to recover damages for delay in delivering cattle as agreed, he is asked, on cross-examination, if he had not sued defendant for damages arising out of the same delay, it is proper, on redirect examination, to ask him if his suit had not been settled.—Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 1 South. 765.

3. IMPEACHING EVIDENCE.

LAYING FOUNDATION FOR IMPEACHING EVIDENCE, § 1200.
COMPETENCY IN GENERAL, § 1201.
EVIDENCE OF DECLARATIONS, STATEMENTS, OR ADMISSIONS OF WITNESS, § 1202.
EXAMINATION OF IMPEACHING WITNESS, § 1203.

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§ 1200. Laying foundation for impeaching evidence.

[a] (Ala. 1843) Evidence is not admissible to prove declarations made by a witness of his interest in the matter in controversy, unless he has been examined as to the declarations, and had an opportunity to admit, deny, or explain such declarations.—Weaver v. Traylor, 5 Ala. 564.

[b] (Cal. 1860) The rule that, where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the precise matter of such contradictions and the time and place of the contradictory statements must be brought to the witness' knowledge on cross-examination, applies equally to declarations or acts of hostility or ill feeling on the part of the witness.—Baker v. Joseph, 16 Cal. 173.

[c] (Cal. 1884) A question to a witness, "Did you not state, in the month of September, in the presence of A. B. and C. D., on the way between town here and the race track, that you would go into court and swear anything at all that would injure the Thomases?" *held* sufficiently definite to lay the foundation for an impeachment.—People v. Turner, 65 Cal. 540, 4 Pac. 553.

[d] (Ind. 1887) On the trial of an indictment for arson, the uncle of, and witness for, the accused, was asked on cross-examination if he had not, two years before, at his own mill, said that the mill afterwards burned would do no harm in competition with his, and in two years would sell for old iron, and if he had not said at another time that the owners of the burned mill would be glad to sell it for old iron inside of two years; the witness answering these questions in the negative. *Held*, that contradictory testimony of the parties with whom the conversations were claimed to have been held was admissible to show his hostility to the owners of the property burned.—Ford v. State, 112 Ind. 373, 14 N. E. 241.

[e] (Iowa, 1859) Evidence to impeach a witness is not admissible where no foundation for the impeachment has been laid in the examination of the witness.—Stewart v. Chadwick, 8 Iowa (8 Clarke) 463.

[f] (Ky. 1885) It was error to allow a witness to testify that he had heard a witness for defendant say that if defendant could find a man who would testify to certain things "money would be no object to him"; no foundation having been laid for such evidence.—L. & N. R. Co. v. Ritter's Adm'r, 7 Ky. Law Rep. 96.

[g] (La. 1880) Where the object of testimony offered is to discredit the witness by proof of an attempt to fabricate testimony, the foundation for such impeaching testimony must be first laid by an examination of the witness sought to be impeached with reference to such improper conduct.—State v. Angelo, 32 La. Ann. 407.

[h] (Me. 1845) The prosecuting attorney was permitted to introduce testimony that a witness who had testified in favor of accused had declared that in a former case, when called by the same party, he had testified falsely, and that he would testify just as accused told him to. The witness had not been first asked whether he made such declarations. *Held*, that the declarations were properly received, as the practice does not require a previous examination.—State v. Blake, 25 Me. (12 Shep.) 350.

[i] (Me. 1867) Where on the issue of an alleged pauper's "need of relief" in an action by one town against another for supplies furnished, the defendant has introduced a witness who testifies contrary to witnesses offered by the plaintiff, the latter, without first interrogating such witness as to the subject-matter, may prove that when speaking of the action she had declared "she would do all she could to help the defendant; she'd be damned if she wouldn't."—Inhabitants of New Portland v. Inhabitants of Kingfield, 55 Me. 172.

[j] (Miss. 1859) Before introducing proof of the statements of a witness as showing his feelings toward the parties, by the testimony of others, it is competent and proper to ask the witness on cross-examination whether she did not make the declaration which the party intends to prove.—Newcomb v. State, 37 Miss. 383.

[k] (N. Y. 1892) The hostility of a witness toward a party against whom he testifies may be shown by independent testimony, without first examining the witness himself as to his hostility.—People v. Brooks, 131 N. Y. 321, 30 N. E. 189, affirming (1891) 61 Hun, 619, 15 N. Y. Supp. 362.

[l] (N. C. 1848) It is improper to prove the bias, prejudice, or improper interest of a witness, where he was not examined on that point, so that he and the party offering him might have an opportunity of explanation.—Edwards v. Sullivan, 30 N. C. 302.

[m] (N. C. 1887) A witness offered to testify that the prosecuting witness had "declared that he would do anything or say anything to put the accused 'behind yonder poles,'" pointing to the penitentiary. This testimony was offered to show the animus of the prosecuting witness toward defendant. *Held*, that the prosecuting witness should have been cross-examined as to acts and declarations hostile to defendant, before evidence could be given with a view to impeach him.—State v. Dickerson, 98 N. C. 708, 3 S. E. 687.

[n] (Or. 1888) To impeach a witness by showing hostile declarations, a foundation must be laid, as in case of impeachment, by showing contradictory statements by him.—State v. Stewart, 11 Or. 52, 238, 4 Pac. 128.

[o] (Tex. 1878) Evidence that the prosecuting witness had threatened to poison the accused *held* to be properly excluded, no predicate therefor having been laid in the cross-examination of the prosecuting witness.—Booker v. State, 4 Tex. App. 564.

[p] (Vt. 1837) Evidence may be given of a violent quarrel existing between a party and a witness introduced against him, without inquiring of the witness as to the quarrel.—Pierce v. Gilson, 9 Vt. 216.

[q] (Vt. 1879) In a criminal prosecution a witness for the state was asked, on cross-examination, if she had ever told a certain man or his wife that she would get the accused into state's prison if she could, and answered in the negative. The wife was thereupon called by the accused and asked what she had heard the witness say about accused. *Held*, that it was not error to refuse to allow the question to be answered because the question to the state's witness did not properly lay the foundation for such inquiry, as it did not state the time, place, nor occasion.—State v. Glynn, 51 Vt. 577.

[r] (Wis. 1858) In an action for injuries it is competent to show a fraudulent agreement between the plaintiff and her medical attendant, who was a witness, that she should feign sickness, without first having examined the witness with reference to it.—Martin v. Barnes, 7 Wis. 239.

[s] (Wis. 1887) A witness was asked, on his direct examination, for the purpose of impeaching a former witness, the following question: "State whether, at the time, he [the former witness] told you, 'I am a friend of his [the accused], but I don't like the old man. *I shall help James all I can.*'" *Held*, that the question was properly excluded, because no suffi-

cient foundation had been laid, by putting it as a whole to the witness sought to be impeached, or by putting the portion in italics to him at all.—Baker v. State, 69 Wis. 32, 33 N. W. 52.

§ 1201. Competency in general.

Competency of husband or wife, see ante, § 135.
Facts subject of inquiry on cross-examination, see ante, §§ 1193–1196.

[a] (Ala. 1876) In a trial for murder, the record of several pending civil suits against the defendants, brought by the widow and next of kin as the personal representatives of the deceased, is not admissible for the defense for the purpose of discrediting the plaintiffs as witnesses, since the plaintiffs having a right to institute such suits, their institution could not in any way affect their credibility as witnesses.—Hadley v. State, 55 Ala. 31.

[b] (Ala. 1889) A witness for the state having testified that he went with N., another witness for the state, after defendant had been released on bail, and swore out a warrant against defendant for another offense, it was competent for defendant to ask, on cross-examination, for the purpose of affecting N.'s credibility, if N. did not induce witness to make the affidavit charging defendant with such second offense.—Salm v. State, 89 Ala. 56, 8 South. 66.

[c] (Ala. 1893) Evidence that the employer of one of the state's witnesses is taking an active part in the prosecution is admissible.—Prince v. State, 100 Ala. 144, 14 South. 409, 46 Am. St. Rep. 28.

[d] (Ala. 1893) Evidence that the prosecutrix, who was absent at the last term of court, was sent into the country by her grandmother and sister, is inadmissible, on trial for rape, to show their interest, and the consequent bias of their testimony.—Jones v. State, 104 Ala. 30, 16 South. 135.

[e] (Cal. 1875) If married women testify as witnesses for the people in a criminal case, the defendant cannot, for the purpose of affecting their credibility, introduce testimony to prove a conspiracy on the part of their husbands to falsely prosecute him and obtain his property.—People v. Parton, 49 Cal. 632.

[f] (Ill. 1888) Upon a bill for divorce charging defendant with incest, the names of witnesses who appeared before the grand jury to procure an indictment against defendant are not competent evidence for the purpose of showing bias existing in the minds of the witnesses testifying upon the trial.—Clark v. Clark, 29 Ill. App. 257.

[g] (Iowa, 1885) In showing the bias of a witness, the party against whom he has testified is limited to a cross-examination of the witness.—State v. Townsend, 66 Iowa, 741, 24 N. W. 535.

[h] (Kan. 1866) On a prosecution for murder, where a state's witness who testifies that she was with defendant at the time of the homicide states that the prosecuting attorney agreed not to prosecute an indictment against her for the same offense if she told the whole truth, such indictment is admissible in evidence as tending to show bias and affecting her credibility.—Craft v. State, 3 Kan. 450.

[i] (La. 1885) In a prosecution for murder, evidence of the governor's proclamation offering a reward for the capture and conviction of the parties to the crime is not admissible for the purpose of showing a probable motive for perjury on the part of the state's witnesses, since their credibility must be attacked directly.—State v. Ford, 37 La. Ann. 448.

[j] (Mass. 1869) In an action on a contract, evidence that a witness of the defendant had improperly tried to obtain from the plaintiff his copy of the contract is admissible to show bias.—Swett v. Shumway, 102 Mass. 365, 3 Am. Rep. 471.

[k] (Mass. 1879) On the trial of an indictment for arson, it appeared that a government witness, who owned part of the property burned, had complained of defendant for forgery, that the complaint had been dismissed, and that defendant brought a pending suit against the witness for a malicious prosecution. The witness testified that defendant had threatened "to be even with him" and to "make it hot" for him. Defendant, to show bias, and to explain these words, offered in evidence the record of the suit for malicious prosecution, and of the complaint for forgery. *Held*, that the presiding judge, in the exercise of his discretion, had a right to exclude the evidence.—Commonwealth v. Allen, 128 Mass. 46, 35 Am. Rep. 356.

[l] (Mass. 1886) A defendant may introduce evidence to show that a witness is biased, by showing that she had preferred other charges against him, but he will not be allowed to show a particular charge in such other indictment is false, and known to be so by the witness.—Commonwealth v. Hobbs, 140 Mass. 443, 5 N. E. 158.

[m] (Mich. 1886) Evidence that a party to an action requested witness to try to prevent another person from becoming surety for his adversary is admissible to affect the former's credibility.—Denton v. Smith, 61 Mich. 431, 28 N. W. 160.

[n] (Minn. 1859) To show hostility to the prisoner in the witness, mere proof of facts likely to give rise to a hostile feeling is not admissible.—State v. Bilansky, 3 Minn. 246 (Gil. 169).

[o] (Minn. 1891) Evidence that plaintiff had brought an action against one of defendant's witnesses is not admissible to show ill feeling by the witness against plaintiff, in the absence of proof as to the effect that such act of plaintiff had on the mind of the witness, to be shown by the latter's acts or declarations.—Wischstadt v. Wischstadt, 47 Minn. 358, 50 N. W. 225.

[oo] (Miss. 1886) In criminal prosecution, it is not competent for defendant to prove, for the purpose of attacking the credibility of the state's witness, that he has testified as a witness for the state in many other cases at the same term of court.—Lea v. State, 64 Miss. 294, 1 South. 244.

[p] (Miss. 1889) Evidence that bribes and other inducements to testify against defendant were offered to his accomplices, who had testified at the trial, is not admissible to discredit them as witnesses, where it is not attempted to show that they accepted such inducements.—Cheatham v. State, 67 Miss. 335, 7 South. 204, 19 Am. St. Rep. 310.

[pp] (Mo. 1887) On a question as to the terms of a certain settlement, plaintiff's testimony was opposed by the testimony of defendant and two witnesses, who claimed to have been present at the time of the settlement. Plaintiff had attached certain land, which defendant, on the day after the settlement, had conveyed to his two witnesses. *Held*, that, for the purpose of affecting the credit of these witnesses, plaintiff might put the deed in evidence, show that the land which it purported to convey was the land attached by him, and that the deed was voluntary, and without consideration.—Waddingham v. Hulett, 92 Mo. 528, 5 S. W. 27.

[q] (Mo. 1891) The prosecutor on a trial for arson was the brother-in-law of the defendant. There had been evidence admitted showing a bitter animosity between the parties and their families, extending down to the time of the fire. The prosecutor was asked, for this purpose, if he had not, in a conversation with a

certain person two years before, made a threat to break up his father-in-law's family, to which he replied that he had not. The person with whom the conversation was alleged to have taken place was then called, and testified that he had. The testimony of the latter was then excluded on motion of the state. The other evidence in the case was almost wholly circumstantial, and it was doubtful whether even the corpus delicti had been proved. *Held*, that the evidence was competent for the purpose of impeachment, and also to show the animus of the prosecution.—State v. Jones, 106 Mo. 302, 17 S. W. 366.

[qq] (Mo. 1896) An offer to prove a witness' malice and ill will toward defendant, by showing that she had defaced a picture of him, is inadmissible, as too remote and uncertain.—State v. Punshon, 133 Mo. 44, 34 S. W. 25.

[r] (N. H. 1851) A quarrel between the witness and the party against whom he testifies may be proved to discredit the witness. The court will not inquire which side was in the wrong, but the degree of violence in the quarrel is manifestly material to the point in question.—Titus v. Ash, 24 N. H. (4 Fost.) 319.

[rr] (N. Y. 1849) It is competent to show by a witness called to prove the plaintiff's demand, that a transfer of the establishment in which the demand arose, made by him to the plaintiff, was a sham and fraudulent sale, in order to test his credibility, by showing that he was really interested in the demand in controversy.—Hoyt v. Lynch, 4 N. Y. Super. Ct. (2 Sandf.) 328.

[s] (N. Y. 1879) In an action against a railroad company for injuries, evidence that one of the plaintiff's witnesses had previously applied to the road master for a position on the road, and had been refused, was not admissible to establish the hostility of the witness to the defendant.—Gale v. New York Cent. & H. R. R. Co., 76 N. Y. 594.

[ss] (N. Y. 1879) Evidence to show that a witness who has testified against a party was hostile to him must be direct and pointed; not indirect and uncertain.—Gale v. New York Cent. & H. R. R. Co., 76 N. Y. 594.

[t] (N. Y. 1881) In an action for the price of hops plaintiff's evidence showed that after the oral contract of sale had been made defendant made a payment by check, and at that time the contract was restated. After defendant had been called as a witness for plaintiff to prove payment of the check, he, as a witness in his own behalf, contradicted plaintiff's evidence as to payment and restatement of the contract, and was asked on cross-examination if the price of hops went down after the time of the alleged payment. *Held*, that such evidence was competent as showing the interest of the witness, as the fact of such interest, where there is a contradiction in the evidence, is proper for the consideration of the jury.—Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544.

[tt] (N. Y. 1889) A question whether witness was told by another witness that he could get him $50 if he would "swear a single word" in the case is incompetent, as it was not proper for one witness to testify as to an offer which another witness said he could get for testimony.—Webber v. Hoag, 55 Hun, 605, 8 N. Y. Supp. 76.

[u] (N. Y. 1893) Where one of plaintiff's witnesses is a Knight of Labor, evidence as to whether plaintiff was a Knight of Labor is inadmissible to show a bias of such witness in plaintiff's favor.—Constable v. Lefever, 66 Hun, 628, 21 N. Y. Supp. 38.

[uu] (Pa. 1831) The fact that several persons contribute money to employ counsel to conduct a prosecution for creating a disturbance is not such a maintenance as would affect their credibility as witnesses, in the absence of other evidence of malice.—Commonwealth v. Dupuy, 4 Clark, 1, 6 Pa. Law J. 223.

[v] (Pa. 1869) The party against whom a witness has testified may show anything which may in the slightest degree affect his credit, by disclosing the fact that he was biased in giving his testimony.—Batdorff v. Farmers' Nat. Bank, 61 Pa. (11 P. F. Smith) 179.

[vv] (Tex. 1877) Where a witness for the state on cross-examination denied that he bore ill will to the accused, a witness for the accused could not testify that the state's witness was of a revengeful and relentless disposition.—Gay v. State, 2 Tex. App. 127.

[w] (Tex. 1885) The defense to show the animus of the principal witness for the prosecution offered to read an indictment charging him with a fraudulent connection with the same property that was the basis of the prosecution against accused, and in order to show that he was testifying under duress or coercion, it was proposed to show that he must so testify as to convict defendant or else establish his own guilt. *Held*, that the indictment and proof was admissible, as showing a motive and to impeach the credibility of the witness.—Watts v. State, 18 Tex. App. 381.

[ww] (Tex. 1894) An affidavit by defendant for a change of venue, in which a witness joined, is admissible to show his relationship to defendant, for the purpose of attacking his his credibility.—Trinity County Lumber Co. v. Denham (Civ. App.) 29 S. W. 558.

[x] (Tex. 1895) Where a witness, in an action for injuries alleged to have been caused by defective machinery in a mill, had testified that the owner of the mill, in a conversation with him after the accident, admitted the defective condition of the machinery, and the owner had denied such admission, it was error to exclude evidence that the witness had been interested in the suit, and the consideration for which he had sold such interest.—Trinity County Lumber Co. v. Denham, 88 Tex. 208, 30 S. W. 856.

[xx] (Tex. 1895) It is not error to exclude testimony offered to prove the raising of money to procure witnesses for the state, where the offered testimony does not show that any witness received the money.—Mixon v. State (Cr. App.) 31 S. W. 408.

[y] (Tex. 1895) Testimony that a witness for defendant advised a witness for plaintiff not to testify for him unless paid his fees, and that "if he would join over on the company's side they would pay him," is admissible to show the bias of the witness.—Missouri, K. & T. Ry. Co. v. McGlamory (Civ. App.) 34 S. W. 359.

[yy] (Utah, 1891) In an action by a person who is forcibly ejected from premises by one who claims title to the land, for an injunction, and for damages for destruction of her buildings by defendant, evidence is not admissible of trespasses committed by plaintiff after suit brought, for the purpose of showing plaintiff's animus, or as affecting her standing as a witness.—Marks v. Tompkins, 7 Utah, 421, 27 Pac. 6.

[z] (Vt. 1892) One accused of cattle stealing may show that a witness who testifies to having bought the cattle from defendant was himself accused of the same offense, as furnishing a motive to testify falsely.—State v. Burpee, 65 Vt. 1, 25 Atl. 964, 36 Am. St. Rep. 775, 19 L. R. A. 145.

[zz] (Va. 1833) Evidence of particular acts of hostility on the part of plaintiff's witnesses toward the defendant was *held* admissible, in an action of slander, to discredit their testimony.—Rixey v. Bayse, 4 Leigh, 330.

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§ 1202. Evidence of declarations, statements, or admissions of witness.

[a] (Ala. 1848) In order to show that a witness entertains ill feelings toward the party against whom he is called, it is not competent to prove that he has used expressions indicating such feelings, without proving what the expressions were.—Hatchett v. Gibson, 13 Ala. 587.

[b] (Ala. 1882) On a trial for assault with intent to murder, letters written by the assaulted party and received by defendant a short time prior to the assault, showing hostility to defendant, are admissible as affecting the credibility of the assaulted party as a witness.—Burke v. State, 71 Ala. 377.

[c] (Ala. 1886) The prosecutor having admitted, on cross-examination, that he was not friendly to the defendant, and that he had employed counsel to aid in the prosecution, the defendant may ask another witness "if he had not heard the prosecutor say that he could not give the defendant justice."—Haralson v. State, 82 Ala. 47, 2 South. 765.

[d] (Ala. 1893) On a trial for hog theft, evidence that a witness said, about 18 months before the larceny was alleged to have happened, "that he would do anything for money," was incompetent for the purpose of impeachment.—Browder v. State, 102 Ala. 164, 14 South. 895.

[e] (Ark. 1889) The bias of one called to testify in a case not being a collateral matter, testimony as to statements made by him which tend to show such bias is competent.—Crumpton v. State, 52 Ark. 273, 12 S. W. 563.

[f] (Cal. 1893) In a prosecution for attempt to rape, a witness may testify as to statements made to him by the prosecuting witness that she was going to get some money out of defendant if she had to put up a job on him, as tending to show her prejudice and interest in the case, provided the proper foundation had been laid while she was on the stand.—People v. Gardner, 98 Cal. 127, 32 Pac. 880.

[g] (Conn. 1875) Where a witness after testifying states out of court that he had testified falsely and had been hired to do so, the statements may be proven in court to discredit his testimony.—McGinnis v. Grant, 42 Conn. 77.

[h] (Ind. 1881) It is competent, for the purpose of impeaching a witness, to prove that, at a time and place specified, he has made statements which show that his impartiality is affected by motives arising from friendship, affection, fear, or interest.—Johnson v. Wiley, 74 Ind. 233.

[i] (Ind. 1889) Evidence of statements made out of court by a witness, showing his hostility to one of the parties to the suit, is admissible for that purpose.—Staser v. Hogan, 120 Ind. 207, 21 N. E. 911.

[j] (Ind. 1891) The fact that letters offered in evidence were written after the notes in suit had been assigned is no objection to their admission for the purpose of showing the interest of some of the witnesses.—Litten v. Wright School Tp., 127 Ind. 81, 26 N. E. 567.

[k] (Iowa, 1880) The declarations of a witness, to the effect that he has an interest in the suit, cannot be shown in evidence to establish such interest in order to affect his credibility.—Erickson v. Bell, 53 Iowa, 627, 6 N. W. 19, 36 Am. Rep. 246.

[l] (La. 1830) Declarations made by a witness that he had received a sum of money for testifying to certain facts, in the absence of the party who offers him, are admissible to discredit his testimony.—Barkley v. Bills, 8 Mart. (N. S.) 496.

[m] (Me. 1890) A pauper's declarations made after 1880, with acts done in pursuance of such declarations, tending to show a disposition on his part to acquire a settlement in V., and avoid one in B., thereby implying that his settlement was not before that time in V., were admissible to show his bias and prejudice, when testifying as a witness in 1887, to his intention between 1860 and 1866 of making his permanent home in V.; it being admitted that no new settlement was ever acquired by him after 1866.—Inhabitants of Belmont v. Inhabitants of Vinalhaven, 82 Me. 524, 20 Atl. 89.

[n] (Md. 1877) On a prosecution for larceny, evidence of threats against defendant's brother made by one of the witnesses for the prosecution, not shown to have any connection with threats against the accused, is inadmissible.—Chelton v. State, 45 Md. 564.

[o] (Mass. 1857) Where a witness, being called by a party, testifies that he has never threatened revenge against the other party, he may be contradicted by other testimony, as such matter was not collateral, but the state of the witness' feelings toward such party affected directly the credit and weight to be given to his testimony.—Collins v. Stephenson, 74 Mass. (8 Gray) 438.

[p] (Mass. 1863) For the purpose of discrediting a witness, independent testimony is competent to prove that he has expressed an opinion, out of court, in favor of the party who called him, upon the merits and probable result of the case.—O'Neill v. City of Lowell, 88 Mass. (6 Allen) 110.

[q] (Mass. 1867) A material witness may be impeached by proving declarations made by him out of court showing personal bias or feeling adverse to the party against whom he has testified.—Day v. Stickney, 96 Mass. (14 Allen) 255.

[r] (Mass. 1891) Plaintiff's statement that he intended to make the case as dirty as possible for one of defendants is admissible to show bias, and to discredit his testimony.—Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; Same v. Tasker, Id.

[s] (N. Y. 1847) A defendant, on the trial of an indictment, may prove that a witness for the prosecution has said of a certain black ash swamp that it would be a good place to kill the defendant, though the remark was made before the time of the commission of the alleged offense, and the witness to whom the declaration was imputed, on his cross-examination, had denied having made it.—Starks v. People, 5 Denio, 106.

[t] (N. Y. 1875) Evidence to show that one of defendants' witnesses had, some seven years before the trial, said that if he ever got a chance he would give plaintiff hell, was properly received; the law has fixed no time beyond which ill feeling on the part of a witness toward a party cannot be proved.—Hotchkiss v. Germania Fire Ins. Co., 5 Hun, 90.

[u] (N. Y. 1877) On the trial of an indictment for obtaining money under false pretenses, a witness for the prosecution testified that accused told him that he was worth a large sum of money and had taken care of his friends prior to his making an assignment, and that he tried to sell witness land so as to protect him. Accused, having been called in his own behalf, offered to testify that such witness had threatened to give such evidence unless accused would pay the amount due to him, but the evidence was excluded. *Held*, that it was error, as it was admissible to impeach the credit of the first witness.—Patterson v. People, 12 Hun, 137.

[v] (N. Y. 1880) A witness' admissions out of court are not competent to prove his interest in the litigation.—Misland v. Boynton, 79 N. Y. 630.

[w] (N. Y. 1892) In an action against a street railroad for injuries sustained in being struck

by a car, a witness who was called by plaintiff in rebuttal was properly allowed to testify, for the purpose of impeaching the driver of another car, who had testified that plaintiff had been guilty of contributory negligence, that such driver had said if he was independent, by reason of having a house and lot, he could give his evidence without regard to being blacklisted by the company.—Pyne v. Broadway & Seventh Ave. R. Co. (Com. Pl.) 19 N. Y. Supp. 217, judgment affirmed (1893) 138 N. Y. 627, 33 N. E. 1083.

[x] (N. Y. 1893) Where a subscribing witness to a will, after having testified for proponents, states on cross-examination that a beneficiary under the will has not promised her money or reward in the case, it is error to exclude evidence of her admissions or declarations to the contrary.—In re Snelling's Will, 136 N. Y. 515, 32 N. E. 1006.

[y] (N. Y. 1893) Such declarations and admissions are not rendered any the less admissible by the fact that they were elicited from her by a woman who was procured by contestants to visit her for the purpose under an assumed name, but such fact goes merely to the credibility of the impeaching testimony.—In re Snelling's Will, 136 N. Y. 515, 32 N. E. 1006.

[yy] (Or. 1895) On a trial for murder, evidence that a witness stated at the coroner's inquest that she would color her testimony to help defendant is admissible, when a proper foundation has been laid.—State v. Brown, 28 Or. 147, 41 Pac. 1042.

[z] (Tex. 1886) In a murder trial, a state's witness who was shown to have been an active participant in the transaction which resulted in the killing of the deceased, having testified to material facts, the defendant proposed to prove that, about two hours before the homicide, the said witness declared that she directed the deceased to load a shotgun, and kill the defendant if he entered upon her premises, which proposed evidence was rejected by the trial court. *Held* error; and that the evidence was competent both to prove the animus of the witness, and, in view of the other evidence in the case, as also material upon the question of the defendant's guilt.—Tow v. State, 22 Tex. App. 175, 2 S. W. 582.

[zz] (Tex. 1888) Evidence that, on the night before the crime, the principal witness for the state had a quarrel with defendant, and said, "I will see you again, and shoot a hole in you a yellow dog can jump through," is admissible to show the hostility and bias of witness against defendant.—Bonnard v. State, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431.

§ 1203. Examination of impeaching witness.

Cross-examination to show interest or bias, see ante, §§ 1192–1199.

[a] (Mass. 1867) Where a witness denies declarations made by him out of court showing personal bias or feeling adverse to the party against whom he has testified, an inquiry put to a contradicting witness need not embody the exact statement, the making of which he denied, but may be in any form proper to elicit the facts.—Day v. Stickney, 96 Mass. (14 Allen) 255.

4. EVIDENCE TO SUSTAIN WITNESS OR REBUT EVIDENCE OF INTEREST OR BIAS.

IN GENERAL, § 1204.
REBUTTAL, § 1205.
GOOD CHARACTER OF WITNESS, § 1206.
EVIDENCE TO SHOW WANT OF INTEREST OR FREEDOM FROM BIAS, § 1207.

§ 1204. In general.

[a] (Mass. 1871) Where a party gives evidence of a quarrel between himself and the witness for the purpose of affecting the credit of the latter, it is within the discretion of the presiding judge how far to allow the other party to show the nature and particulars of the quarrel.—Commonwealth v. Jennings, 107 Mass. 488.

[b] (N. Y. 1848) Where the cross-examination of the principal witness for the people, in a criminal case, was conducted in a manner tending to impair her credibility, and to show that the prosecution was the result of a conspiracy in which she was concerned, it was *held* that it was competent to sustain the witness, by showing that another person, to whom the facts had become professionally known, wrote to the public authorities, and was the cause of the prosecution being instituted.—Lohman v. People, 1 N. Y. (1 Comst.) 379, 49 Am. Dec. 340.

§ 1205. Rebuttal.

[a] (Ala. 1891) In a criminal case, where it is brought out on cross-examination that a witness for the state has been indicted for the same offense with which defendant is charged, it is competent for the state to rebut the inference which might be drawn from the circumstance, by proof that the witness has not been induced by any promise to testify against defendant.—Mitchell v. State, 94 Ala. 68, 10 South. 518.

[b] (Cal. 1895) When it is sought to weaken the testimony of a witness for defendant by showing that he is interested in the result of the trial, defendant may show that such interest arose from the witness' belief in defendant's innocence.—People v. Johnson, 106 Cal. 289, 39 Pac. 622.

[c] (Mich. 1895) Where, from the acts of a witness in connection with the matters to which he testifies, there might be inferred the existence of motives unfavorable to the party for whom he testified, it is proper to allow the witness to give the reasons for such acts.—Burt v. Long, 106 Mich. 210, 64 N. W. 60.

[d] (Wash. 1880) The trial court, in the exercise of its discretion, may permit a witness to state the grounds of an admitted hostility to the party against whom he testifies, without permitting such party to contradict the statements made in this connection.—Bagley v. Carpenter, 2 Wash. T. 19, 3 Pac. 193.

§ 1206. Good character of witness.

[a] (Cal. 1874) If the accused introduces evidence to show that one of the witnesses for the prosecution was suborned, and has been paid for his testimony, the prosecution, in rebuttal, may introduce testimony to show the good character of the witness for truth and veracity.—People v. Ah Fat, 48 Cal. 61.

§ 1207. Evidence to show want of interest or freedom from bias.

[a] (Ga. 1890) In an action on a life insurance policy, it is competent for a brother of the assured to testify that he had assigned a policy, held by him on the life of the assured, to the latter's child, pursuant to certain directions of the assured, as such evidence tends to show that the witness had no interest in the result of the action.—Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18.

[b] (N. Y. 1848) Where the defendant examined his son-in-law as a witness in his behalf, and it was shown that he had made statements contradicting the facts sworn to by him on the trial, it was *held* that it was competent for the defendant to answer the imputation of bias on the part of the witness in his favor, to show that they were not on friendly terms.—Clapp v. Wilson, 5 Denio, 285.

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[c] (N. C. 1859) Where the credit of a witness was impeached on the ground of partiality toward the accused, and to rebut the imputation it was proved that the prisoner and witness had lately had a fight, it was competent for the state to show that next morning, after the act charged, the two were seen together in a conversation that appeared to be friendly, and that without any preliminary inquiry of the witness as to the terms on which they stood toward each other.—State v. Oscar, 52 N. C. 305.

5. EFFECT OF IMPEACHMENT FOR INTEREST OR BIAS.

§ 1208. In general.

[a] (Ga. 1860) Under the act of 1857, authorizing parties to become witnesses and providing that their testimony shall be entitled to such weight as the jury may see fit to give it, the jury can take so much of the evidence of a party who is the only witness as supports the case of the opposite party, and disbelieve the balance.—Hardee v. Williams, 30 Ga. 921.

[b] (Ill. 1862) The feelings of a witness toward the parties may justify the jury in discrediting him, but if he is corroborated his testimony ought not to be rejected.—Hansell v. Erickson, 28 Ill. (18 Peck) 257.

[c] (Ky. 1891) Where one witness for the state was a former witness for defendant, the jury were the judges as to her credibility.—Brown v. Commonwealth, 17 S. W. 220.

[d] (Mass. 1861) Although it is proved that a witness in a criminal case is actuated by malice against the defendant, the court should not instruct the jury to disregard his testimony altogether; but, after giving proper cautions, leave it for them to say how much credit shall be given to it.—Commonwealth v. Putnam, 84 Mass. (2 Allen) 301.

[e] (N. Y. 1823) A court and jury have no right entirely to disregard the testimony of a witness, on the ground that he is biased in favor of the party calling him.—Newton v. Pope, 1 Cow. 109.

[f] (N. Y. 1893) Though the jury are not bound to believe an interested witness, they are not prohibited from believing him.—Reid v. City of New York, 68 Hun, 110, 22 N. Y. Supp. 623, judgment affirmed (1893) 139 N. Y. 534, 34 N. E. 1102.

[g] (Ohio, 1859) Where the testimony of a party is opposed to that of a disinterested witness, the testimony of the latter will prevail.—Spang v. McGarry, 2 Ohio Dec. 116.

(D) INCONSISTENT STATEMENTS BY WITNESS.

1. IN GENERAL, §§ 1209-1213.
2. INCONSISTENT STATEMENTS OF ONE'S OWN WITNESS, §§ 1214-1219.
3. NATURE OF STATEMENTS OR TESTIMONY, AND EXTENT OF INCONSISTENCY, §§ 1220-1227.
4. CROSS-EXAMINATION AS TO INCONSISTENT STATEMENTS, §§ 1228-1232.
5. LAYING FOUNDATION FOR PROOF OF INCONSISTENT STATEMENTS, §§ 1233-1242.
6. ADMISSION OR DENIAL AS TO PREVIOUS STATEMENTS, §§ 1243-1245.
7. EVIDENCE OF INCONSISTENT STATEMENTS, §§ 1246-1257.
8. EVIDENCE TO SUSTAIN WITNESS OR REBUT EVIDENCE OF INCONSISTENT STATEMENTS, §§ 1258-1264.
9. EFFECT OF IMPEACHMENT BY INCONSISTENT STATEMENTS, §§ 1265, 1266.

Conduct inconsistent with testimony, see ante, § 1134.

New trial in criminal prosecution on ground of newly discovered evidence of contradictory statements of witnesses, see "Criminal Law," vol. 15, cc. 174–176, § 2332.

1. IN GENERAL.

INCONSISTENCY OF STATEMENTS AS GROUND OF IMPEACHMENT IN GENERAL, § 1209.
WITNESSES WHO MAY BE IMPEACHED BY INCONSISTENT STATEMENTS, § 1210.
—— ACCUSED IN CRIMINAL PROSECUTION, § 1211.
IMPEACHMENT OF DEPOSITIONS OR TESTIMONY OF ABSENT OR DECEASED WITNESS, § 1212.
STIPULATION AS TO TESTIMONY OF ABSENT WITNESS, § 1213.

§ 1209. Inconsistency of statements as ground of impeachment in general.

[a] To discredit a witness it is competent to show that he made contradictory statements at other times and places.

—(U. S. 1888) United States v. Hughes (D. C.) 34 Fed. 782;

(Ill. 1858) Rankin v. Crow, 19 Ill. (9 Peck) 626; (1876) Presley v. Powers, 82 Ill. 125;

(Mich. 1894) Jensen v. Michigan Cent. R. Co., 102 Mich. 176, 60 N. W. 57;

(Miss. 1870) Head v. State, 44 Miss. 731;

(N. Y. 1863) Knight v. Forward, 63 Barb. 311; (1865) Chapman v. Brooks, 31 N. Y. 75;

(N. C. 1837) Murphy v. McNiel, 19 N. C. 244;

(Ohio, 1826) Lamb v. Stewart, 2 Ohio (2 Ham.) 230;

(Pa. 1822) Stahle v. Spohn, 8 Serg. & R. 317; (1890) Wilson v. Wilson, 137 Pa. 269, 20 Atl. 644;

(W. Va. 1873) Morgan v. Franklin Ins. Co., 6 W. Va. 496.

[b] The credibility of a witness may be impeached by proof of statements out of court contrary to his testimony.

—(Ala. 1895) Holley v. State, 105 Ala. 100, 17 South. 102;

(Ga. 1861) Floyd v. Wallace, 31 Ga. 688;

(Mo. 1888) Leahey v. Cass Ave. & F. G. Ry. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300;

(N. H. 1858) Gerrish v. Pike, 36 N. H. 510.

[c] (U. S. 1859) Inconsistencies and incongruities in the testimony of witnesses whose general character for veracity has not been impeached should be reconciled, when it can be done without violence, especially when there is no extrinsic reason for suspecting error or fraud. And if the testimony cannot be reconciled, the presumption of reason as well as of law will impute the variance to an innocent misconception rather than to a willful and corrupt misrepresentation, especially when the witnesses are compelled to make their answers to an ingenious and artful examination through the medium of an interpreter.—Dietz v. Wade, Fed. Cas. No. 3,903.

[d] (U. S. 1892) Where testimony is conflicting, the jury should consider, in determining what weight to attach to the testimony of witnesses, the consistency of their testimony.—United States v. Ybanez (C. C.) 53 Fed. 536.

[e] (Ala. 1888) A defendant having testified that he was in Florida on the day an offense was charged to have been committed, the state

was properly allowed to impeach his testimony by showing that he had made statements, by affidavits and otherwise, as to his whereabouts on that day, which were inconsistent with his testimony.—Cotton v. State, 87 Ala. 75, 6 South. 396.

[f] (Cal. 1852) Where a defendant offered to prove that a witness, sworn for the plaintiff, had made a statement different from the one he had made under oath at the trial, and the court below refused to admit the testimony, it was *held* that the decision was erroneous.—McDaniel v. Baca, 2 Cal. 326, 56 Am. Dec. 339.

[g] (Colo. 1892) Where there is evidence that a witness has made any statement, oral or written, out of court, concerning any substantial matter in controversy, materially different from what he has stated on the witness stand, such evidence tends to impeach either the recollection or the truthfulness of the witness, and the jury should, on proper request, be instructed to consider the same in determining what weight should be given to his testimony.—Rose v. Otis, 18 Colo. 59, 31 Pac. 493.

[h] (Ga. 1877) Where a debtor is a witness for a claimant of property alleged by a creditor to have been fraudulently conveyed, his declarations as to material matters made preceding the trial may be shown by the creditor to impeach him after laying a foundation therefor.—Oatis v. Brown, 59 Ga. 711.

[i, j] (Ill. 1867) The rule is that if the witness swore knowingly to any one statement in the affidavit, and testified differently about the same matter at the trial, to that extent his testimony was clearly impeached.—Von Glahn v. Von Glahn, 46 Ill. 134.

[k] (Ind. 1820) The statements of a witness, made out of court, contrary to what he swears at the trial, concerning facts relevant to the issue, may be proved, to impeach his credit.—Shields v. Cunningham, 1 Blackf. 86.

[l] (Ind. 1857) Testimony to impeach a witness upon a material point is admissible after the proper foundation, as to time, place, etc., is laid with that view.—Dillon v. Bell, 9 Ind. 320.

[m] (La. 1860) In an indictment for libel, where the party libeled is offered as a witness for the prosecution, it is competent to discredit his testimony by proof of contrary statements made out of court, his attention having been first called thereto.—State v. Butman, 15 La. Ann. 166.

[n] (Mass. 1893) In an action for personal injuries it is proper to show that plaintiff's physician had made statements inconsistent with his testimony, as it tended to show that he had treated plaintiff's injury as less serious than he represented it on the stand.—Liddle v. Old Lowell Nat. Bank, 158 Mass. 15, 32 N. E. 954.

[o] (Minn. 1889) When a proper foundation is laid, a witness may be impeached by showing that he has elsewhere made statements on some matter material to the issue, contradictory to those made on the witness stand.—State v. Barrett, 40 Minn. 65, 41 N. W. 459.

[p] (Miss. 1860) The proof of a witness having made statements which he denies may be taken into consideration as affecting his credit.—George v. State, 39 Miss. 570.

[q] (Mo. 1881) A son was tried for murdering his father. The state introduced evidence tending to show unfriendly relations between father and son. The father's widow testified that on the contrary their relations were friendly. *Held*, that the state might show, in rebuttal, that the widow, before her husband's death, in speaking of a difficulty between father and son, had said that if the son had had a pistol he would have shot his father, and that he was then prepared for him.—State v. Talbott, 73 Mo. 347.

[r] (N. Y. 1838) Declarations of witnesses invalidating their testimony as contained in depositions is inadmissible, if objected to.—Kimball v. Davis, 19 Wend. 437, affirmed (1840) Brown v. Kimball, 25 Wend. 259.

[s] (N. Y. 1858) The declarations of a witness can only be received to impeach him by contradicting testimony already given by him; but if they are admitted first, the error is cured, if the party who objected to the declarations calls him and examines him with relation thereto.—Tooker v. Gormer, 2 Hilt. 71.

[t] (N. Y. 1886) In a trial for larceny, where a witness was proved to have been an accomplice, evidence of previous statements made by her is admissible for the purpose of contradicting and impeaching her testimony.—People v. McCallam, 103 N. Y. 587, 9 N. E. 502, affirming (1885) 3 N. Y. Cr. R. 189.

[u] (N. Y. 1891) Contradictory statements made by defendant, and offered in evidence by plaintiff before defendant has presented himself as a witness, for the purpose of affecting defendant's credibility, are properly excluded.—Davis v. Evans (City Ct. Brook.) 14 N. Y. Supp. 636.

[v] (N. Y. 1893) Evidence as to declarations made by a witness as to the location of a boundary line is admissible to contradict his testimony at the trial, though such declarations may not be competent evidence of the true location.—Humes v. Proctor, 73 Hun, 265, 26 N. Y. Supp. 315.

[w] (Ohio, 1883) A witness' contradictory statements may justify the jury in not believing him, though he is not directly impeached.—French v. Millard, 2 Ohio St. 44.

[ww] (Pa. 1894) Declarations by state's witness, made immediately after the occurrence, entirely inconsistent with his testimony, are admissible to impeach him.—Commonwealth v. Werntz, 161 Pa. 591, 29 Atl. 272.

[x] (S. C. 1846) Where one party gave in evidence the declarations of a free negro, it was *held* that the other party might give in evidence his declarations at another time, to discredit his testimony.—Morgan v. Livingston, 2 Rich. Law, 578.

[xx] (S. C. 1846) Where a deed is proved by evidence of the signature of a subscribing witness who is beyond the state, it is competent for the opposite party to introduce evidence of statements by the same witness as to circumstances of its execution differing from those which he made when examined by commission.—Smith v. Asbell, 2 Strob. 141.

[y] (S. C. 1891) Where defendant, in an action for enticing a servant from his employer, offers the servant to prove there was no contract of employment, plaintiff, having laid the foundation on cross-examination, may prove in reply that the servant had admitted the contract to others, for the purpose of discrediting the testimony of the servant.—Duckett v. Pool, 34 S. C. 311, 13 S. E. 542.

[yy] (S. C. 1892) In an action on a life insurance policy, it is not error to permit plaintiff to introduce evidence of conversations with defendant's agent, who procured the assured's application, for the purpose of contradiction of such agent as a witness.—Stepp v. National Life & Maturity Ass'n, 37 S. C. 417, 16 S. E. 134.

[z] (Tex. 1884) A witness can be impeached on any material issue after laying the proper predicate by showing that he has made statements out of court contradictory of his statements in court.—Texas & P. Ry. Co. v. Woodall, 2 Willson, Civ. Cas. Ct. App. § 471.

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[zz] (Wis. 1889) Evidence tending to show that a witness had made statements out of court as to material facts, different from his testimony, is admissible to impeach him.—A. C. Conn Co. v. Little Suamico Lumber & Mfg. Co., 74 Wis. 652, 43 N. W. 660.

§ 1210. Witnesses who may be impeached by inconsistent statements.

[a] (Colo. 1892) A defendant testifying as a witness in his own behalf is subject to cross-examination as to previous declarations contrary to his testimony as given, the same as any other witness; and this notwithstanding his supposed declarations might have been shown as a part of plaintiff's case in chief.—Cravens v. Bennett, 17 Colo. 419, 30 Pac. 61.

[b] (Ga. 1883) The prosecutor stands before the court and the jury as any other witness, to be impeached in the same way, and the statements of the prosecutor outside and not under oath are admissible for the purpose of impeachment by contradicting his sworn statements.—Womack v. State, 72 Ga. 215.

[c] (Minn. 1881) A witness who is called to contradict another witness by showing contradictory statements made out of court may himself be contradicted in the same manner.—State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

[d] (Mo. 1877) An agent, appearing as a witness in a case involving transactions by him as agent, may be impeached by evidence of contradictory statements made by him relative to his agency.—Peck v. Ritchey, 66 Mo. 114.

[e] (N. Y. 1888) Admissions and declarations of a foreman relating to work of which he was in charge are admissible to contradict his statements made as a witness against his employer in an action concerning such work.—Tripp v. Kirmes (Com. Pl.) 2 N. Y. Supp. 19.

[f] (Ohio, 1877) A witness, called to impeach another by showing statements inconsistent with those testified to, may himself be contradicted after laying the proper foundation therefor by showing statements made by him out of court inconsistent with those testified to by him contradicting the witness sought to be impeached by his testimony.—Berry v. State, 31 Ohio St. 219.

§ 1211. —— Accused in criminal prosecution.

[a] (U. S. 1891) A defendant who testifies in his own behalf may be contradicted by showing that he testified differently before the grand jury as a witness against another, who was charged with the same offense.—United States v. Smith (C. C.) 47 Fed. 501.

[b] (Ala. 1892) An accused person, who testifies in his own behalf, is subject to impeachment, as other witnesses, by evidence of previous contradictory statements, on a proper predicate therefor.—Hicks v. State, 99 Ala. 169, 13 South. 375.

[c] (Cal. 1888) A defendant cannot be compelled upon cross-examination to testify to statements, made out of court, amounting to a confession of the crime, upon the theory of showing contradictory statements to impeach him, unless it is first shown that such confession was voluntary.—People v. Yeaton, 75 Cal. 415, 17 Pac. 544.

[d] (Ky. 1895) Where the theory of the commonwealth is that defendant was wounded while committing a crime, it may show in rebuttal that an explanation by defendant before the trial, as to how he received the wounds, contradicts his testimony.—Logan v. Commonwealth, 29 S. W. 632.

[e] (La. 1890) In a criminal prosecution, evidence to show what the accused, testifying in his own behalf, had stated on a previous trial on the same charge, in which the jury had failed to agree, is inadmissible to impeach him, if it appears that the defendant did not testify at all on the second trial, at which he was convicted.—State v. Brownson, 42 La. Ann. 186, 7 South. 328.

[f] (Md. 1889) Where defendant, on his examination as a witness, makes statements concerning the killing, the state may show, at the close of his case, a previous account thereof, given by him, for the purpose of contradicting and impeaching him.—Garlitz v. State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601.

[g] (Mo. 1893) On a trial for murder, where a witness for the state testified that defendant stated in his presence that it was a man by the name of T. who traveled with him towards the place where deceased's body was found, it was proper to cross-examine defendant as to the statement, for the purpose of laying a foundation to contradict defendant under section 4218, which provides that, when defendant offers himself as a witness, he may be contradicted, as any other witness.—State v. Avery, 113 Mo. 475, 21 S. W. 193.

[h] (Mo. 1894) One on trial for murder, testifying on his own behalf, may be cross-examined as to a statement made a few days after the murder, to lay a foundation for impeachment.—State v. Kennade, 121 Mo. 405, 26 S. W. 347.

[i] (Mont. 1895) Where defendant, on a trial for murder, relies on self-defense for acquittal, it is competent to attack his credibility by proving statements by him out of court as to the self-defense contrary to those made by him as a witness on the trial.—State v. Cadotte, 17 Mont. 315, 42 Pac. 857.

[j] (Tex. 1892) When defendant has testified in his own behalf, a statement made by him while under arrest may be offered as impeachment.—Bell v. State, 31 Tex. Cr. R. 276, 20 S. W. 549.

[k] (Tex. 1894) A confession by accused, though he was not cautioned, is admissible to impeach his credibility as a witness, though it did not result in a discovery of the fruits of the crime.—Rains v. State, 33 Tex. Cr. R. 294, 26 S. W. 398.

[l] (Tex. 1896) A confession by defendant while in jail, made without his being cautioned, though inadmissible as evidence of his guilt, is admissible to impeach him as a witness.—Phillips v. State (Cr. App.) 34 S. W. 272.

[m] (Tex. 1896) Statements by defendant while in jail are admissible in evidence to discredit his testimony.—Thompson v. State, 35 Tex. Cr. R. 511, 34 S. W. 629.

§ 1212. Impeachment of depositions or testimony of absent or deceased witness.

Foundation of impeachment of deposition or other written testimony, see post, § 1238.

[a] (U. S. 1889) On a fourth trial, where defendant introduces in evidence the deposition of a deceased witness, a deposition previously made by him in a suit between different parties, and containing statements inconsistent with the former, is not admissible to rebut it, where it has been used on three former trials during the witness' life, in each of which plaintiff cross-examined him, and did not refer to the previously made deposition.—Ayers v. Watson, 132 U. S. 394, 10 Sup. Ct. 116, 33 L. Ed. 378.

[b] (U. S. 1895) Where a material witness for the government in a murder case dies after the first trial, and on the second trial the government reads in evidence a transcribed copy of the reporter's stenographic notes of his testi-

mony taken on the first trial, it is a valid objection to evidence offered by defendant to show that the deceased witness, after such first trial, stated that his testimony was given under duress, and was untrue, that the usual foundation for impeaching testimony has not been laid.—Mattox v. United States, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409.

[c] (Ala. 1890) Where, in a criminal trial, evidence of an absent witness at a former trial is proved, it was proper to exclude testimony tending to show that the absent witness had made statements inconsistent with his testimony at the former trials.—Pruitt v. State, 92 Ala. 41, 9 South. 406.

[d] (Ark. 1881) Where the testimony of a witness (since dead), given before a committing magistrate, was read in evidence against defendant, the latter might impeach such evidence by proof that the witness had made previous contradictory statements, where the necessary foundation was laid for such impeachment at such preliminary examination.—Griffith v. State, 37 Ark. 324.

[e] (Ga. 1894) Evidence of a deceased witness, whose testimony was taken on a former trial, and reproduced through another witness, cannot be impeached by contradictory statements made by the deceased witness before he testified.—Sharp v. Hicks, 94 Ga. 624, 21 S. E. 208.

[f] (Ind. 1892) Where the deposition of a deceased witness is introduced in evidence by plaintiff, and no ground was laid, when the deposition was taken, for impeachment, a former deposition given by him, and used in another trial between plaintiff and other parties, cannot be used to impeach him, since the death of the witness since the last deposition was taken does not affect the rule requiring, as preliminary to his impeachment, that his attention be first called to the contradictory statements.—Eppert v. Hall, 133 Ind. 417, 31 N. E. 74.

[g] (Ky. 1883) Where evidence of what one since deceased testified to on a former trial is offered, it cannot be impeached by showing that the witness, after the former trial, stated that the testimony given was untrue.—Craft v. Commonwealth, 81 Ky. 250, 50 Am. Rep. 160.

[h] (Ky. 1884) The testimony of a witness on a former trial, who has since deceased, cannot be impeached by proof of contradictory statements made by him subsequent to the first trial.—Neal v. Commonwealth, 6 Ky. Law Rep. 868.

[i] (La. 1883) Evidence that a witness had made a contradictory statement is not admissible after his decease to discredit him, it being impossible to lay the foundation.—State v. Johnson, 35 La. Ann. 871.

[j] (N. Y. 1865) By agreement of parties to a trial, the testimony of a witness at a former trial, who had since died, was read in evidence. Subsequently the defendant offered to read a deposition of the deceased witness, which had been used at still another and former trial, for the purpose of contradicting the evidence as read and impeaching the witness. *Held*, that the deposition was inadmissible for that purpose, as the attention of the deceased witness had not been called to the subject.—Hubbard v. Briggs, 31 N. Y. 518.

[k] (Ohio, 1864) The testimony of a subscribing witness to a will, taken at the probate of the will, was read in evidence on the trial of an issue to determine the validity of the will, the witness having died before the trial. The contestants then offered in evidence declarations of the witness respecting the capacity of the alleged testator to make a will at the time the one in question purported to have been made, for the purpose of impeaching his testimony. *Held*, that before such evidence is admissible, the witness must be interrogated as to the same; and the fact that the opportunity for such examination has been cut off by the death of the witness does not form an exception to the general rule.—Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 469.

[l] (Pa. 1890) The declaration of a deceased witness tending to impair his testimony in a deposition theretofore given by him may be put in evidence for the purpose of affecting the credibility of the deposition.—Patterson v. Dushane, 137 Pa. 23, 20 Atl. 538, 27 Wkly. Notes Cas. 41.

[m] (Tex. 1882) Where the written testimony at the examining trial of witnesses who had left the jurisdiction was admitted, pursuant to statute, in behalf of the state, it may not be impeached by the written testimony of the same witnesses at the examining trial of another person, implicated in the same crime, where no predicate had been laid therefor or opportunity offered the witnesses for explanation.—Ballinger v. State, 11 Tex. App. 323.

[n] (Tex. 1895) On a trial for murder, where testimony given by deceased at the examining trial, when defendant was charged with assault with intent to murder, had been received, evidence offered by defendant that deceased had at different times, after said examining trial, made statements contradictory thereof, was competent.—Hamblin v. State, 34 Tex. Cr. R. 368, 30 S. W. 1075.

[o] (Vt. 1860) The defendant introduced in evidence minutes of the testimony of H. at a former trial of the same case, since which time H. had died. The plaintiff, for the purpose of impeaching such testimony, offered to show declarations of H. inconsistent with his story as recited in the minutes. *Held*, that such declarations were competent testimony, notwithstanding H. was not inquired of at the previous trial in regard to such declarations.—Norton v. Downer, 33 Vt. 26.

§ 1213. Stipulation as to testimony of absent witness.

Right to impeach in general, see ante, § 1090.

[a] (Ark. 1893) Mansf. Dig. § 5108, as amended by Act Feb. 21, 1887 (Pamph. Acts, p. 19), which permits the opposing party to controvert the statements of what an absent witness would testify, contained in a motion for continuance, does not authorize the contradiction of such witness by proving that he has made different statements out of court, and thus impeach him, and discredit his testimony, unless an opportunity is first afforded him to explain such statement.—St. Louis, I. M. & S. Ry. Co. v. Sweet, 57 Ark. 287, 21 S. W. 587.

[b] (Iowa, 1867) If, in a criminal trial, in order to avoid a continuance asked for by defendant on account of the absence of a witness, the state admits that the witness, if present, would swear to the facts stated in his affidavit, such statement cannot be impeached by showing that the witness has made a different statement before a coroner's jury, when it does not appear that the statement was under oath, or, it seems, if the statement was under oath.—State v. Shannehan, 22 Iowa, 435.

[c] (Kan. 1892) When, on an application for a continuance to procure the testimony of an absent witness, the facts set up in the affidavit in support of the application are, by consent, read in evidence, in behalf of the party making the application, as the deposition of the absent witness, it is error for the court to permit alleged statements of the witness, made out of court, to be introduced to impeach his evidence in the deposition, his attention at no time having been called thereto, and he having had no

opportunity to explain them.—State v. Bartley, 48 Kan. 421, 29 Pac. 701.

[d] (Mo. 1882) Under Rev. St. § 1886, providing that, in criminal cases, facts which it is admitted an absent witness would swear to, if present, "may be contradicted by other evidence," etc., statements made by the absent witness, contradictory to the facts which it is admitted he would testify to, are not admissible.—State v. Hickman, 75 Mo. 416.

[e] (Wash. 1894) Defendant's affidavit for continuance set out, and the state conceded, that an absent witness would swear that, since the alleged seduction, prosecutrix had told her that she had had intercourse with a number of men, all of whom she assumed to name, and of whom defendant was not one. *Held*, that the state could not, at the close of the case, without notice to the defense, call a witness to testify that said absent witness had recently told him that she had never talked with prosecutrix about the case.—State v. Carter, 8 Wash. 272, 36 Pac. 29.

2. INCONSISTENT STATEMENTS OF ONE'S OWN WITNESS.

IN GENERAL, § 1214.
PARTY CALLED AS WITNESS BY ADVERSARY, § 1215.
WITNESS WHOM PARTY IS COMPELLED TO CALL, § 1216.
CROSS-EXAMINATION AS TO MATTER NOT SUBJECT OF DIRECT EXAMINATION, § 1217.
WITNESS FOR BOTH PARTIES, § 1218
EXAMINATION, § 1219.

Foundation of impeachment, see post, § 1236.

§ 1214. In general.

[a] A party cannot introduce testimony to prove that his own witness had at different times made declarations at variance with his testimony.

—(Ind. 1873) Kirts v. Spaugh, Wils. 267;
(Me. 1847) Chamberlain v. Sands, 27 Me. (14 Shep.) 458;
(Mass. 1852) Commonwealth v. Starkweather, 64 Mass. (10 Cush.) 59;
(N. J. 1840) Brewer v. Porch, 17 N. J. Law (2 Har.) 377;
(N. Y. 1850) Thompson v. Blanchard, 4 N. Y. (4 Comst.) 303; (1895) Mason v. Corbin, 88 Hun, 540, 34 N. Y. Supp. 773;
—(Vt. 1882) Cox v. Eayres, 55 Vt. 24, 45 Am. Rep. 583.

[b] A party cannot be allowed to prove by witnesses inconsistent statements previously made by a witness called by himself, which would not be admissible as independent evidence, and can have no effect but to impair his credit with the jury.

—(Mass. 1867) Adams v. Wheeler, 97 Mass. 67;
(Pa. 1867) Stearns v. Merchants' Bank, 53 Pa. (3 P. F. Smith) 490.

[c] (U. S. 1894) Where defendant is surprised by the statement of his own witness, who, however, is not hostile, in respect to a matter not in itself prejudicial, and thereupon defendant is permitted to cross-examine him, and show the fact to be otherwise, the court may, in its discretion, refuse to allow defendant to further show by a third person that the witness had made a contradictory statement to him.—Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

[d] (U. S. 1813) A party cannot discredit his own witness by proving that on a former occasion he swore differently from what he has now sworn.—United States v. Jones, Fed. Cas. No. 15,494 [3 Wash. C. C. 209].

[e] (U. S. 1847) On the question whether plaintiff's witness can be cross-examined by plaintiff to discredit himself by confessing on oath that he had made a different and inconsistent statement of the matter, *held*, that plaintiff cannot, for the purpose of impeaching the general character of his witness for veracity, give in evidence facts which would not be admissible upon a direct examination in chief.—Harris v. Berry, Fed. Cas. No. 6,115 [1 Hayw. & H. 272].

[f] (U. S. 1847) There is no difference in principle between giving general evidence of particular facts, the effect of which is to destroy the general character of the witness for veracity, and which would not be admissible for any other purpose.—Harris v. Berry, Fed. Cas. No. 6,115 [1 Hayw. & H. 272].

[g] (U. S. 1893) On trial of an indictment charging a violation of Act March 3, 1875, c. 141, § 3, 18 Stat. 477 [U. S. Comp St. 1901, p. 1286], forbidding the importation of women for purposes of prostitution, three of the women alleged to have been imported for such purpose, being called on behalf of the government, testified that they were not prostitutes. *Held*, that affidavits of such persons, taken before the commissioner of immigration, and their testimony on an examination before the United States commissioner, wherein they swore they were prostitutes, imported for purposes of prostitution, were admissible in evidence, opportunity having been given them to explain their affidavits.—United States v. Pagliano (C. C.) 53 Fed. 1001.

[gg] (Cal. 1874) When a witness who is called by a party does not testify to what the party expected, but does not give testimony against him, the party calling the witness is not permitted to prove that the witness had made statements to others, which, if testified to on the trial, would have tended to make out his case.—People v. Jacobs, 49 Cal. 384.

[h] (Cal. 1886) Under Code Civ. Proc. § 2049, the prosecution is allowed to impeach his own witness by proving statements inconsistent with testimony.—People v. De Witt, 68 Cal. 584, 10 Pac. 212.

[hh] (Cal. 1892) A witness who fails merely to testify as expected cannot be impeached by the party calling him by proving that he had elsewhere made the desired statements, but this can only be done when he has given damaging testimony.—People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

[i] (Cal. 1894) A party whose witness testifies contrary to the way he has been led to believe he would do cannot prove that the witness had made prior statements to the contrary.—In re Kennedy's Estate, 104 Cal. 429, 38 Pac. 93.

[ii] (Ga. 1891) In a criminal prosecution the state cannot impeach its own witness by evidence of previous declarations by him at variance with his testimony, unless it has been deceived or entrapped by the witness.—Dixon v. State, 86 Ga. 754, 13 S. E. 87.

[j] (Ill. 1891) Although the rule is generally that a party may not discredit his own witness, there is an exception where the witness does not testify as he did on the preparatory examination, and his testimony is unfavorable.—National Syrup Co. v. Carlson, 42 Ill. App. 178.

[jj] (Ind. 1870) Code, § 244, authorizing proof of contradictory statements of a person's own witness if denied by the witness, does not apply to criminal cases.—Howard v. State, 32 Ind. 478.

[k] (Ind. 1889) Under Rev. St. 1881, § 507, allowing the party producing a witness to contradict him by showing that he had made

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statements different from his testimony, the state may show that a witness, who was called by the state, and testified that defendant did not strike the fatal blow, had stated that he did strike it.—Conway v. State, 118 Ind. 482, 21 N. E. 285.

[kk] (Ind. 1890) Rev. St. § 507, permits a party to impeach or contradict his own witness only when the testimony is a surprise, and is prejudicial; and where, in a suit for charging plaintiff with unchaste conduct, a witness produced by the defense was asked by defendant's attorney, if he ever had sexual intercourse with plaintiff, and answered that he had not, it was proper to exclude evidence of his declarations to the contrary.—Miller v. Cook, 124 Ind. 101, 24 N. E. 577.

[l] (Ky. 1859) Where a witness does not state any fact prejudicial to the party calling him, but only fails to prove facts supposed to be beneficial to the party, it is not a case within the reason or policy of the rule which allows the witness to be contradicted by evidence that he had previously stated the same facts to others.—Champ v. Commonwealth, 59 Ky. (2 Metc.) 17, 74 Am. Dec. 388.

[ll] (Ky. 1859) Where a party introduces a witness to prove certain facts, but the witness deposes that they did not transpire, he cannot, by way of discrediting the witness, prove by others that the witness had, on another occasion, in their presence, stated the facts in question, in effect to show that his witness had stated out of court facts which he failed to prove in court.—Champ v. Commonwealth, 59 Ky. (2 Metc.) 17, 74 Am. Dec. 388.

[m] (Ky. 1859) The right of a party to contradict his own witness by showing that he has made statements different from his present testimony does not depend on the ability of the party to prove in addition that the testimony of the witness is untrue.—Champ v. Commonwealth, 59 Ky. (2 Metc.) 17, 74 Am. Dec. 388.

[mm] (Ky. 1876) The rule against contradicting one's own witness does not forbid proving that he has made statements to other persons, out of court, inconsistent with his testimony.—Blackburn v. Commonwealth, 75 Ky. (12 Bush) 181.

[n] (La. 1855) A party cannot discredit his own witness without giving him an opportunity to explain anything which he may have stated inconsistent with his testimony.—McDowell v. General Mut. Ins. Co., 10 La. Ann. 16.

[nn] (La. 1895) The fact that a witness for the state stated an important fact on cross-examination on a second trial which he failed to state as witness on the former trial could not be used to impeach his testimony directly by the state.—State v. Vickers, 47 La. Ann. 1574, 18 South. 639.

[o] (Mass. 1852) A party may impeach his own witness by showing that he has made statements different from his present testimony.—Gould v. Norfolk Lead Co., 63 Mass. (9 Cush.) 338, 57 Am. Dec. 50.

[oo] (Mass. 1877) Although a party is not taken by surprise at the testimony of a witness called by him, he is entitled, under St. 1869, c. 425, to impeach such witness' credibility by showing he has, at other times, made statements inconsistent with his testimony.—Brooks v. Weeks, 121 Mass. 433.

[p] (Mass. 1882) A party to a suit may contradict his own witness on matter material to the issue, by showing inconsistent statements made at other times, having first called the witness' attention to such contradictory statements.—Commonwealth v. Donahoe, 133 Mass. 407.

[pp] (Minn. 1893) A party who has called a witness in his own behalf, and is surprised by his adverse testimony, may, in the discretion of the court, be allowed to show, after proper preliminary proof, that he had previously made statements contrary to his testimony.—Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 40 Am. St. Rep. 349, 21 L. R. A. 418.

[q] (Miss. 1893) The fact that a witness called by the state on a murder trial testifies that he has no knowledge of the murder does not justify the state in attempting to discredit him by showing previous contradictory statements, as in cases where surprise is asserted, or the testimony is material and adverse to the party calling.—Chism v. State, 70 Miss. 742, 12 South. 852.

[qq] (Mo. 1896) One cannot, on the ground of surprise, discredit his own witness by proof of contradictory statements previously made by him, where he has not shown that his witness ever told him she would testify she made the statements he desired to prove she had made, or that she ever, in fact, made the statements.—State v. Burks, 132 Mo. 363, 34 S. W. 48.

[r] (N. H. 1848) A tenant offered a deposition and the demandant offered another deposition of the same witness for the purpose of contradicting him. The questions were whether he had had a conversation with certain persons and made certain remarks which were specified. It was contended that the demandant, having taken the deposition, thereby made the witness his own witness and could not put such questions to him. *Held*, that the testimony stood as if the witness had been cross-examined on the stand, as the purpose was to detract by the further examination and by his own answers from the weight to which his original deposition would otherwise have been entitled.—Flanders v. Davis, 19 N. H. 139.

[rr] (N. H. 1873) Where, in an action, plaintiff called the son of defendant as a witness to prove a material fact, and such witness was hostile to the plaintiff and friendly to the defendant, plaintiff could show that the son had previously stated the facts in a different manner.—Smith v. Lucas, 53 N. H. 568.

[s] (Ohio, 1889) Where a witness denies having made statements out of court contrary to his testimony, or his answer is ambiguous concerning them, it is not competent for the party calling him to prove them by other witnesses.—Hurley v. State, 46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161.

[ss] (Pa. 1810) Where a witness testifies against a party for whom he is called, it may be shown that he is mistaken, or has testified differently before.—Delisle v. Priestman, 1 Browne, 176.

[t] (Pa. 1839) Defendant, having called plaintiff's son as a witness, was not entitled to contradict his testimony by introducing evidence of his testimony before arbitrators ostensibly to discredit him, but in truth to operate as independent evidence.—Smith v. Price, 8 Watts, 447.

[tt] (Pa. 1868) On trial of an indictment for seduction, a witness called for the commonwealth destroyed its case by swearing that the character of the prosecutrix for chastity was not good. *Held*, that it was competent for the commonwealth to prove by another that the first witness had declared he knew sufficient to convict the defendant.—Commonwealth v. Lamberton, 2 Brewst. 565.

[u] (Pa. 1869) In a criminal prosecution, where the state calls a witness who proves to be hostile, the prosecution may prove what he said on a former occasion, not as evidence of the facts sought to be proven, but to show that he has made conflicting statements, and

thus affect his credibility.—Commonwealth v. Marrow, 3 Brewst. 402.

[uu] (Pa. 1869) Where a witness for the commonwealth unexpectedly testified favorably to defendant, evidence of his testimony on defendant's examination before the mayor is admissible to affect his credit with the jury, though not proof of the facts stated therein.—Commonwealth v. Marra, 8 Phila. 440.

[v] (R. I. 1885) A party cannot be permitted to impeach his own witness by proof by other witnesses of prior contradictory statements, unless the witness is one whom the law obliges him to call.—Hildreth v. Aldrich, 15 R. I. 163, 1 Atl. 249.

[vv] (S. C. 1851) The defendant examined a witness to prove a fact which he failed to do. *Held*, that he could not give in evidence a letter of the witness, either to prove the fact or discredit the witness.—Bank of Kentucky v. Shier, 4 Rich. Law, 233.

[w] (S. C. 1876) The state cannot impeach its own witness by proving that he has made declarations out of court conflicting with those made on the examination.—State v. Jackson, 7 S. C. (7 Rich.) 283, 24 Am. Rep. 476.

[ww] (Tex. 1890) Under Code Cr. Proc. art. 755, allowing any party, when facts stated by his own witness are injurious to his cause, to attack his testimony in any manner except by proving his bad character, the state, in a prosecution for murder, may, where a witness introduced by it testifies that he heard deceased make threats against defendant, prove by other witnesses that he made contradictory statements as to such threats.—Self v. State, 28 Tex. App. 398, 13 S. W. 602.

[x] (Tex. 1890) Where witnesses, introduced by the state, testify to facts injurious to the prosecution, their testimony may be impeached by showing that they had made statements in contradiction thereof.—Thompson v. State, 29 Tex. App. 208, 15 S. W. 206.

[xx] (Tex. 1891) Where witness in a criminal case, at prior hearings, made contradictory statements, it is not competent for defendant, having called such witness, to impeach him.—Scott v. State (Cr. App.) 20 S. W. 549.

[y] (Tex. 1891) On a trial for murder, where a witness testified that defendant, within a few minutes after the homicide, made a statement to him as to the manner of the killing, in which he claimed it to have been accidental, it was proper for the state to show that such witness stated to the district attorney on the morning of the trial that the statement made by defendant was on the day following the homicide, though the state had made such witness its own.—Davis v. State (Cr. App.) 21 S. W. 369.

[yy] (Tex. 1894) On a trial of a person for knowingly permitting his house to be used as a disorderly house, the state cannot impeach one of its own witnesses, who testified that he did not inform defendant of the character of the inmates, by showing that he had made contradictory statements out of court.—Erwin v. State, 32 Tex. Cr. R. 519, 24 S. W. 904.

[z] (Vt. 1890) Where the court holds that a "witness' testimony" is adverse, "within the meaning of the statute relating to the impeachment of adverse witnesses," and permits the party offering such witness to show contrary statements made at other times, it is fair to presume that the court regarded the witness himself adverse, and not his testimony merely.—Hurlburt v. Hurlburt's Estate, 63 Vt. 667, 22 Atl. 850.

[zz] (Wis. 1892) In trover against officers for the seizure of plaintiff's property on execution against a third person, adverse evidence given by the execution debtor as a witness for defendants cannot be impeached by evidence on their part of prior statements made by him at variance therewith, and tending to show fraud in plaintiff's title, since a party cannot impeach his own witness.—Welcome v. Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913.

§ 1215. Party called as witness by adversary.

Right to impeach, in general, see ante, § 1097.

[a] (Ala. 1874) Where a party takes the deposition of his adversary as a witness and reads it in evidence on the trial, he may adduce other evidence of the facts to which such witness has testified, although it may contradict his testimony.—Warren v. Gabriel, 51 Ala. 235.

[b] (Cal. 1895) On an issue between a grantee and a creditor of the grantor as to whether the deed was given as security, where the creditor called the grantor, who testified that the sale was absolute, it was error to allow another witness for the creditor to testify that the grantor told him he conveyed the land as security.—Hyde v. Buckner, 108 Cal. 522, 41 Pac. 416.

[c] (Ind. 1891) In a suit to set aside conveyances by defendant to his son and daughter as fraudulent, it appeared that defendant had been prosecuted criminally for libel by the plaintiff. Defendant, testifying for plaintiff, being asked if he had not stated to a certain person about the time the conveyances were made that he knew a civil suit was to be brought, and for that reason he had not pleaded guilty, replied that he had had no such conversation. *Held*, that it was within the discretion of the court, under Rev. St. 1881, § 507, allowing the contradiction of a witness by the party introducing him on the ground of surprise, to admit evidence of the person impeaching defendant by showing that he had made the statements.—Miller v. Cook, 127 Ind. 339, 26 N. E. 1072.

[d] (Iowa, 1893) A party is not precluded from proving material statements made by the opposite party at other times by calling him as a witness, nor because such party is present in court.—Thomas v. McDaneld, 88 Iowa, 374, 55 N. W. 499.

[e] (Kan. 1896) The fact that a party to an action in which the bona fides of a transaction is in question uses his adversary as a witness does not preclude him from showing that the adversary had made statements contradictory of his testimony as original evidence of his admissions.—Griffis v. Whitson, 3 Kan. App. 437, 43 Pac. 813.

[f] (Mich. 1871) Where the plaintiff has called the defendant as a witness to prove his signature to the instrument sued on, and the defendant has testified that the signature resembles his handwriting, but that he could not swear it was his, and when asked if he remembered what he testified to at a former trial replied that he testified the same as on the present trial, it was competent for the plaintiff to prove by another witness what the defendant testified to on such former trial, over objection that it tended to contradict or impeach the defendant whom the plaintiff had made his own witness.—Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675.

[g] (N. Y. 1856) Where a defendant calls the adverse party as a witness, and thereby represents him as worthy of credit, he is precluded from denying it by introducing evidence for the purpose of impeaching him by showing that he had made previous contradictory statements.—Pickard v. Collins, 23 Barb. 444.

[h] (N. Y. 1881) In an action against the former members of a firm which had been dissolved, one of the defendants, who had not appeared in the action, was called as a witness

for plaintiff, and was subsequently called and examined as a witness for the defendant, who appeared and answered. *Held*, that it was not competent for plaintiff to prove, by way of impeachment, declarations of the witness, made after the dissolution of the firm, in conflict with his testimony as a witness for the defense.—Nichols v. White, 85 N. Y. 531.

[l] (N. Y. 1894) Under Code Civ. Proc. § 838, providing that the testimony of a party, taken at the instance of the adverse party orally or by deposition, may be rebutted by other evidence, plaintiff, after taking defendant's deposition, may show statements by defendant contradictory to the statements in the deposition.—Kelly v. Jay, 79 Hun, 535, 29 N. Y. Supp. 933.

[j] (Vt. 1891) Where, in an action against the owner and the tenant of a farm for labor performed thereon, plaintiff claims that he was hired by the tenant as agent for the owner, and the tenant, called by plaintiff as a witness, denies that he was agent, plaintiff cannot show that the tenant made former contrary statements, under Rev. Laws, § 1009, which provides that a party to a civil action may compel an adverse party to testify in his behalf, "in the same manner, and subject to the same rules, as other witnesses."—Good v. Knox, 64 Vt. 97, 23 Atl. 520.

§ 1216. Witness whom party is compelled to call.

Right to impeach in general, see ante, § 1095.

[a] (Pa. 1820) A party compelled to call the attesting witness to a bond as a witness may impeach his testimony that the bond was a printed blank when he and the obligors signed it by proof of declarations to the contrary.—Sigfried v. Levan, 6 Serg. & R. 308, 9 Am. Dec. 427.

[b] (Tenn. 1869) As under the law a proponent of a will is compelled to put a subscribing witness on the stand, he is entitled to impeach the witness, if he denies the execution, by showing contradictory statements.—Alexander v. Beadle, 47 Tenn. (7 Cold.) 126.

§ 1217. Cross-examination as to matter not subject of direct examination.

Conclusiveness of answers, see post, § 1244.
Right to impeach, in general, see ante, § 1098.

[a] (Me. 1851) Where a party calls the subscribing witness to prove the execution of an instrument, who is cross-examined, he is not precluded from proving by other persons that such witness had elsewhere made statements at variance from his testimony given on such cross-examination.—Shorey v. Hussey, 32 Me. 579.

[b] (N. Y. 1891) Where a party on cross-examination interrogates a witness as to matter concerning which the witness did not testify in chief, such party makes the testimony so elicited part of his own case, and cannot afterwards show that the witness had made statements in conflict therewith.—Hill v. Froehlick, 60 Hun, 580, 14 N. Y. Supp. 610.

[c] (Vt. 1867) The proponent of a contested will produced the three subscribing witnesses, and examined two, but declined to examine the third. On the order of the court, however, he examined the witness, but only as to the formality of the execution of the will. On cross-examination, the witness stated that the decedent was of unsound mind at the time of the execution of the will. *Held*, that he could be impeached by proving that his previous declarations were to the effect that the decedent was of sound mind at the time in question.—Thornton's Ex'rs v. Thornton's Heirs, 39 Vt. 122.

§ 1218. Witness for both parties.

Right to impeach, in general, see ante, § 1100.

[a] (Colo. 1874) The party calling a witness cannot afterwards assail his general character for truth or the testimony drawn from the witness by him. But the rule does not extend to testimony drawn from the same witness by the opposite party, and where the government first called a witness and afterwards the same witness was called on another point by the prisoner, the government was permitted to ask whether, in relation to the matters drawn from him by the prisoner, he had not given a different account of the matter at another time and place.—Jones v. People, 2 Colo. 351.

[b] (N. H. 1870) Where a witness for plaintiff, on being subsequently recalled by defendant, gave testimony unfavorable to plaintiff, the plaintiff, on submitting evidence tending to show that he was surprised and that there was no collusion or bad faith on his part, was then entitled to prove that the witness had previously made oath before the plaintiff's counsel to statements contradictory to his testimony.—Hurlburt v. Bellows, 50 N. H. 105.

[c] (N. Y. 1874) A party cannot impeach his own witness, though subsequently called as a witness for the adverse party, by proof of contradictory statements out of court.—Coulter v. American Merchants' Union Exp. Co., 56 N. Y. 585.

[d] (Vt. 1853) In a suit against an officer for not collecting and returning an execution, one defense was that the town agent had agreed to control the execution. The agent was not offered by the plaintiffs to prove that he did not control the execution, but upon that point the agent was made a witness by the defendant. *Held* that, the defendant having made the agent his own witness upon this point, it would not be competent for him to offer testimony to prove that the agent had made declarations out of court inconsistent with his testimony upon this point.—Town of Barnard v. Henry, 25 Vt. 289.

[e] (Wis. 1892) A witness for the prosecution was afterwards made a witness for defendant, and interrogated in relation to a matter foreign to his testimony for the prosecution. His answer not being satisfactory, other testimony was offered to show that witness had made different statements out of court concerning the same matter, which was excluded. *Held*, the exclusion was proper.—Richards v. State, 82 Wis. 172, 51 N. W. 652.

§ 1219. Examination.

Refreshing memory by inquiry as to former statements, see ante, § 870.
—— *testimony, see* ante, §§ 885, 886.

[a] (Ala. 1853) A party may ask his own witness if he has not previously made statements inconsistent with what he has just stated on the trial.—Campbell v. State, 23 Ala. 44.

[b] (Ala. 1874) A party may ask his own witness whether on a former occasion he has not made statements inconsistent with his testimony on the trial.—Hemingway v. Garth, 51 Ala. 530.

[c] (Ala. 1886) A party, for the purpose of laying the foundation for impeachment of his own witness, cannot ask him if he has not made previous contradictory statements.—Gandy v. State, 81 Ala. 68, 1 South. 35.

[d] (Ala. 1888) A party may ask his witness if he has not made statements inconsistent with his testimony, provided the question is not for the sole purpose of impeachment.—White v. State, 87 Ala. 24, 5 South. 829.

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[e] (Ala. 1891) On indictment for murder, a state's witness, who, in answer to a question by the state's attorney, answers that defendant did not threaten to commit the crime, may be asked if she did not, before the examination, make a different statement to the attorney.—Griffith v. State, 90 Ala. 583, 8 South. 812.

[f] (Colo. 1889) Where, in a murder trial, a witness for the state testifies that just before the homicide deceased had put his hand in his hip pocket, and that when deceased was found immediately after the shooting, he still had his hand in such pocket, the prosecuting attorney may ask if he so testified at the coroner's inquest, over objection that he should not be allowed to impeach or cross-examine his own witness.—Babcock v. People, 13 Colo. 515, 22 Pac. 817.

[g] (D. C. 1894) The extent to which a party, calling a witness who deceives or disappoints him, should have the right to examine him as to former contradictory statements, is largely in the trial judge's discretion, subject only to review for manifest error.—Weaver v. Baltimore & O. R. Co., 22 Wash. Law Rep. 393.

[h] (D. C. 1894) Where a witness testifies contrary to expectation it is not error to refuse to allow him to be asked whether he did not testify differently on a former trial.—Weaver v. Baltimore & O. R. Co., 3 App. D. C. 436.

[i] (Iowa, 1879) On indictment for murder, a witness for the state testified that on the morning of deceased's disappearance defendant (his father) told deceased that he must go to M. with him, to hear what he (deceased) had said to saloonkeepers there about defendant getting drink from them, and that at the time there was no difficulty between defendant and deceased. The state then asked the witness if defendant had not told deceased that he (deceased) had been to M. and forbidden saloon keepers to give defendant liquor, and that he (defendant) would see who was boss. *Held*, that the question was not objectionable as an attempt by the state to impeach its own witness.—State v. Feltes, 51 Iowa, 495, 1 N. W. 755.

[j] (Iowa, 1881) Plaintiff's attorney cannot cross-examine his own witness by asking if the witness did not relate the matter differently to him before the trial.—Darland v. Rosencrans, 56 Iowa, 122, 8 N. W. 776.

[k] (Iowa, 1886) Where a party is surprised by the testimony of his own witness, he may ask him if he did not previously make a different statement to a person named, at a specified time and place, in order to aid the witness to recollect the truth.—Humble v. Shoemaker, 70 Iowa, 223, 30 N. W. 492.

[l] (Iowa, 1888) A party may, on direct examination, to refresh the recollection of his witness, inquire if he has not at another time testified to facts inconsistent with his present testimony.—State v. Cummins, 76 Iowa, 133, 40 N. W. 124.

[m] (Kan. 1893) One is not conclusively bound by the statements which his own witness may make; and, if he has been deceived by an artful or hostile witness, he may examine such witness as to whether he had not previously made contrary statements, and may, in the discretion of the court, be permitted to show what such contrary statements were.—State v. Sortor, 52 Kan. 531, 34 Pac. 1036.

[n] (Mass. 1855) A witness who has testified in chief that he does not know certain facts, not bearing upon any question pertinent to the issue, cannot, although he shows a disposition to conceal what he knows, be asked by the party calling him whether he did not, on a former occasion, swear to his knowledge of those facts.—Commonwealth v. Welsh, 70 Mass. (4 Gray) 535.

[o] (Minn. 1890) Where, on an indictment for forgery, the state attempts to prove the crime by the person whose name was forged, and he appears to be hostile and unwilling to tell the truth, he may be asked whether he had not before stated facts to the prosecuting attorney which were contrary to his testimony at the trial.—State v. Tall, 43 Minn. 273, 45 N. W. 449.

[p] (Miss. 1881) A plaintiff who calls witnesses who testify that they were not present when he was injured cannot, to impeach their credibility, ask them if they have stated otherwise.—Moore v. Chicago, St. L. & N. O. R. Co., 59 Miss. 243.

[q] (N. Y. 1847) It is not competent for a party to discredit a witness, called and examined by him, by asking him whether he had not made statements upon another occasion contradictory to the testimony which he had given.—People v. Safford, 5 Denio, 112.

[r] (N. Y. 1859) It is not competent for a party calling a witness to ask him whether he had not previously made a certain statement on oath before the coroner's inquest, the alleged statement being repeated in the question, and differing from the testimony of the witness on the trial.—People v. Sanchez, 18 How. Prac. 72; Sanchez v. People, 4 Parker, Cr. R. 535.

[rr] (N. Y. 1860) The prisoner called his wife as a witness. After she had answered certain questions he proposed to ask her if she had not testified directly the opposite before the coroner, but he was not allowed thus to discredit his own witness.—Sanchez v. People, 22 N. Y. 147.

[s] (N. Y. 1887) Where the testimony of a witness called by plaintiff took her by surprise, it was proper to allow her to probe the witness' recollection by questions as to former statements.—Wright v. Grant, 6 N. Y. St. Rep. 862.

[ss] (N. Y. 1889) In an action by a servant against his master for damages caused by a falling elevator, witness for defendant having testified that he "could not say how a piece of board was torn off," was asked by defendant's counsel, "Did you not testify on the last trial that the wagon [of the elevator] jumped against the gate, and cut off the gate?" *Held*, that it was within the discretion of the court to exclude the question as an attempt by defendant to impeach his own witness.—Kern v. De Castro & Donner Sugar Refining Co. (City Ct. Brook.) 5 N. Y. Supp. 548, judgment reversed (1890) 125 N. Y. 50, 25 N. E. 1071.

[t] (N. Y. 1889) Where a witness testifies as to a former statement, "I might have sworn to it," the party calling him cannot ask, "If you did so swear, was it true?" as the effect of such question is to discredit his own witness.—Morris v. Wells, 54 Hun, 634, 7 N. Y. Supp. 61.

[tt] (N. Y. 1891) Where a witness for the prosecution who testified before the grand jury manifests on the trial a disposition to favor the defendant, the prosecution may not call his attention to his testimony before the grand jury for the purpose of impeaching him.—People v. Sherman, 61 Hun, 623, 16 N. Y. Supp. 782, judgment affirmed (1892) 133 N. Y. 349, 31 N. E. 107.

[u] (N. Y. 1892) Where a witness for the prosecution, who, when before the grand jury, gave important evidence against defendant, testifies differently on the trial of the indictment found, and it is shown that since testifying before the grand jury he has talked with defendant in regard to his testimony, the prosecuting attorney may call his attention to his testimony before the grand jury, for the purpose of refreshing his memory, though not for the purpose of impeaching him.—People v. Sherman,

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133 N. Y. 349, 31 N. E. 107, affirming (1891) 61 Hun, 623, 16 N. Y. Supp. 782.

[uu] (N. C. 1823) A witness cannot be asked if he has not, in conversation, stated the facts otherwise than as he now deposes.—State v. Simpson, 9 N. C. 580.

[v] (N. D. 1895) Where a witness disproved the case of the party who called him, to that party's surprise, he may be asked whether he did not make a statement to such party conflicting with his testimony, and which, if proved, would tend to prove such party's case.—George v. Triplett, 5 N. D. 50, 63 N. W. 891.

[vv] (Or. 1890) Civ. Code, § 883, which authorizes the party producing a witness to contradict him by other evidence, and to show that the witness has made at other times statements inconsistent with his present testimony, does not entitle the party producing the witness to inquire of him as to his having made statements at other times which are not connected with his present testimony, nor to inquire about his having made statements at other times regarding matters upon which he is examined, but concerning which he denies any knowledge, except for the purpose of refreshing the witness' recollection as to such matters.—Langford v. Jones, 18 Or. 307, 22 Pac. 1064.

[w] (Pa. 1862) Where a list of items was taken out by counsel from the testimony of a witness on the trial of the same case before arbitrators, and the witness, being called by defendant, stated that at the arbitration he gave a particular account of the items of loss, it was not error to refuse to permit the defendant to ask witness whether the list then shown to him as taken down at the arbitration was a correct statement, in order to discredit the witness.—Franklin Fire Ins. Co. v. Updegraff, 43 Pa. (7 Wright) 350.

[ww] (Pa. 1892) Where the evidence of a witness is a surprise to the party calling him, the trial judge, in the exercise of a sound discretion, may permit him to be cross-examined by such party to show that his previous statements and conduct were at variance with his testimony.—McNerney v. City of Reading, 150 Pa. 611, 25 Atl. 57, 30 Wkly. Notes Cas. 534.

[x] (R. I. 1885) Where a party who is disappointed in his witness asks him if he has not made contradictory statements, for the purpose of refreshing his recollection, and his recollection is not refreshed, the contradictory statements cannot be proved by other witnesses.—Hildreth v. Aldrich, 15 R. I. 163, 1 Atl. 249.

[xx] (Tex. 1881) A party may impeach his own witness in any manner except by proving his bad character; and if, upon a former trial, he has made statements contrary to those made on the pending trial, he may be interrogated concerning them.—White v. State, 10 Tex. App. 381.

[y] (Tex. 1893) In an action on an account against S. and others, alleged to be members of the firm of H. & Co., it is error to refuse to allow plaintiff to ask H., an admitted partner, who had testified denying that S. was a partner, whether a previous written statement made by him, naming S. as a partner, was true or false, even though the witness was called by plaintiff.—Newberger v. Heintze, 3 Tex. Civ. App. 259, 22 S. W. 867.

[yy] (Wis. 1891) When a witness for the state was asked if he had seen defendant on the day and near the place where the crime was committed, which he denied, it was within the discretion of the court to allow the state's attorney to ask if he had not so stated to others, and to put leading questions on the subject.—Schuster v. State, 80 Wis. 107, 49 N. W. 30.

[z] (Wyo. 1895) The fact that answers to questions addressed to a hostile witness as to previous statements made by him for the purpose of making him conform his testimony to his former statements, or to show grounds for calling him as a witness, tend to impeach his credibility as a witness, will not render such answers incompetent.—Arnold v. State, 5 Wyo. 439, 40 Pac. 967.

[zz] (Wyo. 1895) It is within the discretion of the court to allow the prosecution, on being surprised by adverse testimony from one of its witnesses, to proceed to examine such witness as to previous statements, to induce him to make his testimony consistent with them, and to show the reason the prosecution had for calling him.—Arnold v. State, 5 Wyo. 439, 40 Pac. 967.

3. NATURE OF STATEMENTS OR TESTIMONY, AND EXTENT OF INCONSISTENCY.

NATURE AND RELEVANCY OF STATEMENT, ADMISSION, OR DECLARATION IN GENERAL, § 1220.
— TIME OF MAKING STATEMENTS AND CIRCUMSTANCES CONNECTED THEREWITH, § 1221.
— STATEMENTS BY THIRD PERSONS IN PRESENCE OF WITNESS, § 1222.
TESTIMONY SUBJECT TO IMPEACHMENT IN GENERAL, § 1223.
IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS, § 1224.
OPINIONS, § 1225.
NECESSITY, NATURE, AND EXTENT OF INCONSISTENCY, § 1226.
PROOF OF OMISSIONS IN FORMER TESTIMONY, § 1227.

§ 1220. Nature and relevancy of statement, admission, or declaration in general.

[a] (U. S. 1802) The declarations of a witness not under oath may be given in evidence to discredit his testimony.—Harper v. Reily, Fed. Cas. No. 6,091 [1 Cranch, C. C. 100].

[b] (Ill. 1872) The credibility of a witness may be affected by contradictory testimony without showing that his statements are intentionally false or material to the issue. Proof that he has, on former occasions, made statements at variance with his testimony on the trial, has a direct tendency to impeach his veracity or his memory.—Craig v. Rohrer, 63 Ill. 325.

[c] (Iowa, 1887) Defendant, who was unable to read English, set up as a defense in an action for the purchase price of a machine, that he signed the contract relying on the representations of plaintiff's agent as to its contents, and those representations were false and fraudulent. The testimony which made most strongly for plaintiff was that of the agent. Defendant offered to show that, when the agent had ridden about a mile from where the order was given, he was asked by a companion why he had not read the order to defendant, and that he replied: "B—, I got the old man fast. If he had known just everything in that order, I don't believe I could have got him to sign it." *Held*, that the evidence, though not a part of the res gestæ, was admissible in impeachment of the agent as a witness.—Esterly v. Eppelsheimer, 73 Iowa, 260, 34 N. W. 846.

[d] (Ky. 1889) Where an agent of a carrier charged with conversion of goods testified that he had delivered them, it was competent to give evidence of a conversation between the agent and the plaintiff, in which the former had admitted that he had failed to deliver the goods, by way of contradiction.—Louisville & N. R. Co. v. Lawson, 88 Ky. 496, 11 S. W. 511.

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evidence is admissible for defendant that he had made declarations inconsistent with his testimony, though such declarations were made after the representations and sale of stock to plaintiff.—Masterton v. Boyce, 53 Hun, 630, 6 N. Y. Supp. 65.

[j] (N. Y. 1894) A statement made by a witness out of court, inconsistent with his testimony, is admissible to contradict him, though it may not be admissible as a declaration against the interest of the party who called the witness, because it was not made in the presence of such party.—Frankel v. Wolf (Com. Pl.) 7 Misc. Rep. 190, 27 N. Y. Supp. 328.

[k] (N. C. 1884) The confession or declaration of a witness made before the trial of another for a crime may be used to contradict the testimony given by such witness on the trial. If it was made under improper influences, this goes, not to its competency, but to its credibility.—State v. Mills, 91 N. C. 581.

[l] (Pa. 1894) For the purpose of impeaching a witness, acts and declarations of his, inconsistent with his testimony that land standing in his name was the property of his wife, are admissible, though they were not in the presence of his wife.—Miller v. Baker, 160 Pa. 172, 28 Atl. 648, 34 Wkly. Notes Cas. 249.

[m] (Pa. 1895) In an action against a firm for goods sold, where the only defendant who answered set up that the goods were sold to his partner, who contributed them to the firm, as her share of the assets, and her husband, who managed the firm's business, testified that the goods were sold to the firm, and not to his wife, it was error to exclude evidence that in a statement of the firm's assets made by the husband the goods were entered as a contribution by the wife to the firm's assets, and that the husband had represented that they were so contributed, as such evidence was admissible on the question of the husband's credibility, though the statements were made in plaintiff's absence.—Frack v. Gerber, 167 Pa. 316, 31 Atl. 640, 36 Wkly. Notes Cas. 230.

[n] (Tex.) In a proceeding to contest a conveyance as fraudulent, the purchaser having used the vendor as a witness to prove good faith, declarations of the witness subsequent to the conveyance were *held* admissible to contradict him.—(1860) Garahy v. Bayley, 25 Tex. Supp. 294; (1887) Weiss v. Oliver (Sup.) 7 S. W. 47.

[o] (Tex. 1881) That previous statements of a witness were made at a time when he was under arrest *held* no ground for a refusal to admit evidence of them for the purpose of impeaching his testimony.—Reyes v. State, 10 Tex. App. 1.

[p] (Tex. 1889) On a trial for murder, evidence of confessions made by a witness for defendant while she was under arrest, charged with complicity in the same crime, is admissible to impeach her, though the evidence is such as, by statute, would not be admissible on trial of the witness, who has been previously acquitted, and though as to defendant such confessions were hearsay.—Hawkins v. State, 27 Tex. App. 273, 11 S. W. 409.

[q] (Tex. 1894) Where a witness testifies on the examining trial, and is cross-examined, and soon becomes insane, his declarations made after giving such testimony are inadmissible on the trial to impeach that testimony then introduced.—Stewart v. State (Cr. App.) 26 S. W. 203.

[r] (Wis. 1888) Where a witness has been questioned in regard to statements contradictory of his testimony, evidence of the statements is admissible to impeach his credibility, though made after the occurrence which is the subject-matter of the suit.—Welch v. Abbott, 72 Wis. 512, 40 N. W. 223.

§ 1222. —— Statements by third persons in presence of witness.

[a] (Kan. 1887) The credit of a witness may be impeached by showing that the statements made in his presence by another, and which were assented to and adopted by him as his own, are contrary to what he has testified at the trial.—State v. McGaffin, 36 Kan. 315, 13 Pac. 560.

[b] (Kan. 1887) On a prosecution for murder, the exclusion of testimony showing that statements made in the presence of a witness, which were assented to and adopted by him as his own, are contrary to what he has testified at the trial, where the conviction rests largely upon the evidence given by the witness sought to be impeached, is material error, for which the judgment should be reversed.—State v. McGaffin, 36 Kan. 315, 13 Pac. 560.

[c] (N. H. 1890) In an action against a town to recover damages for injuries received from a defective highway, where plaintiff's husband testifies that he found a great many loose stones in the highway, defendant may show, by a witness who was present with the husband at the place of the accident soon after it happened, that she (the witness) said to him, "There are no stones in the road," and that he made no reply.—Judd v. Town of Claremont, 66 N. H. 418, 23 Atl. 427.

[d] (N. C. 1853) Where a solicitor for the state on the trial asserts on the authority of a witness, who is present, a matter material to the issue, and afterwards such witness testifies differently, the testimony may be received for the purpose of showing the inconsistency of the statements and thereby discrediting the witness.—State v. McQueen, 46 N. C. 177.

[e] (S. C. 1891) A witness for the prosecution testified, on cross-examination, that he had made about the same statements on a former trial, and was then asked why he had told certain persons that he had been made to swear lies on that trial, and answered that he had not told them any such thing. He was then asked if one of said persons did not say to him that he ought to be put in the penitentiary, and made to break rock the rest of his life. *Held*, that the question was properly excluded, since the answer sought was hearsay, and the issue was collateral.—State v. Wyse, 33 S. C. 582, 12 S. E. 556.

§ 1223. Testimony subject to impeachment in general.

[a] (Ala. 1845) Where a witness denied that in a certain transaction which was drawn in question, he acted as the plaintiff's agent, it was competent to prove, in order to impair the effect of his testimony, that he had made contradictory statements upon other occasions.—Strawbridge v. Spann, 8 Ala. 820.

[b] (Ala. 1888) On a trial for rape, where a witness has testified as to the complaints made to her by prosecutrix, defendant can impeach the witness by showing contradictory statements by her as to such complaints.—Allen v. State, 87 Ala. 107, 6 South. 370.

[c] (Ga. 1892) It was alleged that decedent was killed by defendant's freight agent, while transacting business with him, and that he was incompetent and dangerous because his mind was diseased. *Held*, that the testimony of a witness that he had never felt uneasy in the agent's presence, and that he was surprised to hear of the killing, was a sufficient foundation for evidence in rebuttal that, when he heard of the killing, he said he was not surprised, and that he was always afraid and uneasy about the agent.—Christian v. Columbus & R. Ry. Co., 90 Ga. 124, 15 S. E. 701; Columbus & R. Ry. Co. v. Christian, Id.

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[d] (Ind. 1883) On a trial for selling intoxicating liquor to a minor, the character of the liquor is material, and defendant's testimony may be contradicted by evidence that he testified differently at a previous trial as to its character.—Nuzum v. State, 88 Ind. 599.

[e] (Mass. 1859) A party to a suit testified on cross-examination that "he did not know but that" the reputation for truth and veracity of one of his witnesses was good. *Held*, that this did not authorize the other party to put in evidence affidavits and depositions taken by this plaintiff in a former action against this witness, containing testimony that the reputation of the witness in this respect was bad.—Grant v. Lewis, 80 Mass. (14 Gray) 189.

[f] (Mass. 1863) In an action to recover the price of goods sold by an agent, in which one ground of defense is that the goods were sold with an express agreement, assented to by the principal, that the purchaser should only be responsible to the agent, with whom a settlement for them has been made, if the agent in his testimony has denied that such a settlement has been made, he may be contradicted by showing that in letters written by him he has made different statements.—Hamilton Woolen Co. v. Goodrich, 88 Mass. (6 Allen) 191.

[g] (Mass. 1875) In an action for libel in publishing a statement that plaintiff's husband had heard from intercepted letters that plaintiff had planned to elope with a certain man, in which defendant sets up the truth of the publication in defense, plaintiff's husband, who testifies on cross-examination that he never intercepted any such letters or letter, and never told any one that he had done so, may be contradicted or impeached by testimony of other witnesses that he had told them substantially that he had taken such a letter from the post office, and opened and read it, stating the contents thereof to the witness, as the question whether the husband had intercepted the letters was material.—Woodard v. Eastman, 118 Mass. 403.

[h] (Mass. 1876) Where all the testimony of a witness, having any bearing upon the case, is stricken out because given under a misapprehension of his privilege, the party calling him cannot, under St. 1869, c. 425, afterwards put in evidence his declarations or admissions to contradict him.—Mayo v. Mayo, 119 Mass. 290.

[i] (Minn. 1868) In a controversy involving the bona fides of a transfer of goods, the testimony of witnesses as to the amount and nature of the alleged consideration thereof is material to the issue, and may be impeached by contradictory statements made by the witnesses out of court on those points.—Hicks v. Stone, 13 Minn. 434 (Gil. 398).

[j] (Neb. 1895) In an action for breach of marriage promise, where defendant's witness, on cross-examination, denied having said that plaintiff admitted to witness that she had led an immoral life, it was proper to permit plaintiff's witness to testify that defendant's witness had told him that plaintiff made such confession, as the alleged confession was not a collateral issue in the case.—Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

[k] (N. H. 1890) In an action against a town to recover damages for injuries received from a defective highway, where a witness, who was the first to discover plaintiff after the accident, testifies when and how he found her, defendant may prove statements made by such witness a few days after the accident, which are inconsistent with his testimony.—Judd v. Town of Claremont, 66 N. H. 418, 23 Atl. 427.

[l] (N. Y. 1887) In an action for slander in charging defendant with having committed the crime of abortion, a witness for defendant having testified that plaintiff had committed abortion on her person, statements by her inconsistent with such testimony might be proven, the evidence given by her not being collateral, but on the main issue.—Calkins v. Colburn, 10 N. Y. St. Rep. 778.

[m] (Tex. 1893) On a trial for murder committed in an attempt to rob a train, where defendant has testified that the conspiracy to rob was formed in a certain part of the country, and not in the penitentiary, the state may impeach him by proving his declarations that it was formed while he and his co-conspirator were confined in the penitentiary.—May v. State, 33 Tex. Cr. R. 74, 24 S. W. 910.

[n] (Tex. 1895) On a trial for assault, evidence that the prosecutor promised not to prosecute if paid a certain sum was admissible, the prosecutor having first denied making such offer.—Richards v. State, 34 Tex. Cr. R. 277, 30 S. W. 229.

[o] (Tex. 1896) Where a witness for the state testifies that he suggested a certain thing which it is for the interest of the state to show was suggested by another, it may impeach him by showing that he stated to others that it was suggested by such other person.—Kirk v. State, 35 Tex. Cr. R. 224, 32 S. W. 1045.

§ 1224. Irrelevant, collateral, or immaterial matters.

Scope of cross-examination for purpose of laying foundation for showing inconsistent statements, see post, § 1237.

[a] To impeach a witness by showing that he has made contradictory statements, the statements must be material to the issue.

—(Ala. 1882) Callan v. McDaniel, 72 Ala. 96; (1893) Burney v. Torrey, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33;

(Cal. 1881) People v. Furtado, 57 Cal. 345;

(Colo. 1894) Torris v. People, 19 Colo. 438, 36 Pac. 153; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848;

(Ind. 1882) Zonker v. Cowan, 84 Ind. 395;

(Kan. 1894) State v. Ray, 54 Kan. 160, 37 Pac. 996;

(Mich. 1887) McDonald v. McDonald, 67 Mich. 122, 34 N. W. 276;

(Minn. 1868) Hicks v. Stone, 13 Minn. 434 (Gil. 398);

(Mo. 1896) State v. Taylor, 134 Mo. 109, 35 S. W. 92;

(Tex. 1876) Henderson v. State, 1 Tex. App. 432.

[b] (Ala. 1848) Where a witness testifies to facts showing payment of the demand in suit, and other certain demands not in suit, it is not competent to produce one of the claims not in suit, to which he referred as having been paid, upon which was a credit, for the purpose of discrediting the witness.—Hadjo v. Gooden, 13 Ala. 718.

[c] (Ala. 1885) Previous contradictory statements, whether made under oath or not, are inadmissible to impeach a witness, unless they relate to some matters material to the issue on trial.—Steinhardt v. Bell, 80 Ala. 208.

[d] (Ala. 1894) On a criminal trial, a witness for the state cannot be impeached by proving contradictory statements by him out of court as to immaterial matters.—Orr v. State, 107 Ala. 85, 18 South. 142.

[e] (Ga. 1892) Contradictory statements of a witness previously made by him, as to matters not relevant to his testimony and to the case, not being admissible to discredit him, a witness who testifies that he was not present at the homicide, and knew nothing about it until afterwards informed, cannot be discredited by proof of his declarations, made after such information was acquired, and tending to show

that he had apprehended and given warning of such and such consequences if a certain witness was dealt with in a certain manner.—Futch v. State, 90 Ga. 472, 16 S. E. 102.

[f] (Ind. 1820) Where a witness has made statements contradictory to those told in court, and such contradictory statements relate to facts irrelevant and immaterial, the testimony ought not to be admitted to impeach the credit of the witness.—Shields v. Cunningham, 1 Blackf. 86.

[g] (Ind. 1895) The testimony of a witness can be impeached by proving statements made by him out of court, contradictory to his testimony on the stand, only when such testimony relates to a material matter in issue.—Blough v. Parry, 144 Ind. 463, 40 N. E. 70.

[h] (Ky. 1895) On a trial for murder, a witness having testified that he did not see the shooting, it was error to permit persons to testify that the witness told them out of court that he saw the shooting, and showed them the place where it was done.—Saylor v. Commonwealth, 33 S. W. 185.

[i] (Mass. 1861) A certified copy of a complaint from the record of proceedings in a police court is competent for the purpose of contradicting the testimony of the complainant at the trial before the jury in material matters; but it is not competent, if time does not enter into the nature of the offense charged, for the purpose of showing that the time of committing it, as therein alleged, was different from that now testified to by him.—Commonwealth v. Goddard, 84 Mass. (2 Allen) 148.

[j] (Mass. 1877) Under St. 1869, c. 425, allowing the party who produces a witness to prove by other evidence not material for any other purpose that he has made at other times statements inconsistent with his present testimony, the testimony which it is proposed to contradict must have been material to the issue on trial.—Force v. Martin, 122 Mass. 5.

[k] (N. Y. 1862) Where a witness for the defense testifies that she is the wife of a person named, although this testimony is not material, the state may introduce evidence to show that on a former occasion she made an affidavit that she was the wife of a different person, in order to impeach her testimony.—Jefferds v. People, 5 Parker, Cr. R. 522.

[l] (N. Y. 1863) Proof of an admission by the secretary of an insurance company, made the morning after the loss, that the property destroyed was insured at the time of the fire, is not competent as a contradiction of the secretary's testimony, in which he swore there was no insurance at the time of the fire, where it appears that the testimony attempted to be contradicted was immaterial.—Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 153.

[m] (N. Y. 1882) Where a witness testifies that a note sued on has been paid, and, while admitting that subsequently, at plaintiff's request, he computed the interest on that and other notes, states that defendant was not present and denies having told others that he was present, their testimony that he did tell them so is not incompetent as impeaching evidence concerning a collateral matter.—Sitterly v. Gregg, 90 N. Y. 686.

[n] (Tex. 1894) Where a witness is recalled by the opposing side for the purpose of laying a predicate for his impeachment, either the question or answer may be excluded, if collateral or immaterial.—Turner v. State, 33 Tex. Cr. R. 103, 25 S. W. 635.

§ 1225. Opinions.

[a] (Cal. 1891) It is proper to show that a witness, who gives his opinion as to the value of the land, formerly entertained a different opinion.—San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

[b] (Ind. 1851) An opinion expressed by a witness, inconsistent with a fact testified to by him, cannot be given in evidence to impeach his credibility.—Rucker v. Beaty, 3 Ind. 70.

[c] (Ind. 1885) Where a witness expresses an opinion on the witness stand, it is competent to prove that he expressed a different opinion out of court.—Cochran v. Amsden, 104 Ind. 282, 3 N. E. 934.

[d] (Iowa, 1875) On the trial of an indictment for burglary, a witness, who, upon direct examination, has testified only to the fact of discovering defendant in her house in the nighttime, cannot be asked, upon cross-examination, if she had not subsequently stated that she did not "think defendant intended to steal anything."—State v. Maxwell, 42 Iowa, 208.

[e] (Ky. 1889) It is competent to show that an expert who has testified that in his opinion defendant was insane at the time of the murder has made a contrary statement before the trial.—Montgomery v. Commonwealth, 88 Ky. 509, 11 S. W. 475.

[f] (La. 1892) On a trial for homicide, it is error, after a proper foundation has been laid, to exclude evidence offered to impeach a leading witness for the state, who was a brother of deceased, by proof of contradictory statements made by him to the effect that deceased was in fault in the quarrel in which he was killed.—State v. Lewis, 44 La. Ann. 958, 11 South. 572.

[g] (Mass. 1857) The opinion of a servant, as to whether or not his master was to blame in a case of collision, is incompetent, and evidence that the servant had given a different opinion at another time is therefore incompetent to contradict him.—Lane v. Bryant, 75 Mass. (9 Gray) 245, 69 Am. Dec. 282.

[h] (Mass. 1872) A witness having testified to circumstances tending to prove the guilt of the defendant, it is not competent for the defendant to show what opinion the witness may have expressed as to his innocence of the matters for which he is being tried.—Commonwealth v. Mooney, 110 Mass. 99.

[i] (Mass. 1886) Where the defendant was complained of for selling lager beer containing more than 3 per cent. of alcohol, under the statute, it was permissible to ask a hostile witness who drank some of the beer if he did not "think it was lager beer;" and where the witness testified that he could not say, evidence was admissible to show that he had previously testified that he thought it was lager beer, under Pub. St. c. 169, § 22.—Commonwealth v. Moinehan, 140 Mass. 463, 5 N. E. 259.

[j] (Mass. 1887) In an action to obtain possession of real estate taken and sold under special attachment as the property of a debtor, on the ground that a prior conveyance by him was in fraud of creditors, the debtor's son, an occupant of the premises, having testified on cross-examination that the tenant owned the house, and that he was occupying it by her permission, it is not competent for the demandant, for the purpose of contradicting him, to introduce evidence of his former declaration that his father's conveyance was intended to defraud him and his brothers, and to prevent their creditors from being paid; the testimony of the son as to the ownership of the house, being only the opinion of a stranger to the suit, and irrelevant.—Jordan v. McKinney, 144 Mass. 438, 11 N. E. 702.

[k] (Mo. 1880) On a trial for larceny, the prosecution, for the purpose of impeaching defendant's witness, may show that the witness had stated that the property alleged to have been stolen was brought to the defendant's

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house at night, and that witness believed that defendant had stolen it; it appearing that the proper foundation had been laid for such impeaching evidence.—State v. Hughes, 71 Mo. 633.

[l] (Mo. 1894) On a will contest, statements of a witness to the will, who has testified favorably as to the testatrix's mental capacity, to the effect that if all the facts were known the will could be broken, are inadmissible, since, to impeach a witness by contradictory statements made out of court, these must not only relate to the issue, but be statements of fact, and not opinions.—McFadin v. Catron, 120 Mo. 252, 25 S. W. 506.

[m] (N. H. 1862) A witness who testifies to circumstances tending to show that he was discharged as surety by the creditor cannot be contradicted by proof that on another occasion he had expressed the opinion that he was still liable.—City Bank v. Young, 43 N. H. 457.

[n] (N. H. 1863) The evidence of an expert may be contradicted by showing that at another time he had expressed a different opinion.—Sanderson v. Nashua, 44 N. H. 492.

[o] (N. Y. 1854) A witness cannot be contradicted by showing that he has given an opinion out of court, relative to the subject-matter of the suit, inconsistent with the conclusion, which the facts he testifies to will warrant; the rule allowing witnesses to be impeached in this way does not extend to such a case, but the statement must not only relate to the issue, but be a matter of fact, and not merely a former opinion, in order to impeach the witness.—Holmes v. Anderson, 18 Barb. 420.

[p] (N. Y. 1894) An adverse and hostile witness may be impeached by proving statements in contradiction of his testimony, after the requisite examination in regard thereto, and it is immaterial whether they are statements of facts or expressions of opinion.—Dudley v. Satterlee (City Ct. N. Y.) 8 Misc. Rep. 538, 28 N. Y. Supp. 741.

[q] (Tex. 1890) On indictment for murder, a witness for defendant on cross-examination was asked whether he did not know before the crime was committed that defendant was going to kill deceased, and, on his answering in the negative, the state proved by other witnesses that he had made a statement that he did know. *Held*, that the evidence sought to be introduced, being a mere opinion, was inadmissible against defendant, and the question was not competent to lay a foundation for impeachment of the witness.—Drake v. State, 29 Tex. App. 265, 15 S. W. 725.

[r] (Tex. 1892) On a trial for murder, C., a witness called by defendant, was asked on cross-examination if he did not tell P. on the night of the murder that defendant and his brother, finding deceased unarmed, "took the advantage" of him. To this question C., under objection by defendant, answered in the negative, whereupon the state called P., who testified that C. had so said. *Held* that, the question asked C. being incompetent by reason of its seeking an opinion of the witness, the calling of P. to impeach C. was reversible error.—Davis v. State (Cr. App.) 20 S. W. 923.

[s] (Tex. 1895) A witness cannot be impeached by a statement as to what he "reckoned" defendant did at the time of the homicide, as it is a statement merely of his opinion.—Phipps v. State, 34 Tex. Cr. R. 608, 31 S. W. 657.

[t] (Va. 1851) A witness, called to prove the handwriting of a paper offered for probate, may be impeached by proof of what she has said about that paper at another time; but neither her capacity to judge of the handwriting, or her credit, is to be impeached by what she may have said about some other paper.—Nuckols' Adm'r v. Jones, 8 Grat. 267.

§ 1226. Necessity, nature, and extent of inconsistency.

[a] (U. S. 1896) In an action by F. & S. and J. against T., on a contract by T. to exchange, for 5 per cent. bonds of a city, certain securities, held by him, which plaintiffs expected to exchange for 6 per cent. bonds of the city, *held*, that a letter from F. & S. to J., asserting that outside creditors could get only 5 per cent. bonds, that the writers were the only persons to receive 6's, and incorrectly stating their contract with the city, did not discredit the testimony of one member of the firm that they had a contract with the city, allowing them to exchange claims, which they had bought, for 6 per cent. bonds.—Tinsley v. Jemison, 74 Fed. 177, 20 C. C. A. 371, 38 U. S. App. 665.

[b] (U. S. 1816) A declaration of a witness relating to a different transaction, and not importing a contradiction of what the witness has sworn to, is improperly received, as the declarations of a witness cannot be given in evidence except in answer to evidence of other declarations of a witness, inconsistent with what he has before sworn to.—Wright v. Deklyne, Fed. Cas. No. 18,076 [Pet. C. C. 199].

[c] (Ala. 1888) Evidence that one of the defendants had sworn on his application for a continuance that there were a large number of witnesses in Florida whose names were unknown to him, and could not be ascertained in time to be stated in the application, was irrelevant for purposes of impeachment, defendant not having testified to anything inconsistent with such statement, and its admission was error.—Cotton v. State, 87 Ala. 75, 6 South. 396.

[d] (Ala. 1889) On a trial for burglary, it is proper to exclude testimony that the prosecuting witness had made statements out of court that he might have been mistaken in thinking that defendant was the burglar, and that the testimony of one of defendant's witnesses on a former trial had shaken him up considerably, where these declarations were not contradictory of his evidence on the trial.—Cooper v. State, 88 Ala. 107, 7 South. 47.

[e] (Ala. 1893) In an action for personal injuries, it is error to admit in evidence, for the purpose of impeaching one of defendant's witnesses, a coemployé of plaintiff, who saw the accident, a written statement made by him to defendant shortly after the accident, containing his opinions concerning it, and not contradictory of any fact testified to by him on the trial.—Helton v. Alabama Midland R. Co., 97 Ala. 275, 12 South. 276.

[f] (Ark. 1861) There is no error in refusing to permit a deposition to be read for the purpose of discrediting a subsequent deposition of the same deponent when the only difference is that one stated that certain property had been delivered to a wife, and the other stated that it had been delivered to the husband and wife.—McNeill v. Arnold, 22 Ark. 477.

[g] (Cal. 1887) The deposition of the prosecuting witness, taken at the preliminary hearing, is not admissible for the purpose of contradicting his testimony, when the deposition fails to show any material contradiction.—People v. Kalkman, 72 Cal. 212, 13 Pac. 500.

[h] (Cal. 1889) In an action for money loaned, where plaintiff testifies on cross-examination that she was married to A. B. at a certain time, evidence that she was at that time the wife of another man, and had testified in another case that she was married to that other before the time mentioned, is not inconsistent with her testimony, and is not admissible to impeach her.—Evans v. De Lay, 81 Cal. 103, 22 Pac. 408.

[i] (Ind. 1854) The testimony of a witness is not necessarily discredited by its disagreement,

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in slight particulars, with previous statements made by the same witness.—Shanks v. Hayes, 6 Ind. 59.

[j] (Ind. 1888) Prosecutrix having testified that defendant was sober when he shot her, defendant, for the purpose of impeachment, offered to show that soon after the shooting she said that it was not defendant, but a man crazy from liquor, who shot her. *Held* that, as defendant might have been crazy from liquor, and yet sober at the time of shooting, the offer was properly refused.—Wagner v. State, 116 Ind. 181, 18 N. E. 833.

[k] (Ind. 1889) Where a witness has testified on direct examination that, in his opinion, testator was of sound mind, evidence that he had stated that testator was childish, and going crazy, is admissible to impeach him.—Staser v. Hogan, 120 Ind. 207, 21 N. E. 911.

[l] (Ind. 1890) On a trial for rape on M., a sister of defendant testified that M. came from the place where the crime was alleged to have been perpetrated, in a cheerful manner, hand in hand with defendant. *Held*, that a subsequent statement by the witness that defendant had taken M. off, that she pitied M., and that she would be afraid to go with defendant herself, was not admissible to impeach her, as it did not contradict her testimony.—Huber v. State, 126 Ind. 185, 25 N. E. 904.

[m] (Ind. 1892) Since, under Rev. St. 1881, § 1992, denouncing seduction as illicit intercourse with any female of good repute for chastity under promise of marriage, a woman may be seduced although she has previously had repeated intercourse with the alleged seducer, an affidavit made by the woman before a justice, stating that she had been seduced on a certain day, does not necessarily tend to contradict her testimony in a bastardy case that the person named had had intercourse with her, and that a child was begotten, previous to that time, and is therefore not admissible for the purpose of impeachment.—Williams v. State, 3 Ind. App. 350, 29 N. E. 1079.

[n] (Iowa, 1890) Where, as affecting the question of damages, plaintiff had testified that her health had been good during 12 years before the accident, it was not error to admit evidence of various statements made by her, during a period reaching to four years earlier, as to the bad condition of her health.—McConnell v. City of Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778.

[o] (Iowa, 1891) In an action for damages for the destruction of 51 trees by fire from an engine on defendant's railroad, evidence that plaintiff had brought another suit for the destruction of 35 trees is irrelevant for purposes of impeachment, where the witness testified that before suit brought plaintiff did not claim compensation for all the trees killed, and gave the reason therefor.—Leiber v. Chicago, M. & St. P. Ry. Co., 84 Iowa, 97, 50 N. W. 547.

[oo] (Ky. 1882) The statement of a witness, "I did not see the pistol taken from Grubbs' person," *held* not to be contradicted by evidence that he said "he knew nothing about a pistol on Grubbs."—Loving v. Commonwealth, 80 Ky. 507.

[p] (Me. 1888) In a writ of entry to determine the location of a boundary line, where a witness for defendant testifies that witness' father, the plaintiff's predecessor in title, pointed out to witness the line claimed by defendant as the true line, evidence is inadmissible on plaintiff's behalf, for the purpose of contradicting witness, that witness afterwards pointed out another line, asserted by plaintiff to be the true one, as it does not tend to contradict the witness' testimony.—Royal v. Chandler, 81 Me. 118, 16 Atl. 410.

[pp] (Md. 1896) Testimony of a witness denying that he had said he did not know the "particulars" of a transaction is successfully impeached by showing that he had said he did not know the "details."—Baltimore City Pass. Ry. Co. v. Knee, 83 Md. 77, 34 Atl. 252.

[q] (Mass. 1888) Where the evidence of one of the signers and indorsers of the notes in suit shows that they were accommodation notes, and that plaintiff was to provide for their payment, a letter written by witness to plaintiff just before the maturity of the first note, relative to its payment and renewal in case of nonpayment, is admissible to impeach him, if it affords some presumption that the fact is otherwise than he testified, though it does not contradict him in terms.—Foster v. Worthing, 146 Mass. 607, 16 N. E. 572.

[qq] (Mass. 1890) Upon an issue as to the sanity of a testatrix at the time of the execution of her will, a witness testified that while testatrix was residing at his house, soon after the execution of the will, he never saw any change in her intelligence, coherence of speech, or memory, and gave accounts of several conversations and acts showing a sound mind. To impeach his testimony evidence was offered that since testatrix's death the witness had declared that he had never seen her, after the death of her husband, which took place before the will was executed, when she was fit to make a will. *Held*, that such declaration was not necessarily inconsistent with his former testimony, as for all that appeared the witness may have always considered testatrix unfit to make a will, and therefore it could not be said on appeal that the court erred in excluding the impeaching evidence.—Williams v. Spencer, 150 Mass. 346, 23 N. E. 105, 15 Am. St. Rep. 206, 5 L. R. A. 790.

[r] (Mass. 1895) On a prosecution for conspiracy to procure money to be paid to aldermen for their votes for granting licenses, where a witness states that he has not paid money for this purpose, evidence by a second witness that the first had said that it had cost him $100 to get his license, and that one of the aldermen might have got it, is competent as affecting the credibility of the first witness.—Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189.

[rr] (Mass. 1895) Where a police officer, who made the arrest on a prosecution for illegally selling liquors, testified as to defendant's ownership of the premises, he cannot be contradicted by showing that he gave the information to the clerk upon which the notice, under Pub. St. c. 100, § 34, was issued; that it was directed to defendant's husband, and described the liquor as having been seized on the premises of defendant's husband; and that it was served by said officer, and a copy thereof attested by him.—Commonwealth v. Acton, 165 Mass. 11, 42 N. E. 329.

[s] (Mass. 1896) A witness having testified that he acquired knowledge of a certain thing in a certain manner, previous statements made by him, that he acquired the knowledge in another manner, were admissible to discredit him.—Cogswell v. Newburyport Institution for Savings, 165 Mass. 524, 43 N. E. 296.

[ss] (Mich. 1895) Evidence that the conductor of a street car, at the time of a collision, stated that the accident would not have occurred had his own motorman had charge, was admissible to impeach his testimony that the motorman who controlled the car at the time of the accident exercised proper care to prevent the injury.—McClellan v. Ft. Wayne & B. I. Ry. Co., 105 Mich. 101, 62 N. W. 1025.

[t] (Minn. 1877) The admissibility of former statements of a witness, inconsistent with his testimony, offered for the purpose of impeachment, does not depend on the degree of their variance from such testimony. They are competent if they differ in any material particular from the evidence given, and their effect on the

credit of the witness is for the jury to determine.—Tinklepaugh v. Rounds, 24 Minn. 298.

[tt] (Mo. 1890) Where plaintiff alleges that the injuries sued for were sustained through his being induced to jump from defendant's train by pretended threats of the conductor and others, and the conductor testifies that the passenger did not jump off, and that no threats were made in his presence, he may be contradicted, on sufficient foundation being laid, by proof of his statements after the occurrence that parties were "codding" the passenger with "bugaboo stories," and that he was frightened and jumped off.—Spohn v. Missouri Pac. Ry. Co., 101 Mo. 417, 14 S. W. 880.

[u] (N. H. 1844) The written statement of a witness, offered to contradict his testimony on the stand, and capable of two constructions, one of which is thus contradictory, should be allowed to go to the jury, to receive from them such weight as they may deem proper.—Town of Concord v. Concord Bank, 16 N. H. 26.

[uu] (N. H. 1852) That the account of a transaction given by a witness out of court is substantially inconsistent with that given upon the stand is all that is required to render it admissible on the ground of contradiction.—Martin v. Farnham, 25 N. H. (5 Fost.) 195.

[v] (N. H. 1858) To render the statement made by a witness out of court admissible for the purpose of contradicting his testimony, it must conflict with some fact stated in it, or with its general drift. It is not sufficient that it consists merely in a comment upon the subject which indicates a general want of veracity.—Hall v. Young, 37 N. H. 134.

[vv] (N. Y. 1869) A person charged in an action for divorce with having committed adultery with defendant denied the charge, but admitted that perhaps he was in love with her. A letter which he had written to defendant, but which never reached her, was then offered in evidence to "contradict" his testimony. His attention was not called to any particular part of it, claimed to be in conflict with his testimony. *Held* that, where the letter contained only expressions of passionate love, it was not error to reject it.—Hobby v. Hobby, 64 Barb. 277.

[w] (N. Y. 1895) Where a complaining witness withdrew a charge of assault and made affidavit in the withdrawal that she made the charge through fear, and afterwards testified that she withdrew the charge through fear, it was error to hold, as a matter of law, that the affidavits were not contradictory, and their effect on the credibility of the witness should have been left to the jury without the statement of the court that there was no contradiction in them.—Wendt v. Craig, 147 N. Y. 697, 41 N. E. 516, reversing (1892) 63 Hun, 627, 17 N. Y. Supp. 748.

[ww] (N. C. 1888) Where a witness has testified that he and a person since deceased were at a certain place on a day when a fence was burned, evidence that decedent, on the night of that day, inquired how much of the fence was burned, is not admissible for the purpose of showing that he was not at the place that day; being hearsay, and not inconsistent with what the former witness testified.—Patterson v. Wilson, 101 N. C. 594, 8 S. E. 341.

[x] (Pa. 1862) Where a witness, produced by the plaintiff to prove the genuineness of a note, by deposition has testified as to the room and place at which the defendant signed the note, without expressly stating that she saw it signed, rebutting evidence is admissible on the part of the defendant to the effect that on a former hearing in the case the witness had not testified that she saw him sign the note; for if there was an essential contradiction in her testimony, the defendant was entitled to it; if there was none, the plaintiff was not injured.—Travis v. Brown, 43 Pa. (7 Wright) 9, 82 Am. Dec. 540.

[xx] (S. C. 1848) After the plaintiff had closed his testimony in reply, the defendant was not permitted to examine a new witness, by way of rejoinder, as to what the plaintiff's witness had said on a former trial of the same cause; it not appearing that the testimony proposed to be offered would in any manner rebut, or in any degree explain, vary, or contradict, what the witness had said on the present trial.—Lott's Ex'rs v. Macon, 2 Strob. 178.

[y] (S. C. 1848) It is not sufficient to invalidate the evidence of a witness, on the trial of a capital case, that it varied slightly, as to a point of time, from her affidavit before the magistrate, she being an ignorant person, and her attention not being called to the importance of exactness; nor that she omitted, in her affidavit, to state a fact testified to by her at the trial, there being no contradiction, in the affidavit, of such fact.—State v. McElmurray, 3 Strob. 83.

[yy] (Tex. 1859) Proof of a different but not inconsistent statement, made by the witness, is not admissible to impeach him.—Hall v. Simmons, 24 Tex. 227.

[z] (Tex. 1888) In a trial for murder, defendant's wife testified that deceased made indecent proposals to her a short time before the homicide; that she never told any one about it except her husband and a third person; and that she did not tell one C., when asked about it, because she had decided not to say anything more about it. *Held* error to admit, for the purpose of impeachment, testimony of C., that shortly after the homicide she asked the witness if deceased made improper proposals to her, to which witness replied that he did not.—Williams v. State, 24 Tex. App. 637, 7 S. W. 333.

[zz] (Tex. 1895) In an action for services as attorney, on an alleged oral contract, where plaintiff testified that such contract was made with defendant on January 3, 1890, for plaintiff's services during the year 1890, defendant may show that plaintiff, in his depositions taken at defendant's instance, swore that he made an oral contract with defendant on January 3, 1890, whereby he agreed with it for a year's service, beginning January 8, 1890, and ending January 8, 1891.—Jarvis-Conklin Mortgage Trust Co. v. Harrell (Civ. App.) 26 S. W. 447.

§ 1227. Proof of omissions in former testimony.

[a] (Ala. 1885) Where a witness testifies to material facts, which he omitted to state when examined on the preliminary examination, he may be impeached by proof of the omission.—Brown v. State, 79 Ala. 61.

[b] (Kan. 1881) Where, upon a second trial, a witness testifies that his testimony was the same upon each trial, *held*, that it may be shown that upon a material point he gave no testimony at the first trial.—Johnston v. Clements, 25 Kan. 376.

[c] (Mass. 1855) A witness may not be impeached by evidence of his having omitted on a former examination facts presently stated by him.—Commonwealth v. Hawkins, 69 Mass. (3 Gray) 463.

[d] (Mass. 1890) Where defendant testified and endeavored to explain suspicious appearances proved by the prosecution, it is competent to show, as affecting his credibility, that at a previous trial, the day after the occurrence, he testified in his own defense, and gave no such explanation.—Commonwealth v. Harrington, 152 Mass. 488, 25 N. E. 835.

[e] (Mich. 1883) The fact that a witness who testified on a second trial upon a certain point did not testify as to the same on the former trial may be commented on to the jury, but is not matter of impeachment, as failure to ask questions on that subject may or may not be a

suspicious circumstance, according to circumstances.—In re Dickerson's Estate, 50 Mich. 37, 14 N. W. 691.

[f] (N. Y. 1890) While it is a suspicious circumstance for a witness to recollect on a second trial a crucial fact which he did not mention on the former trial, yet it is not such conclusive evidence of his dishonesty as to call for a reversal, as his demeanor upon the stand may have been such as to have entirely overcome the suspicion that his testimony was an afterthought.—Cowan v. Third Ave. Ry. Co., 56 Hun, 644, 9 N. Y. Supp. 610, judgment affirmed (1892) 132 N. Y. 598, 30 N. E. 1152.

[g] (N. Y. 1890) The fact that a witness on the second trial of a cause supplies crucial testimony which he did not mention when he testified on the former trial, will not justify a refusal to submit such testimony to the jury.—Bickford v. Menier, 56 Hun, 644, 9 N. Y. Supp. 775.

[h] (N. Y. 1895) On the second trial of an action defendant was absent, and his testimony given on the first trial was read by stipulation. Plaintiff, in testifying as to a conversation with defendant which he had assumed to state fully on the first trial, added matter which he had not before stated. His only excuse for omitting such matter on the first trial was that he was not interrogated as to it. Plaintiff was an intelligent man, and fully comprehended the questions involved on the litigation and the effect of the evidence. *Held*, that the new matter testified to by him was not worthy of credit.—Anderson v. Dickinson, 88 Hun, 614, 34 N. Y. Supp. 510.

[i] (Pa. 1845) Evidence of the omission of a witness to state facts in a previous trial between other parties is not admissible to discredit him, unless it be shown to be pertinent to the issue in such trial.—McAteer v. McMullen, 2 Pa. (2 Barr) 32.

[j] (Tex. 1892) The fact that a witness for defendant testifies to facts on the trial which he did not testify to at the preliminary examination is no ground for impeachment, where he was not interrogated as to such facts on the examination.—Hyden v. State, 31 Tex. Cr. R. 401, 20 S. W. 764.

[k] (Vt. 1862) To discredit a witness, evidence that he has testified to material facts, which he omitted to state upon a former trial, is clearly admissible.—Briggs v. Taylor, 35 Vt. 57.

4. CROSS-EXAMINATION AS TO INCONSISTENT STATEMENTS.

IN GENERAL, § 1228.
PARTICULAR MATTERS OF INQUIRY, § 1229.
FORMER TESTIMONY, § 1230.
MOTIVE FOR CHANGING TESTIMONY, § 1231.
EFFECT OF REFUSAL TO ANSWER ON CROSS-EXAMINATION, § 1232.

As to statements and declarations showing interest or bias, see ante, § 1194.

Examination of one's own witness, see ante, § 1219.

Laying foundation for proof of inconsistent statements, see post, §§ 1233-1242.

§ 1228. In general.

[a] A witness could be asked on cross-examination whether he had not made statements conflicting with his testimony.

—(Ind. 1885) Hyland v. Milner, 99 Ind. 308;

(Kan. 1895) State v. Zimmerman, 3 Kan. App. 172, 42 Pac. 828;

(N. Y. 1888) Plyer v. German-American Ins. Co., 48 Hun, 618, 1 N. Y. Supp. 395.

[b] (Ala. 1840) Where a witness when cross-examined for the purpose of contradicting him, touching his own declarations at a particular time and place, states "that he cannot answer the question without giving the declarations of the defendant made at the same time," the declarations will be properly excluded.—McGehee v. Mahone, 37 Ala. 258.

[c] (Ala. 1861) When a witness in answer to a question as to what he said at a certain time, put for the purpose of discrediting him, replies that he cannot answer without giving statements made by the party who is interrogating him, it is not error to exclude such statements if there is no further showing as to their admissibility.—McGehee v. Mahone, 37 Ala. 258.

[d] (Cal. 1866) It is not irrelevant to inquire of a witness on cross-examination whether he has not given a different account of the matter on a former occasion for the purpose of impeaching his testimony by contradicting him. And an error committed in not allowing such a question to be put is not cured by the fact that the witness is corroborated by other witnesses.—People v. Robles, 29 Cal. 421.

[e] (Ind. 1874) Where a witness, upon examination in chief, had testified that he had never done a certain act, it was error to refuse, on cross-examination, to allow the witness to answer the question whether at a certain time and place he did not state to a person named that he had done said act.—Pruitt v. Brockman, 46 Ind. 56.

[f] (La. 1889) A question, on cross-examination, touching certain statements said to have been made by the witness, the object of which is to impeach the testimony of the witness, cannot be put unless a foundation for it has been laid and the witness put on his guard.—State v. Johnson, 41 La. Ann. 574, 7 South. 670.

[g] (Miss. 1836) Where a witness has testified to a particular fact, he may be asked, on cross-examination, if he has not, on a former occasion, stated that he knew nothing of the controversy between the parties.—Goode v. Lincum, 2 Miss. (1 How.) 281.

[h] (Neb. 1895) Statements made by a witness out of court in conflict with his testimony may be shown on cross-examination.—Fremont Butter & Egg Co. v. Peters, 45 Neb. 356, 63 N. W. 791.

[i] (N. Y. 1887) On a trial for perjury, a witness who has testified that defendant's testimony, which is alleged to be perjured, was entirely false, is properly asked whether he did not state, at a certain time, out of court, that he had formerly made, or might have made, statements inconsistent with his testimony, and consistent with defendant's alleged false testimony, as the question bears on the credibility of the witness; and under Code Cr. Proc. § 527, authorizing the appellate court to grant a new trial, if satisfied that justice requires it, whether or not exceptions were taken, a new trial will be granted for disallowance of such question.—People v. Thornton, 46 Hun, 643.

[j] (N. Y. 1891) The exclusion of a question to a witness, whether or not he was a witness on a former trial of the case, does not take away the right to contradict the witness by his testimony on such former trial, and is not an error sufficiently serious to require reversal of the judgment.—Chase v. Senn (Com. Pl.) 13 N. Y. Supp. 266.

[k, l] (Tex. 1880) On cross-examination of an accomplice, a question as to whether he did not, while in custody for the same theft, make a certain statement contradictory to his testimony, was erroneously excluded on a general objection by the state.—Turney v. State, 9 Tex. App. 192.

[m] (Tex. 1896) Where defendant has elicited unfavorable testimony on a material fact in

the cross-examination of a state's witness, further questions which might be admissible for the purpose of laying a predicate for impeaching the witness are inadmissible as original evidence to show that on other occasions the witness had made statements to other persons contrary to those made on the trial.—Ray v. State (Cr. App.) 36 S. W. 446.

§ 1229. Particular matters of inquiry.

Cross-examination of defendant as to confessions, see ante, § 1211.

—— *of impeaching witness as to character, see* ante, § 1159 [o].

Scope of cross-examination for the purpose of laying foundation for proof of inconsistent statements, see post, § 1237.

[a] (Ala. 1893) In an action for wrongful attachment, where there is evidence that there was a conspiracy between plaintiff and another to defraud creditors by false transfers or sales shortly before the attachment, such other person having been offered by plaintiff as a witness, and having testified that the goods obtained had been bought at the full market price, it is proper to ask him on cross-examination, with a view to impeachment, whether he had not told another that he had been buying goods of plaintiff for much less than their market price.—Little v. Lichkoff, 98 Ala. 321, 12 South. 429.

[b] (Cal. 1861) In a trial for murder, a participator in the crime furnished the only direct evidence. He gave a full account of the affair, but in his account conveyed the idea that he was a reluctant and unwilling abettor, exonerating himself from any criminality beyond going with defendant for the purpose of chastising deceased. On cross-examination, defendant's counsel asked witness if he did not, a few days before the murder, state that he intended to kill the deceased. The theory of the defense was that the witness himself did the murder. *Held*, that this question was admissible, as tending to contradict, inferentially, witness' statements and prove them false.—People v. Williams, 18 Cal. 187.

[c] (Cal. 1886) In a murder case, if a witness for defendant testifies to facts from which the jury might infer that deceased, on the day of the homicide, left his house for the purpose of bringing about an encounter with defendant, the state may cross-examine him as to any former statements made by him relative to the matter inconsistent with his direct testimony, and to any matter connected with it tending to show the mental condition of deceased towards defendant.—People v. French, 69 Cal. 169, 10 Pac. 378.

[d] (Cal. 1891) Where the probate of a will is sought to be revoked on the ground of mental incapacity of the testatrix, and a witness testifies that he was the attending physician of the testatrix during the winter before the will was executed; that during the time he attended her she was in litigation with her sons over property she had conveyed to them; that witness acted as her agent during the litigation; and that he saw no evidence of failing mind or memory—the witness may be asked, on cross-examination, whether he had not asked one Mrs. S. to testify, in the controversy between mother and son, that the testatrix was not of sound mind; if he had not said to Mrs. S. at that time that the testatrix was not in her right mind; and if he had not intended to testify in that case that the testatrix was not in her right mind.—Wixom v. Goodcell, 90 Cal. 622, 27 Pac. 419.

[e] (Ga. 1875) A. bought land of B., giving a note for the purchase money; possession of the land was to be given immediately. The tenant in possession refused to go out, and A. only got possession of part of the land until the year thereafter. In a suit on the notes by B., A. sought to recover the damages for the nondelivery of possession. B. put up the tenant to show that he had retained possession under an agreement with A.'s agent. On cross-examination, A.'s counsel asked the witness if he had set this up in the proceedings taken against him by B. to turn him out, and the court ruled that the "proceedings" must be produced and refused to permit the question to be asked. *Held*, that this was error. The question and answer were necessary as a foundation to introduce the "proceedings," as they were inadmissible to contradict the witness until the witness had an opportunity to explain.—Biggers v. King, 54 Ga. 369.

[f] (Ga. 1887) In order to lay the foundation for impeachment, the state questioned a codefendant, who was a witness for the defendant, and had testified in his behalf, relative to former statements which were in direct conflict with the testimony he gave at the trial. *Held*, that for this purpose the evidence was properly admitted.—Whitaker v. State, 79 Ga. 87, 3 S. E. 403.

[g] (Ind. 1857) In a trial for murder, a brother of the deceased, who had taken part in the disturbance, and who upon the stand had testified that he had not used any deadly weapon during the melée, but simply held a bowie knife in his hand, and had seen no one use a hatchet, was asked, with a view to his impeachment, "Whether he did or did not, in Dr. B.'s office, in this town, on the evening of the 5th, in the presence and hearing of the doctor and one Miles, say that one of the persons engaged in the fight with your brother the deceased would not fight again, as you had sunk the poll of the hatchet in his head?" *Held*, that the rejection of the question by the court below was error.—Gibson v. State, 9 Ind. 264.

[h] (Ind. 1878) A witness, who has testified on a will contest with respect to the sanity of the testatrix, or the manner of procuring the will to be executed, may be asked on cross-examination for the purpose of laying a ground for impeaching the witness whether he had not previously made certain inconsistent statements.—Coffman v. Reeves, 62 Ind. 334.

[i] (Ind. 1884) In an action for slander, wherein the only issue was the truth of the allegations, questions on cross-examination as to whether witness had not made certain statements in reference to plaintiff's conduct in the matter charged, asked for the purpose of impeaching the witness, *held* proper, not being as to collateral matters.—Seller v. Jenkins, 97 Ind. 430.

[j] (Iowa, 1882) In an action for breach of a covenant of general warranty, arising out of an easement in a stairway on the premises, the former owner, a witness for defendant, swore that the addition of the easement did not affect its value. *Held*, that it was competent cross-examination to ask him if he had not said that he would never again construct a building with a stairway common to another person.—McGowen v. Myers, 60 Iowa, 256, 14 N. W. 788.

[k] (Iowa, 1892) In an action by a brakeman for personal injuries caused by being run over while between cars adjusting a coupling link, where plaintiff testified on direct examination that the engineer obeyed his signal, and he thought the cars had stopped when he went between them, it is error to refuse to allow him to be asked on cross-examination if he did not swear in his petition, and if it was not true, that the engineer did not stop.—Hall v. Chicago, R. I. & P. Ry. Co., 84 Iowa, 311, 51 N. W. 150.

[l] (Iowa, 1893) In an action for breach of promise of marriage, where a brother of plain-

tiff testified on direct examination that, while defendant was courting his sister, no one else was going with her, it was error not to permit the witness, on cross-examination, to answer whether he told defendant that witness' sister had made a "mash" on another man.—Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492.

[m] (Iowa, 1896) Where defendant had testified as to quarrels and fights with deceased and his friends before the homicide, but had denied making certain threats against deceased, as brought out by the state's evidence, it was proper cross-examination to ask him if he had not, in a conversation with a third person, made threats against deceased.—State v. Helm, 97 Iowa, 378, 66 N. W. 751.

[n] (Kan. 1892) Where, in an action by a head brakeman against a railway company for injuries occasioned by a switch stand and the target thereof being too close to the railroad track plaintiff testifies that he had no actual knowledge how close the switch target was to the track prior to his injuries, the exclusion of a question, upon cross-examination, whether after the injury he did not state that he had "repeatedly called the attention of parties to that target," is error.—Southern Kansas Ry. Co. v. Michaels, 49 Kan. 388, 30 Pac. 408.

[o] (Kan. 1895) Defendant was prosecuted for assault on the ground that his sons committed the offense in his presence, with his consent. *Held*, that a witness for the defense, who testified solely as to the details of a trip taken by himself and defendant on the day of the assault to another town, could not, on cross-examination, be asked whether he had not told a certain party that his brother had told witness that he, the speaker, and defendant, witnessed the assault.—State v. Zimmerman, 3 Kan. App. 172, 42 Pac. 828.

[oo] (Me. 1878) A party to an action, called as a witness by an adverse party to testify as to the relationship between such witness and another party to the suit, testified that he did not know whether such party was his cousin or not. *Held*, that it was competent to ask him whether he had ever stated to any one else that the party was his cousin.—Call v. Pike, 68 Me. 217.

[p] (Md. 1896) On a trial for selling beer to a minor, on cross-examination the prosecuting witness was asked whether he had not, at the time of purchasing the beer, represented himself to be over 21 years of age. *Held*, that the testimony sought to be elicited was admissible for the purpose of impeaching the credibility of the witness.—Peterson v. State, 83 Md. 194, 34 Atl. 834.

[pp] (Mass. 1843) Where the question in issue is whether A. is member of a certain firm, and a witness testifies that A. is not a member, the witness may be asked, on cross-examination, if he has not told B. that A. was a member.—Hathaway v. Crocker, 48 Mass. (7 Metc.) 262.

[q] (Mich. 1886) In an action for services, where the defendant has testified that the services were not worth more than the board of the servant, his admissions to the contrary may be shown on cross-examination.—Appeal of Dalton, 59 Mich. 352, 26 N. W. 539.

[qq] (Mich. 1891) Plaintiff, in an action for personal injuries caused by a defective highway, was asked, on cross-examination, if he had not told a certain person that the accident was occasioned by his horses taking fright, and replied that he had not, but that what he did tell him was that he claimed damages from the township. He was then asked what claim he made to the person named. *Held*, that the latter question was proper, as tending to bring out whether he had ever made any different claim, or given any different history of the accident.—Langworthy v. Township of Green, 88 Mich. 207, 50 N. W. 130.

[r] (Minn. 1891) In an action for injuries from a fire, alleged to have been set by a locomotive, a witness having testified that he saw the fire which caused the injury start from another source, it was proper, for the purpose of impeachment, to ask him if he had not stated at a certain time and place that it started from the locomotive.—Hoye v. Chicago, M. & St. P. Ry. Co., 46 Minn. 269, 48 N. W. 1117.

[rr] (Mo. 1888) Where defendant, testifying in his own behalf, gives a detailed account of his feelings on the day of the homicide, designed to show absence of malice, it is proper, on cross-examination, to ask "Did you state to F., on the day of the homicide, that you had the same right to kill a man who was trying to steal your land as you would have if he was trying to steal your horse?"—as a foundation for proof of a state of mind different from that testified to by him.—State v. West, 95 Mo. 139, 8 S. W. 354.

[s] (Mo. 1891) In an action against the operator of a railroad by a servant, for injuries sustained by reason of an unlocked switch while attempting to couple cars, where defendant's superintendent, on being examined as a witness for defendant, has testified that he never gave plaintiff an order to couple cars, he may, on cross-examination, for the purpose of laying a foundation to impeach his testimony, be asked whether he did not, after the accident, state to plaintiff that he gave the order.—Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977.

[ss] (Mo. 1895) On the trial of defendant for shooting at with intent to kill K., the police officer who arrested him and defendant's witness, it appeared that, about an hour before the arrest, an assault with intent to rob had been committed on F. by two persons suiting the description of defendant and witness, which was not known to K. when he made the arrest, and that one of them, answering to the description of witness, had shot at a police officer who at the time of the assault had attempted to arrest them. For the purpose of showing that K. was justified in arresting them, witness was asked, on cross-examination (he not having objected to it as tending to criminate him), whether he was not one of the parties who assaulted F., and whether he did not then shoot at the officer attempting to arrest them. *Held*, that such question having been answered in the negative, the evidence thereby elicited was proper for the purpose of laying a foundation to impeach witness.—State v. Foley, 130 Mo. 482, 32 S. W. 973.

[t] (N. J. 1830) In an action by a father to recover damages for the seduction of his daughter, if the plaintiff offers the daughter as a witness, she may be asked, on cross-examination, whether she has said that another person was the father of the child, for the purpose of discrediting her by calling other witnesses to contradict her, if she answers in the negative, and from her own mouth, if she answers in the affirmative.—Fries v. Brugler, 12 N. J. Law (7 Halst.) 79, 21 Am. Dec. 52.

[tt] (N. Y. 1880) In an action by A. to recover dower as the widow of C., where her marriage to C. was disputed, and her sister B. testified that A. was married October 12, 1870, to C., at Carthage, by D., a Catholic priest, since deceased, it was proper to ask B., on cross-examination, whether, after October 12, 1870, she had not told one M. that she had advised A. to come away from C.'s house and not work there any longer, and that she would make A. do so.—Clark v. St. James' Church Soc., 21 Hun, 95.

[ttt] (N. Y. 1880) In an action by A. to recover dower as the widow of C., where her mar-

riage to C. was disputed, it was proper, on cross-examination of a witness, who testified that C. admitted that he was married to A., to ask him if he had not afterwards stated that he did not believe that A. was married to C.—Clark v. St. James' Church Soc., 21 Hun, 95.

[u] (N. Y. 1880) On the trial of an indictment for obtaining goods by false representations, a witness for the prosecution was asked on cross-examination as to a conversation with M. On redirect examination he testified to statements made to him by M. to the effect that the prisoner and his partner had done a great wrong. M. was thereafter called as witness for the prisoner, and gave material testimony of statements made by the prosecutor contradicting his testimony and tending to show the prisoner's innocence, and he also positively contradicated the testimony of the other witnesses. On his cross-examination he was asked if he had not stated to anybody that the prisoner and his partner had been guilty of a great wrong; also if he had not said that they had acted as thieves. *Held*, that the allowance of these questions was not improper, the object being to draw from the witness an admission that he had made some such declaration, and the latitude allowable on a cross-examination was not exceeded in allowing the subject to be approached in the manner in which it was.—Mayer v. People, 80 N. Y. 364.

[uu] (N. Y. 1888) Where a married woman has testified that a mortgage upon her land was delivered without her consent, to secure a loan to her husband, it is competent to ask her, on cross-examination, if she had not admitted to the mortgagee that she consented to the delivery.—Durfee v. Knowles, 50 Hun, 601, 2 N. Y. Supp. 466.

[uuu] (N. Y. 1894) In an action against a corporation, declarations of its president, though not admissible as evidence in chief against the corporation, are admissible on cross-examination to impeach the president as a witness.—Patterson Gas Governor Co. v. Lichtenstein Bros. Co. (Com. Pl.) 9 Misc. Rep. 126, 29 N. Y. Supp. 279.

[v] (N. Y. 1896) On an issue of plaintiff's good faith in purchasing goods from his brother, who was an insolvent at the time of the alleged sale, said insolvent, having testified for plaintiff as to the bona fides of the transaction, should have been permitted on cross-examination to state whether he had, in effect, said to certain persons, in the absence of plaintiff, that the transfer to plaintiff was colorable merely, as such testimony would have been admissible to affect the credibility of the witness, though he had previously denied having made such statements when his brother was present.—Beuerlien v. O'Leary, 149 N. Y. 33, 43 N. E. 417, reversing (1894) 77 Hun, 607, 28 N. Y. Supp. 1133.

[vv] (N. C. 1890) On foreclosure by an assignee of a mortgage, the mortgagee may be cross-examined as to his statements and representations made before the assignment, that the mortgage debt had been paid, in order to discredit his evidence at the trial that the mortgage debt was unpaid when the assignment was made.—Blake v. Broughton, 107 N. C. 220, 12 S. E. 127.

[w] (Pa. 1889) Where a witness, who had negotiated a compromise between plaintiff and defendant, testifies on direct examination that the compromise related to a judgment as a whole, including usury, it is improper to ask him, on cross-examination, if he had not previously said that the usury was not so included.—Kearney v. First Nat. Bank, 129 Pa. 577, 18 Atl. 598.

[ww] (Pa. 1890) Defendant, charged with adultery with one C., having denied on direct examination that he committed adultery with her on the date laid, or at any other time, may be asked on cross-examination why he had pleaded guilty of adultery with her on a former occasion, as the question is not to show a conviction, but to contradict the witness.—Commonwealth v. Mosier, 135 Pa. 221, 19 Atl. 943, 26 Wkly. Notes Cas. 182.

[x] (Tex. 1874) In a prosecution for an aggravated assault and battery, where prosecutor had testified that he went into defendant's field with no expectation of a difficulty and with no ill feeling toward defendant, he may, on cross-examination, be asked if he did not, before going there, make specific statements inconsistent with his testimony.—McFarlin v. State, 41 Tex. 23.

[xx] (Vt. 1869) In an action for injuries sustained by plaintiff, it is proper to ask the attending physician of the plaintiff on cross-examination, and as affecting his credit, whether he did not on one occasion tell the plaintiff that if he could get $100 he had better settle; the physician having testified on the direct examination to an injury calling for much greater damages.—Watts v. Town of Waterbury, 42 Vt. 201.

[y] (Vt. 1891) A witness having testified that on a certain day he drank nothing but beer, and that on his return from a trip a bottle of alcohol which he had with him was in the same condition as when he had started out, it was permissible to ask him on cross-examination if he had not, two days later, offered alcohol to another, and said that it was what was left from his trip.—Stillwell v. Farwell, 64 Vt. 286, 24 Atl. 243.

[yy] (W. Va. 1873) It is proper, in laying a foundation for impeaching the credit of a witness, to inquire of him on cross-examination whether he has not on a former occasion given a different account, or made a different statement, of a matter of fact, to which he has testified on trial.—Morgan v. Franklin Ins. Co., 6 W. Va. 496.

[z] (Wis. 1865) In replevin by a vendee against one holding under an execution against the vendor subsequent to the sale, declarations of the vendor made after possession was transferred to plaintiff are admissible on cross-examination to contradict his direct testimony of the sale.—Selsby v. Redlon, 19 Wis. 17.

[zz] (Wis. 1888) Where in an action for burning property there is evidence that the origin of the fire was from a clearing in a southeasterly direction, as well as from an engine on defendant's track in an easterly course, and near the point where the fire first began, it is error to refuse to allow plaintiff's witness, who had testified that the wind was east or north of east the whole day, to be asked, on cross-examination, if he had not stated that, had the wind not changed from the southeast, most of the town would have burned.—Stacy v. Milwaukee, L. S. & W. Ry. Co., 72 Wis. 331, 39 N. W. 532.

§ 1230. Former testimony.

Foundation for impeachment, see post, §§ 1239, 1240.

[a] (U. S. 1892) In an action to recover duties paid under protest the inquiry was whether the goods were dutiable under Schedule K of the act of March 3, 1883, as "knit goods, made on knitting frames," as assessed by the collector, or under Schedule N, as "bonnets, hats, and hoods for men, women, and children," etc., as claimed by the importers. One of the latter testified that the goods were "Scotch bonnets," known and sold in this country as such. On cross-examination he testified that he had before had a suit against the government, under the old tariff, and was then asked if the claim then was that these goods were caps made on frames. *Held*, that this question could not be excluded on the ground that the record of the

prior suit was the best evidence of the claim, but that it was competent for the purpose of impeaching the witness' credibility.—Toplitz v. Hedden, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961.

[b] (Ala. 1887) When the testimony of a witness, on the preliminary examination, was reduced to writing, and subscribed by him, and the deposition is in court on the trial, he cannot be cross-examined as to the statements then made by him, without allowing him to hear or read the deposition.—Gunter v. State, 83 Ala. 96, 3 South. 600.

[c] (Cal. 1885) It is not error to allow defendant in a criminal case to cross-examine a witness for the prosecution for the purpose of showing that he made statements in his examination in the police court different from those made on the trial.—People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. 859.

[d] (D. C. 1893) After a police officer has answered in the negative a question asked him on a murder trial for the purpose of showing that a confession was not voluntary, as to whether he hit the accused, and put him in a dungeon on the night of his arrest, it is discretionary with the trial court whether to permit the officer to answer a further question as to whether he did not testify in the police court that defendant was put in a dungeon.—Hardy v. United States, 3 App. D. C. 35.

[e] (Ga. 1852) It is not competent, with a view to impeach a witness, to ask him as to what he had sworn on a former occasion, if his testimony on that occasion is of itself inadmissible in evidence.—Mitchum v. State, 11 Ga. 615.

[f] (Ga. 1884) There was no error in allowing the solicitor general, in order to impeach a witness who had been on trial for the same offense, to ask him whether he had not on a former trial made a statement inconsistent with what he swore before the jury on the trial at bar.—Wilkerson v. State, 73 Ga. 799.

[g] (Ill. 1884) Witness, having stated that defendant called deceased "a son of a bitch," was asked on cross-examination, for purposes of impeachment, if he had in his former examinations made "any such statement as that." *Held*, that the question was not too broad, and need not have been limited to the exact words, as great latitude must be allowed in cross-examination.—Ritzman v. People, 110 Ill. 362.

[h] (Iowa, 1889) It is not error to cross-examine a witness on a second trial as to matters testified to by her on a former trial for the purpose of impeachment.—Wacha v. Brown, 78 Iowa, 432, 43 N. W. 269.

[i] (Iowa, 1890) A witness for defendant in a murder case, who had also been charged with the murder, and while under such charge had testified freely and voluntarily before the coroner, knowing that she was not compelled to answer, may be cross-examined as to the statements then made; the object of the cross-examination being to lay a foundation for impeachment.—State v. Peffers, 80 Iowa, 580, 46 N. W. 662.

[j] (Kan. 1886) On trial of defendant for the murder of his sister, where defendant produces a witness who, with a view of showing the conscious innocence of defendant, testifies what his conduct and appearance were soon after the death of his sister, it is proper to inquire on cross-examination if the witness had not stated at the preliminary examination that the conduct of the defendant impressed him at once as being guilty of the murder.—State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

[k] (Kan. 1888) A question on cross-examination as to whether witness had not given a different account of the affair on a former trial may well be ruled out as immaterial, since that evidence could be introduced to impeach him, without first calling his attention to it.—Hughes v. Ward, 38 Kan. 452, 16 Pac. 810.

[l] (Kan. 1889) At the trial of a criminal action wherein the defendant was charged with having committed rape five times upon the witness between the 1st day of April, 1888, and the 1st day of August, of the same year, and her testimony tended to show that the offenses were committed in the months of February, March, and April, 1887, it was proper to ask on cross-examination if she did not swear before the grand jury that the special offense about which she was then testifying was perpetrated on the 13th day of April, 1888.—State v. Spidle, 42 Kan. 441, 22 Pac. 620.

[m] (Mich. 1864) On cross-examination, it is proper to call the attention of a witness to his testimony on a former trial, and ask him whether he did not then testify differently.—Beaubien v. Cicotte, 12 Mich. 459.

[n] (Mich. 1868) If a party desires to cross-examine a witness as to former statements by him deposed to, he must first read the witness' entire deposition in evidence, otherwise it may be read at any time.—Lightfoot v. People, 16 Mich. 507.

[o] (Mich. 1887) A witness may be questioned as to testimony given by him on a former trial, for the purpose of impeaching him.—Battishill v. Humphreys, 64 Mich. 514, 38 N. W. 581.

[p] (Mich. 1887) It is not error to show, on cross-examination, that, in a former action, where the same questions were involved as in the present case, the witness gave different testimony from his main examination.—Graham v. Myers, 67 Mich. 277, 34 N. W. 710.

[q] (Mich. 1890) Where a witness has denied that he was ever arrested or convicted on a criminal charge, or that he had testified in a former action that he had been, it is within the discretion of the court to exclude further questioning on the subject of what he did testify in that action.—Helwig v. Laschowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378.

[r] (Mich. 1895) Evidence of statements made by the state's witness on defendant's preliminary examination, for the purpose of impeachment, should be introduced after defendant's counsel has taken the case, and not upon the cross-examination of such witness.—People v. Oblaser, 104 Mich. 579, 62 N. W. 732.

[s] (Mo. 1891) On a trial for larceny of a cow, a witness for the state, having testified that defendant on a certain day sold him a hide, and that the next day a person came and claimed it, was asked if he had not seen the said person take an ear from his pocket, and fit it to the hide, which he denied. The state's attorney showed the witness a paper, which he stated was his testimony before the grand jury, and, reading therefrom, asked the witness if he had not there testified that he saw the said person fit the ear to the hide, which he also denied. The court ruled that such cross-examination was improper. The state's attorney then said that he had asked the question from the witness' testimony before the grand jury, and that at the proper time he would read his whole statement in evidence. *Held* that, although the methods pursued were improper, especially after the witness had repudiated the paper, and the court had passed upon the admissibility of the evidence, yet, inasmuch as the trial judge had found nothing to justify him in setting aside the verdict, and the hide and ear were fitted together in the presence of the jury, and other witnesses testified that they had been so fitted when first obtained, no preju-

dice could result to the defendant.—State v. Crow, 107 Mo. 341, 17 S. W. 745.

[t] (Neb. 1891) The mother of plaintiff in a bastardy proceeding testified that the last time defendant called on plaintiff was on either the first or second Sunday in May; and that she remembered this because they then talked about planting corn. On her cross-examination she was asked whether she had not, at the preliminary hearing before a justice, testified that she could not tell why she could not remember definitely whether it was either the first or second Sunday in May. *Held*, that the rejection of this question was proper, as its answer one way or the other would not have contradicted her testimony on a material point at the trial.—Daly v. Melendy, 32 Neb. 852, 49 N. W. 926.

[u] (N. H. 1877) It was not error not to permit counsel to ask witness on cross-examination what his testimony was at a former trial of the action, where the testimony was reduced to writing and in counsel's possession.—State v. Cone, 58 N. H. 151.

[v] (N. Y. 1832) A witness is not bound to answer as to how he testified on a former trial, relative to the matters in question, if he objects to the inquiry.—Mitchell v. Hinman, 8 Wend. 667.

[vv] (N. Y. 1868) It is competent on cross-examination to ask a witness what he has testified to on previous occasions as to the same matters on which he has given evidence on the present trial; and, in case he is unable to state how he testified on previous occasions, to ask hypothetically, if he testified in a given way, whether it was true.—McCabe v. Brayton, 38 N. Y. 196.

[w] (N. Y. 1879) On cross-examination it is competent to show that the witness testified differently on a material matter before the grand jury from the evidence given by him.—New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503.

[ww] (N. Y. 1885) The mode and extent of the cross-examination of a witness as to his testimony on a former trial must necessarily be in the discretion of the judge.—Rehberg v. City of New York, 99 N. Y. 652, 2 N. E. 11.

[x] (N. Y. 1888) Where a judgment debtor had been examined in proceedings supplemental to execution, and his testimony reduced to writing, and on the trial of a second action he was interrogated by the plaintiff's counsel concerning statements made by him in the course of that examination, he was entitled to see and read the statement before his answer should be taken.—Vail v. Craig, 13 N. Y. St. Rep. 448.

[xx] (N. Y. 1891) On the trial of an action on appeal from a justice's court a witness may be asked on cross-examination whether he will swear that he did not, before the justice, testify contrary to his testimony in chief, without first producing and reading the minutes of the justice's court, and asking if he swore so and so from the minutes.—Oderkirk v. Fargo, 61 Hun, 418, 16 N. Y. Supp. 220.

[y] (Pa. 1888) To impeach the veracity of a witness, it is proper to ask him whether he had not testified in a particular way on a former occasion.—Zebley v. Storey, 117 Pa. 478, 12 Atl. 569.

[yy] (S. C. 1891) A witness for the defense, who was originally included in the indictment with defendant, but as to whom it has been nolled, may be required, on cross-examination, to state what he said when examined before the coroner, if he was not under arrest at that time.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[z] (Tex. 1893) In an action on a note given for the subscription list of a newspaper, where defendants pleaded failure of consideration, the court properly refused to require plaintiff on cross-examination to give a yes or no answer to a question whether he had not testified on the trial of the same action in the justice court that the subscription list was worth "dollar for dollar," when he did answer that his recollection was that he testified that the subscription list was "good."—Carpenter v. Dowe (Civ. App.) 26 S. W. 1002.

[zz] (Wis. 1894) Where a railroad servant says on cross-examination that he understood certain signals, he may be asked if he has not testified otherwise on a former trial, and it may be shown that, while he has present knowledge of the signals, he had not then.—Waterman v. Chicago & A. R. Co., 82 Wis. 613, 52 N. W. 247, 1136.

§ 1231. Motive for changing testimony.

Re-examination and explanation of inconsistent statements, see post, § 1261.

[a] (Cal. 1895) Where the testimony of a witness for the prosecution is materially different on the trial from what it was on preliminary examination, the extent to which defendant is to be allowed on cross-examination to go into the present surroundings of the witness, in order to show the motives inducing him to change his testimony, is within the discretion of the court.—People v. Dillwood, 39 Pac. 438.

[b] (N. H. 1870) A witness, upon saying that a different statement, made by him at a former trial of the case, was "a slip of the tongue," may be cross-examined as to circumstances attending the statement, and bearing upon his veracity, and not upon his memory.—Ordway v. Haynes, 50 N. H. 159.

[c] (N. C. 1868) Where, on a trial for arson, an accomplice, after he had given an account of the transaction, was asked by the attorney for the prosecution if he had denied his statement to be true on some other occasion, and he answered that he had, and he was then asked why he had denied it, which was objected to, it was *held* that the question was admissible.—State v. Pulley, 63 N. C. 8.

[d] (Tex. 1892) On the second trial of an action against a railroad company for injuries received at a crossing, plaintiff testified that his statement as to the distance the engine was from him when he first saw it was different from his statement at the former trial; and that he had read the opinion of the supreme court, reversing the case, and holding him guilty of contributory negligence on the ground that he had time to get off the track after seeing the engine. *Held*, that it was proper to ask plaintiff on cross-examination if he did not make such different statement because he had seen the ground on which the case was reversed, as such question would tend to show plaintiff's motive in changing his testimony.—Galveston, H. & S. A. Ry. Co. v. Porfert, 1 Tex. Civ. App. 716, 20 S. W. 870.

§ 1232. Effect of refusal to answer on cross-examination.

[a] (Iowa, 1887) Thirty-four questions were propounded to a witness on cross-examination, as to her testimony in a former trial, which she refused to answer. The court refused to strike out her testimony, but instructed the jury that her demeanor on the stand should be considered. *Held*, it was not error, as her former contradictory testimony could have been proven, or the court asked to compel her to testify.—State v. Archer, 73 Iowa, 320, 35 N. W. 241.

5. LAYING FOUNDATION FOR PROOF OF INCONSISTENT STATEMENTS.

NECESSITY OF LAYING FOUNDATION, § 1233.
—— PARTY AS WITNESS, §§ 1234, 1235.
—— IMPEACHMENT OF ONE'S OWN WITNESS, § 1236.
SCOPE OF CROSS-EXAMINATION FOR PURPOSE OF LAYING FOUNDATION, § 1237.
FOUNDATION FOR IMPEACHMENT OF DEPOSITION, AFFIDAVIT, OR OTHER WRITTEN TESTIMONY, § 1238.
FOUNDATION FOR IMPEACHMENT BY WRITTEN STATEMENTS, § 1239.
—— DEPOSITIONS OR MINUTES OF TESTIMONY AT FORMER TRIAL OR HEARING, § 1240.
CERTAINTY AND DEFINITENESS OF INQUIRY, § 1241.
—— TIME, PLACE, CIRCUMSTANCES, AND PERSON TO WHOM STATEMENTS WERE MADE, § 1242.

Notice of impeaching absent witness, see ante, § 1213 [e].

Recalling witness for purpose of impeachment, see ante, § 1109.

§ 1233. Necessity of laying foundation.

[a] A witness cannot be impeached by proving a statement different from the one sworn to, unless he has been examined as to his having made such statement.

—(U. S. 1853) Conrad v. Griffey, 57 U. S. (16 How.) 38, 14 L. Ed. 835; (1840) McKinney v. Niel, Fed. Cas. No. 8,865 [1 McLean, 540]; (1851) United States v. Dickinson, Fed. Cas. No. 14,958 [5 McLean, 325]; (1883) Marks v. Fox (C. C.) 18 Fed. 713;

(Ala. 1879) Atwell v. State, 63 Ala. 61;

(Ark. 1854) Drennen v. Lindsey, 15 Ark. 359; (1860) Bobo v. Bryson, 21 Ark. 387, 76 Am. Dec. 406;

(Cal. 1866) Rice v. Cunningham, 29 Cal. 492; (1887) Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; (1892) Young v. Brady, 94 Cal. 128, 29 Pac. 489;

(Colo. 1896) Mullen v. McKim, 22 Colo. 468, 45 Pac. 416;

(Ill. 1845) Regnier v. Cabot, 7 Ill. (2 Gilman) 34; (1867) Winslow v. Newlan, 45 Ill. 145; (1884) German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; (1886) Chicago & A. R. Co. v. Lammert, 19 Ill. App. (19 Bradw.) 135; (1894) Travelers' Preferred Accident Ass'n v. McKinney, 57 Ill. App. 141;

(Ind. 1839) Sutton v. Reagan, 5 Blackf. 217, 33 Am. Dec. 466; (1844) Weinzorpflin v. State, 7 Blackf. 186; (1861) Owen v. Rynerson, 17 Ind. 620;

(Iowa, 1859) State v. Ruhl, 8 Iowa (8 Clarke) 447; (1863) Strunk v. Ochiltree, 15 Iowa, 179;

(Ky. 1881) Tye v. Commonwealth, 3 Ky. Law Rep. 59;

(La. 1851) Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596; (1853) State v. Cazeau, 8 La. Ann. 109; (1880) Same v. Angelo, 32 La. Ann. 407; (1896) Same v. Delaneuville, 48 La. Ann. 502, 19 South. 550;

(Md. 1839) Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co., 11 Gill & J. 28, 33 Am. Dec. 687; (1863) Matthews v. Dare, 20 Md. 248;

(Mich. 1888) Platt v. Broderick, 70 Mich. 577, 38 N. W. 579;

(Minn. 1862) Scott v. King, 7 Minn. 494 (Gil. 401); (1869) State v. Staley, 14 Minn. 105 (Gil. 75); (1889) Watson v. St. Paul City Ry. Co., 42 Minn. 46, 43 N. W. 804; (1892) Granning v. Swenson, 49 Minn. 381, 52 N. W. 30;

(Mo. 1841) Able v. Shields, 7 Mo. 120; (1860) State v. Davis, 29 Mo. 391; (1892) Carder v. Primm, 52 Mo. App. 102;

(Neb. 1894) Thompson v. Wertz, 41 Neb. 31, 59 N. W. 518;

(N. Y. 1837) Everson v. Carpenter, 17 Wend. 419; (1857) Budlong v. Van Nostrand, 24 Barb. 25; (1859) Valton v. National Fund Life Assur. Co., 20 N. Y. 32; (1887) People v. Minisci, 12 N. Y. St. Rep. 719; (1888) Provost v. City of New York, 3 N. Y. Supp. 531, 15 Daly, 87; (1892) McCulloch v. Dobson, 133 N. Y. 114, 30 N. E. 641;

(N. C. 1876) State v. Wright, 75 N. C. 439;

(Ohio, 1875) New York Life Ins. Co. v. La Boiteaux, 5 Ohio Dec. 242;

(Pa. 1845) McAteer v. McMullen, 2 Pa. (2 Barr) 32; (1851) Mitchell v. Welch, 17 Pa. (5 Harris) 339, 55 Am. Dec. 557; (1861) Wright v. Cumpsty, 41 Pa. (5 Wright) 102;

(Tex. 1858) Bigham v. Carr, 21 Tex. 142; (1864) Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657;

(W. Va. 1889) State v. Goodwin, 32 W. Va. 177, 9 S. E. 85;

(Wis. 1857) Ketchingman v. State, 6 Wis. 426; (1891) Hunter v. Gibbs, 79 Wis. 70, 48 N. W. 257.

CONTRA, see

(U. S. 1848) Howland v. Conway, Fed. Cas. No. 6,793 [Abb. Adm. 281];

(Conn. 1853) Hedge v. Clapp, 22 Conn. 262, 58 Am. Dec. 424; (1876) Tomlinson v. Town of Derby, 43 Conn. 562;

(Me. 1831) Ware v. Ware, 8 Me. (8 Greenl.) 42; (1850) Wilkins v. Babbershall, 32 Me. 184;

(Mass. 1821) Tucker v. Welsh, 17 Mass. 160, 9 Am. Dec. 137; (1852) Gould v. Norfolk Lead Co., 63 Mass. (9 Cush.) 338, 57 Am. Dec. 50;

(N. H. 1851) Titus v. Ash, 24 N. H. (4 Fost.) 319; (1857) Cook v. Brown, 34 N. H. 460.

[aa] Proof of conflicting statements having been made by a witness should be excluded until the foundation is laid for the admission of such testimony.

—(Ky. 1881) Evans v. Commonwealth, 3 Ky. Law Rep. 30;

(Tex. 1880) Shields v. State, 8 Tex. App. 427; (1895) Smith v. Jones, 11 Tex. Civ. App. 18, 31 S. W. 306.

[b] Evidence of the omission of a witness to state facts in a previous trial between other parties is not admissible to discredit him, unless he is first examined as to such statements so as to give an opportunity for explanation.

—(Neb. 1893) Wheeler v. Van Sickle, 37 Neb. 651, 56 N. W. 196;

(N. Y. 1877) Huebner v. Roosevelt, 7 Daly, 111;

(Pa. 1845) McAteer v. McMullen, 2 Pa. (2 Barr) 32.

[bb] In the absence of any foundation for impeachment, it was not error to exclude testimony tending to show what one of the witnesses for plaintiff had stated out of court.

—(Mich. 1896) Connell v. McNett, 109 Mich. 329, 67 N. W. 344;

(Tex. 1895) Cabell v. Holloway, 10 Tex. Civ. App. 307, 31 S. W. 201.

[c] (U. S. 1838) What a witness testified at a former trial may be given in evidence to discredit him by showing a contradiction between

that and his present testimony, without having first asked the witness whether he did not testify to that effect.—United States v. White, Fed. Cas. No. 16,679 [5 Cranch, C. C. 457].

[cc] (Ala. 1841) Where a government's witness is asked, on cross-examination, if he has not made certain statements to two persons (naming them) and others, which he denies, the two persons named may be called to contradict him, but no other person; and whether the state witness shall be recalled, at the request of the defendant, to ask him relative to his statements to others, for the purpose of contradicting him, is within the discretion of the court.—State v. Marler, 2 Ala. 43, 36 Am. Dec. 398.

[d] (Ala. 1875) In an action involving the issue of a sale of cattle to defendant, who testifies in his own behalf that the sale was to a third person, and not to him, his declarations on particular occasion to the effect that he had the cattle are admissible in rebuttal; and the court cannot require plaintiff, having the right to rejoin, to first call defendant back, and ask him if he made such declarations, before introducing them in rebuttal.—Kimmey v. Calloway, 52 Ala. 222.

[dd] (Ala. 1893) A witness having testified that he saw defendant commit an offense, no sufficient predicate was laid for testimony that such witness had said that he did not see the act done, where the witness was not asked if he had made the statement, did not deny making it, and had no opportunity to admit, deny, or explain it.—Gilyard v. State, 98 Ala. 59, 13 South. 391.

[e] (Ark. 1855) On a criminal trial, the following question, without a foundation laid for it, to contradict the witness, is incompetent: "Whether the witness had not testified before the examining court in this case, that he regarded the defendant's threats as of no importance or consequence."—Atkins v. State, 16 Ark. 568.

[ee] (Ark. 1894) A predicate must be laid on which to impeach the testimony of one witness by that of another.—Jones v. State, 58 Ark. 390, 24 S. W. 1073.

[f] (Ark. 1896) It was not error to refuse to permit a grand juror to state what decedent's wife said before the grand jury as to the position of defendant at the time of the homicide, where said wife was not asked, when she testified, as to whether she had ever made such statement.—Carpenter v. State, 62 Ark. 286, 36 S. W. 900.

[ff] (Cal. 1887) Where no attempt is made to contradict a witness, he may be questioned as to previous statements inconsistent with his testimony, although no foundation has been laid for his impeachment, as required by Code Civ. Proc. § 2052.—People v. Levy, 71 Cal. 618, 12 Pac. 791.

[g] (Cal. 1895) A witness for the state testified that she identified defendants at the coroner's office. The defense afterwards proposed to show by another witness that the witness first pointed out another person as the guilty party. *Held*, that it was not the proper method of impeachment, as the state's witness should have been first examined with reference to that point.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[gg] (Cal. 1895) Where the defense in an action for cutting wood was that plaintiff agreed to pile it for measurement, but failed to do so, and defendant's foreman testified that the wood was not in condition to be measured, it was error to permit a witness called in rebuttal to testify that he had a conversation with said foreman after the suit had commenced, and that said foreman told the witness that the wood could be easily measured, as, if said testimony was intended to impeach said foreman's testimony, it was improper, because no foundation had been laid.—Mutter v. I. X. L. Lime Co., 42 Pac. 1068.

[h] (Conn. 1853) The English rule, that a witness cannot be impeached by proof that he has made statements contradictory to what he has sworn upon the trial, unless he has been inquired of, on cross-examination, as to such alleged contradictions, has never been adopted in Connecticut by any legislative enactment or judicial decision.—Hedge v. Clapp, 22 Conn. 262, 58 Am. Dec. 424.

[hh] (Conn. 1876) It is within the discretion of the court to receive evidence of declarations made by a witness contradictory to the material facts testified to by him, without the witness having been first asked on cross-examination whether he has made such contradictory statements.—Tomlinson v. Town of Derby, 43 Conn. 562.

[i] (Ga. 1888) On the trial of a man for a single act of adultery with one of his witnesses, letters written by him before the act, and a conversation, also before the act, had with his wife and his witness when he was not present, all tending to show that he, his wife, and his witness had, several months before the alleged act, combined to "blackmail" another person, were not admissible in behalf of the state to impeach the witness or illustrate her relations to or with the accused, she not having been interrogated as to these matters when under examination, so as to lay the foundation for contradicting her.—Gardner v. State, 81 Ga. 144, 7 S. E. 144.

[ii] (Ill. 1860) It is proper to ask a witness about his previous statements before impeaching him by proving them.—Cook v. Hunt, 24 Ill. (14 Peck) 535.

[j] (Ill. 1882) Where property seized under execution was replevied by a third claimant, and the defendant in execution testified that the property belonged to the claimant, testimony of other witnesses that on several occasions defendant in execution had stated that he was the owner was not admissible as impeaching testimony, without a foundation for its introduction having been laid.—Redmon v. Holley, 10 Ill. App. (10 Bradw.) 202.

[jj] (Ill. 1886) It is improper to attempt to show that a witness testified differently at a former hearing, or before the grand jury, until a proper foundation has been laid therefor.—Hoge v. People, 117 Ill. 35, 6 N. E. 796.

[k] (Ill. 1888) It is needless to lay a foundation to admit a conversation of the opposite party, pertinent to the issue, by asking him first if he made the statement.—Brown v. Calumet River Ry. Co., 125 Ill. 600, 18 N. E. 283.

[kk] (Ill. 1890) In an action for goods sold and delivered, where the defense was a breach of warranty as to quality, the husband of defendant, who was her agent in the conduct of her business, testified that he informed plaintiff of the defect of quality. *Held*, that evidence that he on different occasions offered to settle the bill for the goods, and made no claim as to the quality, was admissible to impeach his evidence after his attention was called to such offers; but the irregularity in failing to call his attention thereto preliminary to its admission is cured by his testifying in rebuttal as to the conversations.—Reid v. Foster, 37 Ill. App. 76.

[l] (Ind. 1893) Where it is sought to impeach a witness who is not a party to the action, by proof of contradictory statements made out of court, and the examination of the witness for the purpose of laying the foundation of impeachment is limited to a certain time, it is not competent for the impeaching party to prove contradictory statements made at any other

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time.—Jackson v. Swope, 134 Ind. 111, 33 N. E. 909.

[ll] (Iowa, 1859) On a prosecution under Code, § 2584, for enticing a female under 15 years of age from her uncle, who had legal charge of her, without his consent, for purpose of prostitution, what the prosecuting witness said before the alleged abduction, with reference to the treatment which she had received at her uncle's and about her intention to leave his house, was properly excluded as impeaching evidence, where defendant failed to lay a basis for impeaching her by asking her the necessary questions while on the stand.—State v. Ruhl, 8 Iowa (8 Clarke) 447.

[m] (Iowa, 1872) In an action for an assault and battery, defendant on his examination as a witness testified that he had no feelings of enmity against the plaintiff at the time of the assault. A witness was then permitted to give evidence of declarations of defendant tending to contradict plaintiff and to show his feelings of enmity and ill will. *Held*, that the evidence was not inadmissible on the ground that defendant had no opportunity given him to explain the declarations of which the witness testified.—Lucas v. Flinn, 35 Iowa, 9.

[mm] (Iowa, 1887) Where it is intended to impeach a witness by showing that he said certain things in a conversation, his attention should be called, on the cross-examination, to the conversation, giving time and place, before introducing the impeaching testimony; but where, after such testimony has been put in, the witness is called in rebuttal, and given an opportunity to deny the testimony, the error is harmless.—Esterly v. Eppelsheimer, 78 Iowa, 260, 34 N. W. 846.

[n] (Kan. 1888) Before a witness can be impeached by proof of contradictory statements made in his evidence on a former trial, such contradictions must be called to his attention, and it is error to introduce them without having laid any foundation.—State v. Cleary, 40 Kan. 287, 19 Pac. 776.

[nn] (La. 1896) The rule that statements of the witness out of court, contradictory of his testimony, cannot be proved unless he is first afforded the opportunity of denial, admission, or explanation, is enforced, where the imputed contradictions are offered to impeach the credit of the witness.—State v. Goodbier, 48 La. Ann. 770, 19 South. 755.

[nnn] (La. 1896) The rule that statements of a witness out of court, contradictory to his testimony, cannot be proved unless he is first afforded the opportunity of denial, will be enforced, though the imputed contradictions are offered to show the malice of the witness to the accused.—State v. Goodbier, 48 La. Ann. 770, 19 South. 755.

[o] (Me. 1845) A witness' declarations that he has sworn falsely in a former case may be received without any previous inquiry of him whether he had made such statements, as the practice does not require a previous examination.—State v. Blake, 25 Me. (12 Shep.) 350.

[oo] (Mass. 1855) A witness may be impeached by evidence of his previous contradictory statements, without first calling his attention to such statements.—Commonwealth v. Hawkins, 69 Mass. (3 Gray) 463.

[p] (Mich. 1842) Before the credit of a witness can be impeached by proof of inconsistency in his declarations, a foundation must be laid by questioning him on cross-examination as to his former statements, that he may have an opportunity for explanation.—Sawyer v. Sawyer, Walk. Ch. 48.

[pp] (Mich. 1842) The practice, in chancery, in this regard, is the same as at law.—Sawyer v. Sawyer, Walk. Ch. 48.

[q] (Mich. 1894) Where a witness denied that he had made certain statements to one K., the contradictory testimony of K. in rebuttal was hearsay, and inadmissible in the absence of a foundation for impeachment.—Skelton v. Fenton Electric Light & Power Co., 100 Mich. 87, 58 N. W. 609.

[qq] (Minn. 1861) Testimony as to what a witness testified in another and former trial between different parties is inadmissible, without first calling his attention to such testimony, that he may have an opportunity to explain.—Castner v. Gunther, 6 Minn. 119 (Gil. 63).

[r] (Miss. 1878) Where, on a trial for murder, two witnesses had testified that they had selected the accused from several persons and identified him as the one they saw kill the deceased, *held*, that it was error to reject evidence offered by him to show what were the words and acts on such occasion, and that there was in fact no such identification, although he had not thereon examined the two witnesses so testifying for the state.—Mixon v. State, 55 Miss. 525.

[rr] (Mo. 1851) Before the credit of a witness can be impeached by proof of anything which he has said in relation to the cause, a foundation must be first laid for such proof, by first asking him whether he has said that which is intended to be proved.—Clementine v. State, 14 Mo. 112.

[s] (Mo. 1888) Evidence as to what a witness testified on a former trial is not admissible to impeach him until he has been particularly inquired of as to such statements.—State v. Parker, 96 Mo. 382, 9 S. W. 728.

[ss] (N. Y. 1850) Error in allowing witness to be impeached by evidence of contradictory statements without first calling his attention to the time and occasion of making the supposed statements was not cured by afterwards recalling him and giving him an opportunity to explain his testimony.—Sprague v. Cadwell, 12 Barb. 516.

[t] (N. Y. 1854) Where no foundation had been laid for impeaching a witness by showing contradictory statements made by him as to any material fact, and he had not been interrogated respecting a particular conversation, evidence of his declarations made in the course of that conversation, offered without any statement to show the relevancy of the proposed proof, was rightly excluded.—Valton v. National Loan Fund Life Assur. Soc., 22 Barb. 9.

[tt] (N. Y. 1872) Where it is attempted to impeach a witness by showing that he has made other statements inconsistent with his evidence upon a material fact, it is requisite that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statement was made, that he may have an opportunity to explain the apparent inconsistency between his evidence and his former statements.—Gaffney v. People, 50 N. Y. 416, affirming People v. Gaffney (1872) 1 Sheld. 304.

[u] (N. Y. 1888) In an action for injuries to a dog, alleged to have been inflicted by defendant, it is improper to admit evidence that a material witness for plaintiff had himself threatened to shoot the dog, and that plaintiff had paid him to make an affidavit in the case, without laying a foundation for contradiction. Code Civ. Proc. § 3063, providing that on appeals from justices objections merely technical and not affecting the merits shall be disregarded, does not abrogate the fundamental rules of evidence.—Sanford v. Shafer, 50 Hun, 600, 2 N. Y. Supp. 357.

[uu] (N. Y. 1889) An objection to the testimony of a witness as to a statement made to him by another witness, because the latter was not asked if he had made such a statement, is

properly overruled where the questions asked both witnesses were directed to the same subject-matter.—Voltz v. Wilson, 54 Hun, 635, 7 N. Y. Supp. 176.

[v] (N. Y. 1890) Defendants introduced a witness who testified that during the trial he went to the property described in the complaint and asked to be admitted, so as to make observations, but the proprietor, who had been introduced by plaintiff as a witness, refused to admit him. The defendants then asked such witness to state the reasons the proprietor gave. *Held*, that such question was properly excluded, the proprietor not having been examined in reference to such statements.—Hamilton v. Manhattan Ry. Co., 58 N. Y. Super. Ct. (26 Jones & S.) 17, 9 N. Y. Supp. 313.

[vv] (N. C. 1879) Testimony relating directly to the subject of litigation may be met by evidence of inconsistent facts, or contradictory statements previously made by the witness, without first calling his attention to such facts or statements.—Jones v. Jones, 80 N. C. 246.

[w] (Or. 1882) The provisions of the Code concerning the contradicting of witnesses by proof of inconsistent declarations made elsewhere, and of the foundation necessary in such cases, are but declaratory of the common-law rules governing the subject.—Sheppard v. Yocum, 10 Or. 402.

[ww] (Pa. 1839) Whether evidence shall be given of contradictory statements made by a witness examined on the trial without first interrogating the witness proposed to be contradicted is a matter for the discretion of the court trying the case, and their decision will not be reviewed on appeal.—Sharp v. Emmet, 5 Whart. 288, 34 Am. Dec. 554.

[x] (Pa. 1846) The admission of evidence of the declarations of a witness for the purpose of discrediting him, without a previous examination of the witness to the same matter, is in the discretion of the court trying the cause.—Kay v. Fredrigal, 3 Pa. (3 Barr) 221.

[xx] (Pa. 1872) Permitting a witness to be contradicted in matters as to which his attention had not been called in his examination is within the discretion of the court trying the case.—Walden v. Finch, 70 Pa. (20 P. F. Smith) 460.

[xxx] (Pa. 1881) Whether to allow the deposition of a witness to be contradicted, by evidence of contradictory statements made by him, without calling his attention thereto, is within the court's discretion, and is not reviewable.—Smith v. Winger, 3 Walk. 138.

[xxxx] (Pa. 1894) It cannot be objected that a proper foundation was not laid for the introduction of acts and declarations inconsistent with witness' testimony, where a proposed cross-examination of him as to acts and declarations inconsistent with his testimony was not allowed.—Miller v. Baker, 160 Pa. 172, 28 Atl. 648, 34 Wkly. Notes Cas. 249.

[y] (Tex. 1880) The right to discredit a witness by proving statements by him contradictory of his testimony extends no further than the predicate laid for that purpose.—Shields v. State, 8 Tex. App. 427.

[yy] (Tex. 1889) On the examination of an executor as to the circumstances attending the execution of a will, it was not proper to ask him on cross-examination whether certain witnesses had not told him that they kept the contestant out of the room while the will was executed, no foundation for the inquiry for the purpose of impeaching such witnesses having been laid.—Robinson v. Stuart, 73 Tex. 267, 11 S. W. 275.

[yyy] (Tex. 1895) The admission of evidence of contradictory statements of a witness without laying a proper foundation when she was on the stand is not error where she afterwards denies the testimony.—Hartsfield v. State (Cr. App.) 29 S. W. 777.

[z] (Vt. 1847) It is an established rule of practice that testimony as to the previous declarations of a witness produced upon the stand, offered for the purpose of impeaching him, cannot be received, unless an opportunity be first afforded to the witness, whose testimony it is proposed to impeach, to explain or qualify the imputed declarations; and in this respect this court have fully sanctioned the English rule, which proceeds so far as to admit of no exception even in cases where, when the cross-examination was closed, the party wishing to impeach had no knowledge of the variant declarations or inconsistent conduct of the witness, and the witness has departed from court, and cannot be recalled.—Downer v. Dana, 19 Vt. 338.

[zz] (Wash. 1896) A proper foundation must be laid for the introduction of statements made by a third person in the absence of plaintiff, which are offered for purpose of impeachment.—Allen v. Swerdfiger, 14 Wash. 461, 44 Pac. 894.

[zzz] (Wyo. 1896) Where a consignor testified that the goods were delivered by him to a carrier as the property of a pledgee, and for transportation to him, evidence of statements made by the consignor, to which his attention had not been called while he was on the stand, that he was owner of the goods after they were packed and delivered to the carrier, was inadmissible to impeach him.—Toms v. Whitmore, 6 Wyo. 220, 44 Pac. 56.

§§ 1234, 1235. —— Party as witness.

[a] (Ark. 1877) Where a party to a suit becomes a witness, it is not necessary to lay the usual foundation for proving previous admissions, contradictory to the party's testimony.—Collins v. Mack, 31 Ark. 684.

[b] (Colo. 1892) In order to introduce testimony that a witness, not a party, has made statements contradictory of his testimony, it is first necessary to examine the witness in regard to such statements; but when the witness is also a party, such statements are competent as substantive evidence as well as impeaching testimony, and a prior examination is not necessary, where, according to the regular order of trial, such party is afforded full opportunity of testifying in regard to such statements.—Rose v. Otis, 18 Colo. 59, 31 Pac. 493.

[c] (Iowa, 1894) In order that a witness, whether a party or not, may be impeached by showing inconsistent statements by him out of court, a foundation must be laid, by directing his attention to the time, place, and person involved in the supposed contradiction.—Browning v. Gosnell, 91 Iowa, 448, 59 N. W. 340.

[d] (Neb. 1891) The admissions or statements of a party to a suit against his interest, upon a material matter, may be proved without laying the foundation required in case of impeaching a disinterested witness.—Bartlett v. Cheesebrough, 32 Neb. 339, 49 N. W. 360.

[e] (N. Y. 1889) Evidence of contradictory statements by a party to an action is admissible, though he has not been previously interrogated as to whether he has made such statements.—Kennedy v. Wood, 52 Hun, 46, 4 N. Y. Supp. 758.

[f] (N. Y. 1893) Evidence of a party to an action on a former trial, so far as it relates to the questions at issue, is admissible to prove admissions made by her, and it is not essential that her attention be first called to what she testified to on the former trial.—Fisher v. Monroe (Com. Pl.) 2 Misc. Rep. 326, 21 N. Y. Supp. 995.

[g] (N. Y. 1894) A party's contradictory statements out of court relevant to the issues, being

original evidence as an admission, may be proved without previous interrogation of the witness.—Boyd v. Boyd (Com. Pl.) 9 Misc. Rep. 161, 29 N. Y. Supp. 7.

[h] (Pa. 1876) Where a party is a witness in his own behalf, his admissions out of court, though contradicting his evidence, may be proved without first calling his attention to them, as in the case of other witnesses.—Kreiter v. Bomberger, 82 Pa. 59, 22 Am. Rep. 750.

[i] (Va. 1880) When the credibility of a witness is to be impeached by anything he has said or done in relation to the cause, he must first be asked, on cross-examination, whether he has said or done that which is intended to be proved; and this applies equally where plaintiff is the witness sought to be impeached.—Davis v. Franke, 33 Grat. 413.

[j] (Wis. 1888) Defendant contending that the lumber for which a lien was sought to be enforced was not sold to him, but to his contractor, evidence of an admission that he was bound to pay plaintiff's claim is competent, without foundation.—Wisconsin Planing-Mill Co. v. Schuda, 72 Wis. 277, 39 N. W. 558.

[k] (Wis. 1891) The admissions of a party against his own interest may be shown without any foundation being laid, and the fact that the testimony of the party taken in the justice's court is read in evidence on the trial in the circuit court on appeal under a stipulation does not take the case out of the rule.—Hunter v. Gibbs, 79 Wis. 70, 48 N. W. 257.

§ 1236. —— Impeachment of one's own witness.

[a] (Ind. 1892) Though by the provisions of Rev. St. 1881, § 507, a party may impeach his own witness by proof of contradictory statements, he must lay the foundation therefor by calling the attention of the witness to the time and place of the statements.—Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87.

[aa] (Mass. 1885) In an action to establish a will, one S. was called by defendants, and testified that in a conversation with B., the testator's wife, who was alleged to have procured the execution of the will by undue influence, B. said that she and her husband were satisfied with the will. The witness was then asked, "Did not Mrs. B. say something to you in effect like this: that she had torn up, or insisted upon tearing up or destroying, a will that was not satisfactory to her?" to which witness replied, "No, sir; nothing of the kind." Defendants then called a witness, and offered to show that S. had made statements inconsistent with the testimony given on the stand, and which was excluded. *Held*, that the impeaching testimony offered was not admissible, under Pub. St. c. 169, § 22, which provides that "the party producing a witness * * * may contradict him by other evidence, and may also prove that he has made, at other times, statements inconsistent with his present testimony; but, before such last mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statements, and, if so, allowed to explain them,"—since it had no tendency to establish the truth of the alleged statement.—Batchelder v. Batchelder, 139 Mass. 1, 29 N. E. 61.

[b] (Miss. 1886) One may not discredit his own witness by proof of previous contradictory statements, unless fraud or artifice is shown, and the necessary foundation laid by directing the attention of the witness to the circumstances.—Dunlap v. Richardson, 63 Miss. 447.

[c] (Pa. 1874) Where a party is called as a witness by his adversary, as on cross-examination, his testimony may be contradicted by proof of inconsistent declarations made out of court, without giving him an opportunity to explain them, as his declarations, he being a party, are evidence in themselves.—Brubaker's Adm'r v. Taylor, 76 Pa. (26 P. F. Smith) 83.

§ 1237. Scope of cross-examination for purpose of laying foundation.

Denial by witness and right to contradict, see post, § 1244.

[a] A witness cannot be questioned on cross-examination about a matter irrelevant to the issue for the purpose of laying a ground to impeach him by contradicting his statements.
—(Ala. 1872) Marx v. Bell, 48 Ala. 497; (1879) Washington v. State, 63 Ala. 189;
(Miss. 1882) Tucker v. Donald, 60 Miss. 460, 45 Am. Rep. 416;
(Or. 1861) Goodall v. State, 1 Or. 333, 80 Am. Dec. 396.

[b] (U. S. 1806) If a witness, in a deposition, on his cross-examination, states as facts circumstances not pertinent to the cause, which he has said or sworn in another cause in which the circumstances were pertinent, the statement cannot be read to discredit him.—Lamalere v. Caze, Fed. Cas. No. 8,002 [1 Wash. C. C. 413].

[c] (Ala. 1889) At a trial for burglary a brother of defendant testified in his behalf to facts tending to show that one B. was the burglar. On cross-examination the witness was asked if he did not say to B. "while in jail about the time of the preliminary trial: 'Why, did you give us away? If you had not turned state's evidence, me and pa would have been out of jail now, and could have got as may G—— d—— witnesses as we wanted to have proved you and Jim [defendant] out.'" *Held*, that the question was admissible to impeach the veracity of the witness.—England v. State, 89 Ala. 76, 8 South. 146.

[d] (Ark. 1866) A witness who has testified before the examining court, in a criminal case, may on the trial be asked if he did not in his testimony before the examining court make certain statements, when such question is put for the purpose of laying a foundation on which to contradict the witness.—Milan v. State, 24 Ark. 346.

[e] (Cal. 1893) On a prosecution for assault with intent to kill, defendant's wife was asked if she did not tell one B. that defendant had intended to do the shooting some weeks earlier, and that defendant had made her pursue a certain course of action, which statement she denied having made. *Held* that, as such evidence did not bear directly on the shooting, the witness could not be impeached by a question asked of B. as to what she had told B. about the shooting.—People v. Nonella, 99 Cal. 333, 33 Pac. 1097.

[f] (Ga. 1866) A witness cannot be discredited by evidence contradicting his answer to a cross-interrogatory, unless the cross-interrogatory was put in accordance with the rule as to laying the foundation for impeaching a witness by statements made out of court.—Wilkinson v. Davis, 34 Ga. 549.

[g] (Ill. 1882) Where, in an action against a master for the negligence of his servant in driving a team, the servant testified merely to the facts concerning the collision, and was then improperly cross-examined as to certain statements and admissions made by him at the time, evidence of inconsistent statements was not competent.—Teal v. Meravey, 12 Ill. App. (12 Bradw.) 32.

[h] (Ill. 1884) In bastardy proceedings the testimony of the prosecutrix cannot be impeached by asking questions on wholly collateral matters and showing that her answers in regard

thereto were contrary to her statements made out of court.—Moore v. People, 108 Ill. 484, affirming (1883) 13 Ill. App. (13 Bradw.) 248.

[i] (Iowa, 1856) A witness may be questioned, on cross-examination, as to certain statements made by him, with a view to contradicting him.—Ross v. Hayne, 3 G. Greene, 211.

[j] (La. 1893) Where, in a criminal trial, the state places a particular witness for the first time on the stand, by permission of the court, after the parties have closed their case, to rebut the testimony of a witness for defendant, the court may refuse to allow him to be asked questions as to irrelevant matters not bearing on the issue in order to lay a foundation for impeachment.—State v. Spencer, 45 La. Ann. 1, 12 South. 135.

[k] (Mass. 1868) The contradiction of a witness by proof of a declaration made by him inconsistent with a statement drawn out on his cross-examination is competent, if upon a material question.—Foot v. Hunkins, 98 Mass. 523.

[l] (Mich. 1887) In a suit by the holder of a claim against an estate, the question being put in issue by claimant as to the ownership of money in the hands of claimant and her husband, the opposing counsel might cross-examine the husband fully as to where he obtained the money, and contradict and impeach his testimony by conflicting statements made by him out of court.—Stackable v. Stackpole's Estate, 65 Mich. 515, 32 N. W. 808.

[m] (Mich. 1891) In an action for assault and battery, for the purpose of impeachment defendant may be asked "if he had not stated that he meant to have killed plaintiff, and would if he had it to do over again."—Kent v. Cole, 84 Mich. 579, 48 N. W. 168.

[n] (Mich. 1893) It is not proper, in a civil action, for the purpose of discrediting a witness, to cross-examine her as to her testimony on a criminal trial, and then impeach by showing that her statements at different times have been contradictory.—Cole v. Lake Shore & M. S. Ry. Co., 95 Mich. 77, 54 N. W. 638.

[o] (Miss. 1896) Where a witness is questioned on cross-examination as to irrelevant and collateral matters not brought out on direct examination, the cross-examining party is bound by the witness' answer, and cannot prove unsworn statements made out of court to contradict him.—Williams v. State, 73 Miss. 820, 19 South. 826.

[p] (Mo. 1886) Where, in a criminal case, the defendant offers to prove by another witness that a witness who had been examined by the state had said that he and another witness would leave, and not be witnesses against defendant, for $100, the defendant is entitled, in cross-examination, to ask such state witness whether he made the statement alleged.—State v. Downs, 91 Mo. 19, 3 S. W. 219.

[q] (Mo. 1887) In a suit to redeem certain land which plaintiff claimed to have been conveyed by deed absolute, which was intended as a mortgage and which had been subsequently conveyed to a third person, the plaintiff was asked if he had not stated to a certain witness that he had sold the property and that he had no interest in it, to which he replied that he had never had any such conversation with such witness. *Held*, that testimony by such witness that he did have such conversation, and that plaintiff had told him that he had conveyed the property, was admissible for the purpose of impeaching the plaintiff, though it was objected to on the ground that it was irrelevant.—Schradski v. Albright, 93 Mo. 42, 5 S. W. 807.

[r] (Neb. 1887) A witness cannot be cross-examined as to one independent collateral matter in no way connected with the subject of the action, in order to show contradictory statements made by him, for the purpose of impeaching his credibility.—Curran v. Percival, 21 Neb. 434, 32 N. W. 218.

[s] (Neb. 1893) To justify the proving of contradictory statements of a witness, for the purpose of impeaching him, the answer of the witness on cross-examination must be material, so that the cross-examining party would be allowed to give it in evidence.—Carter v. State, 36 Neb. 481, 54 N. W. 853.

[t] (N. H. 1859) A witness, who had not been asked whether a bolt in a carriage had a nut upon it, which would have been a question material to the issue, was asked on cross-examination if he had not said he knew the bolt had no nut on it, with a view to contradict him if he denied it. *Held*, that the question was immaterial, and irrelevant, and therefore inadmissible.—Combs v. Winchester, 39 N. H. 13, 75 Am. Dec. 203.

[u] (N. Y. 1854) A witness cannot be cross-examined as to statements made by him at some previous time in regard to one point at issue in the case, where he had not testified at all in chief on such subject, and his answers could not properly affect his credibility.—Bearss v. Copley, 10 N. Y. (6 Seld.) 93.

[v] (N. Y. 1864) A party cross-examining a witness cannot draw out collateral statements from him, and for the purpose of discrediting him show that on some other occasion he stated differently.—Carpenter v. Ward, 30 N. Y. 243.

[w] (N. Y. 1874) On the trial of an action for an alleged breach by T. of a contract to support plaintiff during life, a witness called by defendant testified to conversations between the parties and admissions by plaintiff in substance that no such contract had been made. Upon cross-examination said witness was asked if he had not since said that plaintiff should have $1,000 out of T.'s estate? This the witness denied. Plaintiff thereupon, for the purpose of discrediting said witness, offered and was allowed to prove, under objection, that he had so said. *Held* no error, as it was equivalent to a declaration that the contract was made.—Schell v. Plumb, 55 N. Y. 592, affirming (1873) 46 How. Prac. 11.

[ww] (N. Y. 1877) Where a witness for defendant is asked on cross-examination as to whether he had not made to a third person certain statements which tended to show that he meant to conciliate the defendant by appearing as a witness and by his testimony, and he denied making them, such third person may be called to prove that he did not make such statements, as it is evidence as to the motive of the witness in testifying, and not evidence on a collateral issue.—O'Hagan v. Dillon, 42 N. Y. Super. Ct. (10 Jones & S.) 456.

[x] (N. Y. 1880) Where the state, on cross-examination of accused's witness, brought out matters which were not testified to in chief, the witness is thereby made a witness for the state in respect to such matters, and the state will not be permitted thereafter to discredit her testimony in regard to it by showing contradictory statements made to other persons not under oath.—People v. Cox, 21 Hun, 47, affirmed (1880) 83 N. Y. 610.

[xx] (N. Y. 1889) In an action for forcibly removing plaintiff from defendant's car, the conductor was asked, on cross-examination by plaintiff, whether he testified before the police commissioner that he told plaintiff that he could not ride inside the car because it was against the rules, unless he paid additional fare for a package which he was carrying, to which he answered affirmatively. *Held*, that evidence that he did not so testify was irrelevant and inadmissible to impeach his credibility, as it related to a matter collateral to the issue.—Morris v. Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097.

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[y] (N. Y. 1891) An affidavit made by a witness was offered in evidence for the purpose of impeaching the testimony of such witness. It appeared that the witness, on his direct examination, testified to nothing at variance with matters stated in the affidavit, but the statements alleged to be inconsistent therewith were elicited on cross-examination by the party offering the affidavit. The testimony given on cross-examination did not tend to contradict, discredit, vary, explain, or qualify the testimony given in chief. *Held*, that the affidavit was properly excluded.—Surdam v. Ingraham, 59 Hun, 620, 12 N. Y. Supp. 798.

[yy] (N. Y. 1892) On the question whether or not the signing of the name of one partner by the other to an assignment of firm property was authorized by the non-signing partner, a witness having testified that such partner had denied authorizing the use of his name, and that want of authority was admitted by the other partner, who was present, the court erred in refusing to allow the witness, on cross-examination, to say whether or not his legal advice had been asked, at the time specified by the partners, as to whether a second assignment by them was not illegal because of the existence of the first, and whether he had not answered affirmatively; the object of such answers being to impeach the testimony in chief of the witness.—National Bank of Troy v. Scriven, 63 Hun, 375, 18 N. Y. Supp. 277.

[z] (N. Y. 1892) In an action against a railroad for the death of a person struck by one of its trains, cross-examination of the engineer as to whether his train was late is proper as a test of credibility, to show whether his testimony would be the same as before the coroner.—Lustig v. New York, L. E. & W. R. Co., 65 Hun, 547, 20 N. Y. Supp. 477.

[zz] (N. Y. 1894) A witness called by plaintiff having denied the criminal conversation with plaintiff alleged in defendant's counterclaim for divorce, defendant could lay a foundation for impeachment by asking him if he did not admit to a certain person that he had illicit relations with plaintiff.—Woodrick v. Woodrick, 141 N. Y. 457, 36 N. E. 395.

[zzz] (Tenn. 1850) Where lumber sold as the property of a third person is claimed by plaintiff, who introduces such third person on his behalf to testify as to whether he acted as owner or as agent of the plaintiff, defendant may ask such third person if he had not made certain statements as to the lumber to certain persons, for the purpose of laying the foundation to show such statements by such other persons.—Jones v. Jennings, 29 Tenn. (10 Humph.) 428.

§ 1238. Foundation for impeachment of deposition, affidavit, or other written testimony.

[a] (U. S. 1839) The rule that a witness cannot be impeached by proving that at other times he made contradictory statements unless he shall first be interrogated as to such statements does not apply where an ex parte deposition is read of the taking of which no notice was given.—McKinney v. Nell, Fed. Cas. No. 8,865 [1 McLean, 540].

[b, c] (Ala. 1860) A witness testifying by deposition cannot be contradicted by evidence of his statements in a deposition taken in another suit, without the foundation therefor be first laid by inquiring of the witness whether or not he has made such statements; but depositions taken in the same suit are in effect one deposition, and as to them the rule is otherwise.—Hughes v. Wilkinson, 35 Ala. 453.

[d] (Colo. 1888) Where defendant took two depositions of a witness, and at the trial read the second, the plaintiff, for the purpose of showing that the witness made contradictory statements therein, may read the former deposition, without laying the ordinary foundation by interrogating him as to whether he had made such statements, giving time and place, etc.—Thompson v. Gregor, 11 Colo. 531, 19 Pac. 461.

[e] (Colo. 1895) A witness cannot be impeached by showing that he has made statements inconsistent with his testimony, unless he be given an opportunity to explain or deny the statements claimed to be contradictory; and it is immaterial that his testimony was taken by deposition, and that some of the alleged statements were made after his examination, when it was too late to lay the foundation for their introduction, while others, though made before he gave his deposition, were not known to counsel till afterwards.—Ryan v. People, 21 Colo. 119, 40 Pac. 775.

[f] (Ga. 1849) Where a party wishes to discredit a witness examined on a commission, where there is nothing in the interrogatory to apprise him beforehand what the witness will say, by proving the making of contradictory statements, his only course is to take a new commission for the examination of the witness as to the matter proposed to be contradicted, and then, having laid the foundation, he may contradict such witness by proof of his having made contradictory statements.—Johnson v. Kinsey, 7 Ga. 428.

[g] (Ga. 1853) The answers to cross-interrogatories which had not been read may be read by the adverse party, for the purpose of laying the foundation of impeaching the same witness, whose testimony, taken under another commission, had been read to the jury, the court allowing the other party to read the direct interrogatories.—Thomasson v. Driskell, 13 Ga. 253.

[h] (Ind. 1846) A deposition cannot be impeached by proving that a statement inconsistent with it had, before it was taken, been made by the deponent, unless the deposition shows that the deponent had been asked, on his examination, whether he had made such a statement.—Legg v. Leyman, 8 Blackf. 148.

[i] (Iowa, 1862) Two depositions of a witness were taken at different times; in the second he stated that his deposition had been taken before in the case before A. B., a notary public, that he was then sworn in the usual manner, and that his testimony was correctly written out by that officer. Beyond this the witness' attention was not called to the testimony which he had previously given, nor was any further opportunity given him to confirm or explain it. At the trial, the second deposition only having been introduced, it was *held* that the opposite party could not claim to read the first deposition, for the sake of impeaching the witness, by showing a disagreement between the two.—Samuels v. Griffith, 13 Iowa, 103.

[j] (Kan. 1878) Where the deposition of a witness had been read in evidence, and the opposing party produced another and a conflicting deposition of the same witness in another action between the same parties, it was not error for the court on its own motion to exclude it, as the witness sought to be impeached and the party to be affected thereby were entitled to any explanation which the witness could give for the statements imputed to him, and the attention of the witness must be first called on cross-examination to such prior contradictory statements.—Greer v. Higgins, 20 Kan. 420.

[k] (La. 1858) Where a seasonable though fruitless effort had been made to examine a witness, whose testimony had been taken under commission, in relation to contradictory statements alleged to have been made by him, proof of such contradictory statements was properly received.—Fletcher v. Henley, 13 La. Ann. 191.

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[l] (Md. 1863) The rule that a witness cannot be impeached by proving that he had on other occasions made statements at variance with his testimony, unless a proper foundation has been previously laid by interrogating the witness on the subject of the alleged variance, governs when the testimony of the witness is taken under a commission as well as when he is examined on the stand.—Matthews v. Dare, 20 Md. 248.

[m] (Miss. 1885) A witness cannot be impeached by proof of contradictory statements made by him unless a foundation is laid, even though his testimony is in the form of an affidavit for a continuance.—Fulton v. Hughes, 63 Miss. 61.

[n] (Mo. 1865) A party cannot impeach the credibility of a person whose deposition is introduced in evidence by showing that he has made contradictory written statements since the taking of the deposition, unless he takes a second deposition, and examines him as to such statements.—Gregory v. Cheatham, 36 Mo. 155.

[o] (N. Y. 1854) Evidence will not be received to prove the declarations of a witness inconsistent with his testimony in a deposition taken de bene esse and read without objection, where no opportunity of explanation has been given.—Stacy v. Graham, 10 N. Y. Super. Ct. (3 Duer) 444, affirmed (1856) 14 N. Y. (4 Kern.) 492.

[p] (N. Y. 1856) Testimony de bene esse cannot be impeached, in the absence of the witness, by evidence of contrary statements made by him subsequent to his written testimony. Opportunity for interrogating a witness regarding such statements must be given before it is admissible. — Stacy v. Graham, 14 N. Y. (4 Kern.) 492.

[q] (N. Y. 1892) The deposition of a witness cannot be impeached at the trial by evidence of contradictory statements made by him elsewhere, to which his attention was not called at the time the deposition was taken.—Fitch v. Kennard (City Ct. N. Y.) 19 N. Y. Supp. 468, judgment reversed (Com. Pl. 1892) 2 Misc. Rep. 95, 20 N. Y. Supp. 845.

[r] (N. C. 1845) Where a deposition has been read, the opposite party may prove that the deponent, after the deposition was taken, made statements different from those contained in the deposition, it being impossible, from the nature of the case, to first ask the witness if he had made such statements.—Roberts v. Collins, 28 N. C. 223.

[s] (N. C. 1856) The rule that before a witness can be impeached by proof of contradictory statements he must be inquired of concerning them applies to depositions, unless the inconsistent statements were made after the depositions were taken.—Hooper v. Moore, 48 N. C. 428.

[t] (R. I. 1851) If a deposition be taken, under the statute, in the absence of the adverse party, he may put in proof contradictory statements made by the witness, without previously interrogating him thereto. — Hazard v. New York, B. & P. R. Co., 2 R. I. 62.

[u] (Tenn. 1848) When the deposition of a witness is taken, evidence of his having made contradictory statements is not admissible to impeach his testimony, unless an opportunity to explain had been first offered him.—Story v. Saunders, 27 Tenn. (8 Humph.) 663.

[v] (Tenn. 1858) The credit of a witness whose deposition has been taken cannot be impeached as showing that at a trial had before the deposition was taken his testimony conflicted with that of the deposition, unless the deposition shows that the attention of the witness was called to such prior conflicting statements.—Bounds v. Schwab, 37 Tenn. (5 Sneed) 591.

[w] (Tex. 1893) A report of an accident, not discovered until the trial, cannot be used to impeach the evidence contained in a deposition by the person making the report, no foundation for such use being laid in the interrogatories filed.—Galveston, H. & S. A. Ry. Co. v. Briggs, 4 Tex. Civ. App. 515, 23 S. W. 503.

[x] (Vt. 1847) The rule that testimony as to the previous declarations of a witness, adduced on the stand, offered for the purpose of impeaching him, cannot be received unless an opportunity be first afforded to the witness, whose testimony it is proposed to impeach, to explain the imputed declaration, is not applicable to depositions, but the party may, in such case, without previous inquiry, prove any inconsistent declarations of the witness.—Downer v. Dana, 19 Vt. 338.

[y] (Vt. 1859) It is admissible, for the purpose of impeaching the testimony of a deponent, to introduce evidence of statements made by him conflicting with those contained in his deposition. And it is not necessary that the deponent should be inquired of in relation to such conflicting statements. — Robinson v. Hutchinson, 31 Vt. 443.

[z] (Va. 1855) A witness who has testified in a case cannot be impeached by the proof of contradictory or inconsistent statements, alleged to have been made by him on other occasions, before the foundation for the introduction of such impeaching testimony is first laid by an examination of the witness touching the fact of his having made such statements. And the rule applies to depositions as well as to oral testimony.—Unis v. Charlton's Adm'r, 12 Grat. 484.

§ 1239. Foundation for impeachment by written statements.

[a] In order to entitle letters to be read in evidence for the purpose of contradicting a witness, the witness' attention must first be called to the letters, in order to give him an opportunity to explain the inconsistency.

—(Ala. 1891) Cooper v. State, 90 Ala. 641, 8 South. 821;

(Cal. 1875) Leonard v. Kingsley, 50 Cal. 628;

(Ill. 1891) Perishable Freight Transp. Co. v. O'Neill, 41 Ill. App. 423; (1895) Seckel v. York Nat. Bank, 57 Ill. App. 579;

(Iowa, 1861) Morrison v. Myers, 11 Iowa, 538; (1889) Richmond v. Sundberg, 77 Iowa, 255, 42 N. W. 184;

(Tex. 1895) Burleson v. Collins (Civ. App.) 28 S. W. 898.

[b] (U. S. 1884) The contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation. — The Charles Morgan v. Kouns, 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. Ed. 316.

[c] (Ala. 1883) Where a witness is sought to be impeached by evidence of a former written statement signed by him, the entire statement should be read to him, and not detached portions.—Wills v. State, 74 Ala. 21.

[d] (Cal. 1887) To impeach a witness under Code Civ. Proc. § 2052, on the ground that his previous statements conflict with his present testimony, such previous statements must be shown to the witness, if in writing, before any question can be put concerning them.—People v. Ching Hing Chang, 74 Cal. 389, 16 Pac. 201.

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[e] (Ga. 1853) In cross-examining a witness as to the contents of a letter, or other paper, written by him, with a view to impeach his testimony, the letter or paper must be first shown to him, before counsel will be permitted to represent, in his interrogatory, the contents of the writing.—Stamper v. Griffin, 12 Ga. 450.

[f] (Ill. 1873) Showing to a witness on cross-examination a written statement made by him materially differing from his testimony, and according him an opportunity of explaining the discrepancy, lays a proper foundation for reading the paper in evidence for the purpose of impeaching his testimony.—Northern Line Packet Co. v. Binninger, 70 Ill. 571.

[g, h] (Ill. 1889) When a witness has made written statements material to the issue, on a prior occasion, differing from his evidence on the trial, the other party must call his attention to such previous statements, and give him an opportunity to explain them, in order to impeach him by the introduction of such writings.—Boeker v. Hess, 34 Ill. App. 332.

[i] (Iowa, 1868) To lay a foundation for impeaching a witness by allegations made by him in a certain petition, the correct practice would be to show him the petition and then ask him if he had sworn to it, not merely to ask him outright to state what he thought he made oath to concerning a certain matter in his petition.—Callanan v. Shaw, 24 Iowa, 441.

[j] (Iowa, 1879) In order to impeach a witness by a paper written by him, the paper must be first shown to him, and he must be asked if he wrote it.—Peck v. Parchen, 52 Iowa, 46, 2 N. W. 597.

[k] (Mo. 1883) Where a witness is sought to be impeached by a letter he admits to have written, it may be offered in evidence without examining him as to its contents.—State v. Stein, 79 Mo. 330.

[l, m] (N. M. 1892) Where it is sought to contradict a witness by offering in evidence two letters written by him, a proper foundation must be laid to warrant their admission; Comp. Laws 1884, § 2084, providing that, where it is intended to contradict a witness by writings, "his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him."—Kirchner v. Laughlin, 6 N. M. 300, 28 Pac. 505.

[n] (N. Y. 1872) Where a party proposes to impeach a witness by proving inconsistent written statements, it is sufficient to show the witness or read to him the paper, and if its genuineness is admitted, the party can introduce it.—Romertze v. East River Nat. Bank, 49 N. Y. 577, reversing (1869) 32 N. Y. Super. Ct. (2 Sweeny) 82.

[o] (N. Y. 1872) It is sufficient for a party proposing to impeach a witness by proving inconsistent written statements to show him or read to him the paper, and, if its genuineness is admitted, to introduce it, when he has a right to put in evidence.—Romertze v. East River Nat. Bank, 49 N. Y. 577, reversing (1869) 32 N. Y. Super. Ct. (2 Sweeny) 82.

[p] (N. Y. 1891) The rule that, before a witness can be impeached by showing that he made statements on material points in conflict with his evidence, his attention must be directed to the time and place those statements were made, does not apply where the inconsistent statements are written; but in such case it is sufficient to show or read the paper to the witness.—Doud v. Donnelly, 59 Hun, 615, 12 N. Y. Supp. 396.

[q] (N. Y. 1892) In an action to determine which of two persons at an observatory had the right of property in a star catalogue compiled by them, a witness for defendant stated on cross-examination that he had had some correspondence with plaintiff, and that he was under the impression the catalogue belonged to plaintiff. Afterwards plaintiff, being on the stand, offered the correspondence for the purpose of showing said witness' understanding as to whose the catalogue was, and testing also his credibility or the accuracy of his memory. The genuineness of the correspondence was not denied. *Held* admissible, although witness' attention may not have been called thereto when upon the stand.—Root v. Borst, 65 Hun, 622, 20 N. Y. Supp. 189, judgment reversed (1894) 142 N. Y. 62, 36 N. E. 814.

[r] (N. Y. 1893) In an action against a street-car company by a passenger, for personal injuries sustained in being thrown from the front platform of defendant's car and run over, an entry, in a police blotter, of the report of an officer who assisted plaintiff at the accident, is not admissible to contradict the officer, where it does not appear that his attention has been called to the statements therein.—Weymouth v. Broadway & S. A. R. Co. (Super. N. Y.) 2 Misc. Rep. 506, 22 N. Y. Supp. 1047, judgment affirmed (1894) 142 N. Y. 681, 37 N. E. 825.

[s] (Or. 1896) Where it is sought to impeach a witness by statements in a confession involuntarily made, which was reduced to writing, and signed by the witness, the writing itself must be shown to the witness when the foundation is being made for the admission of statements contained therein.—State v. Steeves, 29 Or. 85, 43 Pac. 947.

[t] (Tex. 1888) On trial of an issue as to the existence of a deed alleged to have been made to a married woman, the inventory of the grantor's estate, filed and sworn to by the grantee and her husband, as administrators of the grantor, is not admissible to impeach the husband's testimony, where he has not been examined on the subject.—Clapp v. Engledow, 72 Tex. 252, 10 S. W. 462.

[u] (Vt. 1862) A witness was asked on cross-examination whether he had not in a certain letter stated a date differently from what he now testified it to be. *Held*, that the inquiry was proper, being collateral, and for the mere purpose of affecting the credit of the witness, and that the questioning party was not bound to produce the letter.—Town of Randolph v. Town of Woodstock, 35 Vt. 291.

[v] (W. Va. 1885) Where a written statement, made by a witness before he gives his evidence, which tends to contradict his evidence in any material point, is offered in evidence, it must first be shown to the witness to give him an opportunity to make any statement he may choose in reference to its execution.—State v. Kinney, 26 W. Va. 141.

§ 1240. —— Depositions or minutes of testimony at former trial or hearing.

[a] (U. S. 1848) Depositions to contradict a witness will not be received unless the question as to the fact was distinctly put to the witness.—Chapin v. Siger, Fed. Cas. No. 2,600 [4 McLean, 378].

[aa] (Ala. 1847) The rule that a witness cannot be contradicted by proof of previous counter declarations, either written or verbal, without first asking him if he has made such declarations, applies to testimony taken by deposition.—Howell v. Reynolds, 12 Ala. 128.

[b] (Ala. 1863) A witness who has been orally examined cannot be impeached by proof of contradictory statements made by him in a deposition previously taken in the same case, unless a foundation is first laid by inquiring of the witness as to such previous statements.—Bradford v. Barclay, 39 Ala. 33.

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[c] (Ala. 1886) When it is sought to impeach the credibility of a witness by proving that he has on other occasions made contradictory oral statements, he may be asked, on cross-examination, if he did not make such statements; but, when his former statements were reduced to writing and subscribed by him, as when testifying on the preliminary examination of the defendant before a committing magistrate, and the deposition or writing is produced in court, it must be read to him, or he must be allowed to read and examine it, before he can be interrogated as to his former statements.—Floyd v. State, 82 Ala. 16, 2 South. 683.

[d] (Ala. 1894) A witness recalled for the purpose of laying a foundation for impeaching testimony may state whether he gave certain testimony upon the preliminary trial, though the evidence at such trial was reduced to writing.—Sanders v. State, 105 Ala. 4, 16 South. 935.

[e] (Cal. 1889) Where a witness is interrogated with regard to statements made by him at a former trial, he has the right, if such statements were reduced to writing, to have the writing presented to him, and read.—People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719.

[f] (Cal. 1891) A tenant, in an action against his landlord for money expended and work done, testified on cross-examination that at the time of the landlord's entry he did not "claim to be in possession under a lease, because there was no lease." Thereupon, for the purpose of contradicting him by showing a former admission that his possession was that of a tenant, the landlord offered a transcript in a former action between them, wherein the tenant had recovered damages for the said entry. The witness was not asked what he had admitted or alleged in the former action; nor was his attention called to the transcript. *Held*, that it was not proper at that time for the purpose proposed.—Salle v. Mayer, 91 Cal. 165, 27 Pac. 513.

[g] (Cal. 1893) One jointly indicted with defendant for burglary, and who had pleaded guilty, as a witness for the state testified that defendant had nothing to do with the robbery. *Held* that, for the purpose of laying a foundation for showing that he had made contradictory statements, the state was properly allowed to ask him if, when he pleaded guilty, he did not in the presence of the court, its officers, and others, state that defendant was one of the parties to the robbery, there being no purpose to impeach him by his written testimony, so that it should have been first read to him.—People v. Kruger, 100 Cal. 523, 35 Pac. 88.

[h] (Fla. 1893) A witness in a criminal case cannot be impeached by the production of inconsistent testimony given by him before a committing magistrate, which was reduced to writing and signed by him, unless such testimony be first shown to the witness, and his attention called to the inconsistencies.—Simmons v. State, 32 Fla. 387, 13 South. 896.

[i] (Ga.) The rule requiring a party to lay the foundation for impeaching a witness by first inquiring of the witness whether or not he has made the statements does not apply where the evidence to impeach the witness is his sworn depositions previously taken in the same cause.—(1849) Williams v. Chapman, 7 Ga. 467; (1853) Bryan v. Walton, 14 Ga. 185; (1860) Molyneaux v. Collier, 30 Ga. 731.

[j] (Ga. 1878) A brief of the evidence on a former trial, agreed upon by the parties as correct, will not be admitted, in a subsequent trial, to impeach witnesses who testified at both trials, until the witnesses have been asked whether they did not swear to certain facts at the former trial, and have denied that they did so swear.—Taylor v. Morgan, 61 Ga. 46.

[k] (Ga. 1890) A witness whose testimony, taken by interrogatories, is before the jury in a second trial cannot be impeached by reading extracts from a brief of his evidence given in at a former trial, without first calling his attention to the brief, and affording him an opportunity to explain.—Georgia R. & Banking Co. v. Smith, 85 Ga. 530, 11 S. E. 859.

[l] (Ill. 1888) The affidavit of a subscribing witness to a will, made prior to and contradicting his evidence, as subscribing witness, as to the mental condition of the testator, being admissible only to impeach him, is not admissible without first calling his attention to it, and to the parts contradicting his testimony at the time of his examination.—In re Noble, 124 Ill. 266, 15 N. E. 850.

[ll] (Ill. 1890) A deposition of a witness taken in another proceeding is admissible in impeachment of his testimony where his attention is first directed to such deposition on his cross-examination.—Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

[m] (Ill. 1891) Where a witness is in court, his testimony taken on a former trial will not be read in evidence, except to impeach him, and then only such part as his attention is called to specifically, and which he is allowed to explain.—Campbell v. Campbell, 138 Ill. 612, 28 N. E. 1080.

[n] (Ind. 1882) In order to contradict the statements of a witness, a bill of exceptions, purporting to contain his testimony of a former trial, filed for the purpose of a former appeal, is inadmissible; the attention of the witness not having been called to any statement contained in such bill.—Starret v. Burkhalter, 86 Ind. 439.

[o] (Iowa, 1865) Minutes of evidence taken before the grand jury are inadmissible as independent evidence, and cannot be used to show conflict in the testimony of the witness without giving the latter an opportunity to deny their correctness or state to the trial jury what he did previously testify. Where it is claimed that there is a conflict of this kind, the witness' attention must be drawn to his former testimony, and the foundation for his impeachment laid in the usual way.—State v. Ostrander, 18 Iowa, 435.

[p] (Iowa, 1871) The rule that, when it is sought to impeach a witness by proof of statements made by him contrary to what he has testified to on the trial, his attention must be first drawn to the time, place, and person involved in the supposed contradiction, applies to an impeachment by means of a former deposition of a witness. In such case, if it is claimed that there is a discrepancy between the statements in a former deposition and the testimony of the witnesses on the trial, such discrepancy must be first brought to the attention of the witness, so that he may have an opportunity to explain, before the deposition is admissible to contradict him.—State v. Collins, 32 Iowa, 36.

[pp] (Iowa, 1882) The deposition of a witness was shown to him before reading it in evidence to impeach his testimony, and after it was so read he was examined and re-examined upon the same subject-matter. *Held*, that no advantage was taken that could prejudice defendant.—Johnson v. Chicago, R. I. & P. R. Co., 58 Iowa, 348, 12 N. W. 329.

[q] (Iowa, 1886) Evidence taken before a grand jury cannot be received for the purpose of impeaching a witness unless the proper foundation has been laid for its introduction.—State v. Leeper, 70 Iowa, 748, 30 N. W. 501.

[qq] (Kan. 1875) It is error for the court to allow one party to attempt to impeach the testimony of a witness of the other party by reading to the jury a portion of a deposition formerly taken of the witness, without having first called the attention of the witness to any

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portion of the deposition, and without having first given the witness any opportunity to explain.—Howe Mach. Co. v. Clark, 15 Kan. 492.

[r] (La. 1889) A witness cannot be impeached by proving that he had, at the preliminary hearing, made statements different from his testimony on the trial, unless the statements ascribed to him, which had been reduced to writing, are produced, and his attention called to them.—State v. Callegari, 41 La. Ann. 578, 7 South. 130.

[rr] (Md. 1876) It is not necessary to render the answers of the witness to interrogatories admissible to contradict his testimony at the trial that he should have been shown his answers and been permitted to read them before asking him concerning them, it being sufficient to prove that he was the witness who was sworn and examined by the commissioner, and whose answers the commission and return purported to give.—Ecker v. McAllister, 45 Md. 290.

[s] (Mich. 1864) It is not improper, on calling the attention of a witness to his testimony on a former trial, to read counsel's minutes of the former testimony.—Beaubien v. Cicotte, 12 Mich. 459.

[ss] (Mich. 1868) A deposition previously made by a witness may be read in evidence to contradict his testimony, though it had not been previously called to his attention during the trial.—Lightfoot v. People, 16 Mich. 507.

[t] (Mich. 1882) In inquiring into the testimony of a witness on a former trial with a view to his impeachment, it is not necessary to read the testimony from the stenographer's minutes, and then ask him if he swore as there stated. The stenographer's minutes, not being written out and signed by him, are not evidence against the witness, and are not therefore to be assumed as correct in his favor.—People v. Becker, 48 Mich. 43, 11 N. W. 779.

[tt] (Mich. 1884) Detached portions of the stenographer's notes of the testimony of a witness on a former trial should not be read for the purpose of impeaching the witness without first calling his notice thereto.—Seligman v. Ten Eyck's Estate, 53 Mich. 285, 18 N. W. 818.

[u] (Mich. 1884) A deposition taken before a committing magistrate is receivable as original evidence on the trial of the accused for the alleged crime to discredit the witness who made it, without cross-examining him concerning it.—People v. Butler, 55 Mich. 408, 21 N. W. 385.

[uu] (Minn. 1890) Where it is sought to impeach the statements of a witness by proof of his admissions contained in a deposition or other writing signed by him, the proper foundation should be laid therefor as in other cases, by first directing his attention to the particular matters in question, and giving him an opportunity to explain.—Hammond v. Dike, 42 Minn. 273, 44 N. W. 61, 18 Am. St. Rep. 503.

[v] (Miss. 1876) To receive in evidence, as impeaching the testimony of a party as a witness, a memorandum, made by some stranger, of the testimony given by such witness on a former trial, without first questioning the witness as to his former testimony, is error.—Scarborough v. Smith, 52 Miss. 517.

[vv] (Miss. 1879) In laying the foundation to contradict a state's witness on a murder trial by his written testimony in a former investigation, such testimony must be presented to him, and it is improper to ask him if he so testified without permitting him to inspect the written testimony.—Cavanah v. State, 56 Miss. 299.

[w] (Mo. 1889) Where the accused becomes a witness, it is not necessary, in order to make his written statement before a coroner admissible against him, to call his attention particularly to it.—State v. Young, 99 Mo. 666, 12 S. W. 879.

[ww] (Mont. 1895) On a trial for murder it is not error to exclude evidence taken before the coroner, offered by defendant to impeach the state's witnesses, when such evidence was not identified in any way, nor presented to the witnesses sought to be impeached, to enable them to identify it, nor was it shown that, if admitted, it would have contradicted any witness in any material matter.—State v. Pugh, 16 Mont. 343, 40 Pac. 861.

[x] (Mont. 1896) In a criminal case, in order to impeach a witness by statements in her testimony at the coroner's inquest, which was taken down in writing, and signed by the witness, it is necessary, as required by Code Civ. Proc. § 3380, that the writing be shown the witness when interrogated as to whether she made such statements.—State v. O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.

[xx] (N. M. 1888) In order to impeach witnesses by the introduction of their written testimony given at a former trial, a foundation must first be laid by showing them such written testimony, or reading it to them at the time of their interrogation.—United States v. Fuller, 5 N. M. 80, 20 Pac. 175.

[y] (N. Y. 1848) A party to a suit may give in evidence, to impeach the credit of a witness of his adversary, a written or sworn statement of such witness, made on another occasion, contradicting his testimony then given, without calling the attention of the witness to it otherwise than by giving it in evidence on the trial.—Clapp v. Wilson, 5 Denio, 285.

[yy] (N. Y. 1859) If it is designed to discredit a witness by showing that the deposition made by him before the coroner was different from that given on the trial, the contradictory parts of the deposition must be read to him in order to give him an opportunity for explanation.—Stephens v. People, 19 N. Y. 549.

[yyy] (N. Y.) Where it is proposed to contradict a witness by showing that he testified differently at a coroner's inquest, as shown by his examination signed by him, his attention need not be first called to anything in the paper which he admits having signed.—(1860) People v. McCraney, 6 Parker, Cr. R. 49; (1887) Same v. Taylor, 43 Hun, 419.

[z] (N. Y. 1875) Where, on the cross-examination of one of defendant's witnesses, his attention was called to an affidavit, and he stated that he had made it, and that he remembered all that was in it, *held*, that the plaintiff was entitled to read the affidavit, to show that it contained statements contradictory of those made by the witness upon the trial.—Honstine v. O'Donnell, 5 Hun, 472.

[zz] (Ohio, 1888) The deposition of a witness not a party to the suit cannot be used to impeach him where no reference to the testimony embodied in such deposition was made in his examination in chief.—Aldrich v. Marcellus, 2 O. C. D. 287.

§ 1241. Certainty and definiteness of inquiry.

[a] (Ala. 1848) On the trial of an issue between the plaintiff in a garnishee process and a claimant of the fund, the wife of the defendant in the garnishment, who was a witness, was asked if she did not, at a certain time and place stated, promise to pay the debts due to several persons named out of the money due from the garnishee, with a view to contradict her if she answered in the negative. *Held*, that the question was competent for that purpose.—Moore v. Jones, 13 Ala. 296.

[b] (Ala.) Where the object is to impeach a witness by showing that he has made declarations inconsistent with his testimony, it is not necessary, in laying the predicate, that the language used by the witness should be stated.

but the substance of what he is supposed to have said is all that is required.—(1850) Nelson v. Iverson, 17 Ala. 216; (1851) Armstrong v. Huffstutler, 19 Ala. 51.

[c] (Cal. 1884) On a trial for murder, a witness was asked if she had not, at a certain time, told a third person that defendant had told her that he was going to kill deceased, and, on her denial, the third person was called. *Held*, that there was no sufficient foundation for impeachment.—People v. Bush, 65 Cal. 129, 3 Pac. 590.

[d] (Ill. 1891) Asking a witness whether he did not make certain statements at a particular place to certain persons shortly after the previous trial of the cause is not sufficient foundation for the introduction of evidence that he made such statements shortly before such trial.—Quincy Horse Ry. & C. Co. v. Gnuse, 137 Ill. 264, 27 N. E. 190.

[e] (Md. 1868) Where a witness is asked for the purpose of laying a foundation to contradict her whether she ever had a certain conversation with another witness, without calling her attention to attendant circumstances or repeating the words which it is intended to prove that she said, the question is improper.—Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

[f] (Mass. 1891) In an action for personal injuries caused by the bite of a dog alleged to have been owned or kept by defendant, where a witness for defendant testifies on cross-examination that he had not stated to one C. that the dog was down in defendant's cellar, a question asked of C. as a witness as to what conversation he had had with the former witness, for the purpose of contradicting the latter, is not prejudicial to defendant, on the ground that it does not call C.'s attention directly to the contradicting conversation, where his answer relates solely to that.—Parkenson v. Bemis, 153 Mass. 280, 26 N. E. 854.

[g] (Mo. 1870) All that is necessary to lay a foundation for impeaching a witness, by showing that he has, at some other time, said something inconsistent with his present evidence, is to ask him as to the time, place, and person involved in the supposed contradiction. The rule is simply for the protection of the witness, to give him an opportunity to recollect the facts and correct the statements when immediately brought to his mind. And it is immaterial whether the alleged contradictory statement was made before or after the institution of the suit.—Spaunhorst v. Link, 46 Mo. 197.

[h] (Mo. 1876) Where it is proposed to impeach a witness by showing former statements inconsistent with his testimony on a matter relevant to the issue, his attention must be called to the particulars accompanying the alleged former statement.—State v. Morgan, 1 Mo. App. 22.

[i] (Mo. 1894) In an action for injuries received in jumping from a train, where plaintiff alleged that he did so in consequence of threats made by the conductor and others, the conductor testified that plaintiff did not jump, and that neither he nor any one else on the train, to his knowledge, had frightened plaintiff off. He was then asked if he did not at the time of the last trial, at J., tell W., of that place, that they told plaintiff stories, and scared him, and did not think he would jump, which he denied categorically. *Held* sufficient foundation for W.'s testimony in impeachment.—Spohn v. Missouri Pac. Ry. Co., 122 Mo. 1, 26 S. W. 663.

[j] (N. Y. 1849) A sufficient foundation is laid for contradiction of the answers of a witness given on cross-examination, if the attention of the witness has been directed to the time, place, and circumstances attending an alleged statement made by him, and the name of the person to whom he may have made it need not be mentioned, if it was not necessary to enable him to know to what remark his attention was directed.—People v. Austin, 2 Edm. Sel. Cas. 54.

[k] (N. Y. 1875) To lay a foundation for the impeachment of a witness, it is not necessary to put to the witness the precise question which it is intended to put to the witness by whom he is to be impeached.—Hotchkiss v. Germania Fire Ins. Co., 5 Hun, 90.

[l] (Tex. 1895) In laying the foundation for the impeachment of a witness by showing contradictory statements, it is not necessary to use the exact words alleged to have been stated.—Donahoo v. Scott (Civ. App.) 30 S. W. 385.

§ 1242. —— Time, place, circumstances, and person to whom statements were made.

Foundation for statements as to interest, see ante, § 1200 [b, q].

[a] Testimony of a witness cannot be impeached by showing contradictory statements made out of court unless the witness has been previously questioned as to the time and place of such statements and the persons to whom they were made.

—(Ala. 1849) Carlisle v. Hunley, 15 Ala. 623;
(Cal. 1866) People v. Garnett, 29 Cal. 622;
(Fla. 1884) Newton v. State, 21 Fla. 53;
(Ga. 1849) Williams v. Turner, 7 Ga. 348; (1854) Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687; (1861) Matthis v. State, 33 Ga. 24; (1861) Williams v. Rawlins, Id. 117;
(Ill. 1864) Root v. Wood, 34 Ill. 283;
(Ind. 1876) Hill v. Gust, 55 Ind. 45;
(Iowa, 1876) State v. Kinley, 43 Iowa, 294;
(Ky. 1883) Craft v. Commonwealth, 5 Ky. Law Rep. 53;
(La. 1886) State v. Clark, 38 La. Ann. 105;
(Md. 1890) Brown v. State, 72 Md. 468, 20 Atl. 186;
(Mich. 1852) Smith v. People, 2 Mich. 415;
(Miss. 1888) Jones v. State, 65 Miss. 179, 3 South. 379;
(Mo. 1872) Lohart v. Buchanan, 50 Mo. 201; (1894) State v. Ragsdale, 59 Mo. App. 590;
(Neb. 1886) Hooper v. Browning, 19 Neb. 420, 27 N. W. 419; (1890) Wood River Bank v. Kelley, 29 Neb. 590, 46 N. W. 86; (1891) Bartlett v. Cheesebrough, 32 Neb. 339, 49 N. W. 360; (1892) Hanscom v. Burmood, 35 Neb. 504, 53 N. W. 371;
(N. Y. 1850) Sprague v. Cadwell, 12 Barb. 516; (1881) Hart v. Hudson River Bridge Co., 84 N. Y. 56; (1887) Myers v. Long Island R. Co., 10 N. Y. St. Rep. 430;
(Ohio, 1851) King v. Wicks, 20 Ohio, 87;
(Or. 1888) State v. Hunsaker, 16 Or. 497, 19 Pac. 605;
(S. C. 1886) State v. Mays, 24 S. C. 190;
(Tenn. 1850) Moore v. Bettis, 30 Tenn. (11 Humph.) 67, 53 Am. Dec. 771;
(Tex. 1877) Treadway v. State, 1 Tex. App. 668; (1895) Ledbetter v. Same (Cr. App.) 29 S. W. 1084.

[b] Evidence of statements made by a witness out of court is inadmissible to contradict him unless his attention was previously called to the time and place of the making of such statements.

—(Cal. 1860) Baker v. Joseph, 16 Cal. 173;
(Ind. 1861) Judy v. Johnson, 16 Ind. 371;
(Iowa, 1870) Williamson v. Peel, 29 Iowa, 458; (1894) Neeb v. McMillan, 92 Iowa, 200, 60 N. W. 612;
(Neb. 1896) Davison v. Cruse, 47 Neb. 829, 66 N. W. 823.

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[bb] A witness cannot be impeached by proof of contradictory statements unless a foundation has been laid by asking him whether he made such statements, giving particulars of time, place, and circumstances, in order that he may have the opportunity of denying, admitting, or explaining.
—(Ind. 1856) Jarboe v. Kepler, 8 Ind. 314;
(Iowa, 1871) State v. Hamilton, 32 Iowa, 572; (1880) Dye v. Young, 55 Iowa, 433, 7 N. W. 678;
(La. 1892) State v. Jones, 44 La. Ann. 960, 11 South. 596.

[c] Where the testimony of a witness not a party to the action is sought to be impeached by inconsistent statements out of court, it is necessary that the witness' attention should be called to the time, place, and person to whom the alleged statements were made, and to the specific statements.
—(S. D. 1896) State v. Hughes, 8 S. D. 338, 66 N. W. 1076;
(Tenn. 1873) Cole v. State, 65 Tenn. (6 Baxt.) 239.

[cc] (Ala. 1840) Where a witness, on cross-examination, is asked whether he has not made other statements than those sworn to, he may inquire as to the particular time or statement to which the cross-examination relates; and if the information is not given, he ought not to be compelled to answer.—Lewis v. Post, 1 Ala. 65.

[d] (Ala. 1853) In laying the predicate to impeach a witness, his attention having been directed to a conversation had by him 20 years before, "in the spring of the year," person and place being specified, evidence of a contradictory statement made by him in February of that year, in a conversation otherwise corresponding with that laid, is admissible; the rule only requires that his attention should be directed with reasonable certainty to the time, place, and person involved in the supposed contradiction.—Nelson v. Iverson, 24 Ala. 9, 60 Am. Dec. 442.

[dd] (Ala. 1893) On a criminal trial, a conversation with one of defendant's witnesses, in the absence of defendant, is admissible only to impeach such witness, and the attention of witness must first be called to the time, place, and circumstances of the conversation, and he must be asked whether he made the statements claimed.—Hester v. State, 103 Ala. 83, 15 South. 857.

[e] (Cal. 1872) Before the credibility of a witness can be assailed by proof of something he may have said elsewhere contradictory of the testimony as given, the witness must first be inquired of concerning it, and the time, place, and person involved in the supposed contradiction must be called to his attention. A qualification of this rule is, that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relative to the issue being tried.—People v. Devine, 44 Cal. 452.

[ee] (Cal. 1893) It is error to admit evidence to impeach the testimony of a witness as to his statements made out of court, when the proper foundation has not been laid by calling the attention of such witness to the time and place at which it is claimed such statements were made, as required by Code Civ. Proc. § 2052.—Birch v. Hale, 99 Cal. 299, 33 Pac. 1088.

[f] (Fla. 1887) Under the statute it is error to permit a party to prove that his witness has made previous statements, inconsistent with his testimony, unless, during his examination, the circumstances and the occasion of his former statements were brought to his attention.—Montgomery v. Knox, 23 Fla. 595, 3 South. 211.

[ff] (Ill. 1880) A witness cannot be impeached by showing that he has at other times made contradictory statements, unless his attention has been directed to the alleged contradictory statement, particularly specifying the circumstances under which it was made.—Bock v. Weigant, 5 Ill. App. (5 Bradw.) 643.

[g] (Ill. 1883) As a basis for the introduction of impeaching testimony, it is not necessary that the time of the antecedent conversation be fixed with absolute precision. If the witness' attention has been directed to dates and attendant circumstances with a reasonable degree of certainty, so as to afford him an opportunity to refresh his recollection, it is sufficient.—Mayer v. Appel, 13 Ill. App. (13 Bradw.) 87.

[gg] (Ill. 1890) A witness cannot be impeached by evidence of statements made by him out of court, unless his attention has been called on cross-examination to the time and place of the alleged statement.—Aneals v. People, 134 Ill. 401, 25 N. E. 1022.

[h] (Ind. 1860) To ask a witness whether during a certain month she made specified statements to certain persons is not definite enough to raise a foundation for proving those statements in order to contradict and impeach the witness.—Joy v. State, 14 Ind. 139.

[hh] (Ind. 1864) In laying a foundation for the impeachment of a witness, by proving that in a conversation he has made statements inconsistent with his evidence, the exact time of such conversation need not be fixed, if the attention of witness is called to it.—Bennett v. O'Byrne, 23 Ind. 604.

[i] (Ind. 1882) A witness was asked concerning a conversation had "in June last, in Hazleton, Ind." It appearing that he clearly understood the particular conversation referred to, *held*, that the specification was sufficiently definite to afford a foundation for contradicting and impeaching him.—Evansville & T. H. R. Co. v. Montgomery, 85 Ind. 494.

[ii] (Iowa, 1876) A question asked for the purpose of laying the foundation for impeaching a witness must be so framed as to direct his attention to the particular time or circumstance to which it relates.—State v. McLaughlin, 44 Iowa, 82.

[j] (Iowa, 1880) A question asked for the purpose of impeachment is properly excluded, where no time is named to which it is applicable.—Osborn v. Ratliff, 53 Iowa, 748, 5 N. W. 746.

[jj] (Kan. 1873) It is incompetent to ask a witness on cross-examination a question concerning a conversation of his with some other person, where no time or place is suggested to the witness as to when or where the supposed conversation occurred, as it was not competent as laying foundation for an impeachment.—Da Lee v. Blackburn, 11 Kan. 190.

[k] (Kan. 1882) To lay a foundation for impeaching the testimony of a witness by proof of contradictory statements, if time, place, and person are made reasonably definite in calling the attention of the witness thereto, it is sufficient.—Kelsey v. Layne, 28 Kan. 218, 42 Am. Rep. 158.

[kk] (Ky. 1889) On a trial for murder, one witness testified to a threat by deceased to kill defendant on sight which had been communicated to defendant. *Held*, that it was improper to permit a witness to testify to statements made the day after the killing by the witness who had communicated to defendant the threats by deceased, that he had never heard the deceased make any threats, without laying the proper foundation by calling witness' attention to the time, place, and matter of the statements.—Robinson v. Commonwealth, 11 S. W. 81.

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[l] (La. 1881) When an attempt is made to discredit a witness by showing that he made a contradictory statement upon a previous occasion, it is not necessary that the exact time of the alleged contradictory statement should be designated; it is enough that sufficient reference is made to the circumstances that attended the statement, and to the statement itself, to place the witness fully on his guard.—School Board of Union Parish v. Trimble, 33 La. Ann. 1073; State v. Hampton, Id. 1252.

[ll] (Md. 1896) A question whether prosecuting witness had, previous to the day he bought the beer, repeatedly and generally stated that he was 21 years of age, was properly excluded, for the reason that it did not specify the time, the place, and the person to whom the alleged statements were made.—Peterson v. State, 83 Md. 194, 34 Atl. 834.

[m] (Mass. 1876) A party cannot contradict his own witness by evidence of statements inconsistent with his testimony without first calling the attention of the witness to the circumstances and occasion of the supposed statements.—Newell v. Homer, 120 Mass. 277.

[mm] (Mass. 1883) Merely asking a witness, whom it is sought to contradict, on re-examination, whether he has made a certain statement to a particular person, with no attempt to designate the time or place, and no suggestion of any reason for not specifying them, or of circumstances which rendered them unnecessary, is not mentioning "the circumstances of the supposed statement, sufficient to designate the particular occasion," within Pub. St. c. 169, § 22.—Commonwealth v. Thyng, 134 Mass. 191.

[n] (Mass. 1895) A question asking a witness whether he had a conversation at a certain place with a certain person a day or two before a certain event, and stating the substance of the conversation, complies with Pub. St. c. 169, § 22, providing that, when questions are asked for the purpose of contradicting a witness, "the circumstances of the supposed statement, sufficient to designate the particular occasion," must be given.—Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189.

[nn] (Mass. 1895) A witness may be impeached by evidence of statements contradictory to his testimony, though his attention has not been previously called to the circumstances attending such statements.—Carville v. Inhabitants of Westford, 163 Mass. 544, 40 N. E. 893.

[o] (Mich. 1881) Impeaching questions as to a conversation with a particular person, at a place named, cannot be asked, unless the time and substance of the alleged conversation are also pointed out.—Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79.

[oo] (Mich. 1893) S., a witness for plaintiff, was asked if he did not say to D. "that K.'s (plaintiff's) system was not half learned," and on his denial D. was called, and asked if S. had made such a statement to him. *Held*, that the question asked D. was properly excluded, since neither time, place, nor circumstance was included in the question asked S., and it does not appear that he identified the occasion.—Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157.

[p] (Mich. 1895) In an action by an infant for personal injuries from stepping into a hole in a sidewalk, a witness for the defense, who testified that he saw the accident, and that there was no hole where it occurred, on being asked whether, at a designated time, he met a certain person at a certain place, and, replying that he knew no such person, was again asked if he met any person at that time and place, and there stated to him that he saw the infant fall into a hole in the sidewalk, replied that he never did. *Held*, that the attention of the witness was sufficiently directed to the time, place, and person to render admissible in rebuttal evidence of the conversation had at the designated time and place with the person named.—Strudgeon v. Village of Sand Beach, 107 Mich. 496, 65 N. W. 616.

[pp] (Minn. 1868) To lay the foundation for showing that a witness has made a contradictory statement out of court, his attention should be called to the time, place, and persons involved in the supposed contradiction, with such reasonable certainty as to recall it to his mind, so that he may have an opportunity to correct his statement on the stand, or explain what he has said elsewhere. The precise date need not be indicated.—State v. Hoyt, 13 Minn. 132 (Gil. 125).

[q] (Miss. 1892) Where the attention of witnesses is not distinctly called to the time and place of a conversation in which statements were made by them out of court, the persons present at the time, and the matter as to which it is proposed to call impeaching witnesses, it is error to admit evidence of such conversation for the purpose of impeachment.—Bonelli v. Bowen, 70 Miss. 142, 11 South. 791.

[qq] (Mo. 1873) A witness cannot be impeached on the ground that he made contradictory statements, unless his attention is first called to the time, place, and circumstances and persons to whom the alleged statements were made.—State v. Foye, 58 Mo. 336.

[r] (Mo. 1891) Defendant, desiring to impeach witness C. by witness W., called C.'s attention to certain statements made by him to W., and to the time and place of making them, but designated W. as "Henry" when his name was "Harry." *Held* that, as C. understood who was meant, the foundation for the impeachment was properly laid.—Mahaney v. St. Louis & H. Ry. Co., 108 Mo. 191, 18 S. W. 895.

[rr] (Mo. 1893) A witness was asked whether in December or thereabouts he did not make a certain statement to a person named. After his denial said person was asked if he remembered a conversation "at any time" with witness relative to the matter, and he replied that witness made such statement in the fall, according to his recollection. *Held*, that no proper foundation was laid for the impeaching evidence.—Spohn v. Missouri Pac. Ry. Co., 116 Mo. 617, 22 S. W. 690.

[s] (Mo. 1894) In laying the foundation for impeaching a witness by proof of a prior contradictory statement, his attention must be called to the place at which it is claimed such statement was made.—State v. Baldwin, 56 Mo. App. 423.

[ss] (Neb. 1891) Where evidence showing contradictory statements of a witness is introduced without first calling his attention to the time, place, and person involved in the supposed contradiction, and no objection is made to such evidence, the jury may consider it, and, if sufficient, base their verdict thereon.—Cool v. Roche, 20 Neb. 550, 31 N. W. 367.

[t] (N. Y. 1848) Where it is sought to discredit a witness by showing that he has on another occasion made statements contradictory to his testimony, he must first have an opportunity to explain such contradictory statements, and for this purpose must be referred to the time and place at which he made them.—Palmer v. Haight, 2 Barb. 210.

[tt] (N. Y. 1848) In the examination of a witness to lay a foundation for impeaching him, it is sufficient if his attention is called to the time, place, and circumstances of a conversation; it is not necessary to state the name of the person with whom the conversation was held.—People v. Austin, 1 Parker, Cr. R. 154.

[u] (N. Y. 1859) It is not sufficient to inquire of a witness whether he has made specific state-

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ments, contradictory to the testimony which he has given, without mentioning time, place, or other circumstance, in order to lay the foundation for giving in evidence such contradictory statements.—Pendleton v. Empire Stone Dressing Co., 19 N. Y. 13.

[uu] (N. Y. 1866) To lay a foundation for impeaching a witness by proving by another person that he had made a threat to swear falsely (considered as an inconsistent statement purely), his attention must not only be called to the name of the person, but to the occasion of the alleged conversation.—Lee v. Chadsey, 3 Abb. Dec. 43.

[v] (N. Y. 1866) To impeach a witness by proving by another person that he made a threat to swear falsely without the foundation laid by calling his attention to the name of the person and the occasion of the alleged conversation, evidence of the threat is not admissible as proving the witness unworthy of credit, unless the threat is shown to have related to the particular case on trial.—Lee v. Chadsey, 3 Abb. Dec. 43.

[vv] (N. Y. 1887) In order to impeach a witness by contradictory statements his attention must first have been called to the time and occasion of the alleged statement.—Laserowitsch v. Reiman, 6 N. Y. St. Rep. 246.

[w] (Or. 1879) The provision of Code, p. 274, § 831, that before a witness can be impeached by inconsistent statements made by him at other times the same must be related to him, with the circumstances of time, place, and persons present, *held* not to be complied with by a question merely referring to a time including three certain days, and a place no more definite than "streets of the city of Portland."—State v. McDonald, 8 Or. 113.

[ww] (S. C. 1881) Where it is proposed to contradict a witness by evidence of contrary statements made out of court, his attention must be called to the place where, and to the person to whom, such contrary statements are alleged to have been made.—State v. White, 15 S. C. 381.

[x] (S. C. 1895) Where defendant in a criminal case testifies in his own behalf, and denies having made certain admissions or declarations, he may be contradicted without his attention having been called to the time, place, and person involved in the proposed contradiction.—State v. Freeman, 43 S. C. 105, 20 S. E. 974.

[xx] (Tenn. 1851) For the purpose of laying the foundation for his impeachment, a question asked a witness on cross-examination, "whether he had ever stated to any one, at any time, that he purchased the negro for defendant," is too vague and indefinite.—Cheek v. Wheatly, 30 Tenn. (11 Humph.) 556.

[y] (Tex. 1884) In order to impeach a witness the predicate as to time, place, and circumstances is not necessary to prove the exact hour or even day; but the time may be definitely fixed by other circumstances with sufficient certainty to put the witness fully on notice as to the particular transaction or conversation in which the statements were made.—Texas & P. Ry. Co. v. Woodall, 2 Willson, Civ. Cas. Ct. App. § 471.

[yy] (Tex. 1890) Where the flagman stationed at a railroad crossing where an accident occurred, testified on cross-examination that he saw one D. there on the evening in question, and that it was untrue that plaintiff, in the presence of D. and after he was hurt, asked him (the flagman) why he told him to cross, and that he did not flag plaintiff across, a sufficient predicate of time, place, and person has been laid to impeach such evidence by the testimony of D.—International & G. N. R. Co. v. Dyer, 76 Tex. 156, 13 S. W. 377.

[z] (Wash. 1893) As a foundation for impeachment, witness was asked if he made certain statements to V. at a specified place "last July," which he denied. *Held*, that the time was sufficiently definite to render admissible V.'s testimony as to the statements.—State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098.

[zz] (Wis. 1893) A witness cannot be impeached by a question whether he had not "once before" testified differently.—Cohn v. Heimbauch, 86 Wis. 176, 56 N. W. 638.

6. ADMISSION OR DENIAL AS TO PREVIOUS STATEMENTS.

IN GENERAL, § 1243.
DENIAL AND RIGHT TO CONTRADICT, § 1244.
DENIAL OF RECOLLECTION, § 1245.

§ 1243. In general.

[a] (Kan. 1886) Where, with a view of impeaching a witness, he is asked if he did not make a certain statement on a previous examination, and he replies that "it amounts to about the same thing," he thereby practically admits the making of the statement, and his answer is insufficient as a foundation for impeachment.—State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

[b] (La. 1896) If the witness admits the contradictory statements, the accused can offer no proof of the contradictions thus admitted, although such proof is proposed to be given to show the falsity of the explanations of the witness why he made the statements contradictory of his testimony.—State v. Goodbier, 48 La. Ann. 770, 19 South. 755.

[c] (N. Y. 1892) The original complaint in an action on a promissory note alleged that the note was duly protested. An amended complaint alleged that protest was omitted at defendant's request. On the trial, plaintiff testified in substantiation of the allegation of the amended complaint, and, when defendant asked him why he had said nothing in the original complaint about the note not having been protested, he replied that he did not know. Defendant then offered the original complaint in evidence, and it was excluded on the ground that the contradictory statement was admitted. *Held*, that plaintiff's answer did not contain the admission, because he was not interrogated as to a statement he had made, but as to one he had omitted to make.—Meyer v. Campbell (Com. Pl.) 1 Misc. Rep. 283, 20 N. Y. Supp. 705.

[d] (Pa. 1867) Letters written by a witness to the plaintiff cannot be received in evidence to contradict the witness, where he admits what he has written so far as read to him by plaintiff's counsel.—Bigler v. Flickinger, 55 Pa. (5 P. F. Smith) 279.

[e] (Tex. 1887) Where a witness, when asked if he had made contradictory statements on his examination before the coroner's jury, admits that he had done so, and explains the reason therefor, the record of his examination before the coroner's jury is not admissible for the purpose of impeaching him.—Rodrigues v. State, 23 Tex. App. 503, 5 S. W. 255.

[f] (Tex. 1889) Defendant, being on the stand in his own behalf, was asked about certain material statements made by him on his preliminary examination. He qualifiedly denied that he made them. *Held*, that this was sufficient to authorize the admission in evidence of the record of his written testimony as given on said preliminary examination.—Huffman v. State, 28 Tex. App. 174, 12 S. W. 588.

§ 1244. Denial and right to contradict.

[a] If a witness on cross-examination deny having made a statement as to any matter not

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relevant to the issue, he cannot be contradicted in reference to it.

—(Ala. 1859) Seale v. Chambliss, 35 Ala. 19;
(Ill. 1873) Chicago, R. I. & P. R. Co. v. Bell, 70 Ill. 102;
(Ind. 1843) McIntire v. Young, 6 Blackf. 496, 39 Am. Dec. 443;
(Ky. 1889) Commonwealth v. Hourigan, 89 Ky. 305, 12 S. W. 550;
(N. H. 1861) Dewey v. Williams, 43 N. H. 384; (1864) Sumner v. Crawford, 45 N. H. 416;
(Wis. 1880) Kaime v. Trustees of Village of Omro, 49 Wis. 371, 5 N. W. 838.

[aa] Where a witness is asked, on cross-examination, if he has not made certain statements to a certain person at variance with his direct testimony, in a material point, and he replies in the negative, such person may afterwards testify that the witness did make such statements.

—(U. S. 1896) Ludtke v. Hertzog, 72 Fed. 142, 18 C. C. A. 487, 30 U. S. App. 637;
(Ga. 1884) Rogers v. Truett, 73 Ga. 386;
(Ind. 1843) McIntire v. Young, 6 Blackf. 496, 39 Am. Dec. 443;
(N. Y. 1874) Blanchard v. New Jersey Steamboat Co., 67 Barb. 102;
(Tex. 1895) Gonzales v. State, 35 Tex. Cr. R. 33, 29 S. W. 1091.

[b] (U. S. 1890) Evidence that a railroad company's night watchman had admitted on the night of the accident that the rear section of the train was going at about 15 miles an hour when it crossed the highway, is admissible to impeach his credibility, where, on his cross-examination, he has denied making such admission.—Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

[bb] (Ala. 1859) Where plaintiff seeks to establish the correctness of his account by his own oath, as he may do in certain cases, under Code, § 2313, and is cross-examined concerning his testimony on the former trial relative to the cross-demand set up as a defense, defendant has no right to impeach him by contradicting his testimony as to such former statements.—Flash v. Ferri, 34 Ala. 186.

[c] (Ala. 1893) Where an attesting witness who testified as to the mental capacity of testator asserted that he had not, two days before the execution of the will, said that testator had become imbecile, evidence that he had said so was competent to impeach him.—Burney v. Torrey, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33.

[cc] (Ark. 1894) On cross-examination, plaintiff asked defendant's witness whether, on the morning and at the place of the wreck to a train, he told one A. that he had, before the accident, called the attention of the road master to the dangerous position of the fallen rock, which caused it, to which the witness replied, "No." A. was then recalled, and asked whether the witness had not so stated to him, and replied that he had. *Held*, that the questions and answers were admissible to show that the witness had made a different statement, though such statement was no part of the res gestæ.—Little Rock & Ft. S. Ry. Co. v. Voss, 18 S. W. 172.

[d] (Cal. 1885) Where plaintiff's witness denies, on cross-examination, that he offered to procure testimony for defendant if paid therefor, defendant may impeach him.—Lewis v. Steiger, 68 Cal. 200, 8 Pac. 884.

[dd] (Cal. 1894) In an action to determine the right to the water of a stream, plaintiff's witness was asked on cross-examination if he had not stated that plaintiff's right was inferior to defendant's. The witness denied having so stated, nor had he, on his direct examination, testified as to defendant's right. *Held*, that it could not be proven, to impeach him, that he had so stated, as such declaration, not being evidence against plaintiff, was not relevant to the issues.—Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883.

[e] (Cal. 1894) Where a witness, on cross-examination by the state, denies having stated out of court that defendant had done certain things, evidence to contradict him is inadmissible, as his statements are not evidence against defendant.—People v. Worthington, 105 Cal. 166, 38 Pac. 689.

[ee] (Ill. 1855) Where a proper foundation has been laid for it, a witness may be inquired of as to the statements of another witness in order to impeach such witness by showing a contradiction to his previous answer.—Galena & C. U. R. Co. v. Fay, 16 Ill. (6 Peck) 558, 63 Am. Dec. 323.

[f] (Ill. 1884) In an action against a railroad company to recover for the loss of a hotel to which fire was communicated from a depot which was set on fire by sparks escaping from an engine, the testimony of a witness tended to show that the depot was not set on fire by the engine, nor the hotel by the burning depot. On cross-examination he denied having made, prior to the trial, a statement that "the engine set fire to the depot, and the depot set fire to the hotel." *Held*, that it was competent to impeach the witness' testimony by proving that he made such statement.—Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

[ff] (Ill. 1898) On the trial of a saloon keeper for selling liquor to a minor, where the minor testifies that he purchased liquor of defendant, and, on cross-examination, swears that he did not tell a third person that he could not obtain liquor of defendant, the testimony of such person is admissible to impeach him.—Dick v. People, 47 Ill. App. 223.

[g] (Ind. 1871) Where a witness for the defense who had testified to certain facts in chief was asked on cross-examination whether he had made a similar statement to another person, his answer was conclusive on plaintiff.—Stout v. Indianapolis & St. L. R. Co., Wils. 80.

[gg] (Ind. 1891) Where, in an action on account, a witness testifies that defendant had admitted the debt, and denies on cross-examination that plaintiff had offered her money to so testify, and denies that she had previously stated that she would not swear to the admission, it is competent to show her former statements that she would not so swear, and that plaintiff had offered her money to do so, for the purposes of impeachment, since the object of the cross-examination was not to prove bribery, but to affect her credibility.—Hess v. Redding, 2 Ind. App. 199, 28 N. E. 234.

[h] (Iowa, 1896) A witness jointly indicted with defendant for rape having testified that prosecutrix virtually seduced him and defendant, and having denied on cross-examination that shortly before the alleged rape he asked a certain person if he could not inform witness and defendant where they could obtain sexual intercourse, it was proper to permit said person, in rebuttal, to testify that said witness did ask him that question.—State v. Philpot, 97 Iowa, 365, 66 N. W. 730.

[hh] (Iowa, 1896) In an action on a life insurance policy defendant claimed that insured committed suicide, and therefore the policy was avoided, whereas plaintiff claimed she was murdered by her husband. There was no dispute but that insured died from poison. *Held* that for the purpose of discrediting the testimony

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of the husband, which tended to show suicide, it was error to admit evidence contradicting denial on his part on cross-examination of statements showing that he was desirous of suppressing the post-mortem examination of insured.—Laird v. Equitable Life Assur. Soc., 98 Iowa, 495, 67 N. W. 385.

[i] (Iowa, 1896) It was also error to admit evidence contradicting a denial on his part on cross-examination of having stated to his wife that if she did not stop complaining of his daughter by a former wife she would "run against a stump."—Laird v. Equitable Life Assur. Soc. of United States, 98 Iowa, 495, 67 N. W. 385.

[ii] (Me. 1890) In an action for injuries to plaintiff occasioned by an alleged defective sidewalk, the defense was that plaintiff was guilty of negligence in wearing high-heeled shoes. Plaintiff's husband denied that he had ever spoken to plaintiff about the heels on her shoes, or that he ever had stated that he had so spoken to her. Thereupon defendant introduced a witness who testified that just after the accident he heard the husband say that he told his wife about wearing such high-heeled shoes. *Held*, that the testimony of such latter witness, being as to a statement made out of court, was inadmissible to contradict the denial of the husband and thereby impeach his credibility.—Woodroffe v. Jones, 83 Me. 21, 21 Atl. 177.

[j] (Md. 1892) Where, in an action for personal injuries, it appeared that there had been two trials, on both of which the physician who attended plaintiff after the accident was a witness for plaintiff, it was proper to ask such witness on cross-examination in the second trial if he had not said, in urging the settlement of another accident case, in which he was a medical witness, that on the first trial of this case he "had been instrumental in getting a big verdict for the plaintiff;" and on his denial that he had made such statement evidence was admissible to contradict him.—Wise v. Ackerman, 76 Md. 375, 25 Atl. 424.

[jj] (Mass. 1857) In an action for an injury occasioned by digging a water course in a highway under the direction of the surveyors of highways, one of the surveyors, being called as a witness for the defendant, denied, on cross-examination, that he ever stated that this work was done as he had directed. *Held*, that the plaintiff might introduce evidence to contradict him on this point.—Benjamin v. Wheeler, 74 Mass. (8 Gray) 409.

[k] (Mass. 1863) In an action for a trespass, in driving a wagon against a horse of the plaintiff and breaking his legs, if the defendant on cross-examination has denied that he had said to a third person that he had a right to one-half of the road, and to break the legs of the plaintiff's horse if he stood in the way, evidence is competent to show, by way of contradiction, that he has so said.—Emerson v. Stevens, 88 Mass. (6 Allen) 112.

[kk] (Mass. 1863) In determining whether or not a sale of property was made to defraud the sole creditor of the vendor, the amount of such creditor's claim is material; and after he has testified to the amount of it, and denied on cross-examination that he ever fixed it at a less sum, evidence is admissible, for the purpose of contradicting him, to show that he has fixed it at a less sum.—Couillard v. Duncan, 88 Mass. (6 Allen) 440.

[l] (Mass. 1864) If, in an action against municipal officers for illegally seizing the plaintiff as a soldier, and taking him to camp, one of the defendants has denied, on cross-examination, that he said, after the seizure of the plaintiff, "We have got him, and I hope they will send him to Fort Warren," the plaintiff may introduce evidence to contradict him.—Tyler v. Pomeroy, 90 Mass. (8 Allen) 480.

[ll] (Mass. 1867) Upon the issue whether A., who had purchased the interest of his insolvent partner, B., in the partnership property, had reason to believe B. insolvent, a witness testified that he was a creditor of B. to a large amount. B. testified that he was largely indebted to the witness, but on cross-examination denied that he had told a third person that his indebtedness to such witness was much less than the amount stated by him in his direct testimony, or that he had requested such person to write to the witness a threatening letter complaining of the witness' conduct in presenting so large a claim. *Held*, that evidence contradicting B. was competent for the purpose of discrediting him.—Carruth v. Bayley, 96 Mass. (14 Allen) 532.

[m] (Mass. 1896) That the court permitted the opposing counsel to question a witness, when called in rebuttal, as to an alleged statement by him, contradictory of his testimony in the examination in chief, does not require that the court, on denial by the witness that he made such statement, allow the counsel to show that the alleged statement was made.—Howes v. Colburn, 165 Mass. 385, 43 N. E. 125.

[mm] (Mich. 1863) The defendant introduced evidence tending to show the commission of adultery by the complainant with one D. in a certain month. D. was then introduced for the complainant and interrogated only as to these facts. On cross-examination he was asked whether he had not the previous year stated that he had had illicit intercourse with the complainant. Defendant undertook to impeach him by witnesses, who alleged that he made such statements at that time. *Held*, that this was erroneous.—Dunn v. Dunn, 11 Mich. 284.

[mmm] (Mich. 1869) On a trial for homicide resulting directly from two riotous assemblages on succeeding nights, one of the rioters who was a witness for the prosecution testified in reference to the proceedings of the first night, and also that the accused had confessed to having struck the deceased on the second night. On cross-examination he was asked whether a few nights after he did not state to a certain person that he was not present at the riot on the first night as a participator but merely as a looker-on, which the witness denied. The court refused to allow the defendant to contradict him by showing that he had made the statements which he denied having made. *Held* to be error.—Patten v. People, 18 Mich. 314, 100 Am. Dec. 173.

[n] (Mich. 1881) In a prosecution for bastardy, the prosecuting witness could not be asked whether she made certain statements admitting illicit intercourse with another than the defendant, with a view of introducing contradictory evidence, as the matter was collateral, and while the prosecutrix might be cross-examined thereon, she could not be contradicted.—Hamilton v. People, 46 Mich. 186, 9 N. W. 247.

[nn] (Mich. 1888) In an action on a note taken by an agent of plaintiff, a farm machine company, where the agent testifies in chief that he saw defendant sign it, and knew nothing of the consideration of a former note in place of which it was given, he may properly be asked by defendant, on cross-examination, if he has not made contrary statements, and defendant is not bound by his denial.—Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536.

[nnn] (Mich. 1891) In an action for the price of lumber to be used in defendant's house, alleged to have been furnished S. on the credit of defendant, on cross-examination S. was asked if he did not say to one Shoemaker that he would make the building "a dear house for" defendant. He denied making the statement, and evidence was then admitted that he did

say so to Shoemaker. *Held*, that the evidence was properly admitted, as bearing on the credit of his evidence.—Tolbert v. Burke, 89 Mich. 132, 50 N. W. 803.

[o] (Minn. 1885) At the trial of an action for the recovery of personal property taken on execution against plaintiff's husband, the husband gave testimony tending to show that the property was plaintiff's and not his. *Held* that, on his cross-examination, it was competent to show conduct and statements by him inconsistent with his testimony, and, on his denying it, to contradict him.—Ladd v. Newell, 34 Minn. 107, 24 N. W. 366.

[oo] (Minn. 1895) On an issue in replevin whether defendant sold the property to plaintiff, plaintiff's husband testified that he purchased the property for his wife. On cross-examination he was asked whether he had not stated that he did not purchase the property, and answered in the negative. *Held*, that the evidence was material, and it was error to refuse to permit witness to be impeached by proving that he did make that statement.—Swift v. Withers, 63 Minn. 17, 65 N. W. 85.

[ooo] (Miss. 1896) Where a witness for defendant was asked on cross-examination if, on the morning of the homicide, witness did not say to one E., in the presence of J.: "I sent you word not to let your husband come down here. They made up a plot to kill him three weeks ago,"—it was erroneous to permit the state to contradict the answer by the testimony of J.—Williams v. State, 73 Miss. 820, 19 South. 826.

[p] (Mo. 1839) After a witness has been asked, on cross-examination, if he made certain statements on a former occasion, and he denies them, it may be proved by other witnesses that he made such statements.—Garrett v. State, 6 Mo. 1.

[pp] (Mo. 1892) Plaintiff was injured by falling at night into an opening in the sidewalk along defendant's hotel. On the trial for damages, a police sergeant, to whom plaintiff's stepson had gone on the morning after the accident to inquire for him, testified that the stepson said that he had seen plaintiff's friend whom he was with the night before, who told him that plaintiff was drunk, and insisted on going alone. The stepson did not testify at all in regard to the proceedings or condition of plaintiff on the night of the accident, except when, on cross-examination, defendant's counsel asked him if his stepfather had not been on a spree the night before the accident, and if he did not tell the sergeant he had, to both of which questions he answered, "No." *Held*, that the testimony of the police sergeant was inadmissible to impeach the evidence of the stepson.—Goltz v. Griswold, 113 Mo. 144, 20 S. W. 1044.

[ppp] (Neb. 1884) Defendant, upon trial under an indictment for having, on November 19th, stolen certain money, and committed an assault with intent to steal, testified in his own behalf, and upon cross-examination was interrogated as to certain statements he had made in August, indicating an intention to commit a similar crime on a day in that month. *Held*, that evidence by the state to rebut his testimony on that point was improper, because, the cross-examination being upon a collateral subject, the state was bound by the evidence so brought out.—George v. State, 16 Neb. 318, 20 N. W. 311.

[q] (Neb. 1889) Though a vendor's declarations after the sale are incompetent to impeach his vendee's title, yet where, on cross-examination, the vendor has denied offering the property sold to some one else, he may be impeached by other witnesses as to that fact.—Williams v. Eikenberry, 25 Neb. 721, 41 N. W. 770, 13 Am. St. Rep. 517.

[qq] (N. H. 1879) Where a witness denies making a statement material to the issues, evidence that he did so is admissible to discredit him.—Martin v. Sowle, 59 N. H. 31.

[qqq] (N. Y. 1868) On the trial of an indictment for larceny, the complainant having testified, on cross-examination, that he had not said that if the prisoner would restore the money he would not testify against him, it is not competent to prove that he did say so. Such a case is not within the rule that the feelings and temper of the witness in a particular transaction may be shown; but is a fact collateral to the issue, and evidence cannot be given to contradict the statement.—Nation v. People, 6 Parker, Cr. R. 258.

[r] (N. Y. 1871) Where a witness denied in his cross-examination that he had told a third person and others that he had a conversation with such third person and other persons named in regard to certain bills, the foundation was sufficiently laid for his impeachment by asking such third person whether witness made certain statements to him, as the evidence was merely a cross-examination to lay the foundation for impeaching testimony, and he could not be regarded as a witness for plaintiff in any sense, and it was proper to contradict him.—Gilbert v. Sage, 5 Lans. 287.

[rr] (N. Y. 1874) In an action for the price of milk alleged to have been sold and delivered by plaintiff to defendant, the latter alleged that it had been sold to a third person for whom defendant acted merely as agent. Such person testified however that he credited the milk on a contract between himself and defendant, and that he did not purchase it from plaintiff, or authorize defendant to purchase it on his account. On cross-examination he stated that as a witness in a prior suit brought by other parties against defendant he had testified that he had credited defendant for the milk. Thereafter defendant was asked whether in such suit such third person had credited him with plaintiff's milk. *Held*, that defendant was not concluded by the denial of the witness, as the evidence offered was of statements made elsewhere inconsistent with his testimony on a material point, and that, hence, defendant should have been allowed to answer the last question.—Smith v. Hart, 58 N. Y. 644.

[rrr] (N. Y. 1875) In a trial for murder by assault, the defense was that the assault was not serious, and that deceased cut her head in falling. On cross-examination, a witness for defendant was asked whether she did not meet M. the morning after the homicide and tell her that defendant had raised a great disturbance, and she replied in the negative. *Held*, that the state might put M. on the stand and question her as to whether she saw said witness on the morning after the homicide.—Shufflin v. People, 6 Thomp. & C. 215, 4 Hun, 16, affirmed (1875) 62 N. Y. 229, 20 Am. Rep. 483.

[s] (N. Y. 1878) In an action to recover for the conversion of a piano which plaintiff claimed had been given her by defendant, a witness for the plaintiff testified relative to a conversation with defendant in the presence of A., defendant's son, in which defendant said that he had bought the piano for plaintiff and had given it to her as a present. A., being called as a witness, denied that such statements were made in the conversation referred to. On cross-examination he was asked if he had not told G. at a specified time and place that his father claimed to have given the piano to plaintiff. He denied having made such statement. *Held*, that it was competent to prove by G. that A. had in fact made such statement to him.—Sparrowhawk v. Sparrowhawk, 73 N. Y. 591.

[ss] (N. Y. 1880) On trial of C. for administering poison to T. with intent to kill, there was evidence that, on a dark evening, a woman,

whose voice resembled C.'s, delivered to T. a letter containing packages of what purported to be medicine and to come from T.'s husband. C.'s mother testified that C. was at home that evening, and, on cross-examination, that she had not told B. that C. had written a letter on the morning of that day. *Held*, that the state could not be allowed to introduce testimony of B. contradicting the statement so elicited.—People v. Cox, 21 Hun, 47.

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[u] (N. Y. 1888) In an action to recover possession of goods alleged to have been obtained by defendant by fraud, evidence was given by plaintiff to show that the defendant made false representations as to his solvency, which defendant denied, and also denied on cross-examination having made statements to certain persons named from whom he had purchased goods. *Held*, that evidence by plaintiff to prove that defendant had made these statements, offered for the purpose of contradicting defendant, was properly excluded, such evidence being relevant testimony applicable to one of the issues which the plaintiff was compelled to establish by affirmative evidence, and which he was bound to introduce before resting.—Auckersmit v. Bluxome, 15 N. Y. St. Rep. 312.

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[vv] (N. C. 1894) Plaintiff's witness having testified that defendant's intestate had received money from plaintiff's intestate, it was not competent to ask him, on cross-examination, if he had not stated to another that it had been repaid, and, on his denial, to prove that he had made such statement.—Lamb v. Ward, 114 N. C. 255, 19 S. E. 230.

[vvv] (Ohio, 1878) Where a witness gives testimony which takes the party calling him by surprise, his answer, on being cross-examined as to contrary declarations made out of court, cannot be contradicted.—State v. Carlyle, 1 Cleve. Law Rep. 338, 4 Ohio Dec. 835.

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[x] (Tex. 1884) Where a witness denies having made certain statements inconsistent with his testimony, it may be shown that his denial is untrue.—Walker v. State, 17 Tex. App. 16.

[xx] (Tex. 1885) Defendant, on a criminal trial, asked a state's witness if he did not, at a certain time and place, and in the presence of certain persons, propose to defendant to "know nothing" about the case if called on to testify. The witness answered in the negative. *Held*, that defendant could show, by those present at that tme and place, that the witness did make the proposition.—Hill v. State, 18 Tex. App. 665.

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§ 1245. Denial of recollection.

[a] If the witness neither denies nor admits having made any contradictory statements, but says he does not recollect having done so, his testimony may be impeached by proof of such statements.

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[d] (Ark. 1889) Mansf. Dig. §§ 2902, 2903, provide that a witness may be impeached by the party against whom he is produced by showing that he has made statements different from his testimony, but, in order to so impeach him, he must be asked if he has made the statement assumed, and the examination must indicate the time when and the person to whom it was made. *Held*, that proof of such contradictory statements may be made as well where he testifies that he does not remember them as where he denies them.—Billings v. State, 52 Ark. 303, 12 S. W. 574.

[e] (Colo. 1874) If a witness has no recollection of a statement imputed to him as having been made out of court concerning the matters in issue upon the trial, the fact that he made such statement may nevertheless be proved.—Jones v. People, 2 Colo. 351.

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[h] (Ind. 1856) A party calling a witness asked him whether a certain fact existed, and if he had not told B. it did. Witness answered he did not remember. *Held*, that evidence offered by the same party from B. that the former witness did tell him so was inadmissible.—McVey v. Blair, 7 Ind. 590.

[i] (Ind. 1861) If the witness neither admits nor denies, but simply states that he has no recollection of, having made the statements, the impeaching testimony is inadmissible.—Mendenhall v. Banks, 16 Ind. 284.

[j] (Ind. 1894) Under Rev. St. 1894, § 515 (Rev. St. 1881, § 507), providing that a party may contradict his own witness "by other evidence, and by showing that he has made statements different from his present testimony," where a person, who is a witness for both parties, is asked, on cross-examination, after being called by defendant, if he had not made statements at a previous time different from those made as a witness, and he answers, "Not that I know of," plaintiff may prove such previous statements.—Ohio & M. Ry. Co. v. Stein, 140 Ind. 61, 39 N. E. 246.

[k] (Kan. 1868) The guard of four prisoners accused of a larceny, three of whom escaped, having testified for the one on trial that he did not try to escape with the others, and having answered on cross-examination that he did not recollect saying to W. that the reason of the defendant's not trying to escape was illness, etc., it was *held* competent for W. to testify that the guard did so assert.—Lewis v. State, 4 Kan. 296.

[l] (Ky. 1892) The engineer in charge of an engine which struck plaintiff's intestate testified in behalf of plaintiff that he first saw deceased on the track when the train was at a point 462 feet from him, and that he did not recollect whether or not he had testified at the coroner's inquest that he saw deceased sitting on the track when the train was 1,287 feet distant from him. *Held*, that it was error to exclude evidence offered by plaintiff to show that the engineer had so testified at the coroner's inquest.—Wren's Adm'r v. Louisville, St. L. & T. Ry. Co., 20 S. W. 215.

[m] (La. 1895) A witness who testified that he did not remember whether he made certain statements to certain persons may be impeached by proof that he did make them.—State v. Johnson, 47 La. Ann. 1225, 17 South. 789.

[n] (Mass. 1860) Evidence that a witness had stated that he had testified in court for the defendant, but thought, if the case was tried again, he should testify for the plaintiff, is admissible to impeach his credit, after he has said, on cross-examination, that he has no recollection of making such statements.—Chapman v. Coffin, 80 Mass. (14 Gray) 454.

[o] (Mich. 1882) A witness in a criminal case cannot be impeached by showing that out of court he had expressed suspicions as to defendant which on cross-examination he says he does not remember expressing.—People v. Stackhouse, 49 Mich. 76, 13 N. W. 364.

[p] (N. Y. 1857) The complainant in an indictment for larceny was asked on his cross-examination by the defendant if he had not said to one A. that he did not think defendant meant to do any wrong. He answered that he did not recollect it. A. was afterwards called as a witness by the defense, who proposed to ask him if complainant had not said this to him. The government objected generally to this evidence. *Held*, that it was admissible.—People v. Jackson, 3 Parker, Cr. R. 590.

[q] (N. Y. 1891) A witness may be asked if he did not make a statement to a certain person conflicting with his testimony given on the trial, and if he denies it, or states that he does not remember it, proof may be given that he did make such a statement.—Palmeri v. Manhattan Ry. Co., 60 Hun, 579, 14 N. Y. Supp. 468, judgment affirmed (1892) 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136.

[r] (Pa. 1867) A witness swore that he did not remember making a statement which was material to the issue. *Held*, it was competent to contradict him by proof of other statements; otherwise, a witness might turn aside the means of contradicting him by alleging a want of memory.—Gregg Tp. v. Jamison, 55 Pa. (5 P. F. Smith) 468.

[s] (S. C. 1895) Where a witness for the state, in answer to a question as to whether before the trial he did not make a certain statement which was at variance with his testimony, answers, "I do not remember whether I used those words or not," and the words referred to were relevant to the issue, the defense may show that the witness did use the words.—State v. Sullivan, 43 S. C. 205, 21 S. E. 4.

[t] (S. C. 1896) Defendants' brother, who had testified to an alibi on behalf of defendants, was asked whether he had not previously used certain threatening language to the justice who issued the warrant for his brothers' arrest, and replied that he did not remember of having done so, stating that he was intoxicated at that time. Said justice thereupon testified that defendants' brother did use said language, and, though he had been drinking, knew what he was doing at the time. *Held*, that the testimony of the justice was admissible.—State v. Kelley, 46 S. C. 55, 24 S. E. 60.

[u] (Tenn. 1858) An important declaration of the prosecutor, in a trial for grand larceny, was offered by the defense. The prosecutor, on being recalled, testified that he did not remember making such a declaration. "He might, and he might not, have done so." The court below having ruled that the declaration was inadmissible, because not denied by the prosecutor, this court reversed the judgment on error.—Janeway v. State, 38 Tenn. (1 Head) 130.

[v] (Tenn. 1874) Where a witness has been asked as to contradictory statements, which he neither admits nor denies, evidence of such statements is admissible, because the imparted statement, when proved, may be such as to amount to a direct contradiction of the witness. and may convince the jury that the witness did not speak the truth in saying he did not remember making the statement.—Reagan v. Mabry, 67 Tenn. (8 Baxt.) 168.

[w] (Tex. 1880) On the taking of a deposition, deponent replied to a question concerning certain conversations that, if they had taken place, he did not know or recollect. *Held*, that he could not be impeached, on the trial, by proving that such conversations had taken place.—Johnson v. Richardson, 52 Tex. 481.

[x] (Tex. 1889) If, for the purpose of laying the predicate to contradict a witness, the prosecution, fixing time, place, and circumstances, asks the witness if he did not make statements contradictory of his evidence on the stand, and the witness answers that he "does not remember," the prosecution may introduce evidence to prove that he did make such contradictory statements.—Levy v. State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826.

[y] (Tex. 1892) Where defendant testified that he did not remember making statements in the presence of a person named, it was proper to show by such person that defendant made the statements that he was interrogated about.—Edwards v. Osman, 84 Tex. 656, 19 S. W. 868.

[yy] (Vt. 1858) Upon the question whether an agreement to refund the price of certain land had been made, the defendant called his attorney as a witness to rebut testimony introduced by the plaintiff to the effect that such an agreement had been made in the attorney's

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presence and by his advice. The attorney testified that he knew of no such agreement or any advice to that effect. The plaintiff inquired of him upon cross-examination if he did not on a certain occasion remark to the plaintiff that the defendant must refund the money, to which the witness replied that he did not recollect any such conversation. *Held*, that it was competent for the plaintiff to prove that the attorney did make such a remark.—Holbrook v. Holbrook, 30 Vt. 432.

[z] (W. Va. 1869) A reply by a witness to the question whether he had a conversation in a certain year with a certain person as to executing a certain deed, that he did not remember any such conversation, is not a sufficient ground for the admission of testimony to impeach his credit.—Robinson v. Pitzer, 3 W. Va. 335.

[zz] (Wis.) An engineer having testified that he did not remember having said, some time after the accident, that he was obliged to run faster than six miles an hour in order to do the work, evidence that he did so state is admissible to impeach his testimony.—(1889) Heddles v. Chicago & N. W. Ry. Co., 74 Wis. 239, 42 N. W. 237; (1890) Id., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

7. EVIDENCE OF INCONSISTENT STATEMENTS.

NOTICE OF INTENTION OR ARTICLES OF IMPEACHMENT AS PREREQUISITE TO ADMISSION OF EVIDENCE, § 1246.
COMPETENCY OF EVIDENCE IN GENERAL, § 1247.
ORAL STATEMENTS AND EXAMINATION OF IMPEACHING WITNESSES, § 1248.
WRITTEN STATEMENTS OR INSTRUMENTS, § 1249.
—— LETTERS, § 1250.
—— PLEADINGS, MOTIONS, AND AFFIDAVITS, § 1251.
FORMER TESTIMONY OF WITNESS, § 1252.
—— STENOGRAPHER'S NOTES OR TRANSCRIPT, § 1253.
—— TESTIMONY BEFORE GRAND JURY OR AT PRELIMINARY INVESTIGATION OR CORONER'S INQUEST, § 1254.
—— DEPOSITIONS, § 1255.
—— BILLS OF EXCEPTIONS OR STATEMENTS OF FACTS, § 1256.
PORTION OF WRITING OR TESTIMONY, § 1257.

Privileged communications between husband and wife, see ante, § 734 [p].
—— *to attorney, see* ante, § 758 [h].
Mode of proof of admissions in general, see "Evidence," vol. 20, cc. 1424, 1425, § 1019.

§ 1246. Notice of intention or articles of impeachment as prerequisite to admission of evidence.

[a] (Del. 1851) Contrary statements cannot be proved to impeach a witness, without notice.—Lord v. Horsey, 5 Har. 317.

[b] (Ga. 1886) In a prosecution for keeping open a tippling house on Sunday, defendant may be contradicted by proving statements formerly made by him without first notifying him of the time and place of the utterance of the former statements, in order to make them admissible.—Klug v. State, 77 Ga. 734.

[c] (Mich. 1842) Where a foundation has been laid by questioning a witness on cross-examination as to his former statements, a party may proceed without exhibiting articles of impeachment.—Sawyer v. Sawyer, Walk. Ch. 48.

§ 1247. Competency of evidence in general.

[a] On a prosecution for rape, the declarations of the husband of the woman on whom the offense is alleged to have been committed are not admissible to discredit her as a witness.
—(N. C. 1846) State v. Jefferson, 28 N. C. 305; (Ohio, 1858) McCombs v. State, 8 Ohio St. 643.

[b] (U. S. 1887) The admissibility of testimony for the purpose of impeaching a witness by showing his failure to make statements consistent with his testimony is in the discretion of the trial judge, subject to the power of the court to grant a new trial, if it should appear, on a review of the testimony, that there was no ground for the inference that the witness whose credibility was in issue would have made the statements in question to the impeaching witnesses, if they had been true.—Becker v. Haynes (C. C.) 29 Fed. 441.

[c] (Ala. 1860) A party against whom a deposition is read cannot introduce evidence of the unsworn declarations of the witness in such deposition as to the manner in which his testimony was taken, his condition at the time, and his knowledge of the facts proved.—Mims v. Sturdevant, 36 Ala. 636.

[d] (Ala. 1880) Where the evidence in a case consists wholly of affidavits, inconsistent declarations, made out of court by the makers of the affidavits, may be proved by counter affidavits.—Dabney v. Mitchell, 66 Ala. 495.

[e] (Ala. 1888) On a trial for burglary, one W., who had been convicted for the same crime, was called as a witness for the state. He testified that before the alleged burglary was committed he had stolen the key of the storehouse, and given it to defendant. On cross-examination he denied that he had testified on the preliminary trial that he did not give the key to defendant. Defendant then called the committing magistrate, who testified that W did, on the trial before him, deny that he gave the key to defendant. On cross-examination he was asked if W. told him, just before the preliminary trial, that he did give the key to defendant, to which he replied that W. had so stated. *Held*, that proof of the declarations made by W. out of court was inadmissible to impeach his testimony on the trial of defendant.—McKelton v. State, 86 Ala. 504, 6 South. 301.

[f] (Ga. 1890) A witness for the state having denied making a certain statement to A., the defense cannot show that A. repeated the statement, but has since become frightened, and denies any knowledge of it.—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

[g] (Ga. 1894) Where a witness testified that he was induced by the father of defendant, in a murder case, to testify falsely at the inquest, and the father contradicted him, a conversation held between the witnesses after the inquest was admissible to impeach the father.—Evans v. State, 95 Ga. 468, 22 S. E. 298.

[h] (Ill. 1895) The fact that the owner of real estate testified as to its value did not render it proper to ask of a real estate broker, with whom the property had been placed by the owner for sale, what had been the asking price of the property, on the ground that the answer might discredit the owner's testimony.—City of Danville v. Mabin, 57 Ill. App. 23.

[i] (Ill. 1895) Declarations of a debtor, made after an alleged fraudulent conveyance, while not competent to impeach the title of his grantee, are competent to impeach his own credibility, where he has testified that the conveyance was not fraudulent.—Phillips v. Kesterson, 154 Ill. 572, 39 N. E. 599.

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[j] (Ind. 1881) While it is necessary, in laying the foundation for impeaching a witness by proof of contradictory statements, that the time, place, and persons present shall be given, it is not necessary that the impeaching witness, when called, shall be able to swear to the exact date. It is enough if it appear that he is about to speak in reference to the same declaration or conversation to which the attention of the principal witness had been called.—Lawler v. McPheeters, 73 Ind. 577.

[k] (Ky. 1896) Where a witness denied making a statement attributed to him, and the testimony as to such statement was afterwards excluded as incompetent, it was error to allow another witness to thereupon testify that such statement was made in his presence.—Louisville & N. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117.

[l] (Md. 1874) Where a witness denies on cross-examination that he had a conversation with the person named, the deposition of the person as to the alleged conversation is admissible to impeach the witness, though he was not examined at the execution of the commission, as there was a sufficient foundation laid for the introduction of the impeaching testimony.—Pittsburg & C. R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568.

[m] (Md. 1896) Plaintiffs' witness had given evidence tending to show that the goods were worth $6,000 to $7,000, thereby corroborating one of plaintiffs. On cross-examination he testified that he supposed he had a conversation with one R.; that he did not say to R. that he had told one of plaintiffs that his books were wrong, and he had no such stock as he claimed to have. *Held*, that it was error not to permit defendant to ask R. as a witness if plaintiffs' witness said to him at a particular place and time that plaintiffs' books were wrong, that he had no such stock as he claimed, and that his charges were erroneous, or something to that effect.—Caledonian Ins. Co. of Scotland v. Traub, 83 Md. 524, 35 Atl. 13.

[n] (Mass. 1827) A witness having testified that he made a certain statement in conversation with A., evidence was admitted, for the purpose of impeaching his credit in point of recollection, of his having made a different statement to B. when A. was not present.—Rice v. New England Marine Ins. Co., 21 Mass. (4 Pick.) 439.

[o] (Minn. 1889) Where statements of a witness on a matter material to the issue are contradictory to those made on the witness stand, and such statements are confessions, the court should first pass on their admissibility as if the impeachment of the witness was not involved.—State v. Barrett, 40 Minn. 65, 41 N. W. 459.

[p] (Miss. 1886) Where a witness for defendant on a criminal trial testified that defendant was in her house at the time of the shooting, and on cross-examination was asked if she had not, on the morning after the shooting, said to one W. that, after defendant came into the house, one G. said to him, "I told you that this gun would get you into trouble," but the witness denied having made the statement, it was error to admit evidence in rebuttal, of what other parties had said about the shooting, and the reply of the witness thereto, as no foundation had been laid for the introduction of impeaching testimony, and the evidence was hearsay.—Clark v. State, 9 South. 820.

[q] (Mo. 1888) Statements of plaintiff purporting to be contained in her deposition partly taken, and then abandoned, are inadmissible to impeach her testimony, where she denies making such statements, and there is no other proof that she did.—Owens v. Kansas City, St. J. & C. B. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39.

[r] (N. Y. 1881) In an action for the negligent death of plaintiff's intestate by falling through an open draw on defendant's bridge, a boy in defendant's employ stated that he did not see a woman fall from the bridge. On cross-examination he testified that he did not say, in the presence of people at the draw, that he saw the woman fall from the end of the bridge. Plaintiff's witness testified that he saw a boy among those gathered on the bridge after the draw was closed, but could not identify such boy. *Held*, that it was not error to exclude evidence by plaintiff that the boy said he saw a woman fall off the bridge, as it was questionable whether the boy whose declarations it was proposed to prove was the same as defendant's witness.—Hart v. Hudson River Bridge Co., 84 N. Y. 56.

[s] (N. Y. 1892) In an action against an elevated railroad to recover damages for injuries to property, plaintiff was called as a witness on his own behalf. Defendant then called a former tenant of plaintiff, who testified that he had never complained to plaintiff about the dust and cinders of the road. Plaintiff was then recalled, and related conversations of the tenant complaining of the serious injury to his stock of goods from dust and cinders. *Held*, that such conversations were not hearsay, but original evidence for the purpose of impeaching the tenant.—Barrett v. Manhattan Ry. Co., 63 Hun, 630, 18 N. Y. Supp. 71.

[t] (N. Y. 1895) Where a witness testifies that a certain event occurred on a certain road "between the sluiceway and the hill," evidence that he stated soon after the occurrence that it took place between the sluiceway and the top of the hill is admissible, as tending to show that immediately after the occurrence the witness was less certain about the precise position than when he was on the witness stand.—People v. Brockett, 85 Hun, 138, 32 N. Y. Supp. 511.

[u] (N. C. 1888) Where a witness testified that when a levy was made on his goods he denied ownership of them, the declaration of the deputy who made the levy, to another deputy, made on returning from making the levy, to the effect that the witness had claimed his exemption, was not admissible, as it was hearsay.—Simon v. Manning, 99 N. C. 327, 6 S. E. 101.

[v] (Tex. 1895) In an action on a life insurance policy, which contained a warranty that insured was born in 1848, a sister of the insured testified by deposition that he was born in 1845. To impeach this deposition, a witness detailed a conversation had with her after the deposition was taken, from which the jury might infer that she had recanted the statement made in the deposition, and then stated that he had taken out a commission for her which had never been returned. *Held*, that the evidence was inadmissible, and ground for reversal.—Mutual Life Ins. Co. of New York v. Baker, 10 Tex. Civ. App. 515, 31 S. W. 1072.

[w] (Vt. 1858) It is competent, for the purpose of impeaching the testimony of a witness, to prove the declarations of the party introducing him, and in whose favor he testified, that the witness had made a statement contradictory to that made by him upon the stand.—Allen v. Harrison, 30 Vt. 219, 73 Am. Dec. 302.

[x] (Va. 1847) Where the previous statements of a witness on oath have been introduced for the purpose of impeaching his credibility, it is not competent for the party who has introduced such statements to introduce further testimony to prove that the statements were not true.—Charlton v. Unis, 4 Grat. 58.

[y] (Wis. 1894) Where a confession has been improperly admitted, and excluded, and defendant offers himself as a witness, it is error to permit him to be asked whether he made such confession, and, on his denial, to allow evidence

that he did make such confession, and the particulars thereof, for the purpose of contradicting the witness.—Shephard v. State, 88 Wis. 185, 59 N. W. 449.

§ 1248. Oral statements and examination of impeaching witnesses.

Cross-examination to show animus of witness testifying to contradictory statement, see ante, § 1192 [oo].

[a] (U. S. 1896) Where a witness denies having made certain statements, leading questions may be propounded to a witness called in rebuttal to contradict him.—Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766.

[b] (Ala. 1884) In impeaching a witness by proof of former contradictory statements, the impeaching witness may be asked either whether the particular words claimed were used, or to state what words were used.—Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31.

[c] (Cal. 1882) Where a witness has been asked, on cross-examination, for the purpose of laying a foundation for contradicting him, if he has not used particular expressions, and he has denied having used them, the witness called to contradict him may be asked if he did not use them.—People v. Lee Ah Yute, 60 Cal. 95.

[d] (Cal. 1893) In examining an impeaching witness, he should be asked the direct question whether the witness sought to be impeached made the alleged contradictory statement at the time and place mentioned.—People v. Nonella, 99 Cal. 333, 33 Pac. 1097.

[e] (Conn. 1869) A foreigner, ignorant of the English language, had testified through an interpreter as to certain facts, and on cross-examination had denied stating the facts differently. The opposing party then offered a witness to testify that some time before the trial the foreigner had, through an interpreter, stated some of the facts differently to him. *Held*, that the interpreter used on that occasion must be called as to what the foreigner said, and that the witness, who heard it only through the interpreter, could not testify to it.—State v. Noyes, 36 Conn. 80, 4 Am. Rep. 37.

[f] (Fla. 1893) It is not error to refuse to permit a party calling an impeaching witness to lead him by reciting in a question the statement which he proposes to prove was made by the witness sought to be impeached.—Wood v. State, 31 Fla. 221, 12 South. 539.

[g] (Ind. 1893) Where a party desires to impeach the testimony of a witness by showing that he has made out of court statements contrary to his testimony at the trial, the question put to the impeaching witness as to such statements should be identical as to time, place, and substance with the foundation question put to the witness sought to be impeached, and so framed as to admit of an affirmative or negative answer.—Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

[h] (Me. 1845) Where a witness consents to answer whether he has not testified falsely in a former case, and states that he did not, his declarations to the contrary may be received to discredit him.—State v. Blake, 25 Me. (12 Shep.) 350.

[i] (Md. 1896) On a trial for selling beer to a minor, where a witness was asked, for the purpose of impeaching statements of prosecuting witness as to his age, whether, at the time the beer was sold, he heard any conversation between the prosecuting witness and defendant, such testimony was properly excluded, not being confined to the conversation concerning the age of the purchaser.—Peterson v. State, 83 Md. 194, 34 Atl. 834.

[j] (Mass. 1832) A witness may be discredited by evidence that he has made a different statement on a former occasion, though the precise language then used by him cannot be shown.—Gould v. Norfolk Lead Co., 63 Mass. (9 Cush.) 338, 57 Am. Dec. 50.

[k] (Mich. 1896) Where the proper foundation is laid for impeaching testimony, and the testimony is confined to contradicting the witness sought to be impeached on a point covered by his testimony, the form of the question, if not leading, is not prejudicial.—Miller v. Jurczyk, 109 Mich. 637, 67 N. W. 898.

[l] (Miss. 1893) Leading questions cannot be asked by counsel of his own witness, introduced to impeach an opposing witness by showing that he had made other and contradictory statements to what he had testified.—Rucker v. State, 71 Miss. 680, 14 South. 534.

[m] (Mo. 1878) On a trial for stealing hogs a witness for the state was asked if he had met a third person at a certain place, and if, in a conversation, he did not state that he did not recognize the hogs found as belonging to him, but that he thought his son would. The witness admitted the conversation, but denied that he had said he did not recognize the hogs. *Held*, that it was proper, for the purpose of contradicting the witness, to ask such third person if, in the conversation testified to by such witness, the latter had stated that he could not recognize the hogs, but that his boy could.—State v. Purdin, 68 Mo. 99.

[n] (N. Y. 1855) Where, upon a question at the trial of a cause as to the seaworthiness of a steamer, a witness had sworn to her seaworthiness, and had denied having ever declared or had the idea "that $500 expended on those water jackets would have saved her," it is competent to repeat the declaration substantially to a subsequent witness, and ask him if the first witness had not said it to him.—Patchin v. Astor Mut. Ins. Co., 13 N. Y. (3 Kern.) 268.

[o] (N. Y. 1871) The usual practice, in showing inconsistent statements made by a witness out of court, is to ask the precise question put to the witness whose credibility is attacked; but the method may, in the discretion of the court, be varied, for the purpose of eliciting the real truth.—Sloan v. New York Cent. R. Co., 45 N. Y. 125.

[p] (N. Y. 1895) A witness for plaintiff, on cross-examination, denied that she had made a certain statement to one S. contradictory to her testimony. Afterwards S. was called by defendant, and, after stating the time and place of a certain conversation between such witness and herself, plaintiff not being present, she was asked to state "what that conversation was." *Held*, that the testimony was properly excluded, in that it called for the whole conversation, and not merely for so much as was necessary to prove the contradictory statement.—Hertz v. Minzesheimer (Com. Pl.) 12 Misc. Rep. 58, 33 N. Y. Supp. 48, affirming judgment Same v. Minzesheimer (City Ct. N. Y. 1895) 10 Misc. Rep. 779, 30 N. Y. Supp. 805.

[q] (N. C. 1892) Where defendant, as a witness, denies that he made a statement to a third person, the latter may repeat it in contradiction.—State v. Crane, 110 N. C. 530, 15 S. E. 231.

[r] (Ohio, 1865) D. was brought forward as a witness, on the part of the defense in a trial for murder, to explain the possession of certain money by the prisoner, supposed to have been taken from the deceased. On cross-examination, the witness denied ever stating that the prisoner was a "worthless fellow." In rebuttal, a witness was asked what she had heard D. say "about the prisoner being an idle or trifling fellow." *Held*, that the question was material,

and admissible to determine the credibility of the witness.—Mimms v. State, 16 Ohio St. 221.

[s] (Pa. 1878) Where a witness is called to contradict a former witness, who has stated that certain expressions were used, the proper practice is to ask whether such expressions were used, without putting the question in a general form by inquiring what was said.—Farmers' Mut. Fire Ins. Co. v. Bair, 87 Pa. 124.

[t] (Tex. 1895) The testimony of an impeaching witness is properly limited to the matter of the weight and credibility to be given to the testimony of the witness, whose testimony she was introduced to impeach by testifying to statements made out of court.—Spiars v. Dallas Cotton Mills (Civ. App.) 32 S. W. 777.

[u] (W. Va. 1873) It is proper, to lay the foundation for impeaching the credit of a witness, to first inquire of him on cross-examination whether he has not on some former occasion given a different account or made a different statement of a matter of fact to which he has testified on the trial. After a denial on cross-examination of a witness that he has made such inconsistent or contradictory statements, though it is admissible upon a principle of convenience or absolute necessity to put a question to the impeaching witness in the same words which had been put to the former witness, yet it would be more satisfactory if the answer should be obtained without a direct suggestion.—Morgan v. Franklin Ins. Co., 6 W. Va. 496.

[v] (Wis. 1886) When it is sought to impeach a witness by proving that he made contradictory statements as to the transaction involved, the impeaching witness may be asked, in the form of a leading question, if such witness did not make to him the statements claimed to have been made.—Hinton v. Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

§ 1249. Written statements or instruments.

[a] (U. S. 1890) In an action against a railroad company for personal injuries to an employé, it is competent, for the purposes of impeachment, to use at the trial and introduce in evidence papers signed by witnesses, and containing a synopsis of statements obtained from them by the company's claim agent shortly after the occurrence, and while they were still in the company's employ.—Chicago, M. & St. P. R. Co. v. Artery, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747.

[b] (U. S. 1894) Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding," shall be given in evidence, or in any manner used against him, does not apply to an application, under section 878, by one indicted, to have witnesses summoned and paid by the United States, and statements therein are competent to contradict his testimony.—Tucker v. United States, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112.

[c] (U. S. 1806) A shipmaster's protest may be read to discredit what he says on his examination in the cause.—Lamalere v. Caze, Fed. Cas. No. 8,002 [1 Wash. C. C. 413].

[d] (U. S. 1829) A book published by a deponent, respecting the date, etc., of certain surveys, many years before his deposition was taken in regard to such surveys, may be read in evidence with a view to qualify his deposition.—Harmer v. Morris, Fed. Cas. No. 6,076 [1 McLean, 44], affirmed Morris v. Harmer (1883) 32 U. S. (7 Pet.) 554, 8 L. Ed. 781.

[e] (Ala. 1894) In an action of detinue, where defendant set up payment of the mortgage debt, and plaintiff alleged that a sum claimed to have been paid thereon was given to him to pay a mortgage due one L., and on the trial defendant first testified that he never made a mortgage to L., but, on the mortgage being shown him, testified that it was given for a debt due W. & L. and that he supposed the mortgage was made to them, it was proper to exclude the mortgage as impeaching testimony.—Winter v. Judkins, 106 Ala. 259, 17 South. 627.

[f] (Ala. 1895) When, in a prosecution for homicide, defendant claims that his codefendant and himself went to deceased's house at night in regard to a mortgage owned by the codefendant, a receipt given by the codefendant in full of the mortgage is admissible in evidence to show that such claim was false.—Evans v. State, 109 Ala. 11, 19 South. 535.

[g] (Ark. 1891) In an action for killing stock on a railroad track it is competent for defendant to discredit the testimony of plaintiff as to the value of the animal by introducing his assessment list, recently signed and verified by him, showing that the animal was of much less value than testified by him.—Fordyce v. Hardin, 54 Ark. 554, 16 S. W. 576.

[h] (Cal. 1892) In an action against a street railway for personal injuries, an employé of defendant, a witness for plaintiff, testified on cross-examination that he had obtained written statements from other employés as to the manner in which the injuries occurred, but that he did not know where these statements were. The witness identified a bundle of papers in the hands of defendant's counsel as the reports referred to, which plaintiff's counsel was permitted to examine. Subsequently another employé, who admitted that he made a written report to defendant in relation to this accident, was called by defendant, and testified to a material circumstance at variance with and contradictory to his report. *Held*, that plaintiff's counsel was entitled on demand to receive this report, which was lying on the table of defendant's counsel, and to introduce it in evidence for the purpose of impeaching such witness.—Freel v. Market St. Cable Ry. Co., 97 Cal. 40, 31 Pac. 730.

[i] (Conn. 1811) A writing subscribed by a witness drawn up by one who is a justice of the peace and an attorney, purporting to be a complaint to grand jurors, charging the defendant with an attempt to commit a rape upon her, is not admissible for the purpose of impeaching her testimony in a public prosecution for another offense, but relating to the same transaction.—Fowler v. State, 5 Day, 81.

[j] (Ind. 1884) A witness may be impeached by a mortgage and affidavit executed by him, containing statements inconsistent with his testimony, and relating to the same transaction.—Camp v. Smith, 98 Ind. 409.

[k] (La. 1819) A witness' written statements may be offered to discredit him.—Lynch v. Postlethwaite, 7 Mart. (O. S.) 209.

[l] (Me. 1830) Where a witness testified to certain facts which were contrary to his own admissions in a written contract made by him with the adverse party, it was *held* that such party might read this contract in evidence to impeach his testimony without first calling the subscribing witness thereto; the witness on the stand, who signed the contract, testifying that the signature was his own.—Drew v. Wadleigh, 7 Me. (7 Greenl.) 94.

[m] (Me. 1839) A paper admitted by a witness to be true, although not then under oath, is admissible in evidence for the purpose of contradicting his testimony.—Robinson v. Heard, 15 Me. (3 Shep.) 296.

[n] (Mass. 1860) A witness, who had testified that he never knew of the existence of a certain water course, answered on cross-examination that he did sign a petition to have this water course reopened, but did not read its contents,

and was told at the time by the person presenting it that it was a petition for a new drain. *Held* that, the person who presented it having testified that he explained the contents to him, the petition was admissible in evidence to contradict the witness.—Hastings v. Livermore, 81 Mass. (15 Gray) 10.

[o] (Mass. 1871) Written statements of a witness in conflict with her testimony are admissible to contradict it, irrespective of their weight.—Hook v. George, 108 Mass. 324.

[p] (Mass. 1875) On an issue whether a loan made by a person deceased, and for which a note since lost was given, was to defendant or a third person, who testifies that the loan was made to him, a memorandum, signed by the deceased, reciting the receipt of the note from the defendant, on which a certain sum is stated to be due to the defendant on the happening of a certain event, and on which the third person afterwards wrote a receipt for the part of the sum named therein, is admissible as a whole, as affecting the credibility of such third person.—Mair v. Bassett, 117 Mass. 356.

[q] (Mass. 1884) To contradict the testimony of plaintiff's witness, a physician, as to the extent of plaintiff's injuries, the action being brought on account thereof, a statement signed by the physician, and by a physician employed by defendant to make an examination of plaintiff before the trial, is admissible.—Smith v. Metropolitan R. Co., 137 Mass. 61.

[r] (Mass. 1889) A member of the board of selectmen having testified to the value of the land taken, the record of the board, signed by such member, with the others, awarding damages at a different sum, offered for the purpose of contradicting him, is properly excluded; the signatures of the selectmen being the method of authenticating their proceedings, and the award of the board not being evidence of the opinions of the individual members, and evidence of the opinions expressed in the course of the deliberations of the board, acting in a quasi judicial capacity, being inadmissible to show the part taken by the witness.—Phillips v. Inhabitants of Marblehead, 148 Mass. 326, 19 N. E. 547.

[rr] (Mo. 1881) A witness is not estopped to give evidence in direct conflict with what he had written at a previous time on the same matter. What he wrote is proper evidence against him, and what he testifies to is proper evidence for him; both to be weighed by the jury.—Rheinhart v. Grant, 24 Mo. App. 154.

[s] (Mo. 1894) Prior written statements of a witness as to the matter about which he testifies are admissible for the purpose of showing that he had related the matter differently on a former occasion, and thus impeaching him.—Cooke v. Kansas City, Ft. S. & M. R. Co., 57 Mo. App. 471.

[ss] (N. J. 1849) Where a document is offered to contradict a witness, it must be first identified as the one referred to by him.—West v. State, 22 N. J. Law (2 Zab.) 212.

[t] (N. Y. 1862) The testimony of a witness as to a matter of fact is not affected by proof that he was a public officer required by law to make a record of the facts in question, and that such record, as originally made by him, did not include a statement contained in his oral testimony. Hence, proof of the alteration of the record by subsequent insertion of such statement is inadmissible to contradict his oral testimony.—Mallory v. Perkins, 22 N. Y. Super. Ct. (9 Bosw.) 572.

[tt] (N. Y. 1872) A written statement by a witness relevant to the issues, differing from the facts testified to by him, is admissible for the purpose of affecting his credibility.—People v. Gaffney, 1 Sheld. 304, affirmed Gaffney v. People (1872) 50 N. Y. 416.

[u] (N. Y. 1881) After plaintiff received the injuries for which he sued, he was taken to a stationhouse with witness, where a record was made of the accident. *Held* that, in the absence of evidence that witness furnished the information from which the record was made, the record was not admissible to contradict him.—Hoffman v. New York Cent. & H. R. R. Co., 87 N. Y. 25, 41 Am. Rep. 337.

[uu] (N. Y. 1888) Statements made by witnesses in writing different from those made on trial, and shown the witnesses, who acknowledge having made them, may be read in evidence.—Plyer v. German-American Ins. Co., 48 Hun, 618, 1 N. Y. Supp. 395, judgment reversed (1890) 121 N. Y. 689, 24 N. E. 929.

[v] (Pa. 1893) Where, on appeal from the report of viewers as to damages and benefits for a street improvement, one of the viewers testifies as a witness as to the effect of the improvement on appellant's property, the report signed by him, showing an entirely different estimate, is admissible to contradict him, and affect the weight of his opinion with the jury.—Dawson v. City of Pittsburgh, 159 Pa. 317, 28 Atl. 171, 34 Wkly. Notes Cas. 69.

[vv] (Pa. 1896) In an action for recovery of the property taken by defendant on execution on a claim against a partnership, for which the execution debtor, as one of the partners, had given a judgment note, and where the proof as to the validity of defendant's claim rested on the testimony of the debtor himself, it was competent, for the purpose of impeaching the debtor's credibility, and the bona fides of the alleged debt, for the plaintiff to show, by the partnership books, that the amount due defendant was in fact much less than the judgment note.—Hartley v. Weideman, 175 Pa. 309, 34 Atl. 625, 38 Wkly. Notes Cas. 192.

[w] (Pa. 1896) In an action for death at a crossing, where one who was riding with decedent at the time of the accident testified as to the manner in which it occurred, it was proper to contradict his testimony by a statement in writing, signed by him, though the body of the instrument was written by another.—Hughes v. Delaware & H. Canal Co., 176 Pa. 254, 35 Atl. 190, 38 Wkly. Notes Cas. 393.

[ww] (S. C. 1851) In an action on a policy of insurance on a vessel, one of the crew, who had signed a protest, was examined by the plaintiff as a witness. *Held*, that the plaintiff might give in evidence his declarations in the protest, to contradict his testimony.—Cudworth v. South Carolina Ins. Co., 4 Rich. Law, 416, 55 Am. Dec. 692.

[x] (Tex. 1885) Where an agent of a railroad company drew up a statement on the next day, giving the amount of plaintiff's goods destroyed by fire while in the company's possession, and defendant company introduced the agent's deposition as to the same facts, the statement was admissible to contradict the deposition, where the witness' attention had been called to the disagreement.—East Line & R. R. Ry. Co. v. Hall, 64 Tex. 615.

[xx] (Tex. 1889) A husband, some time prior to conveying land to his wife, furnished a creditor with a statement of its value, which he stated was a fair estimate, and less than he would sell it for, but which was largely in excess of the consideration expressed in his deed to his wife. In an action involving the validity of that deed, he testified that the statement was understood to show the prospective, and not the cash, value of the property. *Held*, that the statement was admissible, as tending to impeach his testimony that the actual value was much less than that shown in the statement.—Torrey v. Cameron, 73 Tex. 583, 11 S. W. 840.

[y] (Tex. 1891) A written statement, purporting to contain a witness' recollection of the facts

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in controversy, is admissible to impeach his testimony, where such statement, though not signed, is admitted by him on cross-examination to have been written at his request.—Cross v. McKinley, 81 Tex. 332, 16 S. W. 1023.

[yy] (Tex. 1893) In an action for the price of lumber, where plaintiff claimed that defendant agreed to buy such lumber as a contractor constructing a house for him might select, while defendant claimed that he agreed to become responsible for a certain amount, only, of lumber, the bill for which he approved, it was error to exclude the written contract between defendant and the contractor, offered by the former, and showing that the contractor agreed to furnish all the material and build the house at a stipulated price, the contractor having testified to a different contract.—Bernheim v. Lyon, 5 Tex. Civ. App. 716, 25 S. W. 57.

[z] (W. Va. 1885) In a prosecution for murder, one who had been jointly indicted with defendant testified to defendant's guilt. To impeach such witness defendant offered in evidence a written statement, purporting to be signed by the witness, to the effect that he would never have done what he did, if he had not been persuaded to it by the prosecution, and reciting that it was hard "to stand that which a man is not guilty of; you will come out all right in that yet; you need not be afraid about it; I would tell you all if I had a chance to." The witness testified that he wrote such document at the dictation of the defendant, and that it was directed to a third person; but such testimony of the witness was combated by the testimony of the third person and of defendant. *Held*, that the court erred in excluding such writing.—State v. Kinney, 26 W. Va. 141.

[zz] (W. Va. 1885) Any written statement, made by a witness before he gives his evidence before the jury, which tends to contradict his evidence in any material point, is competent.—State v. Kinney, 26 W. Va. 141.

§ 1250. —— Letters.

[a] (Ala. 1840) Where a witness, on cross-examination, admits that he wrote a letter containing different statements from that which he gave in evidence, and, with the letter before him, states its contents to the jury, the adverse party is entitled to read the letter to the jury.—Lewis v. Post, 1 Ala. 65.

[b] (Ala. 1888) Where the scrivener who drew a paper has testified that he intended to write a will, though the evidence, if properly objected to, would have been rejected for incompetency, it is proper to permit the contestant to give in evidence a letter in which the witness stated that the alleged testator died intestate, for the purpose of impeaching him.—Sharp v. Hall, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28.

[c] (Ill. 1890) In an action for a wrongful discharge from employment, where the defense is neglect of duty, to which defendant's secretary testifies, a letter of recommendation given by him to plaintiff is admissible as impeaching testimony.—Western Manufacturers' Mut. Ins. Co. v. Boughton, 37 Ill. App. 183, affirmed (1891) 136 Ill. 317, 26 N. E. 591.

[d] (Ind. 1893) In an action for legal services, though, under the general denial, letters between the parties are not admissible to show that after performance of the services they agreed on an amount which should be paid plaintiff therefor, his letters are proper subjects to cross-examine him on as tending to show the value put on his services by himself.—Stringer v. Breen, 7 Ind. App. 557, 34 N. E. 1015.

[e] (Kan. 1888) Plaintiff sued for the purchase price of a lot in a new town, conveyed by him to one of defendants. The defense was that it was conveyed in consideration of improvements made thereon. Defendants produced as a witness the agent of plaintiff in the disposal of the lots, who testified that he had had correspondence with plaintiff concerning this matter; and that he first heard that the lot was sold for a money consideration in 1885, though he knew it was conveyed in 1882. Two letters, with memoranda attached, dated in 1882, were identified by witness, in cross-examination, as his handwriting, directed to plaintiff, in which was a list of lots sold, to whom, and for what price, which contained this lot, and showed that it was sold to one of defendants for $75, and not paid for. *Held*, that they were competent to impeach witness.—Anthony v. Jones, 39 Kan. 529, 18 Pac. 519.

[f] (La. 1895) A letter alleged to have been written by a witness is not admissible as impeaching, unless it is shown, either by positive proof, or by proof of handwriting, that witness wrote the letter, the fact that it bears the postmark of the office at which he receives his mail not being sufficient evidence of that fact.—State v. Tolliver, 47 La. Ann. 1099, 17 South. 502.

[g] (Md. 1887) The letters of a witness were permitted to be read in evidence, to impeach his credit as to what he had sworn upon his examination contradictory to the contents of the letter, but not to prove any other fact.—De Sobry v. De Laistre, 2 Har. & J. 191.

[h] (Mass. 1842) In the trial of an action by a mortgagee against a town clerk for not recording a mortgage of personal property, so that the property was attached and sold on execution by the mortgagor's other creditors, the plaintiff introduced the deposition of the mortgagor, taken under a commission, in which he deposed that he delivered the mortgage to the defendant to be recorded, and paid him his fees, etc. The defendant had filed a cross-interrogatory, asking the deponent when he was first informed that the mortgage was not recorded, what measures or steps he took in relation to the same, whether he made any communication to the mortgagee respecting the mortgage not being recorded, and what directions he received from the mortgagee in consequence of such communication. A part of the deponent's answer was that he informed the mortgagee that the property was lost through the carelessness of the defendant, and that there was no way to recover it from the attaching officer, as the mortgage was lost, and there was no copy of it; that he also told the mortgagee that he (the deponent) considered the defendant holden for the payment of it, or bound to make it good; that the mortgagee replied that he did not wish to go to law; and that nothing more was then said or done about it. *Held*, that the defendant was rightly permitted to give in evidence, for the purpose of discrediting the deponent, a letter written by him, a short time before the mortgaged property was sold on execution to one of the creditors who had attached it, saying that he should be in no haste to pay the debt, and would pay no cost, and threatening the creditor with trouble if he should dare to sell the property on execution.—Perkins v. Adams, 46 Mass. (5 Metc.) 44.

[i] (Mass. 1866) If, in an action brought by the assignees of an insolvent debtor to recover property conveyed, as they allege, by the debtor, in order to defraud his creditors, the debtor testifies that the conveyance was not made with such fraudulent intent, letters containing statements tending to contradict his testimony, written by his clerk and signed with the debtor's name, may properly be read to the jury, under the instruction of the court that they are admissible for the purpose of contradicting the testimony of the debtor, if the jury find on the evidence that they were written under his authority.—Marsh v. Hammond, 93 Mass. (11 Allen) 483.

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[j] (Mass. 1867) In an action involving the issue whether A., who had purchased the interest of his insolvent partner B. in the property of the firm, had reason to believe B. insolvent, a witness testified that he was a creditor of B.'s, and, upon meeting A. a short time before his purchase, told him the amount of his claim upon B., and that A. asked him to extend the time of payment of the claim, taking the joint notes of A. and B. therefor. *Held* that, to discredit this testimony, a letter written by the witness to A. and B. shortly after this interview, which did not refer to the claim, or the proposed extension of payment, but indicated an expectation that A. and B. were to continue in business on a considerable scale, and showed that the witness was continuing dealings with them, was admissible in evidence.—Carruth v. Bayley, 96 Mass. (14 Allen) 532.

[k] (Mass. 1883) Where, on the trial of a man for adultery, he calls as a witness in his behalf the woman with whom he is charged with having committed the crime, and she denies it, she may be contradicted by showing that a certain letter, admitting the crime, was written by her.—Commonwealth v. Nefus, 135 Mass. 533.

[l] (Mass. 1886) In an action to recover the value of goods sold to one whom the plaintiffs alleged the defendant represented to be his agent, which the defendant denied, it is competent, for the purpose of contradicting the testimony of the defendant, to introduce letters signed by defendant, and mailed by his orders subsequent to the alleged representations, although not addressed to the plaintiffs, in which the defendant made substantially the same statements as the plaintiffs at the trial testified had been made to them regarding his relations with the alleged agent.—Hosmer v. Groat, 143 Mass. 16, 8 N. E. 431.

[m] (Mass. 1889) In an action by a married woman, for writing a defamatory letter to her husband concerning her conduct before marriage, a letter written by defendant before plaintiff's marriage, suggesting improper intimacy with defendant, and calling plaintiff his wife, is admissible to contradict defendant's testimony that he had used no such language, and made no such suggestions.—Beals v. Thompson, 149 Mass. 405, 21 N. E. 959.

[n] (Mich. 1887) A letter may be admitted on the cross-examination of the writer, for the purpose of impeaching his veracity, when, in his direct examination, he has denied having given any such advice as the letter contained.—Krolik v. Graham, 64 Mich. 226, 31 N. W. 307.

[o] (N. H. 1882) A letter written by a witness, which contradicts his testimony, is competent evidence to affect his credit.—Tabor v. Judd, 62 N. H. 288.

[p] (N. Y. 1891) At the trial of an indictment for arson, the motive attempted to be shown was the discharge of defendant's father from employment by the proprietors of the building. The father, testifying for the defense, denied, on cross-examination, that he had been so discharged, or had made complaint thereof, or had made certain charges against his successor. *Held*, that a letter written by him, contradicting his testimony in these particulars, was admissible to impeach him.—People v. Cassidy, 60 Hun, 579, 14 N. Y. Supp. 349, judgment affirmed (1892) 133 N. Y. 612, 30 N. E. 1003.

[q] (N. Y. 1894) Letters written by a wife to a husband, and given by him to his mistress, and produced by her on his trial for perjury, were properly received in evidence, as bearing on the wife's credibility, where they contradicted her testimony in certain respects.—People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830, affirming (1893) 70 Hun, 111, 24 N. Y. Supp. 194.

[r] (R. I. 1890) In an action on a promissory note, where a member of the firm of payees testifies that the firm assigned the note to plaintiff shortly after receiving it, and before its maturity, a letter written by the witness after its maturity to the maker, inclosing a renewal note, and excusing failure to make a demand on the old note when it became due, is admissible, on his cross-examination, as affecting his credibility.—Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777.

[s] (Tex. 1893) In an action involving the title to a lot of jewelry, one R., a son of plaintiff, testified that the property was, and always had been, plaintiff's. On cross-examination he was asked if he did not write a letter to defendant claiming to own the property, and stating that he would put it into their partnership business as a portion of his capital. This he denied, but, on being shown the letter, admitted that he wrote it. Defendants offered the letter in evidence. *Held*, that it was admissible for the purpose of contradicting and discrediting the witness.—Dooley v. Miller, 2 Tex. Civ. App. 132, 21 S. W. 157.

§ 1251. —— Pleadings, motions, and affidavits.

[a] (Ark. 1885) A witness may be impeached by introducing his pleading under oath in another cause.—Texas & St. L. Ry. Co. v. Donnelly, 46 Ark. 87.

[b] (Cal. 1893) In a prosecution for seduction, on the cross-examination of defendant it was proper to read in evidence an affidavit made by him in support of a motion for a new trial in a civil action formerly brought against him by prosecutrix, when such affidavit tends to contradict his testimony on his examination in chief.—People v. Samonset, 97 Cal. 448, 32 Pac. 520.

[c] (Cal. 1894) A complaint not verified or signed by plaintiff, and whose contents are not shown to have been known by him, is not admissible against him, in another action, to contradict his testimony.—Solari v. Snow, 101 Cal. 387, 35 Pac. 1004.

[d] (Colo. 1894) An affidavit by defendant to procure compulsory process for witnesses, which states where he was at the time of the crime, may be introduced against him, and the statement as to his whereabouts contradicted.—Torris v. People, 19 Colo. 438, 36 Pac. 153.

[e] (Colo. 1896) A claim made by one as plaintiff in an action dismissed by him before final judgment is admissible in a subsequent action against him by one not a party to the former action, in which he sets up as a defense a claim inconsistent with that made in the former action, as impeaching evidence, subject to his right to explain the inconsistency.—Fisher v. Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440.

[f] (Fla. 1895) An affidavit for a continuance made by defendant on trial of a former criminal action against him is admissible to contradict his testimony.—Leslie v. State, 35 Fla. 171, 17 South. 555.

[g] (Ga. 1880) On a second trial, answers of a deceased witness at the first were introduced. *Held*, that an affidavit used on the motion for the new trial, weakening the force of her testimony, was inadmissible to contradict or explain her answers.—Bessman v. Girardey, 66 Ga. 18.

[h] (Ill. 1867) An affidavit of a witness was introduced to impeach his testimony. *Held*, that it was error to instruct the jury that, if the witness did not understand the whole import of the fact contained in the affidavit, they should give it no effect.—Von Glahn v. Von Glahn, 46 Ill. 134.

[i] (Mass. 1887) The certified copy of a complaint made by a witness who admits, on cross-

examination, that he signed and swore to such a complaint, and identifies the copy as a true one, is admissible for the purpose of contradicting the witness' other testimony.—Commonwealth v. Snee, 145 Mass. 351, 14 N. E. 157.

[j] (Mo. 1896) A witness may be impeached by an affidavit previously made by her containing statements contradictory to evidence given on the stand.—Sullivan v. Jefferson Ave. Ry. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167.

[k] (N. Y. 1864) The affidavits on which a new trial was ordered, though served on the attorney of the adverse party and not contradicted, are not admissible on the trial to impeach testimony given there by such adverse party.—Wehrkamp v. Willet, 4 Abb. Dec. 548.

[l] (N. Y. 1887) In a trial for grand larceny, the prosecuting witness was cross-examined in regard to the allegations in a complaint made by him in a civil suit against the defendant. The state offered the whole complaint in evidence, to which the defense objected. The court ruled that it might be put in evidence for the purpose of showing what the witness testified to, but not in any other point. *Held*, that within the limit indicated, the complaint was properly admitted in evidence.—People v. Dimick, 107 N. Y. 13, 14 N. E. 178, affirming (1886) 41 Hun, 616.

[m] (N. C. 1891) In an action of waste, defendant was allowed to testify that he used the land as a prudent man would his own; that, at the time of committing the alleged waste, he in fact believed that he had a fee-simple title, and further, on cross-examination, that he had not admitted in a verified answer in another action that when he bought the land he knew his grantor had paid for it with property in which his wife had a life interest, and the present plaintiffs a remainder. *Held*, that the latter statement could be contradicted by putting in evidence such answer.—Floyd v. Thomas, 108 N. C. 93, 12 S. E. 740.

[n] (Tex. 1885) A deposing witness' testimony cannot be contradicted by his ex parte affidavit, made three years before, under circumstances not disclosed.—Marx v. Heidenheimer, 63 Tex. 304.

[o] (Tex. 1889) Where a cashier of a bank testifies that the bank had not disposed of certain collaterals held by it to secure a note of one A., as alleged by defendant, in violation of its agreement with him, the sworn answer of the bank by the cashier in a garnishment suit against A., that at the time alleged it held none of his property or effects, is admissible to impeach the witness.—Smith v. Traders' Nat. Bank, 74 Tex. 457, 12 S. W. 113.

[p] (Tex. 1895) When evidence that a certain witness had made an affidavit in behalf of the defendant for a change of venue had been admitted without objection, it was not reversible error to admit the affidavit in evidence afterwards, to affect his credibility.—Trinity County Lumber Co. v. Denham, 88 Tex. 203, 30 S. W. 856, affirming (Civ. App. 1894) 29 S. W. 553.

§ 1252. Former testimony of witness.

Best and secondary evidence of former testimony in general, see "Evidence," vol. 20, cc. 803, 804, § 539.

[a] (U. S. 1845) An attempt was made to overturn the testimony of one of the plaintiff's witnesses, in a suit in equity, by showing that his testimony before the master contradicted his statements in his original examination. *Held*, that as his examination before the master, as to matters previously testified to by him, without a special order from the court, was improper, it could not be admitted.—Jenkins v. Eldredge, Fed. Cas. No. 7,267 [3 Story, 299].

[b] (U. S. 1891) Rev. St. § 860 [U. S. Comp. St. 1901, p. 661] providing that "no discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him, or his property or estate, in any court of the United States in any criminal proceeding," does not render it incompetent to contradict a party who testifies in his own behalf, by showing that, in a prosecution against another, he voluntarily appeared as a witness, and testified differently, where such testimony of itself has no tendency to criminate the witness, but rather to place the responsibility wholly upon the other.—United States v. Smith (C. C.) 47 Fed. 501, following State v. Broughton (1850) 29 N. C. (7 Ired.) 96, 45 Am. Dec. 507.

[c] (Ala. 1846) Where an impeaching witness, testifying as to what another witness had stated on a former trial, admitted taking a memorandum of such statement, which was produced, such memorandum was not admissible as part of his testimony, though substantially different from what he swore to.—Olds v. Powell, 10 Ala. 393.

[d] (Ark. 1847) A party may prove that a witness has sworn differently on a former trial of the same case after first interrogating him as to the points of difference in his testimony.—Beebe v. De Baun, 8 Ark. (3 Eng.) 510.

[e] (Ga. 1859) A copy of the brief of evidence retained in the lower court, according to the provisions of law when the original is sent up, is available at a second trial for the purpose of impeaching the state witnesses below, when the original is properly retained on the files of the appellate court.—Smith v. State, 28 Ga. 19.

[f] (Ga. 1871) The testimony of a witness, taken down in writing on a former trial, may be offered in evidence to discredit him in whole or in part—in whole to show the negative of something stated, not testified to on former examination, or in part to contradict the witness; and such evidence may be read to the jury, who are to judge the question of its conflict or materiality under the charge of the court.—Pound v. State, 43 Ga. 88.

[g, h] (Ga. 1893) Where a prisoner has been previously tried for the same offense, his statement then made, conflicting with the statement made on the subsequent trial, is admissible in evidence against him for the purpose of contradicting the latter.—Lewis v. State, 91 Ga. 168, 16 S. E. 986.

[i] (Iowa, 1856) Evidence of a witness who swears that he was present at two former trials of the case is admissible to contradict a witness as to what the latter testified at a former trial.—Glenn v. Carson, 3 G. Greene, 529.

[j] (Iowa, 1889) It is not error to show by other witnesses what a witness testified on a former trial for the purpose of impeachment.—Wacha v. Brown, 78 Iowa, 432, 43 N. W. 269.

[k] (Iowa, 1895) Where, in replevin against a sheriff, for attached property, by a purchaser before levy of the attachment, the original owner is plaintiff's witness to show the bona fides of the sale, evidence given by him on a previous examination as to the property is admissible to contradict the witness when proper foundation has been laid.—Klotz v. James, 96 Iowa, 1, 64 N. W. 648, 59 Am. St. Rep. 348.

[l] (Ky. 1824) A bill, containing the testimony of a witness on a former trial, is competent evidence to discredit him if he testify again.—Baylor v. Smithers, 17 Ky. (1 T. B. Mon.) 6.

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[m] (La. 1842) Statements of witnesses in a suit with the former plaintiff as defendant, but another party as plaintiff, are admissible to discredit them.—Wells v. Compton, 3 Rob. 171.

[n] (Me. 1867) The report of evidence, though signed by the presiding judge, is not admissible to show what the witness testified on the former trial, for the purpose of contradicting him.—Webster v. Calden, 55 Me. 165.

[o] (Me. 1876) A witness may be impeached by showing that he testified differently at a former trial.—State v. McDonald, 65 Me. 466.

[oo] (Mass. 1870) Answers made by a party before a register in bankruptcy, and at his own dictation taken down by his attorney, but not signed, *held* to be admissible to contradict his testimony in a collateral proceeding.—Knowlton v. Moseley, 105 Mass. 136.

[p] (Mass. 1887) At the trial of a case in the superior court, it is competent for the auditor who heard the case to testify that a witness who testified at the trial, made statements, at the hearing before him, contradictory of those made at the trial, where the auditor has not set out the testimony of the witness in his report, and where the effect of the auditor's testimony is not to add to or control his report.—Tobin v. Jones, 143 Mass. 448, 9 N. E. 804.

[pp] (Mass. 1891) Where, in an action for slander, a witness testified that the words were spoken of plaintiff's business, in consequence of which an employé left the service, but that he could not fix the time the words were uttered, it was competent to show, for the purpose of contradiction, that on a former trial he had testified that the words were spoken before the employé left.—Elmer v. Fessenden, 154 Mass. 427, 28 N. E. 299.

[q] (Mich. 1873) The minutes of the testimony of witnesses taken by an attorney on a former trial, when properly proved, may be read in evidence to impeach the same witnesses on a second trial.—Fisher v. Kyle, 27 Mich. 454.

[qq] (Mich. 1880) Where proper foundation is laid for it, it is not error, for the purpose of contradicting a witness, to show that he testified differently upon a former trial.—Doty v. Gillett, 43 Mich. 203, 5 N. W. 89.

[r] (Mich. 1893) Where a witness' testimony on a second trial varies materially from that on a former trial, and, for the purpose of impeachment, on cross-examination his attention is called to the variance, and he is asked whether he made certain statements in conversation with a certain person at a specified time, which he denies having made, such person may then testify to the whole conversation, both questions and answers, where the latter can only be understood by the former.—Langworthy v. Green Tp., 95 Mich. 93, 54 N. W. 697.

[rr] (Miss. 1844) In order to impeach a witness, it is competent to show that he testified differently at a former trial of the case before a justice of the peace; and, if the minutes of the justice of the testimony before him have been lost, the contents of the minutes may be shown by parol.—Pearce v. Furr, 10 Miss. (2 Smedes & M.) 54.

[s] (Miss. 1850) It is incompetent to introduce the statement of a witness, made at a hearing for a habeas corpus as taken down by the vice chancellor, for the purpose of contradicting such witness at the trial, because the vice chancellor is not required to take full notes of such statements.—Nelms v. State, 21 Miss. (13 Smedes & M.) 500.

[ss] (Miss. 1879) While a conflicting statement made at a former trial may be proved to discredit a witness, comments of counsel upon said statement are inadmissible.—Cannon v. State, 57 Miss. 147.

[t] (Mo. 1887) The state may, in rebuttal, read in evidence the testimony of defendant given on a former trial for the same offense.—State v. Rose, 92 Mo. 201, 4 S. W. 733.

[tt] (N. H. 1858) Evidence of what a witness testified before trial commissioners may be introduced for the purpose of impeaching his testimony before the jury, although the report made by the commissioners of the evidence given before them contains no statement of such conflicting testimony.—Chesley v. Chesley, 37 N. H. 229.

[u] (N. H. 1874) Any one who heard an accused testify on a former hearing may testify to his statements at that time, for the purpose of contradicting his present testimony; such impeaching testimony not being limited to such witnesses only as took minutes of his former testimony.—State v. Archer, 54 N. H. 465.

[uu] (N. J. 1859) Parol evidence having been, by order of the court, admitted as to what was testified by a witness on a former examination, the same class of evidence is admissible on the other side to show that the witness had made conflicting statements.—Tyrrel v. Overseers of Poor of Woodbridge Tp., 27 N. J. Law (3 Dutch.) 416.

[v] (N. Y. 1874) To contradict a witness by showing that he had sworn differently on some former occasion, the original affidavit or other document must be produced. A copy will not do.—Pratt v. Norton, 5 Thomp. & C. 8, 2 Hun, 517.

[w] (N. Y. 1894) Where witness testifies that plaintiff swore to certain facts on a former trial, the minutes of such former trial are admissible for the purpose of impeaching the witness.—Birnbaum v. Lord (City Ct. N. Y.) 6 Misc. Rep. 535, 27 N. Y. Supp. 135, judgment affirmed (Com. Pl. 1894) 7 Misc. Rep. 493, 28 N. Y. Supp. 17.

[ww] (N. C. 1858) Counsel, in the conduct of a suit, have no right to read a statement of facts contained in the report of a former trial of the same case in the supreme court, for the purpose of contrasting such statement with the statement of the witnesses in the trial pending.—State v. Whit, 50 N. C. 224, 72 Am. Dec. 533.

[x] (N. C. 1886) On the trial of an issue of devisavit vel non, the propounders may contradict a witness of the caveators by a memorandum of the testimony of the witness below; the maker of the memorandum swearing to its accuracy.—Bryan v. Moring, 94 N. C. 687.

[xx] (Pa. 1825) Evidence may be given that a witness swore directly the opposite at a former trial, in order to discredit him.—Cowden v. Reynolds, 12 Serg. & R. 281.

[y] (Pa. 1891) The testimony of a party given in another suit, to which he was not a party, is admissible in evidence for the purpose of contradicting him.—Tisch v. Utz, 142 Pa. 186, 21 Atl. 808, 28 Wkly. Notes Cas. 55.

[yy] (S. C. 1888) It is competent for the coroner, who had taken in writing testimony at the inquest, to prove what a witness then said by reading what he had then taken down, or so much of it as the witness denies saying.—State v. Jones, 29 S. C. 201, 7 S. E. 296.

[z] (Vt. 1886) Where a party testified differently from what he testified in a former trial, and stated in his petition for a new trial, such petition is admissible to impeach him.—Bellows v. Sowles, 59 Vt. 63, 7 Atl. 542.

§ 1253. —— Stenographer's notes or transcript.

[a] (Ala. 1846) Where an impeaching witness, testifying to what another witness had stated on a former trial, produces a memorandum of such statement taken by him, which

is claimed to differ from what he testifies to, the memorandum may be looked to by the witness to refresh his memory, or it may be used by the opposite party, as a written declaration by him of the facts, to impeach his recollection.—Olds v. Powell, 10 Ala. 393.

[b] (Ill. 1885) A stenographer, who took notes at a trial, may refresh his memory with his notes, for the purpose of impeaching a witness. —Chicago & A. R. Co. v. Robinson, 16 Ill. App. (16 Bradw.) 229.

[c] (Ind. 1895) A stenographer who had taken down statements of a defendant may refresh his memory by his notes, and read the notes to show that such statements were contradictory of the evidence given by the defendant on the trial.—Miller v. Preble, 142 Ind. 632, 42 N. E. 220.

[d] (Iowa, 1880) A shorthand reporter's transcript of his notes of testimony in a prior case was offered to impeach a witness by showing a conflict in his testimony in the two cases. *Held*, that the notes were inadmissible, where the evidence was not identified as testimony to the same fact in both cases.—Case v. Burrows, 54 Iowa, 679, 7 N. W. 130.

[e] (Iowa, 1889) After defendant's counsel had called the attention of witnesses for the state to the minutes of their evidence taken by a shorthand reporter at the preliminary examination, and to certain discrepancies between them and their testimony on the trial, he offered to read the minutes to the jury, for the purpose of impeaching the witnesses. *Held* properly refused; defendant having full opportunity to call the shorthand reporter, and to use his minutes to show what they contained.—State v. Adams, 78 Iowa, 292, 43 N. W. 194.

[f] (Iowa, 1891) Under Acts 18th Gen. Assem. c. 195, § 2, providing that a duly certified transcript of the shorthand notes of the evidence in a case "shall be admissible in any case in which the same are material and competent to the issue," such transcript may be introduced on a second trial of the same case in order to impeach a witness.—Hibbard v. Zenor, 82 Iowa, 505, 49 N. W. 63.

[g] (Mich. 1881) The unauthenticated notes of a stenographer's testimony in a civil case cannot be introduced to contradict him on a subsequent trial of the same case, unless by consent.—Edwards v. Heuer, 46 Mich. 95, 8 N. W. 717.

[h] (Mich. 1882) A copy by one stenographer of the notes of another stenographer, the copy having neither been compared with the original, nor read over to the witness, is not admissible for the purpose of impeaching one of the people's witnesses.—People v. McKinney, 49 Mich. 334, 13 N. W. 619.

[i] (Mich. 1888) The reporter's notes of defendant's testimony on a former trial, which have not been certified by the reporter, or signed by defendant as being correct, will afford no ground on which his subsequent testimony can be impeached, and detached portions of such notes may be used in examining defendant as to his former testimony without necessitating the reading of the whole of his testimony to him before such examination.—Toohey v. Plummer, 69 Mich. 345, 37 N. W. 297.

[j] (Mich. 1895) After having called the attention of a witness for the people to his evidence on a former trial, and having asked him if he made certain statements, the defense sought to impeach him by having read the stenographer's minutes of the former trial, but the stenographer was not asked the same question as the witness sought to be impeached. *Held*, the evidence was properly excluded.—People v. Considine, 105 Mich. 149, 63 N. W. 196.

[k] (Mich. 1895) For the purpose of showing inconsistent testimony at the preliminary examination, the clerk of the court, who wrote the testimony of the complaining witness on a preliminary examination for assault, may refresh his memory therefrom.—People v. Kennedy, 105 Mich. 434, 63 N. W. 405.

[l] (Minn. 1890) The official stenographer's notes of the testimony of a witness at a former trial, recognized by such witness as correct, are admissible to show that he has changed or added to his testimony at the present trial.—Bennet v. Syndicate Ins. Co., 43 Minn. 45, 44 N W. 794.

[m] (Ohio, 1896) The notes taken by the official court stenographer of the testimony of a witness at a former trial may be read in evidence for the purpose of impeaching such witness.—Pennsylvania Co. v. Trainer, 12 Ohio Cir. Ct. R. 66.

[n] (Wash. 1892) The stenographer's notes taken on the first trial are not admissible on the second to contradict testimony then given, but may only be referred to by the stenographer to refresh his memory.—State v. Freidrich, 4 Wash. St. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332.

[o] (Wash. 1894) A stenographer who has shown that he took notes of the testimony of a witness on a former trial, and that such notes were correct, may read his notes, to impeach such witness, though, aside from the notes, he has no recollection of what the witness said.—Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621.

[p] (Wis. 1892) In an action for personal injuries caused by a collision of trains, a medical witness, who had testified in plaintiff's behalf at a former trial and was now called by defendant as to the cause and nature of plaintiff's diseased condition, was cross-examined by plaintiff's counsel, in order to show, as test of credit, that his present evidence was inconsistent with his former evidence, and asked whether he had not made certain answers to certain specific questions at the former trial in relation to a specific disease, its causes, etc., which he applied to the plaintiff's condition. Counsel then called a stenographer present at the former trial, who proved from his minutes the witness' former evidence. *Held*, that the questions and evidence were relevant, as relating directly to a material part of defendant's case.—Waterman v. Chicago & A. R. Co., 82 Wis. 613, 52 N. W. 247, 1136.

§ 1254. —— Testimony before grand jury or at preliminary investigation or coroner's inquest.

[a] The deposition of a witness, given before a coroner's jury, and certified and returned by the coroner to the district court as required by the statute, is admissible for the purpose of contradicting the statement of the witness, made under oath, on the trial of the person accused of having murdered the deceased.
—(Cal. 1872) People v. Devine, 44 Cal. 452;
(N. Y. 1859) Stephens v. People, 19 N. Y. 549.

[b] (Ala. 1888) The testimony of a witness taken before the magistrate on the preliminary investigation having been reduced to writing, the court did not err in refusing to allow him to be cross-examined as to extracts taken from the writing, with a view to impeaching him, but properly required that the entire writing should be read to the jury.—Kennedy v. State, 85 Ala. 326, 5 South. 300.

[c] (Ark. 1866) If a witness who has testified before the examining court in a criminal case be asked on the trial if he did not, in his testimony before the examining court, make certain statements, the testimony of a witness

before the examining court, when reduced to writing, is competent evidence to contradict him.—Milan v. State, 24 Ark. 346.

[d] (Ark. 1894) Where the state attempts to impeach the defendant's testimony by showing that he testified differently at the coroner's inquest, the coroner's record of his testimony should be produced if possible.—Cole v. State, 59 Ark. 50, 26 S. W. 377.

[e] (Cal. 1889) Where a witness for the prosecution, in a trial for murder, testifies inconsistently with his testimony at the coroner's inquest, it is not error to call his attention to what he had testified to before the coroner, and, upon his denial thereof, to read such testimony to the jury.—People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549.

[f] (Cal. 1896) In a criminal trial a deposition of the defendant, taken on his preliminary examination, is admissible to impeach his testimony as to the same facts, his attention having been first called to it, notwithstanding Pen. Code, § 686, provides that depositions or preliminary examinations can only be read on the trial where the witness is dead, or insane, or absent from the state.—People v. Hawley, 111 Cal. 78, 43 Pac. 404.

[g] (Fla. 1895) The statement of a witness before a grand jury, reduced to writing, but not read to or signed by him, is inadmissible as independent evidence to contradict the witness on his trial on being subsequently indicted for the offense as to which he testified.—Jenkins v. State, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267.

[h] (Fla. 1895) Testimony given by defendant before the grand jury before he was arrested or indicted, and after he was cautioned that he could not be compelled to criminate himself, was admissible.—Jenkins v. State, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267.

[i] (Ga. 1879) The testimony of a witness at the coroner's inquest, preserved in the stenographer's notes and afterwards written out, is admissible on the principal trial to show contradictions between such testimony and that of the same witness on the trial; the attention of the witness having first been called to such contradictions.—Cox v. State, 64 Ga. 374, 37 Am. Rep. 76.

[j] (Ga. 1886) On trial of an indictment for rape, where witnesses for the state have been asked for purposes of impeachment whether they did not testify to certain material matters before the court of inquiry, contrary to their evidence at the trial in the superior court, it is error to refuse to allow the presiding justice in the former court to prove that the witnesses had so testified there.—Brown v. State, 76 Ga. 623.

[k] (Ill. 1886) Under 1 Starr & C. St. p. 859, par. 472, it is admissible to discredit a witness by proving, by a grand juror, that such witness testified differently before the grand jury.—Bressler v. People, 117 Ill. 422, 8 N. E. 62.

[l] (Ill. 1895) An affidavit of a witness, taken at a coroner's inquest, is admissible for the purpose of impeaching him.—Fein v. Covenant Mut. Ben. Ass'n, 60 Ill. App. 274.

[ll] (Ind. 1877) Where an investigation by the grand jury resulted in an indictment, and on trial of the case a witness gives evidence who had formerly testified before the grand jury, the prosecuting attorney may testify on the trial as to the evidence given by such witness before the grand jury, for the purpose of impeaching him.—State v. Van Buskirk, 59 Ind. 384.

[m] (Iowa, 1876) The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness.—State v. Hayden, 45 Iowa, 11.

[n] (La. 1861) The testimony of a witness before an inquest may be admitted to discredit his testimony at the time of trial.—State v. Mulholland, 16 La. Ann. 376.

[o] (Mass. 1858) The defendant, for the purpose of impeaching a witness for the commonwealth on the trial of an indictment, may prove that he testified differently before the grand jury.—Commonwealth v. Mead, 78 Mass. (12 Gray) 167.

[p] (Mass. 1870) The fact that evidence offered, in an action on a note, to impeach the testimony of a witness, related to what had been said by him before the grand jury, did not affect its admissibility on either side.—Way v. Butterworth, 106 Mass. 75.

[q] (Mo. 1889) Rev. St. 1879, § 1791, providing that grand jurors may be required to testify whether testimony of a witness is consistent with that given before them, and section 1780, providing that a grand jury may appoint a clerk "to preserve minutes of their proceedings, and of the evidence given before them, which minutes shall be given to the prosecuting attorney," do not render admissible the minutes of evidence before a grand jury, signed by the witness, to impeach the witness.—State v. Thomas, 99 Mo. 235, 12 S. W. 643.

[r] (Nev. 1878) The deposition of a witness taken on preliminary examination in a criminal case may be used to impeach the testimony given by him on the trial.—State v. Tickel, 13 Nev. 502.

[rr] (N. Y. 1822) Counsel for defendant may ask the prosecutor any proper question to show a variance between his examination taken before a committing magistrate and his evidence before the jury, but he has no right to read his examination for that purpose.—People v. Watts, 1 Wheeler, Cr. Cas. 52.

[s] (N. Y. 1832) An examination of a witness at a preliminary examination, reduced to writing, is inadmissible for the purpose of impeaching such witness on the trial, unless it is proved by competent testimony to be the same as when sworn to.—Bellinger v. People, 8 Wend. 595.

[t] (N. C. 1821) While the testimony taken down in writing by a magistrate cannot, on a trial of the same matter in court, be used as evidence in chief, it may be used to show contradictory statements by him.—State v. McLeod, 8 N. C. 344.

[tt] (N. C. 1884) A witness on a criminal trial may be contradicted by his sworn statement made on the preliminary examination of the prisoner.—State v. Pierce, 91 N. C. 606.

[u] (N. C. 1892) In a prosecution for rape, the committing magistrate testified that the proceedings on the preliminary examination were in his handwriting, and he was certain that what was there written was a true statement of the prosecutrix's evidence taken before him. *Held*, that such statement was admissible in evidence to contradict or discredit prosecutrix's evidence at the trial.—State v. Jordan, 110 N. C. 491, 14 S. E. 752.

[uu] (S. C. 1888) Where the testimony taken down by the coroner was signed by the witness, it may be received to show what he had previously stated in regard to the occurrence.—State v. Jones, 29 S. C. 201, 7 S. E. 296.

[v] (Tenn. 1874) A witness may be impeached by contradictory statements made by her on her examination before a committing magistrate, and identified by him as her testimony, and signed by him for her at her request, she being unable to write, although not shown to

or read over by the witness at the time of its being offered.—Titus v. State, 66 Tenn. (7 Baxt.) 132.

[vv] (Tex. 1887) A witness may be impeached by showing that he made statements under oath before the grand jury inconsistent with his evidence on the trial.—Scott v. State, 23 Tex. App. 521, 5 S. W. 142.

[w] (Tex. 1890) To contradict a witness, the state read in evidence the record of his testimony on the examining trial of defendant. It was not objected that the impeachment was upon immaterial and collateral matter, nor was the identity of the record of the evidence duly and legally taken on the examining trial questioned. *Held*, that the evidence was properly admitted.—Hudson v. State, 28 Tex. App. 323, 13 S. W. 388.

[ww] (Tex. 1890) A witness may be impeached by showing that his statements at the trial contradict those he made before the grand jury.—Rippey v. State, 29 Tex. App. 37, 14 S. W. 448.

[x] (Tex. 1894) Testimony of a witness, taken in the examining court, wholly at variance with his testimony on the trial, is admissible to contradict him, though he states that the record offered is false; that he did not read it before signing, and would not have signed it, had it been read to him.—Jackson v. State, 33 Tex. Cr. R. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30.

[xx] (Va. 1853) On a trial for murder, the deposition of a witness given before the inquest, taken down at the time by the coroner, and read to and signed by the witness, may be introduced to contradict him.—Wormeley v. Commonwealth, 10 Grat. 658.

[y] (Va. 1864) On a trial for murder, G., a witness, on his examination in chief, made a statement as to the action of a third person, and upon cross-examination was asked whether he had not made a certain statement before the examining court which was different from that made at the trial, to which G. replied that he did not remember. *Held*, that evidence was competent to show by one witness that only a single witness testified before the examining court, and that he made a different statement from that just given by G., and then to show by another witness that G. was the witness before the examining court.—Forde v. Commonwealth, 16 Grat. 547.

[yy] (Va. 1874) Defendant on a criminal trial may prove by a person who is present that a statement made before the grand jury by a witness for the commonwealth was altogether different from that made by him on the trial.—Little v. Commonwealth, 25 Grat. 921.

[z] (Va. 1887) Certain witnesses of defendant were asked whether they had made certain statements at the coroner's inquest, which they each denied. Plaintiff introduced, in rebuttal, their depositions taken at the inquest. *Held*, that the evidence thus introduced was properly admitted.—New York, P. & N. R. Co. v. Kellam's Adm'r, 83 Va. 851, 3 S. E. 703.

[zz] (Wis. 1883) Evidence of statements made by defendant on his preliminary examination, contradicting his evidence on the trial, are admissible by way of impeachment.—Rounds v. State, 57 Wis. 45, 14 N. W. 865.

§ 1255. —— Depositions.

[a] (Ala. 1847) Where the object is not to establish the facts stated by a witness, but to impeach his credit, a deposition made by him, in another suit and between other parties, is evidence to contradict him.—Holman's Heirs v. Bank of Norfolk, 12 Ala. 369.

[b] (Kan. 1894) Where plaintiff in an action for personal injuries makes statements on the witness stand, substantially different from those contained in a deposition which he admits having signed, but denies the entire correctness of, refusing to permit defendant to read in evidence those parts of the deposition tending to contradict his testimony is error, whether such deposition is admissible in evidence or not.—Southern Kansas Ry. Co. v. Painter, 53 Kan. 414, 36 Pac. 731.

[c] (Md. 1876) It is not necessary, to render a witness' answers to interrogatories admissible to contradict his testimony at the trial, that his answers should have been read to him before he signed his name thereto; it being sufficient to prove that he was the witness who was sworn and examined by the commissioner, and whose answers the commission and return purported to give.—Ecker v. McAllister, 45 Md. 290.

[d] (Pa. 1842) It is competent to contradict the verbal testimony of a witness by reading his deposition taken in the same case and filed in the court which directed the issue.—Bull v. Towson, 4 Watts & S. 557.

[e] (S. C. 1895) It is within the court's discretion to permit the reading of answers to cross-interrogatories showing what the witness swore to in another cause in regard to the same matters.—Bickley v. Commercial Bank, 43 S. C. 528, 21 S. E. 886.

[f] (Wis. 1861) A deposition which has been excluded on the ground that the witness is present in court at the time of trial may be used to contradict the testimony of the witness there given.—Thayer v. Gallup, 13 Wis. 539.

§ 1256. —— Bills of exceptions or statements of facts.

[a] A bill of exceptions taken at a former trial of the same cause is inadmissible in evidence for the purpose of impeaching a witness who testifies at both trials.
—(Ind. 1890) Pennsylvania Co. v. Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687;
(Md. 1880) Ecker v. McAllister, 54 Md. 362.

[b] (Ala. 1882) Statements in a bill of exceptions reserved on a former trial are not admissible to contradict witnesses.—South & North Alabama R. Co. v. Wood, 72 Ala. 451.

[c] (Ga. 1888) A bill of exceptions, showing testimony of a witness in another case, is not admissible to impeach him, though approved by the court; it not having been read or assented to by the witness.—Reid v. State, 81 Ga. 760, 8 S. E. 431.

[d] (Ind. 1884) Where a witness denies having testified differently at a former trial, he cannot be impeached by a bill of exceptions purporting to contain all the evidence in such trial; he not being a party to the action.—Terry v. Shively, 93 Ind. 413.

[e] (Iowa, 1868) A bill of exceptions, purporting to contain the evidence of a witness in a cause on a previous trial, is inadmissible in evidence for the purpose of contradicting on the second trial the same witness.—Boyd v. First Nat. Bank, 25 Iowa, 255.

[f] (Me. 1853) Where one witness testified that another witness, who testified on a former trial of the same case and on this trial also, swore differently on the two, it is not competent to introduce the bill of exceptions taken in the former trial, to show that the witness had contradicted himself.—State v. Bonney, 35 Me. 105.

[g] (N. Y. 1806) The evidence stated in a case made on a former trial cannot be admitted to impeach the testimony of the same witness, given on a second trial of the same cause.—Neilson v. Columbia Ins. Co., 1 Johns. 301.

[h] (Tex. 1891) A statement of facts made by the court and the charge of the court cannot be used on a subsequent trial for the purpose of impeaching a witness by showing how he testified at the first trial.—McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580, 1054.

[i] (Tex. 1896) A statement of facts made up after a trial to be used on appeal is not admissible in a subsequent trial for the purpose of impeaching a witness.—Houston & T. C. Ry. Co. v. Strycharski (Civ. App.) 35 S. W. 851.

§ 1257. Portion of writing or testimony.

Right to show whole statement, see post, § 1263.

[a] (U. S. 1887) A contradiction between the testimony of a witness at the trial and that given before the commissioner on preliminary examination tends to lessen its credibility; but where the commissioner testifies that he did not give a complete report of the evidence, and the testimony was not so full as at the trial, an omission from the examination of testimony given at the trial may be attributed to the incompleteness of the report.—United States v. Ford (D. C.) 33 Fed. 861.

[b] (Ala. 1887) On a trial for murder, a witness cannot be impeached by reading to him extracts from his testimony taken down by a magistrate, and signed by himself, as required by statute, on a preliminary trial of one accused of the murder.—Carden v. State, 84 Ala. 417, 4 South. 823.

[c] (Cal. 1890) Where the court refuses to allow portions of a deposition of plaintiff, taken before trial, to be read to plaintiff for the purpose of contradicting her statements on the trial, and afterwards the whole deposition is put in evidence, an objection that defendant was not allowed to contradict plaintiff in such way cannot be sustained.—White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

[d] (Ind. 1895) Where a party undertakes to impeach a witness by a writing or deposition showing that he had made statements out of court different from those made on the trial, such party is not obliged to put all of such writing or deposition in evidence, but may introduce such parts only as tend to contradict or impeach the witness.—Miller v. Preble, 142 Ind. 632, 42 N. E. 220.

[e] (Ky. 1883) Where an attempt is made by the commonwealth to contradict one of defendant's witnesses, by showing that he testified differently on the examining trial, the defendant is entitled to all the evidence given by the witness on that trial that was relevant, and which tended to reconcile the apparent contradiction.—Galloway v. Commonwealth, 4 Ky. Law Rep. 720.

[f] (Ky. 1883) Where one of defendant's witnesses is shown to have testified differently on the preliminary examination from his evidence given on the trial, the defendant is not prejudiced by the refusal to admit all of the evidence of the witness on that occasion, for the purpose of reconciling the apparent contradiction, if it appears that what defendant avers he can prove thereby would throw no additional light upon the question.—Galloway v. Commonwealth, 4 Ky. Law Rep. 720.

[g] (Mich. 1885) Where it is sought to contradict a witness on re-examination, it is error to allow portions only of a written statement, as given by him to the prosecuting attorney and chief of police, to be read in evidence for that purpose. If the writing is contradictory, the whole of it should be introduced.—People v. Sweeney, 55 Mich. 586, 22 N. W. 50.

[h] (Mich. 1888) It is error to admit, for the purpose of impeaching defendant's testimony in his own behalf, part of his testimony on the same point in a former trial, and exclude another part which might explain the apparent discrepancies.—Dunbar v. McGill, 69 Mich. 297, 37 N. W. 285.

[i] (Mo. 1884) Where, on cross-examination, it is sought to impeach a witness by reading from her evidence as preserved in the bill of exceptions taken on a former trial, it is proper to permit only such part of the written evidence to be read as the witness denies having testified to on the former trial, and to exclude such part as she admits having testified to thereon.—State v. Cooper, 83 Mo. 698.

[j] (N. Y. 1889) Where, on cross-examination of a witness of defendant, it appeared that he had made an affidavit inconsistent with his direct testimony, and it did not appear whether he had adhered to or receded from his direct testimony, the entire affidavit was admissible to show the former statements of the witness, which were inconsistent with his testimony.—Hine v. Cushing, 53 Hun, 519, 6 N. Y. Supp. 859.

[k] (N. C. 1836) In impeaching the credibility of a witness, by proving that he swore differently as to a particular fact on a former trial, the impeaching witness need not state all the former testimony of the impeached witness; but it is sufficient if he is able to prove the repugnancy as to the particular fact.—Ingram v. Watkins, 18 N. C. 442.

[l] (N. C. 1848) Where it is sought to impeach the credibility of a witness, by showing that he had testified differently at a former trial, it is not necessary that the impeaching witness should swear to all his former testimony, but only to those facts which he has contradicted.—Edwards v. Sullivan, 30 N. C. 302.

[m] (Pa. 1840) Notes of the testimony given by a witness on a former trial, taken by the judge who tried the cause, were *held* not to be admissible for the purpose of contradicting the witness; the judge having testified that it was not his practice to take full notes of the testimony, except in cases where it was probable the cause would be reviewed, and it not appearing that full notes were taken by him on that trial.—Schall v. Miller, 5 Whart. 156.

[n] (Tex. 1894) On a prosecution for murder, where a witness testified as to the threatening attitude and language of deceased towards defendant just before the shooting, it was error to permit the state to impeach the witness by introducing a part of the testimony given by him on a previous trial, which part failed to corroborate him as to such threats, and to refuse to admit another part thereof which agreed with his evidence in that respect.—Jones v. State (Cr. App.) 25 S. W. 634.

[o] (Vt. 1886) Where a party testified differently from what he testified in a former trial and stated in his petition for a new trial, such part of the petition only as is pertinent to the issue need be offered in evidence for the purpose of impeaching him.—Bellows v. Sowles, 59 Vt. 63, 7 Atl. 542.

8. EVIDENCE TO SUSTAIN WITNESS OR REBUT EVIDENCE OF INCONSISTENT STATEMENTS.

REBUTTAL OF EVIDENCE OF INCONSISTENT STATEMENTS, § 1258.
PROOF OF GOOD CHARACTER OF WITNESS IMPEACHED, § 1259.
EVIDENCE AS TO STATEMENTS CONSISTENT WITH TESTIMONY, § 1260.
EXPLANATION OF INCONSISTENCY, § 1261.
—— FEAR AND INTIMIDATION, § 1262.
RIGHT TO SHOW WHOLE STATEMENT, § 1263.
RIGHT OF IMPEACHED WITNESS TO GIVE VERSION OF STATEMENT, § 1264.

Right to show inconsistent statement of impeaching witness, see ante, § 1210 [c, f].

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§ 1258. Rebuttal of evidence of inconsistent statements.

[a] (Ala. 1884) Where, in a criminal case, the prosecutrix is cross-examined as to the particulars of her complaint, to lay the predicate for her impeachment by inconsistent statements, and other persons present at the time testify to facts tending to impeach her, she may examine other persons present for the purpose of supporting her statements.—Griffin v. State, 76 Ala. 29.

[b] (Ind. 1884) Where a witness was cross-examined as to certain admissions by him, so as to lay a foundation for his impeachment, and he denied such admissions, and thereafter testimony as to such admissions was given, it was proper to refuse to allow him to be recalled to again deny having made the admissions.—Hamm v. Romine, 98 Ind. 77.

[c] (Kan. 1882) Where an impeaching witness testified that a witness of plaintiff made certain statements at a particular time and place, *held*, that plaintiff might introduce evidence to show that the impeaching witness could not have been present at that time and place.—McClurg v. Van Zandt, 27 Kan. 113.

[d] (Kan. 1884) Where, for the purpose of impeaching a witness for the state, the defendant introduces witnesses who testify that at the preliminary examination they heard the former witness, and that he did not then mention the facts testified to by him on the trial, the state may in rebuttal, call other witnesses, also present at such examination, to testify that they heard the witness, and that he did then mention these facts.—State v. McKinney, 31 Kan. 570, 3 Pac. 356.

[e] (Ky. 1868) Where the committing magistrate was introduced to prove that the statements of one of the defendant's witnesses on the trial in the circuit court were different from those made by him on the examining trial, it was *held* that a statement of the evidence of such witness on the examining trial, signed by the magistrate, was competent as a test of the magistrate's memory, and to show the imperfection of his recollection.—Lanham v. Commonwealth, 66 Ky. (3 Bush) 528.

[f] (La. 1894) Defendant was charged with burglary alleged to have been committed between 9 and 10 o'clock at night. In support of an alibi, defendant's uncle testified that defendant came to his house, eight miles away, at 10 o'clock that night. Witnesses for the state then testified that the uncle had previously stated that it was 11 o'clock when defendant came to his house. *Held*, that it was not an abuse of the court's discretion to exclude the testimony of witnesses, who had not previously testified in the case, to rebut such witnesses for the state.—State v. Cady, 46 La. Ann. 1346, 16 South. 195.

[g] (Md. 1885) Where the characters of defendant's witnesses are impeached by proof of contradictory statements, it is a matter within the discretion of the trial court to permit them to again deny the contradictory statements after plaintiff has finally closed.—Stirling v. Stirling, 64 Md. 138, 21 Atl. 273.

[h] (Mass. 1890) A witness having denied on cross-examination that he admitted to V. that he was the father of the child, and V. having afterwards testified to such admission, it is competent to recall the witness, and ask him if he had heard the evidence of V., and if it was true.—Francis v. Rosa, 151 Mass. 532, 24 N. E. 1024.

[i] (Mich. 1871) The statement of a witness, put in writing at a time when he had no reason to misrepresent, is admissible in rebuttal of evidence introduced to impeach him and tending to show that he had made statements inconsistent with his testimony.—Stewart v. People, 23 Mich. 63, 9 Am. Rep. 78.

[j] (Mich. 1881) A witness who has denied making a statement properly identified cannot contradict impeaching testimony on this point by showing that he had no such idea as is expressed by such statement.—Patrick v. Howard, 47 Mich. 40, 10 N. W. 71.

[k] (Mich. 1889) A witness on the trial in the circuit court was asked if he did not give certain testimony on the trial of the case before the justice, and answered in the negative. The adverse party then offered several witnesses, who contradicted this testimony. *Held*, that it was proper in rebuttal to introduce one of the jurors at the trial before the justice, for the purpose of showing that the witness did not give such testimony before the justice.—Bronson v. Leach, 74 Mich. 713, 42 N. W. 174.

[l] (N. H. 1855) If a witness has made statements conflicting with his testimony, his credit cannot be supported by evidence showing how the truth is as to particulars not material to the case.—Wiggin v. Plumer, 31 N. H. (11 Fost.) 251.

[m] (N. H. 1858) C., a witness, testified that he saw certain notes given up by one G. as the consideration of a deed. To impeach his testimony, A. testified that the witness told her that he did not see the notes given up, and added that G. subsequently told him that he had the notes at home in his desk. *Held*, that although C. might be recalled to testify whether he made the last statement to A., yet it was not competent to call G. to testify whether he made it to C.; the point being whether C. had given different accounts of the matter.—Gerrish v. Pike, 36 N. H. 510.

[n] (N. Y. 1836) Where the testimony of a witness is impeached by evidence of inconsistent statements made before a magistrate, in a prosecution for a criminal offense against another person, such examination, taken by the magistrate, may be read to invalidate the testimony of the magistrate in the account given by him of the facts testified to by the witness on such examination.—People v. Moore, 15 Wend. 419.

[o] (N. Y. 1889) After a witness has denied making certain statements relative to the matters testified to by him, and evidence is introduced tending to prove that he did make them, it is not error to refuse to allow the witness to repeat his denial.—Bick v. Reese, 51 Hun, 639, 3 N. Y. Supp. 757.

[p] (N. C. 1848) Where it is sought to discredit a witness by showing that he had formerly testified differently from what he had sworn to at the trial, confirmatory evidence of his testimony may be introduced, and the witness himself may be examined to confirm his own testimony.—State v. George, 30 N. C. 324, 49 Am. Dec. 392.

[q] (Tex. 1888) In a trial for murder defendant's wife testified that deceased made indecent proposals to her a short time before the homicide; that she never told any one about it, except her husband and a third person. *Held* error to exclude the testimony of the third person, introduced to rebut impeaching testimony, that the witness had made such statements to him, and that he advised her not to tell any one else about it then.—Williams v. State, 24 Tex. App. 637, 7 S. W. 333.

[r] (Wash. 1894) On trial for murder, where the defendant attempted to show that one of his own witnesses had made a different statement after the homicide than on the trial, the state may show that such statement was substantially as given in his testimony.—State v. Manville, 8 Wash. 523, 36 Pac. 470.

[s] (Wash. 1894) Where it is sought to impeach a witness by proving that he made statements out of court contrary to those in court it is not proper to allow a witness, in rebut-

tal, to state that the statements out of court were the same as his testimony in court, without calling for the statements made out of court; the proper method being to prove the statements made out of court, and allow the jury to decide whether they are the same as the testimony given in court.—State v. Murphy, 9 Wash. 204, 37 Pac. 420.

§ 1259. Proof of good character of witness impeached.

[a] Where the credibility of a witness has been impeached by evidence of contradictory statements made out of court, evidence of a good reputation for truth and veracity is admissible to sustain it.

—(Ala. 1895) Holley v. State, 105 Ala. 100, 17 South. 102;

(Ind. 1868) Harris v. State, 30 Ind. 131; (1886) Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; (1893) Carroll County Com'rs v. O'Conner, 137 Ind. 622, 35 N. E. 1006;

(Tex. 1857) Burrell v. State, 18 Tex. 713; (1895) Ledbetter v. Same, (Cr. App.) 29 S. W. 479.

[b] Where the veracity of a witness is attacked, and he is sought to be impeached only by proof of contradictory statements made by him on other occasions in respect to the same matter, or by proof of particular facts stated by such witness against himself on his examination, evidence of general good character, or of good character for truth and veracity, in support of the witness, is incompetent.

—(Ky. 1859) Vance v. Vance, 59 Ky. (2 Metc.) 581;

(N. Y. 1859) Frost v. McCargar, 29 Barb. 617;

(S. C. 1860) Chapman v. Cooley, 12 Rich. Law, 654.

[c] (Ala. 1848) Where evidence has been adduced to show that a witness has made statements contradictory to his testimony, evidence may be given of his general character for veracity.—Hadjo v. Gooden, 13 Ala. 718.

[d] (Ala. 1879) The credibility of a witness who has been impeached by evidence of prior contradictory statements may be sustained by proof of his general good character.—Haley v. State, 63 Ala. 83.

[e] (Ala. 1895) Evidence that a witness made conflicting statements as to the persons engaged in the burglary of her premises having been introduced, it was competent to admit evidence of the reputation of the witness for veracity, and to instruct that in weighing her testimony the jury could consider the same.—Towns v. State, 111 Ala. 1, 20 South. 598.

[f] (Ga. 1853) If a witness has been discredited by proof of contradictory statements made by him, it is not competent to support his testimony by proof of general good character for truth and veracity. Evidence as to general character is only admissible when that character has been impeached.—Stamper v. Griffin, 12 Ga. 450.

[g] (Ga. 1879) A witness, impeached by contradictory statements, may be sustained by proof of general good character, the effect of the evidence to be determined by the jury; and where the testimony of a witness in a criminal case was material as to the participation of the defendant in the commission of the crime, and it was sought to impeach him by proof of contradictory statements, it was error to charge that, "if the fact or facts testified to by the witness be disproved to the satisfaction of the jury, then the evidence of general good character should not be treated as re-establishing such disproved facts."—McEwen v. Springfield, 64 Ga. 159.

[h] (Ga. 1884) Where the character of a witness is attacked by a showing of contradictory statements made by him, proof of his general good character for truth, and of his social standing, may be given in rebuttal.—Price v. State, 72 Ga. 441.

[i] (Ind. 1866) A contradiction of a witness to amount to an impeachment, so as to let in evidence of the witness' good character, must be by statements of the witness inconsistent with material evidence given by him in the body of his testimony, and which statements he does not admit that he made.—Paxton v. Dye, 26 Ind. 393.

[j] (Ind. 1868) Evidence in support of the good character of a witness for truth is admissible in rebuttal of evidence, tending to impeach him, that he had previously made statements inconsistent with his testimony.—Clark v. Bond, 29 Ind. 555.

[jj] (Ind. 1894) Where the wife of a defendant in replevin brought cross-suit for certain articles taken under the writ, and the actions were tried together, said wife having testified for herself, plaintiff introduced proof that, when his writ was served, she admitted her husband's ownership of all but one item. She was thereupon recalled, and denied such admissions, and others swore to her repute for veracity. *Held*, that such evidence of her repute was admissible, since she was not a party to the main suit, and no motion was made to confine it to her cross-suit.—Garr, Scott & Co. v. Shaffer (Sup.) 36 N. E. 208.

[k] (Iowa, 1887) The state introduced testimony showing that defendant and his wife had made statements contradictory to their evidence. The defendant offered to prove their general reputation for truth. *Held*, that the offer was properly refused.—State v. Archer, 73 Iowa, 320, 35 N. W. 241.

[l] (Mass. 1829) Where a witness, on cross-examination, contradicted a deposition he had previously given in the same case, the party calling him was not permitted to call other witnesses in support of his general character for truth.—Russell v. Coffin, 25 Mass. (8 Pick.) 143.

[m] (N. C. 1874) To rebut evidence, adduced to impeach a witness, that he has made statements contradictory to his testimony, the party by whom he was called may introduce general evidence that he is a person of good character for truthfulness and integrity. So *held*, although the impeaching counsel declared he did not impeach the witness' character, but only his integrity.—Isler v. Dewey, 71 N. C. 14.

[n] (Ohio, 1876) The impeachment of the credit of a witness, by showing that he has made statements at other times contradictory of his testimony given on the trial, does not lay the foundation for sustaining him by proof of his reputation for truth.—Webb v. State, 29 Ohio St. 351.

[o] (Or. 1874) Testimony going to show that a witness has made at other times statements inconsistent with his testimony is an impeachment of his general character for truth and veracity, and in such a case evidence of general good character for truth and veracity may be offered in rebuttal. Evidence of good character is admissible whenever the character of a witness has been impeached in any of the ways permitted by the statute.—Glaze v. Whitley, 5 Or. 164.

[p] (Or. 1882) A witness was impeached by evidence that he had at other times made statements inconsistent with his testimony as given on the trial. *Held*, that it was not competent to show in rebuttal that his general reputation for truth and veracity was good.—Sheppard v. Yocum, 10 Or. 402, overruling Glaze v. Whitley (1874) 5 Or. 164.

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[q] (S. C. 1839) A witness who has been impeached by evidence of inconsistent statements improperly introduced by the party calling him may call witnesses to prove his good character.—Farr v. Thompson, Cheves, 37.

[r] (Tex. 1883) Proof of the general good character of an impeached witness is admissible when his testimony has been assailed merely by proof of conflicting statements previously made by him.—Dixon v. State, 15 Tex. App. 271.

[s] (Tex. 1889) Where the credibility of a witness for the state has been attacked by showing statements by him inconsistent with his testimony, and the witness is a stranger in the county, the state may show that his general reputation for truth and veracity is good.—Crook v. State, 27 Tex. App. 198, 11 S. W. 444.

[t] (Tex. 1891) Where, on a trial for incest, the testimony of the prosecuting witness as to the paternity of her child is contradicted by evidence of statements made by her to several witnesses, the prosecution may show her good reputation for veracity in the neighborhood where she lives.—Tipton v. State, 30 Tex. App. 530, 17 S. W. 1097.

[u] (Vt. 1848) Proof from other witnesses that the complainant in a prosecution for bastardy has made statements in reference to the paternity of the child inconsistent with her testimony upon the stand entitles her to call witnesses to sustain her general good character for truth.—Sweet v. Sherman, 21 Vt. 23.

§ 1260. Evidence as to statements consistent with testimony.

[a] If a witness is impeached by proof of his having previously made statements inconsistent with his testimony, he may be supported by proving other statements made by him in accordance with it.

—(D. C. 1880) United States v. Neverson, 1 Mackey, 152;

(Ind. 1837) Coffin v. Anderson, 4 Blackf. 395; (1842) Beauchamp v. State, 6 Blackf. 299; (1867) Dailey v. Same, 28 Ind. 285; (1881) Carter v. Carter, 79 Ind. 466; (1884) Dodd v. Moore, 92 Ind. 397; (1885) Hodges v. Bales, 102 Ind. 494, 1 N. E. 692;

(Kan. 1884) State v. Hendricks, 32 Kan. 559, 4 Pac. 1050;

(La. 1896) State v. Fontenot, 48 La. Ann. 283, 19 South. 113;

(N. C. 1822) Johnson v. Patterson, 9 N. C. 183, 11 Am. Dec. 756; (1854) March v. Harrell, 46 N. C. 329; (1887) State v. Rowe, 98 N. C. 629, 4 S. E. 506; (1894) Same v. Staton, 114 N. C. 813, 19 S. E. 96;

(S. C. 1833) Lyles v. Lyles, 1 Hill, Eq. 76;

(Tenn. 1855) Dossett v. Miller, 35 Tenn. (3 Sneed) 72;

(Tex. 1894) Stephens v. State (Cr. App.) 26 S. W. 728; (1895) Dicker v. Same (Cr. App.) 32 S. W. 541; (1896) Parker v. Same (Cr. App.) 34 S. W. 265.

CONTRA, see

(Ga. 1893) Fussell v. State, 93 Ga. 450, 21 S. E. 97;

(Iowa, 1868) State v. Vincent, 24 Iowa, 570, 95 Am. Dec. 753;

(Me. 1831) Ware v. Ware, 8 Me. (8 Greenl.) 42;

(N. Y. 1854) Smith v. Stickney, 17 Barb. 489; (1886) Jenkins v. City of Hudson, 40 Hun, 424;

(S. C. 1845) Davis v. Kirksey, 2 Rich. Law, 176.

[b] (U. S. 1850) After evidence that a witness has previously made a different statement of the transaction sworn to by him, evidence that since that statement he has given the same account as he now testifies to is inadmissible.—Conrad v. Griffey, 52 U. S. (11 How.) 480, 13 L. Ed. 779.

[c] (U. S. 1834) Where it is proved that a witness has at other times made statements different from his testimony, the party offering him cannot be allowed to support his testimony by proving statements at other times corroborative of such testimony.—Ellicott v. Pearl, Fed. Cas. No. 4,386 [1 McLean, 206], affirmed (1836) 35 U. S. (10 Pet.) 412, 9 L. Ed. 475.

[d] (U. S. 1854) A written protest, made by a captain and crew on the morning after a collision, which corresponds with their statements in court, is competent evidence to sustain the credit of the captain, impeached by proof of his having made different statements.—Ward v. The Fashion, Fed. Cas. No. 17,154 [Newb. Adm. 8].

[e] (U. S. 1858) Testimony is not admissible that the witness gave the same account out of court, although it has been proved in order to contradict him that he had given a different account.—United States v. Holmes, Fed. Cas. No. 15,382 [1 Cliff. 98].

[f] (Cal. 1874) As a general rule, a witness, impeached by proof of former statements made by him in conflict with his testimony, cannot be sustained by proof that he made to other persons, before being called as a witness, the same statement detailed in his testimony. To contradict evidence tending to show that the statement made by him under oath is a fabrication of a late date, such statements made by the witness may be admissible, if the statements were made before their effect could be foreseen.—People v. Doyell, 48 Cal. 85.

[g] (Cal. 1891) In an action against an officer for the value of property wrongfully levied on, in which plaintiff claims title by purchase from the execution debtor, evidence that the execution debtor, who was a witness for plaintiff, before the trial made statements consistent with his testimony, is not admissible in rebuttal of proof of inconsistent statements.—Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310.

[h] (Colo. 1892) Where the testimony of plaintiff as to the manner of his injury has been discredited by testimony on behalf of defendant that plaintiff, shortly after his injury, made declarations that it had resulted from his own fault, it is not competent, for the purpose of sustaining plaintiff, to prove that at other times thereafter he made statements consistent with his testimony.—Davis v. Graham, 2 Colo. App. 210, 29 Pac. 1007.

[i] (Ind. 1853) On an indictment for receiving stolen goods, a state witness testified that he and others stole the goods, and the defendant, knowing them to be stolen, received them. Defendant proved by other witnesses that such state witness had stated out of court that he had made the charge against defendant with a hope of pardon, and that defendant had nothing to do with the matter. The state, to sustain its witness, offered a witness to prove that he had testified before the grand jury to the same statement that he had sworn at the trial. *Held*, that such evidence was properly admitted, as it was consistent with his testimony on the trial, admitted to repel the force of the evidence given to impeach his character for veracity.—Perkins v. State, 4 Ind. 222.

[j] (Ind. 1876) The rule that a witness, impeached by proof of his declarations out of court inconsistent with his testimony, may be corroborated by proving other declarations in harmony with it, is not limited to such declarations as were made before the impeaching declarations.—Brookbank v. State, 55 Ind. 169.

[k] (Ind. 1889) In an action for personal injuries, defendant having shown that plaintiff had made statements contrary to his testimony, which statements showed that the accident was due to his own carelessness, plaintiff cannot show that he had made other statements consistent with his testimony.—Logansport & P. G. Turnpike Co. v. Heil, 118 Ind. 135, 20 N. E. 703.

[l] (Ind. 1893) Where a witness has been impeached by proof of contradictory statements out of court, it is proper rebuttal for the party calling the witness to support him by proving that he had on other occasions stated the facts to be as he represented them in his testimony, and such corroborative statements may be shown by the testimony of the impeached witness.—Hobbs v. State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

[m] (Iowa, 1888) A witness for the state, having testified to statements of defendant of a material character, the defense introduced evidence that the witness had denied defendant's making such statements. *Held*, that the state could not show in rebuttal, by witness' wife, that he told her, shortly after or before the crime, that defendant had made the statements.—State v. Porter, 74 Iowa, 623, 38 N. W. 514.

[n] (Kan. 1878) When a witness is assailed on the ground of a prior different narration by him, confirmatory statements made by him may be admitted, if clearly shown to have been made previous to such contradictory narration.—State v. Petty, 21 Kan. 54.

[nn] (La. 1887) An attack by the defense on the veracity or credibility of a state witness may be legally met in rebuttal by the state by testimony to sustain the assailed witness. If the attempt is to show that the witness had previously made statements or declarations contradictory to his testimony on the trial, it is competent for the state to show that, soon after the occurrences which he relates, he had made to persons other than the impeaching witness declarations in harmony with his testimony on the trial, although the particulars of his statements thus made are not admissible.—State v. Waggoner, 39 La. Ann. 919, 3 South. 119.

[o] (Md. 1803) The declarations and showings of the patentee of a tract of land as to the beginning of it, as located by the party claiming under him, are not legal evidence for the purpose of impeaching the credibility of testimony proving that the patentee had, at a different time, made different declarations and showed a different place, as no one can give evidence for himself.—Tolley's Lessee v. Ford, 1 Har. & J. 413.

[oo] (Mass. 1858) A witness, who has been impeached by evidence that he previously testified differently, cannot be corroborated by evidence that he had made still earlier statements, not under oath nor in the prisoner's presence, in accordance with his present testimony.—Commonwealth v. Jenkins, 76 Mass. (10 Gray) 485.

[p] (Mich. 1889) Evidence that plaintiff, soon after the injury, stated his case to an attorney substantially as given on the trial is not admissible to contradict defendants' witness, who said plaintiff told him he did not know how he was injured.—Kinney v. Folkerts, 78 Mich. 687, 44 N. W. 152.

[pp] (Mo. 1890) The uncertified minutes of the testimony of a witness taken down by the clerk of the grand jury, as provided by Rev. St. § 4075, who is not under oath to fully and correctly take down the evidence, are inadmissible on the trial in corroboration of the witness, whose testimony has been impeached by evidence of contradictory statements made before the trial.—State v. Whelehon, 102 Mo. 17, 14 S. W. 730, following State v. Thomas (1889) 99 Mo. 235, 12 S. W. 643.

[q] (Mo. 1896) Where the motives of defendant's mother-in-law, testifying in defendant's behalf, are not sought to be impugned, her testimony at the coroner's inquest is not admissible to corroborate her testimony, when attacked by evidence of contradictory statements on her part.—State v. Taylor, 134 Mo. 109, 35 S. W. 92.

[qq] (N. H. 1833) Where it was contended that the evidence of a witness was a new fabrication, and that he had previously given another account of the transaction, evidence that he had given the same account of the transaction immediately after it had happened was *held* admissible.—French v. Merrill, 6 N. H. 465.

[r] (N. H. 1860) Where a witness has been impeached by showing that he has made statements to several persons contradictory to those made on the stand, it is not competent to introduce the statements of the witness made to other persons, similar to those made upon the stand, for the purpose of sustaining him, even where such statements were made immediately after the transaction occurred which had been stated on the stand, unless it shall distinctly appear that there has been some change in the relation of the witness to the party or cause since such early statements were made.—Reed v. Spaulding, 42 N. H. 114.

[rr] (N. H. 1866) In an action against a town for injuries received, owing to an obstruction in the highway, the defendant put in evidence that the plaintiff, about the time of the accident, gave an account of it which contained no mention of the obstruction to which he testified. *Held*, that the plaintiff could not introduce evidence of other statements made by him about the same time in which he did speak of the obstruction.—Judd v. Brentwood, 46 N. H. 430.

[s] (N. Y. 1836) Where the testimony of a witness is impeached by evidence as to statements, previously made, inconsistent and different from his testimony, his examination taken by a magistrate on the institution of a prosecution for a criminal offense against another person, in which the statements were made, may be read in support of his testimony.—People v. Moore, 15 Wend. 419.

[ss] (N. Y. 1838) The examination of a witness, taken on the arrest of a criminal, is admissible in support of his testimony, where the witness is sought to be impeached on the ground of inconsistent relations of the matter in question.—People v. Rector, 19 Wend. 569.

[t] (N. Y. 1875) Statements made by a witness corroborating his evidence on the trial, made soon after the transaction to which it relates, or when he was not under the influence of any motive to relate the transaction untruthfully, are competent, when it is attempted to be shown that he had given a different relation of the occurrence, or that he testified under the influence of a motive calculated to induce him to testify falsely.—Hotchkiss v. Germania Fire Ins. Co., 5 Hun, 90.

[tt] (Pa. 1847) If a witness contradicts statements made in his deposition, before taken in the case, his previous declarations may be proved to corroborate his first statements.—McKee v. Jones, 6 Pa. (6 Barr) 425.

[u] (S. C. 1892) On a murder trial, where a witness has been cross-examined as to a statement made by him, which he had not made at the inquest, it is competent in reply for him to refer to an affidavit made ex parte about the time defendant applied for bail, for the purpose of showing that his statements at all times had been consistent, although he might not at the inquest have remembered and stated the circumstances of the affair as fully as he did afterwards.—State v. Turner, 36 S. C. 534, 15

S. E. 602, distinguishing Davis v. Kirksey (1845) 2 Rich. Law, 176.

[uu] (Tenn. 1860) Evidence is not admissible of consistent statements for the purpose of giving support to the credit of a witness made after the contradictory representations by which it is sought to impeach him.—Queener v. Morrow, 41 Tenn. (1 Cold.) 123.

[vv] (Tenn. 1880) Where an attempt is made to injure the credit of a witness by proof of contradictory statements, evidence is admissible to show that he made the same statement as that testified to at a time when the facts were recent, and when no motive existed for misrepresentation.—Hayes v. Cheatham, 74 Tenn. (6 Lea) 1.

[ww] (Tex. 1888) Where, on cross-examination of plaintiff, defendants sought to leave the impression that plaintiff testified differently in a deposition taken by defendants to be used in the case, but not offered in evidence, plaintiff may read such deposition in rebuttal.—Schmick v. Noel, 72 Tex. 1, 8 S. W. 83.

[xx] (Tex. 1892) Where defendant, on a trial for robbery, in order to impeach the prosecuting witness, has introduced testimony that he had stated to others that he did not know who had robbed him, a witness for the state may testify that the prosecuting witness stated to him in defendant's presence that he did not know who had robbed him, but when defendant had gone stated that he had been done up by defendant.—Bell v. State (Cr. App.) 20 S. W. 362.

[yy] (Tex. 1893) Where a witness was impeached by proof of statements made out of court contradictory to his testimony on the trial, it is proper to prove by a third person that the witness had made the same statements as testified to on the night following the crime under investigation.—Goode v. State, 32 Tex. Cr. R. 505, 24 S. W. 102.

[zz] (Tex. 1895) Proof that the prosecutrix told her mother the same story testified to by her on the day of the assault, and prior to alleged contradictory statements shown by the defense, is admissible to sustain her testimony.—Sentell v. State, 34 Tex. Cr. R. 260, 30 S. W. 226.

[aaa] (Tex. 1895) The testimony of deceased, given at the preliminary trial, that defendant was his assailant, having been impeached by evidence that on one occasion deceased expressed doubts on the question, the state could properly introduce evidence of declarations as to defendant's guilt, made by deceased to his wife, to show that deceased always declared that defendant was his assailant.—Easterwood v. State, 34 Tex. Cr. R. 400, 31 S. W. 294.

[bbb] (Tex. 1895) Where, on a prosecution for attempt to rape, the state attempted to impeach the alleged injured person, who testified for the defense, by showing declarations made by her after the alleged offense, it was error not to admit her testimony given on the preliminary examination in rebuttal.—Bozeman v. State, 34 Tex. Cr. R. 503, 31 S. W. 389.

[ccc] (Tex. 1895) On a prosecution for murder, where there is evidence that a fight took place when the killing was done, in which the murderer would probably have been bruised, and defendant has testified that bruises seen on his face the day after the homicide were caused by being thrown from a horse, and a witness in rebuttal has testified that the defendant told him they were caused by being thrown from a mule, it is error to exclude evidence of another witness that defendant told him that the bruises were caused by his being thrown from a horse.—Campbell v. State, 35 Tex. Cr. R. 160, 32 S. W. 774.

[ddd] (Tex. 1895) Where prosecutor swore that defendant was the person who robbed him, and defendant introduced evidence to show that he had made contradictory statements, and also that he had sued defendant for damages growing out of the robbery, it was proper for the state to support him by proof that, soon after the robbery he made statements similar to those made by him at the trial.—Kirk v. State, 35 Tex. Cr. R. 224, 32 S. W. 1045.

[eee] (Tex. 1896) In a murder case, where there was evidence that a witness for the state had made statements out of court contrary to his testimony, it was proper to admit, in rebuttal, extracts from his testimony at the inquest which corresponded with his testimony on the trial.—Sims v. State, 36 Tex. Cr. R. 154, 36 S. W. 256.

§ 1261. Explanation of inconsistency.

[a] (Ala. 1847) Where it is sought to contradict the testimony given by a witness in the taking of his deposition by proving counter declarations by him, the witness must have the opportunity of explaining.—Howell v. Reynolds, 12 Ala. 128.

[b] (Ala. 1851) A witness cannot be impeached by proof of contradictory statements previously made by him, whether oral or written, without first giving him an opportunity to explain such previous statements.—Powell v. State, 19 Ala. 577.

[c] (Ala. 1853) If a witness has been cross-examined respecting his former statements, with a view of impeaching him, he may be asked on re-examination in chief his motive in making those statements.—Campbell v. State, 23 Ala. 44.

[d] (Ala. 1893) Where a witness for defendant admits that he has said that he knew nothing of the difficulty out of which the killing arose, and as to which he is testifying, his response, in answer to a query as to his motive in so admitting, that "I did not want to talk about it at all," should be admitted to counteract the effect of the admission.—Johnson v. State, 102 Ala. 1, 16 South. 99.

[e] (Ala. 1893) Where, on cross-examination, a witness states that he made a certain statement before the justice, which tended to contradict his direct testimony, it is proper to allow him to explain the same.—Thomas v. State, 103 Ala. 18, 16 South. 4.

[f] (Ala. 1893) On a trial for seduction, to explain discrepancies between the testimony of the prosecutrix on such trial and that previously given by her before a justice she may testify that she was so scared and embarrassed before the justice that she did not remember the facts.—Anderson v. State, 104 Ala. 83, 16 South. 108.

[g] (Cal. 1893) On a prosecution for rape on a child 11 years old, where defendant has read her testimony given before the committing magistrate to contradict her evidence at the trial, she may be recalled to explain the discrepancies.—People v. Wessel, 98 Cal. 352, 33 Pac. 216.

[h] (Ga. 1859) A deposition is not to be impeached by proof of other statements, which the witness is not allowed to explain, not even if those statements be that the deposition is not true.—Mulligan v. Bailey, 28 Ga. 507.

[i] (Ga. 1884) Where a record of a homestead was introduced to impeach a witness by showing the omission from the schedule of the debt in suit, it was admissible for him to explain such omission.—Printup v. James, 73 Ga. 583.

[j] (Idaho, 1895) Where a letter written by a witness is introduced to discredit him, he is entitled to explain it.—Douglas v. Douglas, 4 Idaho, 293, 38 Pac. 934.

[k] (Ill. 1886) Where, on cross-examination, for the purpose of rebuttal and discrediting a

witness, he is asked if he did not give certain different testimony on a former examination, he must answer categorically. If he wishes to explain what he did say, or any other matter touching his former testimony, he may be allowed to do so on the redirect examination.—Bressler v. People, 117 Ill. 422, 8 N. E. 62.

[l] (Ind. 1885) On examination before a justice of the peace, the prosecutrix testified that she was raped in a certain field, and in the circuit court she stated that it was in a barn, *held*, that evidence was admissible to show the motive for changing the place of the crime.—Bessette v. State, 101 Ind. 85.

[m] (Md. 1889) A witness who has made inconsistent statements on direct and cross-examination may be asked on redirect, by a leading question pointing out the inconsistency, to explain, such matter being discretionary with the trial court.—Stoner v. Devilbiss, 70 Md. 144, 16 Atl. 440.

[n] (Mich. 1885) Where a plaintiff, on appeal from a justice's judgment, swears that a much larger balance is due him than was claimed before the justice, which he explains by saying that he did not have his books before him on the former trial, this discrepancy should be considered by the jury in weighing his testimony.—Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327.

[o] (Mich. 1889) Every facility should be given a witness to explain alleged discrepancies in his testimony on former occasions.—Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696.

[p] (Mich. 1893) Prosecutrix, in a trial for rape, and another witness, both of whom were members of a religious sect of which respondent was the leader, having disclosed on cross-examination certain statements relative to respondent's conduct inconsistent with their testimony, may be re-examined to show that they had been made while witnesses were under the influence of respondent, submission to whose desires they had been taught involved no wrong.—People v. Mills, 94 Mich. 630, 54 N. W. 488.

[q] (Mich. 1894) Where a defendant in an action alleges that his deed was delivered on a certain day, he may, when such statement is introduced to contradict him in a subsequent action, explain what he understood the term "delivery" to mean.—Jourdan v. Patterson, 102 Mich. 602, 61 N. W. 64.

[r] (Minn. 1869) Affidavits made by a witness some years previous, in another proceeding, were offered for purpose of impeachment. *Held*, that he might be allowed to explain the circumstances under which they were made.—Yale v. Edgerton, 14 Minn. 194 (Gil. 144).

[s] (Mo. 1896) A witness sought to be impeached by an affidavit previously made may explain an alleged alteration of it.—Sullivan v. Jefferson Ave. Ry. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167.

[ss] (Mont. 1896) Where, for the purpose of impeaching a witness, letters purporting to be written by him are introduced, it is both competent and material that he should be allowed to explain the circumstances under which and for what purpose the letters were written.—Kennelly v. Savage, 18 Mont. 119, 44 Pac. 400.

[t] (N. Y. 1860) Every witness, a party as well as any other, must be allowed to show that he was mistaken in previous admissions or statements which are used to discredit him.—Van Ness v. Bush, 14 Abb. Prac. 33, 22 How. Prac. 481.

[tt] (N. Y. 1872) Where a party proposes to impeach a witness by proving inconsistent written statements, it is not the right of such witness to explain the contents of such paper until it has been put in evidence.—Romertze v. East River Nat. Bank, 49 N. Y. 577, reversing (1869) 32 N. Y. Super. Ct. (2 Sweeny) 82.

[u] (N. Y. 1892) Where there is a contradiction between an allegation in the verified answer and defendant's testimony, defendant, for the purpose of explaining the contradiction, may show that he was advised by his attorney that the legal effect of the allegation and of the testimony was the same.—Ferris v. Hard, 135 N. Y. 354, 32 N. E. 129.

[uu] (N. C. 1888) Defendant, a sheriff, levied on some property, but, instead of selling it, turned it over to a bank. The execution debtor testified that the property was his. Defendant introduced a bill of sale, absolute in form, to the bank, which the execution debtor admitted he had executed. Plaintiff asked witness "what was the purpose and object of giving said bill of sale." *Held*, that the witness had a right to explain the apparent contradiction between his statement and the bill of sale.—Peck v. Manning, 99 N. C. 157, 5 S. E. 743.

[v] (N. C. 1888) A witness who testifies that a stock of goods is worth a certain amount, larger than his estimate at a former trial, may explain the discrepancy by stating that what he heard the other witnesses testify at the former trial had caused him to change his mind as to the value of the goods.—Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

[vv] (Tenn. 1891) A witness who, on cross-examination, admits having made statements impeaching her direct testimony, may explain why, how, and under what circumstances she made them.—Graham v. McReynolds, 90 Tenn. (6 Pickle) 673, 18 S. W. 272.

[w] (Tex. 1882) The fact that a witness' deposition was not read over to him by the examining court may be elicited to account for discrepancies between it and his testimony at the final trial of the accused.—Grosse v. State, 11 Tex. App. 364.

[ww] (Tex. 1886) Upon trial for murder, the state attempted to discredit the testimony of witnesses for the defense as to certain facts, by showing that, upon habeas corpus proceedings, these witnesses, though examined, had been silent concerning such facts. *Held*, that it was competent for the defense to introduce the evidence of the attorney of the accused at that trial, to show that, because of local prejudice at the time, the attorney did not expect to obtain bail, and did not undertake to develop the evidence in accused's behalf.—Kunde v. State, 22 Tex. App. 65, 3 S. W. 825.

[x] (Tex. 1891) Where plaintiff's cashier testified that plaintiff had not disposed of certain collaterals held by it to secure a note against defendant, in violation of an agreement with him, and on cross-examination testified to a sworn statement by him, in a garnishment suit against the investment company, that at the time alleged it had none of its property or effects, on re-examination plaintiff could explain the reason for making such statement.—Smith v. Traders' Nat. Bank, 82 Tex. 368, 17 S. W. 779.

[xx] (Tex. 1892) On the second trial of a criminal case, where the testimony of a witness is sought to be impeached by contradictory statements, the judge who tried the case may testify that the witness, from her want of familiarity with the English language, sometimes found it difficult to understand the question asked.—Gibbs v. State (Cr. App.) 20 S. W. 919.

[y] (Vt. 1886) It is not error to permit a witness to explain why he testified differently at the court of inquiry from his testimony on the trial.—State v. Lockwood, 58 Vt. 378, 3 Atl. 539.

[yy] (Vt. 1892) On a trial for rape, the person who was in the company of prosecutrix just

before the alleged commission of the offense identified defendant as one of those who made the assault, and testified that on the following morning he saw defendant and one of the others, and then recognized them as two of the assailants. Some one then asked him if he recognized any of the assaulting party among the persons present, to which he replied, "No." *Held* that, where defendant claimed that such statement tended to discredit witness' testimony, it was proper to permit him to explain that he made it because he was afraid of putting defendant on his guard, and enabling him to escape.—State v. Bedard, 65 Vt. 278, 26 Atl. 719.

[z] (Vt. 1892) Prosecutrix's escort having on the next morning after the assault said that one of defendants was not among the assailants, it was permissible for him to state that he said so that he might not frighten him, and cause him to flee, and to show that he subsequently pointed such defendant out to the officers.—State v. Wilkins, 66 Vt. 1, 28 Atl. 323.

[zz] (Wis. 1895) In an action for personal injuries received while alighting from a street-car, plaintiff claimed that the car started before she had time to alight, and a witness for defendant testified that he saw the car coming down the street and thought it was coming too fast, and that it slowed up, and plaintiff got off before it stopped. *Held*, that it was proper to permit the witness to testify on cross-examination that he previously stated to a certain person that he considered it the most careless piece of business he ever saw, and to explain that he meant the speed of the car, since it was proper to ask him on cross-examination if he had not made a statement apparently in contradiction with his testimony, as bearing on his credibility as a witness.—Hardy v. Milwaukee St. Ry. Co., 89 Wis. 183, 61 N. W. 771.

§ 1262. —— Fear and intimidation.

[a] (Ala. 1860) It was proved on cross-examination that the witness had previously testified differently. He was thereupon allowed to state that on the previous occasion a witness on the other side had intimidated him.—Lewis v. State, 35 Ala. 380.

[b] (Ga. 1892) Since, under Code, § 4303, duress or fear, produced by threats or menaces, to excuse a crime, must be such as to put life or member in danger, or to induce a reasonable belief that there is such danger, fear of death or dismemberment at some future time, in the absence of all danger at the time of testifying, will not excuse the commission of perjury; but it may afford a moral explanation of perjury, sufficient to account to the jury for false testimony, and, where the explanation is satisfactory to them, the witness may be believed, with or without corroborating circumstances or supporting evidence, though he admits the falsehood of the testimony formerly given, and now deposes directly to the contrary of that testimony.—Burns v. State, 89 Ga. 527, 15 S. E. 748.

[c] (Ky. 1895) Though statements by co-conspirators after the crime are inadmissible against each other, their trials being separate, yet, where a witness for the state is impeached by showing that he had made a previous affidavit contrary to his testimony, it is not error to permit him, in explanation, to state that the affidavit was made on account of a threat from an alleged co-conspirator to kill him if he testified for the state.—Armstrong v. Commonwealth, 29 S. W. 342.

[d] (N. Y. 1890) A witness for the prosecution denied at the inquest knowledge of facts subsequently testified to by him. Another witness withheld a portion of his testimony when examined before the coroner. Both avowed fright at being brought into the affair as the explanation of their conduct, and neither were otherwise impeached. *Held*, that it was for the jury to pass upon their credibility.—People v. Chapleau, 121 N. Y. 266, 24 N. E. 469.

[e] (Tex. 1895) Where a witness, at the time of the robbery, identified defendants, but failed thereafter, when he had an opportunity to do so, evidence that his reason for not identifying them was fear of his personal safety is admissible to explain conduct.—Thompson v. State, 35 Tex. Cr. R. 511, 34 S. W. 629.

§ 1263. Right to show whole statement.

Portion of inconsistent writing or testimony, see ante, § 1257.

[a] (Ala. 1883) A witness for the prosecution having been cross-examined as to a written statement made by him, such statement may be read to the jury in rebuttal in order to compare the statement with his testimony.—Wills v. State, 74 Ala. 21.

[b] (Ga. 1889) A witness who is interrogated as to a conversation with a view to impeaching him may give the whole conversation so far as it is pertinent.—Savannah, F. & W. Ry. Co. v. Holland, 9 S. E. 1040.

[c] (Ga. 1889) When, on cross-examination, a witness is interrogated as to a conversation with a view to laying the foundation for impeaching him, he has a right to give the whole conversation so far as it is pertinent.—Savannah, F. & W. Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158.

[d] (Me. 1880) When, for the purpose of contradicting a witness, one party offers extracts from the testimony of such witness at a former trial, the other party is entitled to put in so much of the remainder as is relevant, and for that purpose may call the stenographer and have him read his original minutes.—Noyes v. Gilman, 71 Me. 394.

[e] (N. H. 1885) Where a party reads portions of a witness' deposition to the jury for the purpose of contradicting his testimony on the stand, the other party may read other portions of it relating to the same subjects.—Whitman v. Morey, 63 N. H. 448, 2 Atl. 899.

[f] (Tex. 1896) Where it is attempted to lay a predicate for the impeachment of a witness by showing that she had made a statement previous to the trial inconsistent with her testimony on the trial, she may, in explanation, state all of the conversation in which the alleged contradictory statement was made.—Ball v. State (Cr. App.) 36 S. W. 448.

§ 1264. Right of impeached witness to give version of statement.

[a] (Ala. 1879) Where a witness denies, on cross-examination, that he made a certain statement, which varied from his testimony, at a certain time and place, to a given person, he may, in rebuttal, testify as to the statement he did make on that occasion.—Haley v. State, 63 Ala. 83.

[b] (Ala. 1881) A witness sought to be impeached by his prior statements at a designated time and place, and who denies making them in the words or form suggested, has the right, either on direct or cross-examination, to state what he did say on the occasion in question.—Henderson v. State, 70 Ala. 29.

[c] (Conn. 1880) A witness, having testified to certain facts, was asked on cross-examination if he had not made a certain different statement to A., to which he replied that he had not. A. then testified otherwise. The former witness was recalled, and stated what he did say. *Held*, that he could be interrogated by the party calling him as to the whole conversation upon the subject.—Appeal of Harrison, 48 Conn. 202.

[d] (Iowa, 1892) Where a party has introduced evidence to contradict the testimony of an adverse witness given on cross-examination,

denying that he had made certain statements out of court, the other party may recall such witness to give his version of the conversation in which such statements were alleged to have been made.—Hoover v. Cary, 86 Iowa, 494, 53 N. W. 415.

[e] (Iowa, 1893) Where plaintiff's witness was asked on cross-examination if she did not make a certain statement before the grand jury, and she answered, "I think I will say that I did not," and the testimony of grand jurors called by defendant tended to show that she made the statement, the court properly allowed witness thereafter to explain what she did say before the grand jury.—McMurrin v. Rigby, 87 Iowa, 18, 53 N. W. 1079.

[f] (N. H. 1843) When a credit of a witness has been impeached by proof that in a certain conversation he has made statements inconsistent with the truth of his testimony, he may, on his re-examination, be asked, and may state, what that conversation was to which the impeaching witness referred.—State v. Winkley, 14 N. H. 480.

9. EFFECT OF IMPEACHMENT BY INCONSISTENT STATEMENTS.

IN GENERAL, § 1265.
EFFECT OF PREVIOUS STATEMENT AS AFFIRMATIVE EVIDENCE, § 1266.

Effect of mistake, or inaccurate or false testimony in general, see ante, §§ 1079–1083.

§ 1265. In general.

[a, b] (U. S. 1846) Loose declarations or admissions extracted from or freely made by portions of a crew directly after a wreck from collision will have but slight weight in invalidating their deliberate testimony to the facts.—The New Jersey, Fed. Cas. No. 10,161 [Olcott, 415].

[c] (U. S. 1854) The testimony of a witness should not be rejected because, in a hurried conversation immediately after the collision, he gave a different statement as to a particular fact from that positively sworn to in court.—Ward v. The Fashion, Fed. Cas. No. 17,154 [Newb. Adm. 8, 6 McLean, 152].

[d] (U. S. 1856) A witness supported by his previous deposition, though not on file, will be believed, rather than one whose previous deposition does not support his testimony.—Hall v. The Buffalo, Fed. Cas. No. 5,927 [Newb. Adm. 115].

[e] (U. S. 1859) Where the relation in which a witness stands to the cause makes it reasonable to suppose that he must labor under a strong bias to testify in favor of one of the parties, inconsistencies in his testimony may be taken into consideration to dispute his entire testimony as unworthy of credit, especially where it is not corroborated.—Sanders v. Parsons, Fed. Cas. No. 12,296.

[f] (U. S. 1863) But little credence can be given to the testimony of a sailor who contradicts statements deliberately made by him, in writing, immediately after the collision.—The Douglass, Fed. Cas. No. 4,031 [1 Brown, Adm. 105].

[g] (U. S. 1867) Very little reliance should be placed upon the testimony of a witness who has contradicted himself on cross-examination, whether the discrepancies arose from forgetfulness, disingenuousness or dullness.—The Carroll, Fed. Cas. No. 2,451 [1 Ben. 286].

[h] (U. S. 1868) Where defendant swears to a certain statement of facts in his answer, and swears in his deposition to a statement of facts which contradicts his answer, the statement of facts which bears most strongly against defendant will be considered as true.—Farrell v. Campbell, Fed. Cas. No. 4,681 [3 Ben. 8].

[i] (U. S. 1890) The question whether a witness is impeached or not is for the jury, and, though he swore differently on a former trial, if this was done under duress of bodily harm, it may not affect his credibility at the present trial.—United States v. Hall (D. C.) 44 Fed. 864, 10 L. R. A. 324.

[j] (Ark. 1848) Where a witness has made a different statement from the one made by him on trial, he is not thereby discredited, unless the discrepancy is willful.—Yoes v. State, 9 Ark. (4 Eng.) 42.

[k] (Ark. 1854) When the deposition of a witness, made nine years after the transaction deposed to, is inconsistent with his own letters, referring to the same transaction, written at the time, the jury is warranted in disregarding it entirely.—State Bank v. McGuire, 14 Ark. 530.

[l] (Ga. 1894) Where a witness testifying at different times and in different trials of the same case contradicts himself, the jury should not be instructed not to consider contradictions on immaterial matters, though it would be correct to instruct that for these matters alone the witness could not be discredited.—Evans v. State, 95 Ga. 468, 22 S. E. 298.

[ll] (Ill. 1862) Inconsistency in the statements of a witness may justify the jury in discrediting him, but if he is corroborated his testimony ought not to be rejected.—Hansell v. Erickson, 28 Ill. (18 Peck) 257.

[m] (Ill. 1891) Where testimony that a witness has made statements out of court contrary to what he has testified at the trial is admitted to impeach him, the jury should be told to consider it in determining what credit and force shall be given him; but they should not be instructed that they can rightfully disregard his entire testimony for that reason unless corroborated.—Kerr v. Hodge, 39 Ill. App. 546.

[n] (Ill. 1895) An instruction that, if plaintiff has on another occasion willfully sworn that he was the partner of defendant during the time for which he now seeks to recover wages as a servant, the jury are at liberty to disregard his testimony, is erroneous, as it omits the qualifications as to corroboration.—Schanzenbach v. Brough, 58 Ill. App. 526.

[o] (Iowa, 1894) It is not error to charge that if any witness has at another time and place made statements, material to the issues, at variance with his testimony, the jury may disregard all his testimony, except in so far as he is corroborated by other credible evidence.—Blotcky v. Caplan, 91 Iowa, 352, 59 N. W. 204.

[p] (Mass. 1890) In a proceeding in bastardy, V. having testified that A., a witness, had admitted to him that he was the father of the child, which admission A. denied, the instruction that A.'s declarations, if made as V. said, could be used to the extent of entirely destroying his evidence, but no further, is correct.—Francis v. Ross, 151 Mass. 532, 24 N. E. 1024.

[q] (Mass. 1896) Where a witness has testified to a material fact, and acts or declarations of hers are shown, inconsistent with her testimony, it is not error to charge that such acts or declarations, if true, would tend to show what degree of credit should be given to her testimony, and would tend to weaken it.—Handy v. Canning, 166 Mass. 107, 44 N. E. 118.

[qq] (Mich. 1895) A party is not conclusively bound by his testimony on a former trial, but his change of testimony is to be considered by the jury as affecting his credibility.—Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462.

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[r] (Mo. 1884) In an action against a railroad company for killing stock, the fact that a witness testifies that they were worth $140, but admits on cross-examination that he appraised them at $100, when he supposed the amount would be paid without litigation, goes to his credibility, and does not require the exclusion of his testimony.—Maberry v. Missouri Pac. Ry. Co., 83 Mo. 664.

[rr] (Mo. 1893) Where the evidence is conflicting, and the testimony of one witness is essentially different in some respects from that given by him in a deposition previously taken, it is not error to charge that if the jury believed any witness had willfully sworn falsely as to any material fact in the case they may disregard the whole or any part of his testimony.—Church v. Chicago & A. R. Co., 119 Mo. 203, 23 S. W. 1056.

[s] (Mo. 1894) Where evidence of contradictory statements is received for the purpose of impeaching a witness, an instruction directing the jury that they are at liberty to consider the probability or improbability of the testimony of the impeached witness is not erroneous.—State v. Baldwin, 56 Mo. App. 423.

[ss] (N. Y. 1864) When it appears that a witness has sworn differently upon the same point on a former occasion, his testimony is not to be wholly excluded from consideration; but it should remain in the case to be considered in connection with the other evidence under such prudential instructions as may be given by the court.—Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319.

[t] (N. Y. 1872) When it appears upon a trial that a witness then examined has sworn differently upon the same point on a former occasion, he is not to be pronounced by the judge to be incompetent, and his testimony excluded from consideration by the jury; but his testimony should be submitted to the jury to be considered by them, in connection with the other evidence, under proper instructions.—Warren v. Haight, 62 Barb. 490.

[tt] (N. Y. 1882) A verdict supported only by the discredited testimony of one witness, he having made contradictory statements under oath as to the same material facts, should not be permitted to stand.—Molloy v. New York Cent. & H. R. R. Co., 10 Daly, 453.

[ttt] (N. Y. 1885) Where the testimony of a plaintiff in his own behalf is contradicted, not only by other witnesses, but also by his own writings, made long before the litigation began, and unexplained by him, his testimony should be disregarded; and a judgment in his favor supported only by such testimony must be reversed.—O'Brien v. McManus, 13 Daly, 37.

[u] (N. Y. 1887) The evidence of a witness for the state will not be excluded from the jury because he had sworn falsely as to the matter in question before a committee of the senate.—People v. Sharp, 45 Hun, 460.

[uu] (N. Y. 1888) Where a party gives testimony directly contradicting that given by her in a former action, showing that either in one or the other she testified falsely, her testimony should be carefully scrutinized, and when not satisfactorily corroborated should be disregarded.—Dickinson v. Ensign, 14 N. Y. St. Rep. 65.

[v] (N. Y. 1891) Plaintiff testified that defendant agreed to pay him $9,000 if he would agree to a postponement of his appeal from a judgment in proceedings taken by defendant to acquire the right to build a railway in a street in front of plaintiff's premises, but afterwards admitted that for the $9,000 defendant should acquire plaintiff's easement in the street. *Held*, the evidence of plaintiff being contradictory, and unsupported except by that of his counsel, that a finding of the jury that the $9,000 was to be paid for the postponement of the appeal only was erroneous, and should have been set aside.—Nutting v. Kings County El. R. Co., 62 Hun, 621, 16 N. Y. Supp. 673.

[vv] (N. Y. 1892) The recollection of a train dispatcher that, some years previously, plaintiff, after the date of the alleged injury for which his action is brought, applied for easier work, on the ground that he had been injured at a place and in a manner different from that alleged, together with a denial thereof by plaintiff, does not compel the jury to discredit plaintiff's story.—Van Tassel v. New York, L. E. & W. R. Co. (Com. Pl.) 1 Misc. Rep. 299, 20 N. Y. Supp. 708, judgment affirmed (1894) 142 N. Y. 634, 37 N. E. 566.

[w] (N. Y. 1895) A witness is not discredited, as of course, by the fact that he has contradicted himself on a point immaterial to the issue.—Kopetzky v. Metropolitan El. Ry. Co. (Com. Pl.) 14 Misc. Rep. 311, 35 N. Y. Supp. 766.

[ww] (Ohio, 1847) Where the different statements of a witness in chancery are inconsistent with each other, or he is directly contradicted in regard to material facts, his whole testimony will be disregarded.—Hargraves v. Miller's Adm'x, 16 Ohio, 338.

[x] (Pa. 1845) It is a rule of reason, and, therefore, of law, that where a witness varies in his statement of the same transaction, in material particulars, at different periods, his testimony is to be greatly doubted.—Commonwealth v. Sallager, 4 Pa. Law J. 512.

[xx] (Pa. 1849) Contradictory statements on different examinations go only to the credibility of the witness, and must be referred to the jury.—Miller v. Stem, 12 Pa. (2 Jones) 383.

[y] (Tex. 1881) Upon a trial for theft, the only evidence tending to criminate the accused was the testimony of a witness for the state, who, before the trial, had assured accused and his counsel that he knew nothing of the case and nothing against accused. *Held*, that a new trial should be granted.—Adams v. State, 10 Tex. App. 677.

[yy] (Tex. 1895) Where a witness charged with a murder twice denied any knowledge, her evidence incriminating accused, delivered under threats and the influence of intoxicants, was insufficient for conviction.—Dodson v. State, 34 Tex. Cr. R. 566, 35 S. W. 151.

[z] (Va. 1891) The credibility of a witness, on whose testimony a conviction for murder rests, and who admitted having made different statements, is a matter for the determination of the jury.—Lyles v. Commonwealth, 88 Va. 396, 13 S. E. 802.

[zz] (Wis. 1879) The credibility of a witness is a question for the jury, under proper instructions and cautions from the court, though he may have made contradictory statements under oath.—Mack v. State, 48 Wis. 271, 4 N. W. 449.

§ 1266. Effect of previous statement as affirmative evidence.

[a] Inconsistent statements by which a witness is sought to be impeached cannot be considered for the purpose of establishing the truth of such statements as substantive testimony in the case.

—(Ind. 1884) Allen v. Davis, 99 Ind. 216;
(Ky. 1892) Walkup v. Commonwealth, 20 S. W. 221;
(Me. 1862) Holmes v. Morse, 50 Me. 102;
(Mass. 1852) Gould v. Norfolk Lead Co., 63 Mass. (9 Cush.) 338, 57 Am. Dec. 50;
(Mich. 1894) Jensen v. Michigan Cent. R. Co., 102 Mich. 176, 60 N. W. 57;
(Minn. 1868) Hicks v. Stone, 13 Minn. 434 (Gil. 398);
(Va. 1847) Charlton v. Unis, 4 Grat. 58.

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[b] (U. S. 1893) Where witnesses deny that they made statements that attempts had been made to bribe them, evidence to contradict such denials simply goes to the credibility of the witnesses, and is incompetent as substantive evidence tending to show the fact of such bribery.—Baltimore & O. R. Co. v. Rambo, 59 Fed. 75, 8 C. C. A. 6, 16 U. S. App. 277.

[c] (U. S. 1866) Evidence of conversations with the crew of the injured vessel, where inconsistent with their cotemporary act, and denied upon the stand, are entitled to but little weight.—Whitney v. The Empire State, Fed. Cas. No. 17,586 [1 Ben. 57].

[d] (U. S. 1879) Where, in a plenary cause of collision, the witness was regularly examined for libelants, and had been previously examined on oath in an investigation before the board of inspectors of steam vessels, under the authority of an act of congress, the respondents could not use his deposition before the inspectors as evidence of what the witness stated in it, but only for the purpose of contradicting him.—The Marietta Tilton v. The Harrisburg, Fed. Cas. No. 9,084.

[e] (Ga. 1890) Declarations by a witness out of court, admitted to impeach him, cannot be treated as substantive evidence of the facts which they affirm, and a charge which so treats them, either expressly or by necessary implication, is erroneous.—Watts v. Starr, 86 Ga. 392, 12 S. E. 585.

[f] (Ill. 1894) Declarations of a party to the record are admissible against the party making them, as direct evidence, and not merely as impeaching evidence.—Baker v. Hess, 53 Ill. App. 473.

[g] (Ind. 1881) The declarations of a witness not a party, though admissible to discredit his testimony, cannot be regarded as otherwise affecting any issue in the case.—Davis v. Hardy, 76 Ind. 272.

[h] (Ind. 1881) A witness having denied that she made a certain statement inconsistent with her testimony, the adverse party introduced a witness to testify to having heard her make such statement. *Held*, that in order that this contradictory evidence might show an admission involved in the statement as well as affect her credibility, it was not necessary that he should twice repeat the statement made by her.—Clark v. Rhoads, 79 Ind. 342.

[i] (Iowa, 1859) Statements made, not under oath, by a witness, relative to the subject-matter in controversy, may be admitted on the trial to discredit his testimony; but if such contradictory statements are not supported by other proof, they must yield to his evidence given under oath upon the trial of the cause. —Burrows v. Goodhue, 1 G. Greene, 48.

[j] (Me. 1862) Proof of declarations of an agent after his agency has ceased, if inconsistent with his testimony, may be admitted to affect its credibility, but is not to be regarded as evidence of facts to influence the jury in determining the point in issue, in an action by a third person against the principal.—Holmes v. Morse, 50 Me. 102.

[k] (Mich. 1894) Admissions by a party, inconsistent with his testimony, merely go to his credibility.—Eastman v. Lake Shore & M. S. Ry. Co., 101 Mich. 597, 60 N. W. 309.

[l] (Minn. 1889) Testimony tending to show that a witness not a party to the suit has made extrajudicial admissions to a third person in opposition to his evidence as a witness on the stand is not to be treated as affirmative proof of the truth of the statements involved in such alleged admissions.—Lundberg v. Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

[m] (Mo. 1893) Evidence of statements, made by a witness out of court, and received to impeach his contrary testimony in court, is not substantive evidence of the truth of such statements.—Shoninger v. Day, 53 Mo. App. 147.

[n] (N. Y. 1889) Where, on cross-examination of a witness of defendant, it appeared that he had made an affidavit inconsistent with his direct testimony, but it did not appear whether he adhered to or receded from his direct testimony, the defendant could not, by cross-examining him on the old affidavit, make direct testimony of any of the previous declarations made by the witness.—Hine v. Cushing, 53 Hun, 519, 6 N. Y. Supp. 850.

[o] (N. C. 1859) A statement made by a witness in pais contradicting that made on the trial, and brought in for the purpose of impeaching the integrity of such witness, cannot be treated as substantive evidence of the facts involved in the issue.—State v. Neville, 51 N. C. 423.

[p] (Or. 1890) Former declarations of a witness contained in an impeaching question, when contradicted, only tend to impeach the character of the witness attacked for truth and veracity, and are not evidence of the facts recited in such declarations.—State v. Jarvis, 18 Or. 360, 23 Pac. 251.

[q] (Tex. 1894) An instruction that the object of evidence of contradictory statements by a witness out of court is not to prove that what he says on the trial is untrue, but to show his unworthiness of belief, is ground for reversing a conviction.—Winn v. State, 34 Tex. Cr. R. 37, 28 S. W. 807.

[r] (Vt. 1874) What a witness who is not a party states out of court is not evidence in chief to prove that the fact is as stated by him; but can only be shown to discredit his testimony at the trial, when contrary to such statements.—Law v. Town of Fairfield, 46 Vt. 425.

[s] (Va. 1847) Where a party who has introduced statements of a witness for the purpose of impeaching his credibility introduces further testimony to prove that the statements were not true, the other party is not authorized to introduce testimony to sustain such previous statements of the witness.—Charlton v. Unis, 4 Grat. 58.

[t] (Wis. 1854) The falsehood of a witness called to prove one side of an issue does not necessarily tend to prove the other side. Thus, where a witness falsely testified that he had not admitted the cutting of timber on plaintiff's land, this does not prove that defendant either cut it, or authorized it to be cut, on plaintiff's land.—Mercer v. Wright, 3 Wis. 645.

(E) CONTRADICTION AND CORROBORATION OF WITNESS.

1. CONTRADICTION, §§ 1267-1283.
2. CORROBORATION, §§ 1284-1289.

Contradiction and corroboration of dying declarations offered in evidence in prosecution for homicide, see "Homicide," vol. 26, cc. 725, 726, § 461.

—— *of experts, see* "Evidence," vol. 20, cc. 3494, 3495, § 2380.

1. CONTRADICTION.

RIGHT TO CONTRADICT TESTIMONY IN GENERAL, § 1267.
RIGHT TO CONTRADICT TESTIMONY OF ONE'S OWN WITNESS, § 1268.
—— PARTY CALLED AS WITNESS BY ADVERSARY, § 1269.
—— WITNESS CROSS-EXAMINED AS TO MATTER NOT SUBJECT OF DIRECT EXAMINATION, § 1270.

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ABSENT WITNESSES AND STIPULATIONS AS TO TESTIMONY, § 1271.
TESTIMONY SUBJECT TO CONTRADICTION, § 1272.
—— IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS IN GENERAL, § 1273.
LAYING FOUNDATION FOR CONTRADICTION, § 1274.
RIGHT OF CROSS-EXAMINER TO CONTRADICT ANSWERS ELICITED ON CROSS-EXAMINATION, § 1275.
COMPETENCY OF CONTRADICTORY EVIDENCE, § 1276.
—— TENDENCY TO CONTRADICT AND EXTENT OF INCONSISTENCY, § 1277.
EXAMINATION OF CONTRADICTING WITNESS, § 1278.
—— RECALLING WITNESS, § 1279.
REBUTTAL OF CONTRADICTION, § 1280.
EXPLANATION OF CONTRADICTION, § 1281.
EVIDENCE OF GOOD CHARACTER OF CONTRADICTED WITNESS, § 1282.
EFFECT OF CONTRADICTION, § 1283.

New trial in criminal prosecutions on ground of newly discovered contradictory evidence, see "Criminal Law," vol. 15, cc. 176, 177, §§ 2333, 2334.

Right to contradict evidence offered on reopening of case in criminal prosecution, see "Criminal Law," vol. 14, c. 2328, § 1626.

§ 1267. Right to contradict testimony in general.

[a] (Ind. 1859) A witness may not only be impeached by evidence of general bad reputation, but by being contradicted by other witnesses.—Terry v. State, 13 Ind. 70.

[b] (Kan. 1889) Where the state in a prosecution for rape introduced testimony showing that a sister of the prosecutrix saw the crime committed, and the defendant, in making his defense, asked the sister whether or not she was present and saw the offense, it was error to refuse to allow her to answer that question.—State v. Spidle, 42 Kan. 441, 22 Pac. 620.

[c] (Mass. 1884) Where, on the question of whether a sale was absolute or conditional, plaintiff's witness has testified to a universal custom, defendant may ask his witness a question calling for a contrary statement as to the custom.—Sears v. Le Better, 137 Mass. 374.

[d] (Tenn. 1859) Where a party avails himself of a statute authorizing him to prove his account by his own oath, he voluntarily places himself in the condition of a witness. His evidence may be contested or opposed by other legal evidence.—Johnson v. Price, 40 Tenn. (3 Head) 549.

[e] (Wis. 1887) If plaintiff offers evidence as to statements of defendant in a particular conversation, defendant may properly testify in rebuttal as to such conversation.—Plano Mfg. Co. v. Frawley, 68 Wis. 577, 32 N. W. 768.

§ 1268. Right to contradict testimony of one's own witness.

Impeachment of one's own witness in general, see ante, §§ 1094–1100.

[a] One may contradict his own witness by proving the facts to be otherwise than as testified by him.

—(U. S. 1829) United States v. Watkins, Fed. Cas. No. 16,649 [3 Cranch, C. C. 441];
(Ala. 1829) Winston v. Moseley, 2 Stew. 137;
(Cal. 1866) Norwood v. Kenfield, 30 Cal. 393;
(Ga. 1880) Cronan v. Roberts, 65 Ga. 678;
(Ill. 1865) Rockwood v. Poundstone, 38 Ill. 199; (1881) Waller v. Carter, 8 Ill. App. (8 Bradw.) 511; (1885) Tobin v. Chicago City Ry. Co., 17 Ill. App. (17 Bradw.) 82;
(Iowa, 1866) Thorn v. Moore, 21 Iowa, 285;
(Ky. 1866) Champ v. Commonwealth, 59 Ky. (2 Metc.) 17, 74 Am. Dec. 388; (1892) Walkup v. Same, 20 S. W. 221;
(La. 1885) State v. Simon, 37 La. Ann. 569;
(Me. 1846) Brown v. Osgood, 25 Me. (12 Shep.) 505; (1854) Hall v. Houghton, 37 Me. 411;
(Mass. 1826) Brown v. Bellows, 21 Mass. (4 Pick.) 179; (1852) Commonwealth v. Starkweather, 64 Mass. (10 Cush.) 59;
(Mich. 1896) Darling v. Thompson, 108 Mich. 215, 65 N. W. 754;
(Mo. 1892) Meyer Bros. Drug Co. v. McMahan, 50 Mo. App. 18;
(N. H. 1849) Seavy v. Dearborn, 19 N. H. 351;
(N. Y. 1874) Coulter v. American Merchants' Union Exp. Co., 56 N. Y. 585; (1876) Gibbs v. Huyler, 41 N. Y. Super. Ct. (9 Jones & S. 190; (1881) Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544;
(N. C. 1845) Shelton v. Hampton, 28 N. C. 216;
(Pa. 1860) White v. Lucas, 4 Phila. 30; (1894) Lewis v. Baker, 162 Pa. 510, 29 Atl. 708;
(S. C. 1839) Farr v. Thompson, Cheves, 37;
(Wis. 1877) Smith v. Ehanert, 43 Wis. 181.

[b] The rule that a party cannot impeach his own witness does not prevent him from introducing testimony the effect of which is to contradict such witness.

—(Ala. 1856) Upson v. Raiford, 29 Ala. 188;
(Conn. 1864) Olmstead v. Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260;
(Ga. 1855) Burkhalter v. Edwards, 16 Ga. 593, 60 Am. Dec. 744; (1877) Skipper v. State, 59 Ga. 63; (1887) Hollingsworth v. Same, 79 Ga. 605, 4 S. E. 560;
(Iowa, 1880) Clapp v. Peck, 55 Iowa, 270, 7 N. W. 587;
(Ky. 1823) Gray v. Gray, 13 Ky. (3 Litt.) 465;
(La. 1874) Boedicker v. East, 26 La. Ann. 209;
(Mass. 1859) Brolley v. Lapham, 79 Mass. (13 Gray) 294; (1864) Whitney v. Eastern R. Co., 91 Mass. (9 Allen) 364;
(Mo. 1888) Edwards v. Crenshaw, 30 Mo. App. 510; (1889) Price v. Lederer, 33 Mo. App. 426;
(Neb. 1889) Blackwell v. Wright, 27 Neb. 269, 43 N. W. 116, 20 Am. St. Rep. 662;
(N. H. 1851) Swamscot Mach. Co. v. Walker, 22 N. H. (2 Fost.) 457, 55 Am. Dec. 172;
(N. J. 1826) Skellinger v. Howell, 8 N. J. Law (3 Halst.) 310;
(N. Y. 1850) Thompson v. Blanchard, 4 N. Y. (4 Comst.) 303; (1854) Parsons v. Suydam, 3 E. D. Smith, 276; (1856) Pickard v. Collins, 23 Barb. 444; (1888) Sherry v. Fredericks, 13 N. Y. St. Rep. 23;
(N. C. 1851) Hice v. Cox, 34 N. C. 315; (1884) Gadsby v. Dyer, 91 N. C. 311; (1892) Chester v. Wilhelm, 111 N. C. 314, 16 S. E. 229; (1896) State v. Mace, 118 N. C. 1244, 24 S. E. 798;
(Pa. 1838) Stockton v. Demuth, 7 Watts, 39, 32 Am. Dec. 735; (1891) Eastern Lumber Co. v. Gill (Com. Pl.) 9 Pa. Co. Ct. R. 630.

[c] (U. S. 1870) A complainant in equity, who takes the deposition of the adverse party without a previous order of court specially reserving his rights, is not thereby estopped to deny the truth of his evidence.—Rison v. Cribbs, Fed. Cas. No. 11,860 [1 Dill. 181].

[d] (U. S. 1890) Where the law obliges a party to call a witness, the party calling him is not precluded from proving the truthfulness of any particular fact by any other competent

testimony in direct contradiction to what such witness may have testified, and this is not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.—United States v. Hall (D. C.) 44 Fed. 864, 10 L. R. A. 324.

[e] (Ala. 1840) The deposition which is taken and read by a party on one trial is evidence, when used by the opposite party, for him, on a subsequent trial of the same action. But it will not conclude the party against whom it is offered; and he may show by the deponent that he was mistaken in the facts which it narrates, and, perhaps, may prove the truth as to the facts by other evidence.—Hallett v. O'Brien, 1 Ala. 585.

[f] (Ala. 1846) In an action on a note given for the purchase price of a horse, defendant, having sought to show by his own witness that the horse was older than represented and was unsound, and having received adverse testimony, was not thereby precluded from proving those facts, notwithstanding the rule that a party cannot discredit his own witness.—Bradford v. Bush, 10 Ala. 386.

[g] (Ala. 1895) It is competent for a party to show that her witness was mistaken in reference to a matter unfavorable to her, and to elicit from such witness the extent or character of his recollection.—Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 South. 540.

[h] (Colo. 1892) A party may prove any material fact by evidence in direct contradiction to the testimony of his own witness, and this not only when it appears that the witness was innocently mistaken, but even when the evidence may collaterally show that he is generally unworthy of belief.—Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348.

[i] (Del. 1838) If a witness to the will denies his own attestation, the party calling him is not prohibited from contradicting or impeaching him.—Rash v. Purnel, 2 Har. 448.

[j] (Ill. 1889) When a witness testifies against the party calling him, and there is no attempt to impeach his character, but evidence is offered to contradict him, it is error to charge that, when a party calls a witness, he vouches for him, and cannot deny that he is worthy of belief.—McFarland v. Ford, 32 Ill. App. 173.

[k] (Ill. 1889) While a party may not impeach the character of his witness, he is not bound by his testimony, and may contradict him by other witnesses, though the evidence so offered may have the effect of showing the witness to be unworthy of credit; and where such evidence is introduced, and there is no impeaching testimony before the jury, an instruction that a party is not permitted, after putting a witness on the stand, to deny that he is worthy of belief, is erroneous, as calculated to mislead.—McFarland v. Ford, 32 Ill. App. 173.

[l] (La. 1881) In a suit upon a life insurance policy, defendant introduced in evidence, without qualification, the certificate of the physician by whom plaintiff's medical examination was made. *Held*, that defendant could not impeach its statements by other testimony.—Maclin v. New England Mut. Life Ins. Co., 33 La. Ann. 801.

[m] (Me. 1846) The right of a party to prove a fact to be different from the statement thereof by a witness introduced by him is not restricted to cases where he is surprised by the testimony in that particular.—Brown v. Osgood, 25 Me. (12 Shep.) 505.

[n] (Md. 1843) A party may show that his witness is mistaken; and he is not precluded from showing the truth by any testimony, oral or written, which he may produce.—Wolfe v. Hauver, 1 Gill, 84.

[o] (Md. 1878) Where a witness gives evidence against the party calling him, who was misled by the prior statements of the witness, the party is not bound by whatever the witness may say, but he is permitted to call other witnesses, not to impeach him, but to contradict him as to a fact material to the issue, in order to show how the fact really is.—Sewell v. Gardner, 48 Md. 178.

[p] (Mass. 1877) If a witness testifies without objection as to the valuation which the assessors of a town have put upon a parcel of land, it is within the discretion of the judge to allow the party calling the witness to put in the assessor's valuation for the purpose of contradicting the testimony of the witness.—Truro v. Freeman, 123 Mass. 187.

[q] (Mass. 1882) At the trial of a criminal case, an accomplice, who was a witness for the government, testified to the guilt of himself and of the defendant, and, on cross-examination, also testified that he made a confession of his guilt to the officer who arrested him; that such confession was induced by promises, on the part of the officer, of protection and favor; and that the confession was true. *Held*, that the government might show, by the testimony of the officer, that the confession was voluntary.—Commonwealth v. Ackert, 133 Mass. 402.

[r] (Mich. 1880) Where, on cross-examination of a child six years old, who had testified that defendant was the person who committed a robbery in his presence, he answers in the affirmative a question as to whether his father had not told him that defendant was the man, it is proper to allow the father to testify that he had not so told the boy, this not being an attempt to impeach the boy, but evidence to show that the boy had not made a conclusion of identity from improper data.—McGuire v. People, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265.

[s] (Mich. 1892) Where, after the court had erroneously ruled that certain facts could not be brought out on cross-examination of plaintiff's witness, defendant made the witness his own for the purpose of showing those facts, defendant can contradict the witness.—Pickard v. Bryant, 92 Mich. 430, 52 N. W. 788.

[t] (Mo. 1854) A party cannot introduce evidence merely to discredit his own witness; but if to establish a fact he introduces a witness who fails to prove it, he may prove the fact by another, though in so doing he may show the first witness guilty of perjury.—Brown v. Wood, 19 Mo. 475.

[tt] (N. Y. 1830) If a party calls a witness to prove a particular fact and fails in establishing it by him, he may prove the fact by another witness, or may show that the account given by the first witness is incorrect.—Lawrence v. Barker, 5 Wend. 301.

[u] (N. Y. 1848) A party cannot be allowed to insist that his own witness is not to be believed. He has the right, if surprised by his testimony, to show by other witnesses that the facts testified to are otherwise; but he cannot impeach him directly or indirectly.—Hunt v. Fish, 4 Barb. 324.

[uu] (N. Y. 1848) A party calling a witness may show by evidence that he was mistaken in some of his statements and conclusions, while in others he was correct.—Keutgen v. Parks, 4 N. Y. Super. Ct. (2 Sandf.) 60.

[v] (N. Y. 1861) In an action in which the defendants had set up a counterclaim, one of them, being examined as a witness, testified that the demand had been assigned, among other things, to himself, by the other defendant. *Held*, the question arising upon objections to a referee's report, that defendants might prove by another witness that the demand was expressly excepted from the assignment, and that

the defendant who had taken the assignment had agreed to defend the suit and enforce the counterclaim for the benefit of both defendants.—Platt v. Thorn, 21 N. Y. Super. Ct. (8 Bosw.) 574.

[vv] (N. Y. 1861) The rule that a party will not be permitted to impeach his own witness does not prevent him from proving material facts, though the effect is to contradict his own witness; but as to collateral matters, the party calling the witness is bound by his testimony.—Bok v. Vincent, 12 Abb. Prac. 137.

[w] (N. Y. 1867) A party is not permitted to assert or present evidence showing one state of facts to be true, and afterwards to assert or prove to the court that his prior evidence is untrue, or not to be relied on. But where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or with intentional falsehood, and there is no bad faith on the part of the party producing the witness, he is allowed to give evidence explaining or even contradicting his own witness.—People v. Sheehan, 49 Barb. 217.

[ww] (N. Y. 1873) A party may be examined in his own behalf, to contradict a witness previously called and examined by him, where such party's testimony is not necessarily an impeachment of the witness.—Hildreth v. Shepard, 65 Barb. 265.

[x] (N. Y. 1892) Assuming, in an action for damages for failure to ship a car load of eggs on a particular day, that the broker through whom the sale was made was defendants' agent, they are not bound by his testimony as to the conversation between him and defendants at the time of the sale, and it is error to exclude evidence offered by the latter as to such conversation, though contradictory of the evidence of such broker.—Fitch v. Kennard (Com. Pl.) 2 Misc. Rep. 95, 20 N. Y. Supp. 845, reversing (City Ct. N. Y. 1892) 19 N. Y. Supp. 468.

[xx] (N. Y. 1896) A party is not precluded from contradicting the adverse testimony of his own witness, where the matter in dispute is directly at issue in the case.—Cruse v. Findlay (Sup.) 16 Misc. Rep. 576, 38 N. Y. Supp. 741.

[y] (N. C. 1840) Where a party's witness gave his opinion as to a fact, it was *held* that the party might show the fact to be different; this not being a discrediting of his own witness.—Spencer v. White, 23 N. C. 236.

[yy] (N. C. 1886) A party may show, by evidence aliunde, that his witness was mistaken in his statement of a fact.—McDonald v. Carson, 94 N. C. 497.

[z] (N. C. 1895) The fact that a witness testified in the negative on an issue whether a deed was delivered at its date did not preclude the party offering him from relying on the presumption to the contrary.—Kendrick v. Dellinger, 117 N. C. 491, 23 S. E. 438.

[zz] (Pa. 1782) Where a party calls a witness who is contradicted by another witness of his own, he cannot call the first to disprove what the second said.—Rapp v. Le Blanc, 1 Dall. 63, 1 L. Ed. 38.

[zzz] (Tex. 1884) The state may rebut a statement of the prosecuting witness that he was induced by the county attorney to make the affidavit on which the prosecution was based.—Gonzales v. State, 16 Tex. App. 152.

§ 1269. —— Party called as witness by adversary.

Impeachment in general, see ante, § 1097.
Matter brought out on cross-examination of party, see post, § 1270 [c].

[a] (U. S. 1885) Where a party is called by the opposite party, he stands in a different position from an ordinary witness; he is necessarily hostile to the party calling him, who is not bound by what he testifies. It may be that he cannot be directly impeached by the party who called him, but he may be freely contradicted, even though this may incidentally discredit him.—Dravo v. Fabel (D. C.) 25 Fed. 116.

[b] (Ill. 1893) Where a plaintiff calls the defendant as a witness, he is not bound by such statements of the witness as are mere conclusions.—Rindskoph v. Kuder, 145 Ill. 607, 34 N. E. 484.

[c] (Ind. 1857) Where plaintiff called defendant as a witness, and he testified to new matter pertinent to the issue, but not responsive to inquiries put to him, the plaintiff may testify in respect to such new matter; otherwise, if the matter about which he testifies be at once pertinent and also responsive to the inquiries put to him.—Thompson v. Shæffer, 9 Ind. 500.

[d] (Ind. 1858) Where one party, called by the other to testify as to who paid a note claimed as a set-off by such other, the latter alleging that he was a surety merely thereon, testifies that the alleged surety paid it, and then states certain arrangements amounting to a satisfaction, this is such an introduction of new matter as entitles the other party to testify concerning it.—Draggoo v. Draggoo, 10 Ind. 95.

[e] (Ind. 1890) The introduction by a plaintiff of the examination of the defendant as a witness, taken before the trial, under Rev. St. 1881, § 510, does not make the latter plaintiff's own witness, so as to preclude plaintiff from specifically negativing any statement contained in it.—Crocker v. Agenbroad, 122 Ind. 585, 24 N. E. 169.

[f] (Iowa, 1863) Where defendant was called as a witness by the plaintiff, under the provisions of the statutes, making the sworn admission of a party equivalent to a written contract, *held* that the plaintiff could not introduce other evidence, to impeach that of the defendant.—Hunt v. Coe, 15 Iowa, 197.

[g] (Iowa, 1866) Where plaintiffs call the defendant as a witness to prove that an indebtedness on an account still justly subsists, in order to defeat the bar of the statute (Revision, § 2742), and the defendant denies such indebtedness, then the plaintiffs are concluded thereon by such denial.—Thorn v. Moore, 21 Iowa, 285.

[h] (Iowa, 1888) Defendant alleged that plaintiff did not own the note sued on, and called her as a witness. She testified that she had contributed $200, earned by herself, to the purchase of the note, and that her father furnished the rest of the money. *Held*, that defendant was not bound by her statement, but could show that her husband owned the note.—Gardner v. Connelly, 75 Iowa, 205, 39 N. W. 650.

[i] (Ky. 1869) Under Civ. Code, § 673, a party may introduce his adversary and put to him particular questions, so as to establish particular facts, and if the party testifying shall confine his responses to those inquiries, the party calling on him cannot be heard to contradict them; but if the witness shall depart from a direct and simple response, by stating other or new matter not responsive to the questions, not being introduced for such purpose, but availing himself of such privilege as a witness to testify in his own behalf, his adversary can be heard on such new matter.—Hester v. Wallace, 69 Ky. (6 Bush) 182.

[j] (Md. 1875) Laws 1864, c. 104, § 4, does not alter the rules of evidence, except in so far as not to hold a party bound by the proof of the other party to the suit, when placed by him as a witness upon the stand; but he is permitted to rebut it by adverse testimony, or by proof

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of the admissions made by the party so examined.—Mason v. Poulson, 43 Md. 161.

[k] (Mich. 1890) Where plaintiff puts defendant on the stand for the purpose of showing his fraud, his testimony is to be judged according to its merits, and his denial of the fraud creates no estoppel.—Webber v. Jackson, 79 Mich. 175, 44 N. W. 591, 19 Am. St. Rep. 165.

[l] (Minn. 1892) One calling the opposite party to testify under Laws 1885, c. 193, is not concluded by any statement of fact he may make in testifying, but may show it false either by other evidence or by inferences or arguments drawn from the testimony of the witness himself.—Schmidt v. Durnam, 50 Minn. 96, 52 N. W. 277.

[m] (Mo. 1857) Where plaintiff is examined as a witness by defendant, and, in answering a question, gives the reason for his answer, which, if true, would warrant the answer, such reason cannot be considered new matter within Prac. Act, art. 24, § 9, authorizing defendant to answer to alleged new matter denying its truth.—Christy's Adm'r v. Horne, 24 Mo. 242.

[n] (Mo. 1892) In an action to set aside a judgment on a note as being fraudulent, and confessed with intent to delay and defraud the promisor's creditors, plaintiff must abide the results of having made the payee, who recovered the judgment, his witness as to the character of the transaction, who testified that it was an ordinary business transaction, and denied knowledge of the promisor's embarrassment.—Claflin v. Dodson, 111 Mo. 195, 19 S. W. 711.

[o] (N. Y. 1850) A party calling the adverse party as a witness may call witnesses to rebut the testimony given by such party.—Armstrong v. Clark, 2 Code Rep. 143.

[p] (N. Y. 1887) In an action for separation and alimony, defendant, called as a witness by plaintiff, testified that he did not abandon his wife, and that he sought in good faith to restore their marital relations. *Held*, that plaintiff might dispute specific facts sworn to by him, and the trial court had the right to confront his statements with all the facts and circumstances of his conduct.—Cross v. Cross, 108 N. Y. 628, 15 N. E. 333.

[q] (N. Y. 1889) A party who examines his adversary is not bound by his testimony.—Arms v. Arms, 113 N. Y. 646, 21 N. E. 147.

[r] (N. Y. 1890) The fact that defendant, when called as a witness for plaintiff, testified that he was a resident of Dresden, and had no intention to return to New York, and also contradicted plaintiff's evidence to the contrary, did not conclude plaintiff on the question of his residence.—De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652.

[s] (N. C. 1890) Code, § 579, abolishes the action to obtain discovery under oath, and provides that "no examination of a party shall be had on behalf of the adverse party, except in the manner prescribed in this chapter." Section 580 provides that a party to an action may be compelled to testify at the instance of the adverse party. Section 583 provides that "the examination of the party thus taken may be rebutted, by adverse testimony." *Held*, that a party who puts his adversary on the stand may contradict him by testimony of other witnesses inconsistent with his.—Helms v. Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893.

§ 1270. —— Witness cross-examined as to matter not subject of direct examination.

Conclusiveness of answer on cross-examination as to character, see ante, § 1149.

—— *as to interest and bias, see* ante, § 1198.

Conclusiveness of denial of inconsistent statements, see ante, § 1244.

Impeachment in general, see ante, § 1098.

Right of cross-examiner to contradict answers elicited on cross-examination, see post, § 1275.

[a] (Iowa, 1876) Where a witness, after having been dismissed by the party who called him, testifies, upon examination by the other party, to new matter, he becomes the witness of the latter; and the party who first called him may contradict him in respect of the new matter.—Arts v. Chicago, R. I. & P. R. Co., 44 Iowa, 284.

[b] (Miss. 1887) On a trial for burglary a witness for the state, indicted for the same offense, fully testified as to the guilt of defendant, and, on cross-examination, stated that he, while confined in jail, had sent for one of the prosecuting attorneys, and, being informed that the person divulging all the facts would not be prosecuted, he determined "to make a clean breast and come clear." To rebut this statement, the state proved by counsel referred to that no such promise had been made. *Held* error, as a party introducing a witness cannot, to support evidence given on direct examination, and discredit that drawn out on cross-examination, directly attack his credit by proving facts irrelevant to the issue.—Madden v. State, 65 Miss. 176, 3 South. 328.

[c] (N. Y. 1854) Where plaintiff calls defendant as a witness, and, on cross-examination, defendant presents a counterclaim, as set up in his answer, plaintiff may be examined in reference to the evidence given by defendant on the counterclaim.—Harpell v. Irwin, 1 Abb. Prac. 144, 3 E. D. Smith, 565.

[d] (N. Y. 1867) Where a witness for plaintiff, in cross-examination, testified that plaintiff had promised to reward him in the event of recovery, plaintiff was entitled to contradict the witness.—Bemis v. Kyle, 5 Abb. Prac. (N. S.) 232.

[e] (Va. 1857) Evidence brought out in cross-examination explanatory or relative to the evidence in chief of the witness is as much the evidence of the party calling the witness as the examination in chief.—Horner v. Speed, 2 Pat. & H. 616.

§ 1271. Absent witnesses and stipulations as to testimony.

Right to impeach in general, see ante, § 1090.

[a] The district attorney, who admits that absent witnesses, to procure whose testimony an accused applied for a continuance, would swear to the facts stated if present, is not thereby precluded from contradicting or discrediting the facts stated, in the same way that the testimony of the witnesses could, if given, be contradicted or discredited.

—(Ky. 1821) Olds v. Commonwealth, 10 Ky. (3 A. K. Marsh.) 465;

(La. 1877) State v. Colbert, 29 La. Ann. 715.

[b] (U. S. 1888) Statements in writing of absent witnesses, introduced under an admission that the witnesses, if present, would testify to the facts therein stated, are equally subject to contradiction as if the witnesses had testified in open court.—United States v. Taylor (C. C.) 35 Fed. 484.

[c] (Ill. 1837) The admission, by consent, of an affidavit for a continuance on the ground of the absence of a material witness in evidence, is an admission of the facts which the affidavit states can be proved by the witness, and they cannot be contradicted.—Willis v. People, 2 Ill. (1 Scam.) 399.

[d] (Ill. 1871) If, upon application of defendant in a criminal case for a continuance on the

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ground of the absence of witnesses, the state's attorney will admit the truth of the statements which it is alleged the absent witnesses would testify to, there is no objection to the practice of requiring defendant, under such circumstances, to proceed to trial; but in such case the state cannot be permitted to contradict the statements admitted, as this would take from the accused the right to have his witnesses seen and heard by the jury.—Van Meter v. People, 60 Ill. 168.

[e] (Ind. 1882) Where the state admits, to avoid a continuance, that the testimony which would be given by defendant's absent witnesses is true, it is precluded from introducing evidence to contradict it, but it may introduce evidence, if competent for other purposes, which incidentally tends to contradict the facts admitted to be true.—Burchfield v. State, 82 Ind. 580.

[f] (Miss. 1886) Since a motion for a continuance because of the absence of a witness must be decided on the affidavit as made, where the court permits defendant to be examined by the prosecuting attorney as to the truth of his affidavit, and his answers proving contradictory, the prosecuting attorney agrees to admit the facts stated in the affidavit, as the evidence of the absent witness, and immediately, on the reading of the affidavit, has the counsel of accused sworn and proves by him the contradictory statements, a new trial will be granted.—Hubbard v. State, 64 Miss. 315, 1 South. 480.

[g] (Neb. 1896) An admission of plaintiff that proposed witnesses of defendant, if time applied for should be allowed to procure their evidence, would give certain testimony, is not equivalent to an admission that such proposed testimony is indisputable.—Burris v. Court, 48 Neb. 179, 66 N. W. 1131.

[h] (N. C. 1863) It is error for the court, in a capital case, to order that an affidavit, made by the defendant for the continuance of the cause, should be read as evidence for the affiant, with leave to the state to offer testimony in contradiction, the defendant objecting, and insisting on a continuance. If the statement of the witness is to be controverted, the party offering the testimony has the right to have his witnesses testify before the jury.—State v. Twiggs, 60 N. C. 142.

[i] (N. C. 1881) The admission by a party that the testimony of an absent witness would be the same as that set out in a certain statement of facts does not preclude him from introducing evidence impeaching said statement, such evidence tending to support the main issue, and not being collateral to it.—Rhea v. Deaver, 85 N. C. 337.

§ 1272. Testimony subject to contradiction.

[a] (U. S. 1895) A witness who testifies that he does not recollect hearing a certain person, not a witness, make a certain statement, cannot be impeached by testimony that such person made such a statement in the witness' presence.—Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343.

[b] (Conn. 1879) In an action for an injury from a defective bridge, where plaintiff testified that the load which had broken through the bridge was, in his opinion, a proper one, and that he had driven such loads through neighboring towns without breaking through the bridges, it was competent for defendants to show in rebuttal that the plaintiff had broken through the sluice bridges with such loads and injured the roads in one of the neighboring towns.—Wilson v. Town of Granby, 47 Conn. 59, 36 Am. Rep. 51.

[c] (Ga. 1888) The controlling question being whether defendant set fire to his own house, and thereby caused the damage complained of, and the plaintiff having testified that a third person stated in the hearing of defendant that he (defendant) did it, to which he made no response, and this third person, when examined in behalf of defendant, having denied making the statement, it was error not to allow plaintiff, in reply, to prove by another witness that he was present and heard the defendant's witness make the statement at the time and place mentioned by the plaintiff in her testimony.—Bray v. Latham, 81 Ga. 640, 8 S. E. 64.

[d] (Ga. 1891) In an action against a carrier for damages for failure to deliver peaches in time, whereby they were damaged, plaintiffs alleged that defendant contracted to deliver the peaches in New York, which was denied by defendant, which claimed that its agreement was to deliver to a connecting line. *Held*, that where statements of defendant's agent, in reply to plaintiffs' request for defendant's reason for not complying with the alleged contract, have been brought out by defendant's interrogatories to the agent, plaintiffs may testify in regard to them in rebuttal, and for the purpose of impeaching the agent.—Central Railroad & Banking Co. v. Skellie, 86 Ga. 686, 12 S. E. 1017.

[e] (Ill. 1893) Where a party testifies that he destroyed certain papers on the advice of other people, whom, on cross-examination, he names, the adverse party may show that such persons did not give such advice.—Butler v. Cornell, 148 Ill. 276, 35 N. E. 767.

[f] (Md. 1892) A witness testified voluntarily, and not in response to any question, that he had interviewed the father of defendants as to settling the case, and that the father acknowledged that the accident was the fault of defendants, saying that he had always feared an accident there, and that he desired to settle the case. *Held*, that it was error to refuse defendants' offer to prove by their father that he had made no such statements.—Wise v. Ackerman, 76 Md. 375, 25 Atl. 424.

[g] (Mass. 1891) In a prosecution for keeping intoxicating liquors with intent to illegally sell them, where a witness for defendant denies that he was found in an intoxicated condition on defendant's premises when searched by the officers, and further states that he had not drunk intoxicating liquors for the past two years, the prosecution was properly allowed to show what had been such witness' habits as to the use of intoxicating liquors within the time mentioned.—Commonwealth v. Goodnow, 154 Mass. 487, 28 N. E. 677.

[h] (Mass. 1895) Where one, in contradiction to evidence stating that he did certain acts as the agent of another, denies the acts, and also that he is agent, evidence contradicting his denial of agency is competent as affecting his credibility as a witness.—Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189.

[i] (Mich. 1866) After a witness had given certain testimony, and the case was closed, a dispute arose as to what he had testified, and he was recalled and asked by the judge to state what he had testified, and he so stated. *Held*, that testimony could not be admitted to contradict him, as his answer agreed with what the judge certified it to have been before the dispute arose.—People v. Sackett, 14 Mich. 320.

[j] (N. Y. 1882) Where a witness denies on cross-examination that he has attempted to suborn a witness to swear falsely in the cause in favor of the party calling him, the adverse party may give evidence to contradict him in that respect, on the ground that acts done by the witness touching the cause, which tend to discredit him, are not collateral merely in respect to which his answer is conclusive.—Gulerette v. McKinley, 27 Hun, 320.

[k] (N. Y. 1892) Where, in an action for the unlawful taking of goods which defendants justified on the ground that they had been induced

to sell the goods to plaintiff's assignors by false statements as to their solvency, there is evidence that the agent of a board of trade had obtained information as to the standing of plaintiff's assignors, and one of the latter testifies that the agent at the time of obtaining such information stated that he wanted it only for a special purpose, it was error to exclude testimony of the agent in denial, as it was material as to the extent of the credibility to be given to such witness.—Rosellen v. Herzog, 64 Hun, 639, 19 N. Y. Supp. 314.

[l] (Pa. 1895) Where a defendant testified that he had not made threats against deceased, testimony relating to such threats is admissible on behalf of the state, after defendant's evidence is all in, to impair his credibility.—Commonwealth v. Weber, 167 Pa. 153, 31 Atl. 481, 36 Wkly. Notes Cas. 193.

[m] (S. C. 1831) Where the answer of a witness is in any wise material to the issue, he may be contradicted by the adverse party.—Smith v. Henry, 2 Bailey, 118.

[n] (S. C. 1886) It is not error to allow the prosecution, in the reply, to offer testimony for the purpose of contradicting a witness for the accused, although the subject-matter of the testimony formed a part of the direct case of the prosecution.—State v. Prater, 26 S. C. 198, 613, 2 S. E. 108.

[o] (Tex. 1887) On a prosecution for murder, the theory of the state, that the only witness for the defendant was not present at the homicide, is supported by evidence that the defendant's witness swore positively to the color of the coat worn by the deceased, and that in fact the deceased did not have on such a coat.—Gibson v. State, 23 Tex. App. 414, 5 S. W. 314.

[p] (Tex. 1890) On an issue as to the authority of an agent to make a sale between the purchaser and attaching creditors of the principal, the latter testified that he had not authorized the sale. On cross-examination he admitted that, after the levy, he signed a written ratification in which the agent's authority was acknowledged. *Held* that, the principal having admitted signing the writing, the ratification was not admissible for the purpose of impeaching him.—Conner v. Littlefield, 79 Tex. 76, 15 S. W. 217.

§ 1273. — Irrelevant, collateral, or immaterial matters in general.

[a] It is only as to matters relevant to the issue that a witness can be contradicted for the purpose of impeachment.

—(Ala. 1853) Ortez v. Jewett, 23 Ala. 662; (1895) Louisville Jeans Clothing Co. v. Lischkoff, 109 Ala. 136, 19 South. 436;

(Ark. 1893) Jones v. Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679;

(Colo. 1896) Mullen v. McKim, 22 Colo. 468, 45 Pac. 416;

(Ill. 1885) Hanchett v. Kimbark, 2 N. E. 512;

(Iowa, 1885) Clark v. Reiniger, 66 Iowa, 507, 24 N. W. 16; Eikenberry v. Edwards, 67 Iowa, 14, 24 N. W. 570;

(Kan. 1894) State v. Ray, 54 Kan. 160, 37 Pac. 996;

(Mass. 1834) Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 153; (1881) Shurtleff v. Parker, 130 Mass. 293, 39 Am. Rep. 454;

(Mich. 1882) Driscoll v. People, 47 Mich. 413, 11 N. W. 221; (1884) Dalman v. Koning, 54 Mich. 320, 20 N. W. 61;

(Minn. 1868) Hicks v. Stone, 13 Minn. 434 (Gil. 398); (1869) State v. Staley, 14 Minn. 105 (Gil. 75);

(Mo. 1872) Lohart v. Buchanan, 50 Mo. 201; (1895) Carder v. Primm, 60 Mo. App. 423, 1 Mo. App. Rep'r, 167;

(N. Y. 1869) Gandolfo v. Appleton, 40 N. Y. 533;

(S. C. 1831) Smith v. Henry, 2 Bailey, 118;

(Tex. 1890) Sutor v. Wood, 76 Tex. 403, 13 S. W. 321;

(Wis. 1867) Noonan v. Ilsley, 22 Wis. 27.

[b] (Ala. 1838) A witness cannot be examined as to any distinct collateral fact for the purpose of impeaching his testimony afterwards; but if the witness voluntarily swears falsely in relation to matters not within the issue, he may be impeached by contradicting him.—Dozier v. Joyce, 8 Port. 303.

[c] (Ala. 1879) Although evidence as to a dispute between the accused and a witness for the prosecution is admissible, the witnesses who furnished such evidence cannot be impeached by the contradictory testimony of other witnesses, if the dispute and its subject had no connection with the offense of which the defendant is accused.—Haley v. State, 63 Ala. 83.

[d] (Ala. 1887) A confession by defendant that he struck the blow, assigning as a reason that deceased had struck him on a former occasion, was given in evidence. *Held*, that evidence that it was not deceased who struck defendant on the occasion referred to was not admissible to impeach the credibility of the witness relating the confession, as it would raise an issue as to a collateral fact.—Lang v. State, 84 Ala. 1, 4 South. 193, 5 Am. St. Rep. 324.

[e] (Ala. 1888) In an action on an insurance policy, on the defense that the house was fraudulently burned, evidence was introduced that assured was about the house in the night when it burned, in a nightgown, saying that he had been nearly suffocated before he discovered the fire. Defendant introduced evidence that assured drew out his watch from his clothes under his nightgown, and told the time to bystanders. Assured denied this, and testified in rebuttal that he had no watch. *Held*, that proof by another witness that assured had no watch was not admissible, as it was only an attempt to impeach the opposing witness by attacking a part of his testimony which was not material.—Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 6 South. 143, 4 L. R. A. 848.

[f] (Ariz. 1889) The affidavit of a prosecuting witness that he is a poor person, made to entitle him to his necessary expenses in attending, cannot be introduced by defendant to impeach his truthfulness, as the witness in making such affidavit was not swearing to any matter material to the issue, and he could be contradicted only on a material matter.—Territory v. Clanton, 20 Pac. 94.

[g] (Ark. 1894) Defendant was indicted for slandering prosecutrix, in charging that she committed fornication with his sons. The prosecutrix testified, on direct examination, that she never had sexual intercourse with defendant's sons, "or any one else." *Held*, that defendant could show, for the purpose of contradicting her, that she had committed fornication with others than defendant's sons, though section 2902, Mansf. Dig., provides that a witness shall not be impeached "by evidence of particular acts."—McArthur v. State, 59 Ark. 431, 27 S. W. 628.

[h] (Cal. 1895) On trial for cattle theft, where there was no direct evidence of a taking by defendant, and he testified that he obtained the animal by a trade made on a certain day in January, with one who testified that no such trade took place, and that defendant was not at his place during that month, defendant, after stating that he was at such place during that month, should be allowed to state whether such witness was then there, over objection that the question was irrelevant, since the statement would affect the credibility of such

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witness' testimony.—People v. Ward, 105 Cal. 652, 39 Pac. 33.

[i] (Cal. 1896) Where the defense is alibi, it is not error to allow the people, in rebuttal, to contradict the witnesses who testified to the alibi, by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw defendant at the place distant from the scene of the crime.—People v. Evans, 41 Pac. 444.

[j] (Colo. 1891) A party, having introduced certain testimony tending to sustain his side of the issue, is precluded from denying the materiality of such testimony for the purpose of preventing its contradiction.—Grimes v. Hill, 15 Colo. 359, 25 Pac. 698.

[k] (Ga. 1890) On a trial for using abusive language, the accused having stated that he did not abuse the prosecutor, but that they met and parted friendly, it is competent, in rebuttal of his statement, to show that, on the same occasion, he used other abusive words in addition to those alleged in the indictment, and the witness may recite the words so used.—Porter v. State, 86 Ga. 362, 12 S. E. 583.

[l] (Ga. 1893) Where a witness, by way of accounting for his presence at the scene of the tort, states that just before going there he made a particular purchase at a certain store, the opposite party can show that he made no such purchase at that time.—East Tennessee, V. & G. Ry. Co. v. Daniel, 91 Ga. 768, 18 S. E. 22.

[m] (Ind. 1869) A witness on a criminal trial cannot be contradicted by other witnesses on a matter not affecting the cause on trial.—Fogleman v. State, 32 Ind. 145.

[n] (Kan. 1884) On a trial for murder, had more than a year after the homicide, a witness for defendant testified to certain material facts. The witness had resided in the immediate vicinity all the time, and was aware of the homicide and the consequent excitement, and of the arrest and commitment of defendant. The facts so testified to were the appearance of three strangers riding rapidly away from the place of the homicide right after the time it must have taken place. *Held*, that the witness having named certain persons to whom he told such facts, such persons might, in the discretion of the court, state that nothing of the kind was ever told them.—State v. McKinney, 31 Kan. 570, 3 Pac. 356.

[o] (Kan. 1890) On a trial for larceny, a witness for the state was asked what the offense was for which he was then in jail. On re-examination, in explaining this matter, the witness gave testimony implicating defendant in this offense, which was different from that for which he was on trial, but no objection was made to such testimony. *Held*, that his testimony as to such collateral matters cannot be contradicted by witnesses for the defense.—State v. Blakesley, 43 Kan. 250, 23 Pac. 570.

[p] (Me. 1845) Where a witness has been introduced and has testified, testimony to contradict him is not to be excluded as contradicting that which is collateral or irrelevant.—State v. Blake, 25 Me. (12 Shep.) 350.

[q] (Md. 1843) A party cannot introduce illegal testimony and then impeach the witness by discrediting the facts illegally established.—Wolfe v. Hauver, 1 Gill, 84.

[r] (Minn. 1861) Questions intended to impeach immaterial testimony may be properly excluded.—Derby v. Gallup, 5 Minn. 119 (Gil. 85).

[s] (Minn. 1869) Admitting that impeaching evidence is admissible on the trial of the preliminary question as to whether a confession was made voluntarily, the witness testifying to such confession may not be contradicted on facts not material to such issue.—State v. Staley, 14 Minn. 105 (Gil. 75).

[t] (N. Y. 1823) If a witness for the prosecution answer a question which is totally irrelevant, the opposite counsel may call witnesses to contradict him.—People v. Pentz, 1 Wheeler, Cr. Cas. 240.

[u] (N. Y. 1831) A witness cannot be examined as to a distinct collateral fact for the purpose of impeaching his testimony by contradicting him; but if a question relative to such fact be put and answered, evidence cannot afterwards be adduced for the purpose of contradiction.—Harris v. Wilson, 7 Wend. 57.

[v] (N. Y. 1887) On a trial for murder defendant was asked, on cross-examination, if he had entered a certain house at night. He denied this, and on redirect testified that he had never entered any house at night with intent to steal. Evidence was then introduced to contradict defendant in this regard. *Held* error, necessitating a new trial, when the evidence connecting the prisoner with the crime charged is entirely circumstantial, and the conviction is of murder in the first degree.—People v. Greenwall, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. Rep. 415.

[w] (N. C. 1889) A witness testified for defendant as an expert that, in his opinion, defendant's culvert was sufficiently large for the size of the stream; that it was the largest culvert he ever built. *Held*, that plaintiff could show that a culvert built for another company, a short distance further down stream, was larger than defendant's.—Emery v. Raleigh & G. R. Co., 102 N. C. 209, 9 S. E. 139.

[ww] (Pa. 1861) Where a witness, when asked his reason for leaving a certain county, answers that he left to engage in his business elsewhere, the records of the court of quarter sessions of that county, showing the finding of two bills of indictments against him for misdemeanors, are not admissible to show that he gave a false reason, where he had not been asked whether such indictments had been found; for the question was about irrelevant matter, which could not be contradicted, and the records of the indictments, as offered, did not contradict the witness.—Wright v. Cumpsty, 41 Pa. (5 Wright) 102.

[x] (Tex. 1888) Where the issue is whether a certain wreck was caused by a loose wheel, and a witness has testified that he was not informed that the wreck was caused by a loose wheel, he cannot be contradicted or impeached on the collateral issue as to whether he was so informed or not.—Gulf, C. & S. F. Ry. Co. v. Coon, 69 Tex. 730, 7 S. W. 492.

[xx] (Vt. 1854) Though it is not ordinarily allowable to contradict a witness on a matter wholly collateral, the court may, in its discretion, depart from the rule, and in such case the court, by submitting to the jury the question whether on the whole evidence they believe the main fact testified to by the witness, does all that the party offering the contradictory evidence is entitled to have him do.—Powers v. Leach, 26 Vt. 270.

[y] (Vt. 1868) In an action by a school-teacher to recover wages, her veracity cannot be attacked by evidence of what she told her scholars in reply to inquiries in respect to trouble she had had in a former school, and by evidence to show that this account was incorrect, where such evidence has no bearing on any point in issue.—Wells v. School Dist. No. 2 in Granby, 41 Vt. 353.

[yy] (Vt. 1878) The prosecution having given evidence tending to prove the adultery on the day alleged, defendant testified on his own behalf that neither on the day alleged, nor at any time after the alleged particeps was married, did he have intercourse with her, or solicit her, and, further, that never in his life did he have intercourse with her. *Held*, that evidence that

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defendant had intercourse with her before her marriage was admissible in rebuttal and to impeach defendant's credit.—State v. Arnold, 50 Vt. 731.

[z] (Vt. 1883) As to a collateral fact, a party to a suit is bound by the answer of his witness.—Lewis v. Barker, 55 Vt. 21.

[zz] (Va. 1895) It is proper to refuse to allow a witness for the defense to contradict a witness for the commonwealth who states that another witness for the commonwealth had not told him that he could not tell the same tale he had told before the justice, as this introduces a purely collateral issue.—Robertson v. Commonwealth, 22 S. E. 359.

§ 1274. Laying foundation for contradiction.

[a] A witness cannot be cross-examined as to collateral facts not brought out on the examination in chief, with the view of impeaching him by contradicting him.

—(Ala. 1853) Ortes v. Jewett, 23 Ala. 662; (1879) Flinn v. Barber, 64 Ala. 193;
(Cal. 1881) Pierce v. Schaden, 59 Cal. 540;
(Fla. 1891) Eldridge v. State, 27 Fla. 162, 9 South. 448;
(Ky. 1884) Crittenden v. Commonwealth, 6 Ky. Law Rep. 20;
(Me. 1874) State v. Benner, 64 Me. 267;
(Md. 1883) Sloan v. Edwards, 61 Md. 89;
(Mass. 1876) Kaler v. Builders' Mut. Fire Ins. Co., 120 Mass. 333;
(Minn. 1889) Paddock v. Kingsley, 41 Minn. 528, 43 N. W. 393;
(Mo. 1871) Harper v. Indianapolis & St. L. R. Co., 47 Mo. 567, 4 Am. Rep. 353; (1894) McFadin v. Catron, 120 Mo. 252, 25 S. W. 506;
(N. H. 1846) Tibbetts v. Flanders, 18 N. H. 284; (1849) Seavy v. Dearborn, 19 N. H. 351;
(N. Y. 1830) Lawrence v. Barker, 5 Wend. 301;
(N. C. 1836) Redford v. Rice, 19 N. C. 39; (1885) State v. Glisson, 93 N. C. 506;
(S. C. 1831) Jones v. McNeil, 2 Bailey, 466;
(Tex. 1881) Brite v. State, 10 Tex. App. 368;
(Vt. 1894) Perry v. Moore, 66 Vt. 519, 29 Atl. 806;
(Va. 1882) Langhorne v. Commonwealth, 76 Va. 1012.

[b] The reception of evidence on cross-examination for the purpose of contradicting the witness is within the discretion of the trial court.

—(Ala. 1895) A. G. Rhodes Furniture Co. v. Weeden, 106 Ala. 252, 19 South. 318;
(Mass. 1896) Conant v. Johnston, 165 Mass. 450, 43 N. E. 192;
(Minn. 1896) Matthews v. Hershey Lumber Co., 65 Minn. 372, 67 N. W. 1008;
(N. Y. 1896) Laidlaw v. Sage, 2 App. Div. 374, 37 N. Y. Supp. 770.

[c] (Ark.) Defendant's affidavit for a continuance, made at a former term, is not admissible to lay a foundation for evidence that his statements therein were false.—(1881) Burris v. State, 38 Ark. 221; (1885) Polk v. Same, 45 Ark. 165.

[d] (Cal. 1896) It is not error to permit the people to rebut the circumstances called out on cross-examination of the witnesses to an alibi, though no foundation is laid for contradiction, where no objection is made on such ground.—People v. Evans, 41 Pac. 444.

[e] (Ga. 1850) Where there is a dispute as to localities, a diagram, drawn in accordance with the testimony of a witness, may be submitted to the jury without having been first exhibited to the witness whose evidence it contradicts.—Bishop v. State, 9 Ga. 121.

[f] (Ky. 1895) It is too late, after all but one of the arguments to the jury have been made, to lay the foundation for the contradiction of a witness.—Delaney v. Commonwealth, 35 S. W. 1037.

[g] (Md. 1843) Where a party desires to introduce hearsay evidence for the purpose of impeaching a witness, he must apprise the court of such design, as it is incompetent to introduce illegal testimony for the purpose of impeachment of the witness by disproving the facts thus illegally established.—Wolfe v. Hauver, 1 Gill, 84.

[h] (Md. 1896) It is proper to refuse to permit a witness to be cross-examined, to impeach her, on wholly irrelevant issues.—Hopper v. Beck, 83 Md. 647, 34 Atl. 474.

[i] (Mich. 1886) In assumpsit for breaking a log jam, a witness in defendant's behalf was asked on cross-examination if he did not tell certain men under him to roll logs in and to keep the channel of the creek full, and responded in the negative. On rebuttal two of the men working under him were permitted to testify that he did so instruct them. *Held*, that it was proper to ask such witness what he instructed his men to do, and to impeach his testimony if untrue as to what he said as well as to what he did.—Butterfield v. Gilchrist, 63 Mich. 155, 29 N. W. 682.

[j] (Mich. 1887) In a prosecution for seduction, a witness for defendant testified that he had had intercourse with the complaining witness at his brother-in-law's house, where she was at the time assisting him to take care of the brother-in-law's sister. The prosecution asked him if his brother-in-law had not sued him for board; and, upon objection, stated that he proposed to show that such suit had been brought, and witness had defended by claiming compensation for nursing plaintiff's sick sister, and had sworn that he had no assistance at such nursing. *Held*, that the question was legitimate cross-examination, and that the explanation of the prosecution was proper.—People v. Jensen, 66 Mich. 711, 33 N. W. 811.

[k] (Minn. 1893) In an action for a balance alleged to be due on a contract to build a mill, defendants set up a breach of the contract as a counterclaim, and alleged that instead of turning out from 50 to 70 barrels a day, as the contract provided, the mill only turned out 35 barrels a day. *Held*, where a miller who had been in defendants' employ testified that he had made a test of the mill, and that it turned out 60 barrels of first-class flour in a day, it was proper to ask him on cross-examination whose wheat he was grinding, in order to lay a foundation for showing that the flour was not first-class.—Pye v. Bakke, 54 Minn. 107, 55 N. W. 904.

[l] (N. Y. 1874) In an action to enjoin the defendant from surreptitiously obtaining and communicating to another foreign news dispatches sent by Atlantic cable exclusively to the plaintiff, the defendant, after testifying that the foreign news he so furnished was obtained by him several times each day directly by cable from London, and that the dispatches came to a banking house in New York, from whom he received them, was asked, "What banking house is that?" *Held*, that the question was proper and pertinent, as the plaintiff had a right to contradict the statement, and to test its accuracy in any legal manner. And that the question being material and competent, the defendant was in contempt for refusing to answer.—Kiernan v. Abbott, 3 Thomp. & C. 755, 1 Hun, 109.

[m] (N. Y. 1889) Where, in an action for selling liquor without a license, defendant denies

all knowledge of the alleged offense, and a witness testifies that he saw two persons in defendant's saloon when he bought the liquor, it is competent to ask him, on cross-examination, who they were, so as to enable defendant to produce them in his own behalf, to impeach the credibility of the witness.—People v. Fitzgerald, 55 Hun, 605, 8 N. Y. Supp. 81.

[n] (Pa. 1853) There can be no ground of objection to a deposition that it purported to contradict a witness whose deposition had been previously taken on the other side, but who was not examined on the trial, and that the first witness had not been questioned as to the matter testified to in the second deposition.—McKelvy v. DeWolfe, 20 Pa. (8 Harris) 374.

[o] (Pa. 1879) Whether the attention of a witness must first be called to the contradictory matter with which it is proposed to discredit him rests in the discretion of the court, and unless the discretion is abused, its exercise is not ground for reversal.—Rothrock v. Gallaher, 91 Pa. 108.

[p] (Tex. 1889) In an action by an engineer against a railroad company for personal injuries received by the derailment of his engine, it is reversible error to permit the plaintiff to ask his witness if he did not observe a low joint where the accident occurred, and if he did not call the road master's attention to it at the time of the accident as the cause of the derailment, and make a certain remark to him, though the road master had testified on cross-examination that he did not remember that the witness called his attention to the joint, or what was said, as no proper predicate was laid for impeaching the road master.—Ft. Worth & D. C. R. Co. v. Thompson, 75 Tex. 501, 12 S. W. 742.

§ 1275. Right of cross-examiner to contradict answers elicited on cross-examination.

Conclusiveness of answer on cross-examination as to character, see ante, § 1149.

—— *as to interest and bias, see* ante, § 1198.

Conclusiveness of denial of inconsistent statements, see ante, § 1244.

Impeachment in general, see ante, § 1098.

[a] If a witness be cross-examined upon a collateral matter, evidence will not be admitted to disprove that matter, in order to discredit the witness.

—(U. S. 1836) United States v. White, Fed. Cas. No. 16,675 [5 Cranch, C. C. 38];

(Ala. 1859) Seale v. Chambliss, 35 Ala. 19;

(Cal. 1867) People v. Jones, 31 Cal. 565; (1878) Same v. McKeller, 53 Cal. 65; Same v. Bell, Id. 119;

(Colo. 1882) McKeone v. People, 6 Colo. 346;

(Conn. 1857) Winton v. Meeker, 25 Conn. 456;

(D. C. 1880) United States v. Neverson, 1 Mackey, 152;

(Ill. 1884) Moore v. People, 108 Ill. 484;

(Ind. 1885) Welch v. State, 104 Ind. 347, 3 N. E. 850;

(Iowa, 1844) Wau-kon-chaw-neek-kaw v. United States, Morris, 332; (1857) Cokely v. State, 4 Iowa (4 Clarke) 477; (1894) Swanson v. French, 92 Iowa, 695, 61 N. W. 407;

(Kan. 1888) Atchison, T. & S. F. R. Co. v. Townsend, 39 Kan. 115, 17 Pac. 804; (1895) State v. Zimmerman, 3 Kan. App. 172, 42 Pac. 828; (1895) Butler v. Cooper, 3 Kan. App. 145, 42 Pac. 839;

(Me. 1837) Page v. Homans, 14 Me. (2 Shep.) 478; (1857) Brackett v. Weeks, 43 Me. 291; (1872) Bell v. Woodman, 60 Me. 465; (1874) Davis v. Roby, 64 Me. 427;

(Md. 1834) Goodhand v. Benton, 6 Gill & J. 481;

(Mass. 1834) Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 153;

(Mich. 1878) Hitchcock v. Burgett, 38 Mich. 501; (1890) People v. Hillhouse, 80 Mich. 580, 45 N. W. 484;

(Minn. 1861) Derby v. Gallup, 5 Minn. 119 (Gil. 85);

(Miss. 1888) Garman v. State, 66 Miss. 196, 5 South. 385;

(Mo. 1876) Iron Mountain Bank v. Murdock, 62 Mo. 70; (1889) St. Louis Gaslight Co. v. American Fire Ins. Co., 33 Mo. App. 348; (1892) Manget v. O'Neill, 51 Mo. App. 35;

(Neb. 1884) Frederick v. Ballard, 16 Neb. 559, 20 N. W. 870; (1889) McDuffie v. Bentley, 27 Neb. 380, 43 N. W. 123; (1894) Carpenter v. Lingenfelter, 42 Neb. 728, 60 N. W. 1022, 32 L. R. A. 422;

(N. H. 1851) Hersom v. Henderson, 23 N. H. (3 Fost.) 498;

(N. Y. 1863) Plato v. Reynolds, 27 N. Y. 586; (1868) Crounse v. Fitch, 1 Abb. Dec. 475; (1871) Green v. Rice, 33 N. Y. Super. Ct. (1 Jones & S.) 292; (1872) Rosenzweig v. People, 6 Lans. 462; (1872) Rosenweig v. Same, 63 Barb. 634; (1883) People v. Ware, 29 Hun, 473; (1884) Hilsley v. Palmer, 32 Hun, 472; (1886) People v. Buddensieck, 4 N. Y. Cr. R. 230; (1887) Sherman v. Delaware, L. & W. R. Co., 106 N. Y. 542, 13 N. E. 616; (1896) Wiley v. Goodsell, 3 App. Div. 452, 38 N. Y. Supp. 376;

(N. C. 1871) Clark v. Clark, 65 N. C. 655; (1873) State v. Elliott, 68 N. C. 124;

(Ohio, 1877) Clinton v. State, 33 Ohio St. 27; (1879) Brown v. Hunkin, 4 Ohio Dec. 502;

(Pa. 1835) Griffith v. Eshelman, 4 Watts, 51; (1870) Hildeburn v. Curran, 65 Pa. (15 P. F. Smith) 59; (1878) Hester v. Commonwealth, 85 Pa. 139;

(Tenn. 1882) Rocco v. Parczyk, 77 Tenn. (9 Lea) 328;

(Utah, 1895) Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 43 Pac. 112;

(Vt. 1858) State v. Thibeau, 30 Vt. 100;

(W. Va. 1889) State v. Goodwin, 32 W. Va. 177, 9 S. E. 85;

(Wis. 1871) Posey v. Rice, 29 Wis. 93.

[aa] If a party cross-examining a witness draw out facts material to the issue other than those elicited by the party calling him, he may contradict or discredit them.

—(D. C. 1880) United States v. Neverson, 1 Mackey, 152;

(Me. 1831) Ware v. Ware, 8 Me. (8 Greenl.) 42; (1840) Lewis v. Hodgdon, 17 Me. (5 Shep.) 267;

(Mo. 1889) St. Louis Gaslight Co. v. American Fire Ins. Co., 33 Mo. App. 348;

(N. Y. 1866) Frank v. Manny, 2 Daly, 92; (1873) Newberry v. Furnival, 46 How. Prac. 139, affirmed (1874) 56 N. Y. 638;

(W. Va. 1883) Welch v. Franklin Ins. Co., 23 W. Va. 288.

[b] (U. S. 1893) On the issue of contributory negligence plaintiff testified that at the time of the accident he was not intoxicated. On cross-examination he testified that he was not a drinking man, and had never been intoxicated while he lived in C. *Held*, that this was collateral matter, and, having been brought out on cross-examination, evidence was not admissible to contradict it.—Union Pac. Ry. Co. v. Reese, 56 Fed. 288, 5 C. C. A. 510, 15 U. S. App 92.

[bb] (U. S. 1895) One who is alleged to have caused a loss by the negligent doing of certain

work, and who testifies, in an action for such loss, that he did the work properly, and in the same manner that he did similar work at another place, may be cross-examined as to the way in which he did such other work, and contradicted by showing that he did it negligently.—Southern Bell Telephone & Telegraph Co. v. Watts, 66 Fed. 460, 13 C. C. A. 579, 25 U. S. App. 214.

[c] (Ala. 1888) On an indictment for murder, witnesses were introduced to testify to the good reputation of deceased for peace and quiet, and were asked, on cross-examination, if they had heard of specified and notorious difficulties in which deceased had been involved, to which they replied that they had not. *Held* that, as the specific acts of the deceased were irrelevant, it was proper to refuse to permit the defendant to introduce witnesses to prove these specific difficulties, for the purpose of impeaching the state's witnesses.—Hussey v. State, 87 Ala. 121, 6 South. 420.

[cc] (Ala. 1889) Defendant and one C. being camped with their teams by the roadside, deceased and one M. came along and began cursing the parties in camp for leaving their wagons so that parties approaching would have to turn out of the beaten track. This was the commencement of the difficulty ending in the homicide. Defendant testified that his wagon was not left in the road. *Held*, that defendant having denied on cross-examination that it had been said in his presence and hearing that the difficulty occurred because deceased's wagon ran into defendant's, it was competent to show that such statement was made in a conversation in which defendant participated, and was not denied by him.—Kirby v. State, 89 Ala. 63, 8 South. 110.

[d] (Ark. 1879) Where a witness for the state, in a murder trial, testifies on cross-examination that she washed the defendant's bloody shirt by direction of her husband, the defendant cannot contradict her as to such collateral or immaterial matter by showing that she washed the shirt of her own accord.—Butler v. State, 34 Ark. 480.

[dd] (Cal. 1886) Where, in a criminal case, one of the witnesses of the defendant is, after examination or cross-examination, recalled by the prosecution for further cross-examination in order to lay a foundation for impeaching him, the prosecution is bound by the answers of the witness in regard to matters collateral and not relative to the issues being tried, and, as to such matters, he cannot be contradicted; and it would be error to allow, against the objections of the defendant, any evidence for such a purpose.—People v. Webb, 70 Cal. 120, 11 Pac. 509.

[e] (Cal. 1890) Defendant on his direct examination denied that he had procured a third person to set the fire, as testified to by a witness for the people. On his cross-examination, he was asked how long he had known such third person, and answered, only six or seven days before the fire. *Held*, that the people could not show in rebuttal that defendant had known the third person for a longer period, as a party cannot cross-examine his adversary's witnesses on irrelevant matters for the purpose of eliciting something to be contradicted.—People v. Tiley, 84 Cal. 651, 24 Pac. 290.

[ee] (Cal. 1890) In an action to quiet title, defendant claimed under a grant made by the Mexican governor of California in 1838, but plaintiff alleged that such grant was really made in 1848, after California had become subject to the United States. A witness for defendant having said that he had received a certain grant, and stated some particulars in regard to it, *held*, that it was proper, for the purpose of impeachment, although this was a collateral matter, to cross-examine him as to such grant, and then to show by another witness that there was no trace of it in the proper archives.—Davis v. California Powder Works, 84 Cal. 617, 24 Pac. 387.

[f] (Cal. 1890) In an action for slander, defendant justified by attempting to show that plaintiff was connected with the cattle stealing charged by defendant. On cross-examination of the thief, he testified that while he was under arrest one T. told him that the whole matter of the stealing had been settled, but nothing was said to connect plaintiff with such settlement. *Held*, that this statement was merely a collateral matter, and the witness could not be impeached by contradicting it.—Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1.

[ff] (Cal. 1895) In a murder trial, evidence is not admissible to contradict a witness who has testified, on cross-examination, that he executed a bond for certain Chinamen under the internal revenue law, but denied that he had been paid for it.—People v. Collins, 105 Cal. 504, 39 Pac. 16.

[fff] (Cal. 1895) Where a witness for plaintiff has testified, on cross-examination, to facts not called for by anything in his examination in chief, he cannot be contradicted in regard thereto.—Redington v. Pacific Postal Tel. Cable Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132.

[g] (Ill. 1892) In an action by a passenger against a railroad company for personal injuries, where plaintiff states, on cross-examination, that he did not go on the platform while the train was at the station next to the one at which the accident occurred, testimony contradicting such statement is inadmissible; the matter sought to be contradicted being immaterial, and drawn out on cross-examination.—Lake Erie & W. R. Co. v. Moraln, 140 Ill. 117, 29 N. E. 869, affirming (1889) 36 Ill. App. 632.

[gg] (Ind. 1881) The provision of Prac. Act, § 244, that the party producing a witness may in all cases contradict him by other evidence, does not allow the cross-examination of a witness produced by the adverse party as to matters which are collateral and irrelevant to the issue, merely for the purpose of contradicting him.—Talburt v. Berkshire Life Ins. Co., 80 Ind. 434.

[ggg] (Ind. 1889) Where a witness, on cross-examination, is asked whether he had not drank with one of the adverse witnesses, and answers that he had on two occasions, and is asked whether he had not done so a third time, at a particular time and place, and states that he had not, evidence contradicting the latter statement is properly excluded as immaterial.—Simons v. Busby, 119 Ind. 13, 21 N. E. 451.

[h] (Ind. 1889) Where impeaching witnesses state, on cross-examination, the names of the persons from whom they have heard reports as to the reputation of the person to be impeached, such statement, being on a collateral issue, is conclusive.—Robbins v. Spencer, 121 Ind. 594, 22 N. E. 660.

[hh] (Ind. 1892) Where, on a bastardy trial, the relatrix testifies that defendant begot the child about a certain date in a certain city, and defendant testifies that, two weeks before, he went to a town 23 miles distant, and remained till after said date, and on cross-examination denies that a week before said date he accompanied another woman home from church in said city, the testimony of such woman that he did then accompany her is admissible in rebuttal.—State v. Taylor, 4 Ind. App. 296, 30 N. E. 628.

[hhh] (Iowa, 1876) In a suit for personal injury, a minister of the gospel was introduced by defendant, and testified that he visited the plaintiff shortly after he was injured; and narrated conversations he had with plaintiff in re-

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gard to the manner of the injury and the circumstances under which it was received, and other matters; and, on the direct examination, stated that he offered plaintiff the consolations of religion; and, on the cross-examination, was asked if he refused to pray with plaintiff, and replied that he did not. Plaintiff was permitted to testify, in rebuttal, that the witness was requested to pray for him, and refused.—Artz v. Chicago, R. I. & P. R. Co., 44 Iowa, 284.

[i] (Iowa, 1887) The accused testified, on his second cross-examination, that he was not at the place of the homicide at the time it was committed. *Held*, that the prosecution could afterwards contradict the accused upon that point.—State v. Johnson, 72 Iowa, 393, 34 N. W. 177.

[ii] (Iowa, 1890) Where, in a suit aided by attachment in which defendant files counterclaims for unwarranted levy of the attachment, one of the plaintiffs starts to testify as to information he received before the levy, for the purpose of showing his reason for suing out the attachment, but is interrupted, and does not finish, defendant, who brings out for the first time, on cross-examination, that he got his information from a rating-book issued by a commercial agency, makes him his own witness as to such evidence, and cannot rebut it.—Deere v. Bagley, 80 Iowa, 197, 45 N. W. 557.

[iii] (Kan. 1890) In a prosecution for keeping and maintaining a common nuisance, where intoxicating liquors were unlawfully sold, on cross-examination defendant admitted that he gave intoxicating liquors to a witness who testified against him, but stated that he treated the witness at a drugstore, where he obtained the liquor, without making or giving any statement prescribed by the statute. Upon rebuttal, the prosecution proved that his evidence in regard to the statement was false. *Held*, that the admission of this evidence to contradict the defendant on a collateral matter was not sufficient cause for reversal.—State v. Rieck, 43 Kan. 635, 23 Pac. 1076.

[j] (Ky. 1882) A witness cannot be cross-examined as to facts which are collateral and irrelevant to the issue, for the purpose of contradicting him; his answers about such facts being conclusive against the party calling for them. Therefore, where, on the trial of an indictment for murder, a witness for defendant testified that soon after the killing he was in the room where deceased lay, and that J. came up to the body, and leaned over it, and seemed to be fumbling some little time, when he straightened up, and said, "Say nothing about this boys," and went into another room, but that he did not see the pistol to which another witness had testified was then taken from deceased, it was error to permit the prosecution to prove the declarations of witness out of court, that he knew nothing about a pistol on deceased.—Loving v. Commonwealth, 4 Ky. Law Rep. 457.

[jj] (Ky. 1886) Where one of the commonwealth's witnesses has been recalled by the defense, and foundation laid for contradicting him, it is error for the trial court to refuse to allow a witness for the defense to give evidence contradicting the first witness, and showing that the evidence which he gave, important and prejudicial to the defendant, was false.—Joseph v. Commonwealth, 1 S. W. 4.

[jjj] (Ky. 1887) On a trial for manslaughter, defendant, on cross-examination, was asked if the wife of deceased did not, just after her husband was shot, go to him and smear her hands and arms with his blood; and, an affirmative answer being given, the widow was introduced, who testified that she did not do so. *Held*, that this was an immaterial matter, and a witness cannot be examined upon a subject not relevant to the issue for the mere purpose of contradicting him.—Radford v. Commonwealth, 5 S. W. 343.

[k] (Ky. 1889) The theory of the state in a murder trial was that defendant had borrowed a penknife, with which the killing was done, for that purpose. Defendant claimed to have borrowed it to trim his nails, which his nephew, from whom he borrowed it, corroborated. The state, on cross-examination, asked the nephew if he had not borrowed a whetstone that morning to sharpen the knife, and if he had not said that his uncle was going to have a difficulty that day. He answered both questions in the negative. *Held*, that the state could not call witnesses to impeach the nephew on those points.—Randolph v. Commonwealth, 11 S. W. 813.

[kk] (La. 1893) On a trial for the murder of a policeman while engaged with two associates in making an arrest, after cross-examining one of such other officers with a view to showing that he might have accidentally shot deceased during the scuffle, defendant cannot contradict the answers of the witness given on such cross-examination, as they bear only on facts collateral to the issue.—State v. Donelon, 45 La. Ann. 744, 12 South. 922.

[kkk] (Me. 1893) On libel for liquors found in a certain room in claimant's hotel, a witness testified that she occupied the next room, and had heard claimant in the first room with different persons, talking about liquors and prices, and, on cross-examination, that A. was one of such persons. Claimant called A., and asked him if he was ever in said room. *Held* relevant to impeach the former witness, though on a matter brought out on cross-examination.—State v. Intoxicating Liquors, 85 Me. 304, 27 Atl. 178.

[l] (Md. 1888) Where defendant, on cross-examination, denies that he had been told a certain fact by B., it is competent to contradict him by the testimony of B. that he did tell him.—Turnbull v. Maddux, 68 Md. 579, 13 Atl. 334.

[ll] (Mass. 1835) In an action against a person as a partner, a witness testified in chief that he had given notice of the withdrawal of defendant, and of the general dissolution of the partnership, and that he was "confident that all the neighborhood were notified in two days." On his cross-examination, the plaintiff's counsel inquired whether he gave the same notice to the other creditors of the partnership as he had testified that he gave to the plaintiff; and the witness replied affirmatively, and gave the names of several to whom he had given notice. *Held*, that it was competent for the plaintiff to call the person so named to prove that the witness had not given them any such notice as he had stated.—Howe v. Thayer, 34 Mass. (17 Pick.) 91.

[lll] (Mass. 1843) Where a witness, on cross-examination, stated what he understood to be the meaning of a certain written contract, made jointly by himself and another with a third person, it was *held* that the party who cross-examined him could not be permitted to give evidence that, when such contract was made, all the parties thereto understood it to have a meaning different from that stated by the witness.—Brockett v. Bartholomew, 47 Mass. (6 Metc.) 396.

[m] (Mass. 1854) A witness, on cross-examination by the plaintiff, answered in the negative the following question: "Did you not say to W. [another witness], after he had left the stand, that if you had been upon the stand in his place, when cross-examined by the defendant's counsel, you would have said something, even if it had been untrue?" *Held*, that the plaintiff could not be allowed to contradict this answer by other evidence.—Harrington v. Inhabitants of Lincoln, 68 Mass. (2 Gray) 133.

[mm] (Mass. 1857) On the trial of an indictment for unlawful sales of intoxicating liquors, two witnesses testified that they drank such liquors together at the defendant's shop and other places; one of them testified that his object was to inform against the sellers; but both testified that the other did not know of this object, and he testified that his only object was to gratify his appetite. He was asked, on cross-examination, whether, on leaving one of these places, the other witness did not whistle for him, and answered in the negative. *Held*, that this answer was immaterial, and could not be contradicted.—Commonwealth v. Farrar, 76 Mass. (10 Gray) 6.

[mmm] (Mass. 1861) In a suit against a railroad company for personal injury from a collision, the defendants' station agent being called as a witness by the defendants, and being inquired of on cross-examination whether he ever asked the plaintiff, or the plaintiff's partner, for a bill of the damage done, or ever obtained more than one bill thereof, or ever said that a certain clerk of the defendants, who was on the train which caused the collision, was going away, and that he wished to take the amount of the bill out of the clerk's wages, and that the clerk was careless, no authority being proved in the agent to do or say these things, it was *held* that these matters were collateral, and that the answers of the witness could not be contradicted by other evidence.—Fletcher v. Boston & M. R. R., 83 Mass. (1 Allen) 9, 79 Am. Dec. 695.

[n] (Mass. 1867) On a trial for damages by the owners of land taken to extend a street in a city, witnesses for the petitioners testified that the land taken was well adapted to the erection of a large building with two large shops underneath, and that there was, and for several years had been, a large demand for such shops, of 25 feet front by 100 feet deep, in that neighborhood. On cross-examination the witnesses named one of that description in the neighborhood. *Held*, that the respondents in defense might introduce evidence to show that the dimensions of the shop were different from those testified to by petitioner's witnesses.—Whitney v. City of Boston, 98 Mass. 312.

[nn] (Mass. 1870) Where a mill laborer in an action for a personal injury, which occurred on Monday, testified that she worked that day and part of the next, and the defendant called the overseer, who testified that she worked until sometime Thursday, and on cross-examination said that she came to him Thursday, and said she could not attend to her work, and wanted to be let out, and he let her go, it was competent for plaintiff to testify in rebuttal that this conversation occurred Tuesday, and that she did not see or talk with him afterwards, since the overseer's cross-examination stated a new and material fact which plaintiff had a right to rebut by her own denial.—Sheren v. City of Lowell, 104 Mass. 24.

[nnn] (Mass. 1880) Where, on an indictment for manslaughter, the sister of the person killed, testifying for the government, stated on cross-examination where she and the deceased had lived, it was not improper to exclude evidence by defendant tending to show that the witness had falsely stated the residence of the deceased and herself, as such inquiry as to the residence was not material.—Commonwealth v. Dunan, 128 Mass. 422.

[o] (Mass. 1889) In an action on an account, three of the items of which were notes alleged to have been transferred by defendant to plaintiffs, one of the notes was withdrawn, and no recovery sought thereon. Defendant, on cross-examination, testified that he had never seen that note, and that the indorsement was a forgery. *Held*, that it was prejudicial error to permit plaintiffs to contradict him, as the matter was collateral, and immaterial.—Alexander v. Kaiser, 149 Mass. 321, 21 N. E. 376.

[oo] (Mass. 1892) Where defendant, on trial for violating the liquor laws, asks witnesses for the state if they were not drunk at another time than that respecting which they testified in chief, which they denied, evidence offered by defendant in rebuttal was properly excluded as immaterial.—Commonwealth v. Jones, 155 Mass. 170, 29 N. E. 467.

[ooo] (Mass. 1894) Where a witness for defendant testified in chief as to a certain conversation with deceased, and, on cross-examination concerning it, testified to another conversation of a later date, plaintiff may in rebuttal contradict the testimony in regard to the second conversation, if it was closely connected with the testimony in chief, was material, and a contradiction tending to discredit the witness.—Cloutier v. Grafton & U. R. Co., 162 Mass. 471, 39 N. E. 110.

[p] (Mass. 1895) In an action for injuries to an employé due to the breaking of a bolt in a paper machine, the manufacturer of the machine testified for defendant, as an expert, that all bolts used in such machines were made of steel, and, on cross-examination, stated that he had sent a new machine to defendant, but that it was improbable that he sent an iron bolt, because none were made at his establishment. *Held*, that the testimony on cross-examination was immaterial, but that plaintiff was bound thereby, and could not show that an iron bolt was sent with the new machine.—Chalmers v. Whitmore Mfg. Co., 164 Mass. 582, 42 N. E. 98.

[pp] (Mich. 1895) Where, in an action for injuries from a dog bite, a doctor, who was a witness for defendant, testified that he examined plaintiff's leg after he was bitten, and discovered from the scar that there had been an ulcer on the leg before plaintiff was bitten, and plaintiff's counsel showed the witness a scar on his leg, and asked what caused it, and the witness answered that he could not tell, but it was certain that the bone was not involved, and that the scar must have been the result of a flesh wound; that he could not say whether there had been an ulcer or running sore, but that it looked as if there was suppuration; that he could not state whether the bone was injured, but that it was not seriously injured—it was error to allow the counsel to testify that he received the wound from an ax, and that a piece of bone had been taken out, and that there was never any discharge or running sore.—Kennett v. Engle, 105 Mich. 698, 63 N. W. 1009.

[ppp] (Miss. 1896) Where the answer of a witness on cross-examination as to matters not brought out on direct examination would not be admissible if offered in evidence by the cross-examining party, the matter so elicited is collateral, and cannot be contradicted.—Williams v. State, 73 Miss. 820, 19 South. 826.

[q] (Mo. 1884) On a murder trial the father of deceased was asked on cross-examination whether he had not made a certain threat against defendant. And on his denial a witness was introduced to contradict him. *Held*, that the testimony as it did not raise a collateral issue should have been admitted.—State v. Cooper, 83 Mo. 698.

[qq] (Mo. 1894) A question, on cross-examination, to defendant, sued for the price of goods, who claims that before the sale he had sold out his business, and notified the plaintiff's salesman that he would not be responsible for any more goods purchased in his name, as to whether he had given like notice to salesmen for other houses, is collateral to the issue, and he cannot be contradicted by testimony that he had not given such notice as testified to by him.—

Scharff v. Grossman, 59 Mo. App. 199, 1 Mo. App. Rep'r, 11.

[qqq] (N. H. 1859) The rule is that any question which could not be proposed by the party calling the witness, because of its immateriality, is inadmissible when proposed on cross-examination by the other party; and if answered, the answer cannot be contradicted.—Combs v. Winchester, 39 N. H. 13, 75 Am. Dec. 203.

[r] (N. H. 1880) On a writ of entry, plaintiff claimed under a deed from a third person, and a witness testified for him that she saw such third person on the day of the deed, and he showed her his money, and stated how much he had received. She was asked on cross-examination, for the purpose of showing that she was not old enough to know anything of the transaction, when and by whom she was married, and she answered that she was married in 1864 by L. Defendants then introduced the widow of L., who testified that he died in 1857. The defendants then offered to show when the witness was married, but the evidence was rejected. *Held*, that if such testimony tended to weaken her evidence to any greater extent by showing the true date of her marriage, it would be contradicting her on a collateral issue, and to what extent that should be carried was a question for the trial court.—Perkins v. Towle, 59 N. H. 583.

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[sss] (N. Y. 1868) In an action for damages for the seduction of the plaintiff's daughter, testimony was given by the daughter, on cross-examination by the defendant, concerning certain previous acts of unchastity on her part with other persons. *Held*, that the defendant might contradict such testimony by other witnesses.—Hogan v. Cregan, 29 N. Y. Super. Ct. (6 Rob.) 138.

[t] (N. Y. 1868) Where, upon cross-examination, a witness is asked how he knows facts testified to by him upon the direct examination and answers by repeating statements made to him by others, the party asking the question does not make such statements evidence against himself.—Monk v. Union Life Ins. Co., 29 N. Y. Super. Ct. (6 Rob.) 455.

[tt] (N. Y. 1887) On a trial for murder, defendant was asked, on cross-examination, if he had entered at night a certain house. He denied this, and swore on redirect examination that he had never entered any house in the night with intent to steal. *Held* error to allow evidence to contradict these statements, the evidence on cross-examination being collateral to the issue, and the evidence on redirect having been rendered competent by the course of the cross-examination.—People v. Greenwall, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. Rep. 415.

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[uuu] (N. Y. 1891) The answers made by a witness touching collateral matters upon cross-examination, during a preliminary trial in a police court, are conclusive upon the defendant asking such questions, and, in a subsequent trial upon indictment, he cannot introduce evidence to impeach the testimony of such witness in those particulars.—People v. Fleming, 60 Hun, 576, 14 N. Y. Supp. 200.

[v] (N. Y. 1892) Where expert witnesses who have testified as to the handwriting of certain letters are shown other letters, and are asked on cross-examination whether they are in the same handwriting, the cross-examining party is bound by their answer, since it is a collateral issue.—People v. Murphy, 135 N. Y. 450, 32 N. E. 138, affirming (1892) 63 Hun, 624, 17 N. Y. Supp. 427.

[vv] (N. Y. 1892) In an action against a railway company for a personal injury, a physician testified for defendant that before the alleged injury he examined the plaintiff, and found him to be in a condition which with reasonable certainty would have resulted in the disabilities attributed to the injury, and that he was sure of the date, because he had entered it on his books at the time; on cross-examination he stated that he kept a record of his consultations in chronological order. A handwriting expert thereafter testified that in his opinion all the entries in the physician's record purporting to be of different dates were made at the same time. The competency of the expert was not questioned. *Held*, that this was admissible as going to disprove the alleged consultation, and not in violation of the rule that a party bringing out evidence as to collateral matter on cross-examination cannot thereafter contradict it.—Van Tassel v. New York, L. E. & W. R. Co. (Com. Pl.) 1 Misc. Rep. 299, 20 N. Y. Supp. 708, judgment affirmed (1894) 142 N. Y. 634, 37 N. E. 566, and distinguishing Gandolfs v. Appleton (1869) 40 N. Y. 533.

[vvv] (N. Y. 1893) Where plaintiff has drawn out of defendant, on cross-examination, that he spoke of plaintiff's claim as a blackmailing scheme, plaintiff may show by competent evidence that this did not correctly represent defendant's attitude when plaintiff's claim was urged upon him.—Chesebrough v. Conover, 66

Hun, 634, 21 N. Y. Supp. 566, 568, judgment affirmed (1893) 140 N. Y. 382, 35 N. E. 633.

[w] (N. Y. 1895) In an action to recover penalty from defendant for practicing medicine without registration as required by law, where it was admitted that defendant was not a registered physician, defendant's testimony on cross-examination that he had never practiced medicine relates, not to a collateral matter, but to a material issue, and therefore plaintiff may contradict it.—City of New York v. Roller (Com. Pl.) 11 Misc. Rep. 324, 32 N. Y. Supp. 139.

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[www] (N. C. 1887) On the trial of defendant for larceny, the prosecuting witness was asked on cross-examination if he had not gone to defendant's house, and finding him absent left a message with his wife. He denied leaving such message, and defendant's wife was called and asked if the witness had not left such a message, but she was not allowed to answer the question. *Held*, that the answer was properly excluded, as the examination, instead of being general, related to particulars, which were likely to distract the mind of the jury from the real issue.—State v. Ballard, 97 N. C. 443, 1 S. E. 685.

[x] (N. C. 1890) On a criminal trial a witness for the state was asked if he had not written a letter making a false charge against a young man. He answered that he had not, and the defense offered evidence that there was a general report that he had written the letter. *Held*, that the fact was collateral, and the answer conclusive, and if not, it could not be contradicted by general report.—State v. Hawn, 107 N. C. 810, 12 S. E. 455.

[xx] (N. C. 1895) Where, on prosecution for bastardy, the prosecuting witness testifies on cross-examination that she never had intercourse with any other man, evidence of intercourse with other men at about the time the child was begotten is admissible to impeach her.—State v. Perkins, 117 N. C. 698, 23 S. E. 274.

[xxx] (Ohio, 1879) Where, in an action for breach of warranty in the sale of a horse, defendant is cross-examined as to why he subpœnaed a certain witness, and under objection testifies that he subpœnaed him because he had stated to him that plaintiff said he had injured the horse in driving him across a railroad track, his answers are binding on the plaintiff, and plaintiff cannot call the person subpœnaed by defendant for purposes of contradiction.—Brown v. Hunkin, 2 Cleve. Law Rep. 281, 4 Ohio Dec. 502.

[y] (Pa. 1870) In ejectment defendant alleged that plaintiff concealed his title and encouraged him to buy, and evidence was admitted that defendant had been informed by a stranger of plaintiff's title, and defendant testified on cross-examination that he did not know whether the stranger had informed him. *Held*, such cross-examination did not relate to a collateral matter, and defendant might be contradicted.—Fehley v. Barr, 66 Pa. (16 P. F. Smith) 196.

[yy] (Pa. 1892) Evidence by defendant, on cross-examination, denying that he had received the proceeds of other notes, not in suit, which had been indorsed by him, and which had been negotiated by the maker, who also negotiated the one in suit, cannot be contradicted by plaintiff in rebuttal, since such cross-examination related to an irrelevant matter.—Second Nat. Bank v. Wentzel, 151 Pa. 142, 24 Atl. 1087, 31 Wkly. Notes Cas. 33.

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[zz] (Tex. 1889) The issue being as to defendant's identity, a witness was asked by the state on cross-examination if he had received a letter from defendant after the commission of the crime, asking if defendant was accused of it. *Held*, that as the witness denied receiving the letter the state could not call another witness to contradict the testimony.—Johnson v. State, 27 Tex. App. 168, 11 S. W. 106.

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[zzzz] (Vt. 1862) Where a witness, on cross-examination, is inquired of regarding a new subject, not connected with any matter for which his evidence was offered by the other side, but for the benefit of the cross-examining party, the latter cannot contradict his reply to such inquiry.—Fairchild v. Bascomb, 35 Vt. 398.

§ 1276. Competency of contradictory evidence.

Competency of husband or wife, see ante, § 135.

[a] (Ala. 1885) A witness cannot be impeached by proof of declarations of third persons, not made in his presence.—Clarke v. State, 78 Ala. 474, 56 Am. Rep. 45.

[b] (Cal. 1894) A writ of attachment, and the sheriff's return thereon, in a certain case between plaintiff and his vendor, and a memorandum furnished by the garnishee, are admissible in connection with a cross-examination of such garnishee when they tend to contradict statements made by him on direct examination.—Nichol v. Laumeister, 102 Cal. 658, 36 Pac. 925.

[c] (Colo. 1895) In an action for personal injuries, defendant offered to prove in rebuttal, by an insurance agent and the books of the company, that certain scars claimed by the plaintiff to be the result of the injury were in fact caused prior thereto. *Held* admissible to affect the character and credibility of the witness.—Globe Smelting & Refining Co. v. Spann, 6 Colo. App. 146, 40 Pac. 198.

[d] (Ga. 1871) On a criminal trial, a witness denied that one P. had sued the defendant in her name. The court permitted proof to be made that a suit was pending in her name by P. as her next friend, but refused to permit the declaration and accompanying papers to be read to the jury. *Held*, that this was not error; as the contents of the papers were not material to the issue, which was simply whether or not a suit had been brought by P. in the witness' name.—Powers v. State, 44 Ga. 209.

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[f] (Md. 1843) The declarations of a person who is a competent witness cannot be offered in evidence merely because they are in reply to the testimony of other witnesses.—Whiteford v. Burckmyer, 1 Gill, 127, 39 Am. Dec. 640.

[g] (Md. 1883) Where a witness in a will contest had testified on cross-examination that he had been on friendly terms with the testator up to the time of the latter's death, evidence that the testator had used unfriendly language relative to such witness, out of his presence, was not admissible to impeach the witness, without proof that the witness had heard or knew of such language.—Layman v. Conrey, 60 Md. 286.

[h] (Mass. 1855) Where testimony to a fact is founded mainly on a written memorandum, which the witness testifies was made by himself at the time, and which was produced by him at a former trial, and since lost, the other party may show, for the purpose of discrediting the witness, that the memorandum then produced was not in his handwriting.—Commonwealth v. Hunt, 70 Mass. (4 Gray) 421.

[i] (Mass. 1863) If, in an action to recover for services as salesman, the plaintiff has testified on cross-examination that the defendants did not, at a particular time while he was in their employment, state to him the amount of his sales and of those by the other salesmen, the defendants, after contradicting him in this respect, cannot be allowed to testify what they stated to him that the amount of his sales was.—Greene v. Washburn, 89 Mass. (7 Allen) 390.

[j] (Mass. 1890) As it is not competent to show that the bell was usually rung at the crossing, for the purpose of showing that it was rung at the time of the accident, so it cannot be shown that it was not always rung, for the purpose of contradicting a witness whose cross-examination shows that he, in his statement that the bell was rung, relies largely, though not wholly, on the fact that it was usually rung.—Tuttle v. Fitchburg R. Co., 152 Mass. 42, 25 N. E. 19.

[k] (Mass. 1892) Since it is not admissible to impeach a defendant's testimony by showing that on a former trial for a like offense he raised a similar issue, and was contradicted, it is error to admit evidence of such former trial as preliminary to proof of such contradiction.—Commonwealth v. Lannan, 155 Mass. 168, 29 N. E. 467.

[l] (Mich. 1889) In an action for personal injuries caused to an employé by the giving way of a lumber dock on which he was at work, where one of defendant's employés, whose duty it was to inspect and repair the docks, testifies that he had no knowledge of any defect in them, it is competent, for the purpose of impeaching him, to prove that he was told before the accident that the dock was unsafe.—Van Dusen v. Letellier, 78 Mich. 492, 44 N. W. 572.

[m] (Mich. 1892) The testimony of a witness in regard to the mental condition of testatrix at the time testatrix was visiting her cannot be contradicted by letters written by witness' husband to the husband of testatrix at the time of the visit.—Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, reversing (1891) 88 Mich. 567, 50 N. W. 637.

[n] (Mo. 1894) On trial for perjury committed on trial of defendant for assault, testimony showing that, after the assault, defendant's son had said, "T, looked so funny when pa drew the hatchet," and the reply of defendant's wife thereto, is admissible, though the son was not a witness, to contradict the testimony of the wife that no such conversation took place.—State v. Higgins, 124 Mo. 640, 28 S. W. 178.

[o] (N. Y. 1887) The credibility of a witness may be attacked by contradicting him by circumstances as well as by statements of others contrary to his own.—Griswold v. Learned, 9 N. Y. St. Rep. 242.

[p] (Pa. 1890) On a trial for an assault with intent to kill, the accused testified in his own behalf. *Held*, that a record of his conviction for a manslaughter was admissible in rebuttal to impeach his credibility; and that his testimony that he had lived at home continuously for two years might be contradicted by a record showing that, during part of the time, he was undergoing imprisonment for an assault and battery, the latter record being admitted to show this only, and not being rendered incompetent by the fact that it would be likely to prejudice his case.—Commonwealth v. Barry, 8 Pa. Co. Ct. R. 216.

[q] (Tex. 1881) Where a witness testifies that he did not testify in a certain case, a transcript of the record in the case which contained a copy of witness' deposition is not admissible to show the unreliability of his memory.—Coleman v. Smith, 55 Tex. 254.

[r] (Tex. 1888) An agreed statement of facts prepared by counsel on a former appeal is inadmissible to contradict the evidence of a witness on a subsequent trial.—Sinclair v. Stanley, 69 Tex. 711, 7 S. W. 511.

[s] (Tex. 1891) In trespass to try title, where a witness has testified that he paid the taxes on land in controversy during certain years, the certificate of the comptroller showing the payment of such taxes by another person is admissible in evidence to contradict him.—McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580.

[t] (Tex. 1892) An hotel register is admissible in rebuttal of testimony that one stopped there during certain months.—Gilmour v. Heinze, 85 Tex. 76, 19 S. W. 1075.

[u] (Tex. 1895) Defendant's witness testified on cross-examination that he never heard deceased positively accuse defendant of having assaulted him. *Held*, that the state, after laying the foundation therefor, could impeach the witness by showing that he was present on a former occasion, when deceased declared that he was sure defendant assaulted him.—Easterwood v. State, 34 Tex. Cr. R. 400, 31 S. W. 294.

[v] (W. Va. 1888) A witness for the contestants testified that testator, in giving his evidence in an action in ejectment, was incoherent. On cross-examination he said he had the stenographer's notes of the evidence in the action; that the stenographer was not sworn, but that the notes were substantially correct. *Held*, that it was proper to allow the proponents, to contradict the witness, to read the notes to the jury.—Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

[w] (Wis. 1872) Where witnesses examined as medical experts testified that certain books, recognized as standard authorities in the profession, laid down certain propositions, or sustained certain conclusions, *held* not error to admit in evidence the books themselves, for the purpose of discrediting the witnesses.—City of Ripon v. Bittel, 30 Wis. 614.

[x] (Wis. 1875) On trial in the circuit court of a case appealed from a justice's court, where the justice, on being examined for the purpose of showing what the evidence testified on the trial before him was, used his minutes to refresh his memory, such minutes are competent to impeach the testimony of the justice.—Zitske v. Goldberg, 38 Wis. 216.

[y] (Wis. 1883) Where plaintiff denies knowledge of the fact that a horse, given by him in exchange for cattle, was blind at the time, evidence of what a third party said to him just before the time of the exchange, as to the condition of the horse's eyes, is admissible.—Dowling v. Lawrence, 58 Wis. 282, 16 N. W. 552.

§ 1277. —— Tendency to contradict, and extent of inconsistency.

[a] (Ala. 1845) Where the vendor of a plantation and slaves, in giving testimony, with a view to support the sale, stated that he acted as the vendee's overseer, it was allowable for the adverse party to inquire of another witness whether he ever knew the vendor to act as an overseer of the vendee.—Borland v. Mayo, 8 Ala. 104.

[b] (Cal. 1890) In an action to quiet title, defendant claimed under a grant made by the Mexican governor of California in 1838, but plaintiff alleged that such grant was really made in 1848, after California had become subject to the United States. The scribe who testified as to a positive recollection that he wrote the petition for the grant in question on the day of its date, February 3, 1838, said on cross-examination that, while on his way to his brother's Rancho El Refugio, he had met the grantee, and that this was before he wrote the petition. *Held* proper to show by another witness that El Refugio was not granted to witness' brother until 1846.—Davis v. California Powder Works, 84 Cal. 617, 24 Pac. 387.

[c] (Cal. 1890) In an action to quiet title, defendant claimed under a grant made by the Mexican governor of California in 1838, but plaintiff alleged that such grant was really made in 1848, after California had become subject to the United States. One who was formerly a Mexican alcalde's assistant stated that in 1841 or 1842 he had seen in the archives the title papers of the grantee under whom defendant claims, and to give probability to the statement testified as to several matters tending to show his knowledge of the archives. On cross-examination as to the extent of his familiarity, he mentioned that he had seen a certain grant therein in 1836 or 1837. *Held* proper to show that such grant was not made until 1841.—Davis v. California Powder Works, 84 Cal. 617, 24 Pac. 387.

[d] (Cal. 1891) Where defendant in a murder trial testified that shortly before the time at which the crime was alleged to have been committed he and a witness for the state had a quarrel, and on a certain bridge he had knocked said witness down, it was proper to admit in rebuttal evidence that said bridge was muddy at that time, and that the clothes of said witness were free from mud when he reached the place where the alleged crime was committed.—People v. Freeman, 92 Cal. 359, 28 Pac. 261.

[e] (Cal. 1894) On a prosecution of a police officer for killing deceased, who was being pursued by a person shouting "Stop thief!" such person, having testified for defendant, may be impeached by evidence that, a few days before, he had a quarrel with deceased, he having testified that he never saw him before the time of the shooting.—People v. Kilvington, 36 Pac. 13.

[f] (Ga. 1858) Where a witness testified that he heard the parties to a note say that the consideration was the surrender of a certain draft, it was proper to show that the draft was in the possession of the plaintiff and not surrendered, as it tended to discredit the witness.—Cartright v. Clopton, 25 Ga. 85.

[g] (Ga. 1885) One of the payees of a note, who testifies that he advanced $1,000 to the maker to pay his sisters for their interest in certain lands, may be contradicted or impeached by introducing the deed from the sisters to the maker reciting $500 as its consideration, together with the testimony of the draftsman that he was the attorney of the payees, and upon examining the title found that it was necessary to put the title to the sister's interest in the maker in order that the deed securing the note might be good security, and that his recollection is that the maker conveyed other property to his sisters for their interest.—National Bank of Augusta v. Cunningham, 75 Ga. 366.

[h] (Ga. 1896) In an action against a railroad company for the death of a trespasser killed by a train, the engineer on the locomotive which drew the train stated that he gave his testimony concerning the speed of the train and regarding the location of the brakemen thereon partly from recollection and partly from the rules of the company as to what his and their duties were. *Held*, that evidence of the violation of one of said rules by the brakeman on the train was not admissible as going to reduce the strength of the witness' testimony, on the ground that he swore according to rule.—Fink v. Ash, 99 Ga. 106, 24 S. E. 976.

[i] (Ill. 1891) Where, in a prosecution for assault with intent to murder, the prosecuting witness had sworn that she had no acquaintance with the defendant, and a witness for the defense testifies that defendant had previously been in witness' room, evidence as to what was done on that occasion is irrelevant.—Crosby v. People, 137 Ill. 325, 27 N. E. 49.

[j] (Iowa, 1892) In an action for the purchase price of a reaper, a witness, who has testified as to defendant's admission when witness "went there to sell him" another machine, cannot be impeached by showing that the contract for the last machine was in the handwriting of some person other than the witness, as such fact is immaterial.—Hoover v. Cary, 86 Iowa, 494, 53 N. W. 415.

[jj] (Ky. 1889) Defendant testified that, about a year before the killing, deceased had applied to him as a physician; told him that he had seduced a certain girl, and had given her medicine, from which she was suffering, and wanted defendant to relieve her; that, on defendant's refusing, deceased became angry and threatened him. *Held*, that it was competent for the state to show, as tending to contradict this testimony, that at the time indicated there was nothing the matter with the girl.—Commonwealth v. Hourigan, 89 Ky. 305, 12 S. W. 550.

[k] (Md. 1853) In a petition for freedom, the petitioner offered in evidence the will under which he claimed his freedom, and the defendant proved that the testatrix, long before the execution of the will, gave and delivered the petitioner's mother to the witness as a slave for life, and that while the mother was so held in slavery by witness, the petitioner was born, and was afterwards sold to defendant. *Held*, that it was error to admit the will, inventory, and administration account, disposing of and treating the petitioner as part of the estate of the testatrix, for the purpose of impeaching this witness, there being nothing to show that he had any knowledge of the contents of the will when executed, or authorized or sanctioned the correctness of the inventory or accounts.—Steuart v. Williams, 3 Md. 425.

[kk] (Mass. 1848) A witness having testified that the defendant had told him "that there was a house in Lowell which had been his brother's, but that by some agreement the defendant could have a deed of it any day, and that he would place it in the hands of the witness as collateral security," the defendant, with a view to contradict the witness, offered the evidence of his brother to prove that the defendant had no interest in or control of the house alluded to. *Held*, that the evidence was inadmissible, on the ground that it did not tend to show what the defendant had or had not told the witness.—Commonwealth v. Parker, 56 Mass. (2 Cush.) 212.

[l] (Mass. 1850) The defendants, in an action on a policy of insurance against fire, having introduced evidence, under their specification of defense, that after the date of the policy the

plaintiff's ashes had been deposited in wooden vessels contrary to a stipulation in his application for insurance, the plaintiff called witnesses, who testified that they had never known the plaintiff's ashes to be deposited in wooden vessels, and upon cross-examination by the defendants stated that they had never known the plaintiff's ashes to be so deposited since the house was built in 1838. *Held*, that the defendants could not thereupon introduce witnesses to prove that, in 1844, which was before the execution of the policy, wooden vessels were the ordinary places of deposit for the plaintiff's ashes.—Underhill v. Agawam Mut. Fire Ins. Co., 60 Mass. (6 Cush.) 440.

[ll] (Mass. 1857) Testimony that certain statements were made to a witness cannot be contradicted by evidence that the statements to which he testifies were not true.—Collins v. Stephenson, 74 Mass. (8 Gray) 438.

[m] (Mass. 1857) In an action for breach of promise of marriage, the plaintiff testified that, after the intimacy between the parties was broken off, she boarded at the same house as the defendant and another woman, whom he afterwards married, and that she never knew or heard of any intimacy between them before the marriage. *Held*, that evidence that during that time the defendant was publicly attentive to his present wife, with the plaintiff's knowledge, was immaterial, and therefore inadmissible to contradict the plaintiff.—Ray v. Smith, 75 Mass. (9 Gray) 141.

[mm] (Mass. 1859) In an action by a mother against two sons for money paid to their use, one of the defendants contended that the money was paid to the sole use of the other, and testified that he asked his mother to give him a note for the amount which he feared he should have to pay for his brother, and she offered to give him a mortgage of part of her farm. *Held*, that evidence of her having in former years paid money for him, and given him the use of the farm, was incompetent to contradict his testimony.—Farnum v. Farnum, 79 Mass. (13 Gray) 508.

[n] (Mass. 1886) At the trial of a complaint charging the defendant with the illegal keeping of intoxicating liquor with intent to sell the same, the defendant having testified that the liquor found on his premises, which was a barrel of ale, was a present to him, it is competent for the government, for the purpose of contradicting the defendant, to introduce a receipted bill for a barrel of ale from the person alleged by the defendant to have given the liquor to him, the bill bearing a date nearly corresponding to the date of the seizure; and the fact that the bill was received and retained by the defendant as a voucher is in the nature of an admission by him that the ale was bought and paid for.—Commonwealth v. Carbin, 143 Mass. 124, 8 N. E. 896.

[nn] (Mass. 1886) On a trial for polygamy, the alleged first wife having testified that she was married to defendant, it is competent, for the purpose of contradicting her testimony, to introduce evidence tending to show the character of her associates on an occasion during the time when she was living with the defendant, when, upon being remonstrated with by defendant's sister for leaving home very late at night in company with a man and woman, and being asked to come back, she replied: "I will not; I have a right to do as I have a mind to,"—such an expression by the alleged wife being in itself ambiguous and capable of having any one of various shades of meaning.—Commonwealth v. Lee, 143 Mass. 100, 9 N. E. 11.

[o] (Mass. 1886) Upon a trial for polygamy, the alleged first wife having testified to a marriage between herself and defendant, evidence of lewd conduct on her part is not admissible to contradict her testimony as to the marriage.—Commonwealth v. Lee, 143 Mass. 100, 9 N. E. 11.

[oo] (Mass. 1888) In an action for injuries received by plaintiff while running defendants' machine, plaintiff admitted that it was not his regular duty to attend to the machine, but showed that there was a custom in defendants' mill that when the regular workman was obliged to absent himself temporarily, to call in other employés, and that the regular workman of this machine asked plaintiff to run it. *Held*, that it was proper to admit in rebuttal the evidence of another workman that the regular workman had asked him to run the machine on the same occasion.—Hoar v. Abbott, 146 Mass. 290, 15 N. E. 659.

[p] (Mass. 1895) In an action for personal injuries testimony as to plaintiff's habits of sobriety is not admissible to contradict evidence, brought out on cross-examination, that he had been seen several times intoxicated before the accident.—Carr v. West End St. Ry. Co., 163 Mass. 360, 40 N. E. 185.

[pp] (Mich. 1891) In a suit for attorney's fees, where an attorney testifies that his client authorized him to employ plaintiff to assist in the case, it is competent to show, as affecting his credibility, that he had agreed to conduct the case to a successful issue.—Fraser v. Haggerty, 86 Mich. 521, 49 N. W. 616.

[q] (Mich. 1893) Where testimony is taken by a court stenographer, the mere statement of the witness thereafter that he does not recollect giving such testimony will not impeach the stenographer's evidence, or justify a finding that he did not so testify.—Gillespie v. Beecher, 96 Mich. 486, 56 N. W. 69.

[qq] (Mich. 1895) On a trial for forgery committed November 23, 1891, at Kalamazoo, Mich., P., a witness for defendant, testified that on that date the accused was in Detroit, and that witness borrowed money of him, giving his note therefor, which he paid April 11, 1892, to the defendant personally, at Detroit. *Held*, that evidence that accused was in Minnesota on April 11, 1892, was competent, as bearing upon the credibility of P.'s evidence.—People v. De France, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139.

[r] (Minn. 1871) When a witness testifies that he made a payment at a certain time, and, on cross-examination, that he knows he so made it because he "sold" a piece of land about that time, the record of the deed is not admissible to show that the sale was at a later time, since the deed could only show the date of the conveyance and not the date of the sale.—Goodell v. Ward, 17 Minn. 17 (Gil. 1).

[rr] (Minn. 1881) A witness for the state on a trial for murder stated that on the trial of one R. for the same homicide with which defendant was charged, the testimony given by her, which bore strongly against R. and in exculpation of defendant, was given under threats of personal violence made by defendant. *Held*, that an offer by defendant to prove by a justice of the peace that he and the county attorney before the trial of R. assured the witness officially that she would be protected in telling the truth, was properly excluded as not tending to disprove the duress.—State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

[s] (Minn. 1895) The person whom it was alleged defendant procured to commit the murder testified that, after shooting deceased, she fell back in her seat in the buggy, in which she was riding with witness, and sat still. To contradict the witness, defendant offered expert evidence that a person shot as was deceased would instantly become limp. *Held*, that the evidence did not have a tendency to contradict

the witness, and hence was properly excluded.—State v. Hayward, 62 Minn. 474, 65 N. W. 63.

[ss] (Miss. 1879) Where a witness stated in a former trial that deceased was in a certain position when shot, but on a subsequent trial an expert having stated that the wound was received while deceased was in a certain other position, and witness in her testimony in such subsequent action did not repeat the statement made by her on the former trial, it was inadmissible to prove that the expert was not examined in the former trial, as the proposed testimony was not contradictory of her testimony.—Cannon v. State, 57 Miss. 147.

[t] (N. H. 1884) Where a witness has testified that he does not remember a certain conversation, proof that he was specially requested to remember it does not tend to controvert his testimony.—Pinkham v. Benton, 63 N. H. 226.

[tt] (N. Y. 1861) Where, on the trial of an indictment for seduction under a promise of marriage, the prosecutrix testified that she had never had sexual intercourse with any other person than defendant, it was proper for the defense, as showing facts from which the jury could infer such intercourse, to prove by a witness that he had seen her commit wanton or lewd acts toward some other person than defendant.—People v. McArdle, 5 Parker, Cr. R. 180.

[u] (N. Y. 1880) On the trial of one charged as accessory to the crime of arson, evidence that the prisoner conferred with the principal after the fire was admissible, he having denied that he knew them.—Levy v. People, 80 N. Y. 327.

[uu] (N. Y. 1890) Where a witness incidentally stated that at the place where a boat was burned the distance between high and low water mark upon the beach was about 700 feet, the fact that another witness estimated it at only 200 feet was not such a contradiction as to impeach or cast discredit upon the former's testimony that a watchman was kept upon the boat, as required by an insurance policy.—Plyer v. German-American Ins. Co., 121 N. Y. 689, 24 N. E. 929, reversing (1888) 48 Hun, 618, 1 N. Y. Supp. 395.

[v] (N. Y. 1890) The same witness testified that when a surveyor came to make an examination of the boat for the purpose of insurance he said that if defendant insured the dredge he would want it to "lay at anchor, separate from this hulk" (referring to a storeship owned by the witness, at which the repairs had been made). *Held*, the fact that the surveyor testified that he "made no request to have the position of the dredge changed," was not a contradiction and had no tendency to discredit the witness' testimony as to the watchman.—Plyer v. German-American Ins. Co., 121 N. Y. 689, 24 N. E. 929, reversing (1888) 48 Hun, 618, 1 N. Y. Supp. 395.

[vv] (N. Y. 1890) Where the testimony of the owner of the repair ship and that of another witness, as to the presence of the watchman, was uncontradicted except as above stated, plaintiff was entitled to a charge that such presence was conclusively proved, and was not open to question by the jury.—Plyer v. German-American Ins. Co., 121 N. Y. 689, 24 N. E. 929, reversing (1888) 48 Hun, 618, 1 N. Y. Supp. 395.

[w] (N. Y. 1893) In an action for the contract price of thermometers manufactured by plaintiffs, at defendants' instance, for use as an advertising medium in defendants' brewing business, evidence that for a long time before the contract was entered into thermometers had been in general and notorious use as a medium of advertisement is admissible to impeach one of defendants' witnesses, who testified that he was induced to make the contract on the faith of plaintiffs' false representation that thermometers were a novel and original medium of advertising in the brewing business, and that plaintiffs had not theretofore supplied any brewers with them.—Pharo v. Beadleston (Com. Pl.) 2 Misc. Rep. 424, 21 N. Y. Supp. 989, affirming judgment (City Ct. N. Y. 1892) 19 N. Y. Supp. 816.

[ww] (Tex. 1863) In an action for goods sold by a firm, a clerk testified that he sold part of the goods, and that most of them were charged in the handwriting of W., one of the firm. W. testified that he kept the books, that the items of the account sued on were correct, and that he had no other proof of the account than the books, and the testimony of the former witness, and himself. *Held*, that evidence was admissible for the defense that there were other clerks in the establishment at the time of the alleged sales.—Hastings v. Bachelor, 27 Tex. 259.

[x] (Tex. 1892) On issues as to the right of property in a stock of dry goods between the claimant and attaching creditors of the debtors, the testimony of an experienced merchant in the town where claimant had the goods, that certain articles of the stock were not of the amount and character usually carried by a retail house there, was admissible in rebuttal of claimant's testimony that he bought the goods to establish a retail store.—Gilmour v. Heinze, 85 Tex. 76, 19 S. W. 1075.

[xx] (Tex. 1893) A witness for the prosecution having testified that, if he did make certain statements in the presence of W., it was because he thought W. was the attorney for defendant, evidence is admissible that at the time the conversation occurred W. was not defendant's attorney.—Smith v. State (Cr. App.) 20 S. W. 554.

[y] (Vt. 1867) A witness, who had been an attorney in a former suit, testified that he did not direct the sheriff to take M. and N. as receiptors for the property therein attached. To impeach him, N. was offered as a witness to testify that he was informed by the attorney that the plaintiff in that suit had told him (the attorney) to direct the sheriff to take M. as a receiptor. *Held*, that the evidence was inadmissible, as it did not contradict the attorney's statement.—Hine v. Pomeroy, 39 Vt. 211.

[yy] (Vt. 1888) Where defendant had told a man that he had not heard of the crime till a certain time, evidence that the matter was notorious in the community before that time is relevant.—State v. Flint, 60 Vt. 304, 14 Atl. 178.

[z] (Wis. 1871) In an action for the price of piling furnished by plaintiff to defendants, under a verbal contract, to be used in constructing a bridge for a railroad company, evidence as to the terms of another and entirely independent contract between defendants and a third party, another furnishing piling for the same bridge, is not admissible for the purpose of contradicting the answers of a witness for defendants to questions put to him on cross-examination relating to such independent contract in order to discredit him, nor for any other purpose.—Posey v. Rice, 29 Wis. 93.

[zz] (Wis. 1879) Plaintiff testified that he had stated that at the date a note fell due gold was falling. *Held*, that evidence that after the note was made, and before its maturity, gold advanced was incompetent to discredit plaintiff's testimony.—St. Maries v. Polleys, 47 Wis. 67; 1 N. W. 389.

§ 1278. Examination of contradicting witness.

[a] (U. S. 1816) The court will not permit plaintiff to put a question to a witness called by him to rebut defendant's testimony, which is

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not intended to contradict or discredit defendant's witnesses, and which question is not rendered necessary by evidence given by defendant.—Evans v. Eaton, Fed. Cas. No. 4,559 [Pet. C. C. 322; 1 Robb, Pat. Cas. 68].

[b] (U. S. 1881) A leading question is one which suggests or leads to the answer, and which embodies a material fact, and can be directly answered by yes or no. Such a question cannot be put on main examination even to contradict another witness.—United States v. Angell (C. C.) 11 Fed. 34.

[c] (U. S. 1869) Where a witness has sworn to a declaration made officially by a public officer, and the officer is called to contradict it, the question put to him must be limited to the precise statement of the former witness.—Cobb v. United States, 5 Ct. Cl. 176.

[d] (Colo. 1890) In an action in which the issue was as to whether a conveyance to plaintiff was in fraud of creditors, one who had contemplated associating himself with plaintiff in the purchase testified to statements made to him before the sale by one W., acting for the grantor, which showed fraudulent intent on the part of the latter. *Held*, that plaintiff could interrogate W. by direct questions for the purpose of contradicting such testimony.—Grimes v. Hill, 15 Colo. 359, 25 Pac. 698.

[e] (Ga. 1857) A witness may, in the discretion of the judge, be recalled and examined in a leading manner, to contradict a witness, introduced to attack his credit.—Thomasson v. State, 22 Ga. 499.

[f] (Ga. 1859) Leading questions are no more admissible in the case of an impeaching and contradicting witness, than in any other case.—Allen v. State, 28 Ga. 395, 73 Am. Dec. 760.

[g] (Ind. 1859) Unless the witnesses were ordered not to converse with the parties, it is no impropriety for a party to tell a witness called in rebuttal, or contradiction, what the testimony on the other side has been.—Horne v. Williams, 12 Ind. 324.

[h] (Iowa, 1895) Where a witness for the state testified that H., who was jointly indicted with defendant, said, in the presence of defendant and S., "Because we got the best of a railroad man, they want to drive us off the face of the earth," deceased having been a railroad man, it was not error, while S. was a witness for the defense, to exclude a question by defendant's counsel as to whether he heard H. say, in the presence of defendant and the other witness, "But, now we got the best of railroad men, they want to run us off the earth, or something like that;" it being too indefinite to establish a contradiction.—State v. Weems, 96 Iowa, 426, 65 N. W. 387.

[i] (Mich. 1892) In an action involving the issue as to whether a transfer of hogs and other chattels had been made by a debtor to his father-in-law to defraud creditors, or whether it had been made in good faith to pay the debtor's notes held by the father-in-law, the latter testified that, at the time the notes were made, the debtor agreed to pay them in the fall when he butchered his hogs. The debtor testified on cross-examination that the first talk he had with the father-in-law about letting him have the hogs in payment on the notes was about two weeks before the transfer. He was then asked: "Then it is not correct, as your father testified, that, when he let you have the money in the spring, the talk was that, when you killed your hogs in the fall, you would pay him? Have any such talk as that?" *Held*, that the clause, "as your father testified," had no proper place in the question, and that there was nothing to prevent a full inquiry without using it; and it was not error to exclude the question, unless such clause was left out.—Daniels v. Weeks, 90 Mich. 190, 51 N. W. 273.

[j] (N. Y. 1870) Where a plaintiff introduces testimony of an admission by the defendant, made in the course of a conversation, the defendant is entitled to meet the evidence given by testimony equally strong and emphatic, and a question put to him by his counsel, requiring a direct, categorical answer on that point, cannot be excluded as leading, since it involves a contradiction of the plaintiff's witness on a material point.—Potter v. Bissell, 3 Lans. 205.

[k] (N. Y. 1892) In an action by an accountant against an executor for services rendered him in preparing accounts of the estate, a question to defendant: "Mr. D. [plaintiff] has testified that in July, 1885, you requested him to write up the accounts of this estate for you. Is that true?"—does not suggest either an affirmative or negative answer, and is not leading.—Douglass v. Leonard (Com. Pl.) 17 N. Y. Supp. 591, reversing Douglas v. Same (City Ct. N. Y. 1891) 14 N. Y. Supp. 274.

[l] (N. C. 1857) One of the circumstances authorizing departure from the rule forbidding leading questions is where one witness is called to contradict another, in which case the interrogatory may be permitted to embrace the language proposed to be contradicted.—Gunter v. Watson, 49 N. C. 455.

[m] (N. C. 1887) An inquiry was put in the terms: "State whether or not the testimony of Fanny Turner, as to throwing a bucket of water upon Mrs. Crabtree, is true." *Held*, that the question was not allowable in that form, but that it should be so put as to disprove the statement of the witness, and not merely assail her veracity.—Scoggins v. Turner, 98 N. C. 135, 3 S. E. 719.

[n] (Ohio, 1894) When a witness testifies that certain language was used by another person, such person may be called and asked if he used that identical language, and he is not simply to be inquired of as to what he did say, nor is it necessary to ask the time and place where such statements were made.—Stribley v. Welz, 8 Ohio Cir. Ct. R. 571, 4 O. C. D. 520.

§ 1279. —— Recalling witness.

[a] (Ga. 1873) A plaintiff who has been examined may nevertheless be re-examined in rebuttal of defendant's testimony.—Rust v. Shackleford, 47 Ga. 538.

[b] (Md. 1883) Where a witness in an equity suit has been examined, he cannot be recalled without leave of court for the purpose of contradicting what a witness on the other side before testified to, the right of recall not having been reserved, and there being no agreement for a further examination.—Girault v. Adams, 61 Md. 1.

[c] (Mo. 1892) When the attending physician has testified fully as to the extent of plaintiff's injuries, and a physician called by defendant, who has examined plaintiff, testifies that the injuries are slighter than the other stated, and, on cross-examination, that he thinks attendance for two weeks after the injury would have been enough, the court may, in its discretion, refuse to allow the attending physician to testify as an expert whether plaintiff would have required medical attendance for a longer time, since such witness, having been fully examined previously, it is discretionary with the court to permit or deny his re-examination on such collateral matters.—Coppersmith v. Mound City Ry. Co., 51 Mo. App. 357.

[d] (Mo. 1893) It is discretionary with the trial court to permit the recall of a witness to impeach a statement of defendant, where no new matter, but a strict rebuttal of matter about which defendant had been fully examined, was elicited.—State v. Murphy, 118 Mo. 7, 25 S. W. 95.

[e] (N. J. 1881) The rule that a witness cannot, without leave of the court, be re-examined

on a matter as to which he has been previously examined, does not prevent the recalling of a witness in rebuttal.—Osborne v. O'Reilly, 34 N. J. Eq. (7 Stew.) 60.

[f] (Pa. 1870) A witness for plaintiff testified that what he said was all that occurred in the making of an alleged contract, but defendant testified that he had required security before he would execute the contract. *Held*, that it was proper to examine the witness in rebuttal to contradict the defendant as to the security, since if what was testified to by the defendant did not take place, the fact that it did not could not have been drawn out in chief.—Brown v. Finney, 67 Pa. (17 P. F. Smith) 214.

[g] (Tex. 1860) Plaintiff may recall a witness for the purpose of rebutting defendant's testimony.—Dunham v. Forbes, 25 Tex. 23.

§ 1280. Rebuttal of contradiction.

[a] (La. 1889) A witness who has testified in a particular manner in his first examination, and who is sought to be contradicted by the defense, can be heard, in rebuttal, to testify as to a new matter brought out in the attempt to contradict or impeach him, where the witness had not testified on that subject when examined in chief.—State v. Claire, 41 La. Ann. 1067, 6 South. 806.

[b] (Neb. 1888) The plaintiff was cross-examined as to where he derived the money used in the purchase of property in litigation, and, having answered that a portion of it had been received in payment of a loan made to his father, an attempt having been made to discredit his statement, he was permitted to testify, in rebuttal, as to where he obtained the funds out of which said loan was made. *Held* no error.—Campbell v. Holland, 22 Neb. 587, 35 N. W. 871.

[c] (Pa. 1851) The object of an offer to rebut testimony must be stated with sufficient particularity to show whether it was entitled to be considered as rebutting.—Branch v. Johnson, 1 Phila. 206.

§ 1281. Explanation of contradiction.

[a] (Miss. 1876) With his answer to a bill for settlement of a partnership, the defendant, in response to a prayer for discovery, filed an exhibit showing the entire transaction of the firm. Subsequently one of his witnesses, at the suggestion of his solicitor, annexed to his deposition an exhibit showing the business of the firm during a certain period of its existence, which was much less favorable to defendant than the exhibit to the answer. Other proof in the case showed that the exhibit filed by the witness was manifestly wrong, and that the one filed by defendant in person was probably correct. *Held* to be erroneous to adopt the one that was evidently wrong and reject the one which was probably correct, without affording opportunity for further proof and explanation.—Handy v. Andrews, 52 Miss. 626.

[b] (Miss. 1882) After an attachment defendant has denied on cross-examination that he loaned certain sums of money to a claimant of the attached property, and plaintiff thereupon contradicts him by introducing checks and bank notes evidencing payment of such sums from defendant to the claimant, together with testimony that the sums were credited on the books to the claimant's account, it is error to refuse permission to the claimant to newly introduce the defendant to explain the transaction in which the checks were given and prove that they were not given for a loan to the claimant.—French v. Sale, 60 Miss. 516.

§ 1282. Evidence of good character of contradicted witness.

[a] Contradiction among witnesses is no ground for admitting evidence of the general character of either of them for truth and veracity, where their character has not been assailed.
—(Conn. 1881) State v. Ward, 49 Conn. 429;
(Fla. 1886) Saussey v. South Florida R. Co., 22 Fla. 327;
(Md. 1869) Vernon v. Tucker, 30 Md. 456;
(Vt. 1848) Sweet v. Sherman, 21 Vt. 23.

[b] The general good character of a witness cannot be proved, where his general character has not been impeached, though he has been contradicted by other witnesses.
—(U. S. 1849) Ray v. Donnell, Fed. Cas. No. 11,590 [4 McLean, 504];
(Ill. 1889) Chicago & A. R. Co. v. Fisher, 31 Ill. App. 36;
(Ind. 1863) Pruitt v. Cox, 21 Ind. 15; (1881) Presser v. State, 77 Ind. 274.

[c] (Ala. 1853) The statement of a witness on an immaterial point being contradicted by evidence, the party calling him may bring witnesses to testify to his general good character, although the opposite party disclaims the idea of discrediting him.—Newton v. Jackson, 23 Ala. 335.

[d] (Ala. 1856) Where both parties are examined as witnesses under the statute, and contradict each other in some particulars, and one of them introduces a witness which contradicts the other, the latter cannot be allowed to prove her good character in any manner.—Owens v. White, 28 Ala. 413.

[e] (Ala. 1860) One witness denied any intimidation of another as alleged in the testimony of the latter, but evidence was introduced to prove it; he was thereupon allowed to prove his general character for truth and veracity.—Lewis v. State, 35 Ala. 380.

[f] (Ala. 1875) The mere existence of a material conflict between the testimony of a witness and that of other witnesses does not justify the admission in evidence of his general good character, in the absence of any testimony to impeach his character.—Mobile & G. R. Co. v. Williams, 54 Ala. 168.

[g] (Ga. 1893) A witness who is not impeached otherwise than by disproving the truth of his testimony cannot be supported by proof of his general good character, as Code, § 3874, providing that a witness may be sustained by proof of character, refers only to witnesses whose "character" is sought to be impeached.—Miller v. Western & A. R. Co., 93 Ga. 480, 21 S. E. 52.

[h] (Ill. 1884) A party to a suit who has offered himself as a witness cannot introduce evidence of his character for truth and veracity, where such character has not been attacked except indirectly by a contradiction of his testimony by witnesses on the other side.—Tedens v. Schumers, 112 Ill. 263.

[i] (Ind. 1892) Where there is a mere contradiction on an issue in a case, the admission of evidence of the good character of one of the witnesses is reversible error, though the contradiction imputes to him moral turpitude, or the commission of a crime.—Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87.

[j] (Ky. 1888) When the prosecuting witness was contradicted by the weight of evidence, it is error to allow a witness to testify to the moral character of the prosecutor, which had not been attacked, for the purpose of discrediting defendant's testimony.—Cupp v. Commonwealth, 87 Ky. 35, 7 S. W. 405.

[k] (Md. 1873) When, upon the trial of an indictment, witnesses, called on opposite sides, contradict each other on a material point, and the credit of such witnesses is fairly put in issue, either side may sustain its witness by proof

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of general character for veracity.—Davis v. State, 38 Md. 15.

[l] (Md. 1873) On the trial of an indictment for murder, a witness for the prisoner was contradicted on a material point; whereupon the defense introduced evidence to prove the character for truth and veracity of the witness so contradicted. *Held*, that the state might also prove the character for truth and veracity of the contradicting witness.—Davis v. State, 38 Md. 15.

[m] (Mass. 1856) Evidence tending to contradict a witness, and to show that he had conspired with one party to the action to cheat and defraud the other, does not authorize the introduction of evidence of the character of the witness for honesty and integrity.—Heywood v. Reed, 70 Mass. (4 Gray) 574.

[n] (Mo. 1883) On a trial for murder, where the testimony is conflicting, evidence is not admissible to support the character of a witness unless attacked.—State v. Thomas, 78 Mo. 327.

[o] (N. Y. 1847) A party is not entitled to give evidence of the general good character of his own witness, unless the character of the witness has been attacked by witnesses on the other side; and it is not enough to warrant proof of good character, that the witness had been discredited by proof contradicting portions of his testimony, and by evidence that he had made declarations hostile to the party against whom he was called, and that the witness in his testimony had denied making such statements.—Starks v. People, 5 Denio, 106.

[p] (N. Y. 1855) That the accuracy of a witness as to some particular facts has been discredited in the course of a trial, will not entitle the party calling him to go into evidence to support his general character for veracity.—Leonori v. Bishop, 11 N. Y. Super. Ct. (4 Duer) 420.

[q] (S. C. 1829) Where a party incidentally impeaches his own witness by contradictory evidence upon facts material to the issue, it does not let in evidence of good character in reply.—Farr v. Thompson, Cheves, 37.

[r] (Tex. 1886) Where there was conflict between the evidence of one of defendant's witnesses and a witness for the state, evidence of the good character of the former was properly excluded, where the facts about which there was conflict had no bearing upon the material facts of the case.—Britt v. State, 21 Tex. App. 215, 17 S. W. 255.

[s] (Tex. 1888) Evidence is not admissible to prove that the general reputation of a prosecuting witness for veracity is good, where his veracity has not been directly assailed, but there is simply a conflict between his testimony and that of witnesses for the defense.—Rushing v. State, 25 Tex. App. 607, 8 S. W. 807.

[t] (Tex. 1896) The fact that there is a conflict between defendant's testimony and that of witnesses for the state does not entitle defendant to introduce evidence of his reputation for veracity.—McGrath v. State, 35 Tex. Cr. R. 413, 34 S. W. 127, 941.

§ 1283. Effect of contradiction.

Effect of contradiction of witness part of whose testimony was false, see ante, § 1083.

[a] (U. S. 1894) The fact that a witness has been successfully contradicted does not justify disregarding all his testimony that is not corroborated.—Louisville & N. R. Co. v. Kelly, 63 Fed. 407, 11 C. C. A. 260, 24 U. S. App. 103.

[b] (U. S. 1858) In determining the question of priority of invention, contradictions between two witnesses, whose general character for veracity has not been questioned, should rather be reconciled without imputing improper motives than that their concurrent testimony on another point should be entirely rejected.—Davidson v. Lewis, Fed. Cas. No. 3,606 [1 MacArthur, Pat. Cas. 599].

[c] (U. S. 1885) Mere variance between the statements of two witnesses will not necessarily impeach or affect the credibility of either of them, as the contradiction may arise from mistake, or other cause consistent with their integrity.—Sharon v. Hill (C. C.) 26 Fed. 337.

[d] (Ill. 1868) The fact that testimony of a witness is contradicted by that of other witnesses does not constitute impeachment.—Baker v. Robinson, 49 Ill. 299.

[e] (Ill. 1896) A wife testified positively in proceedings for divorce that she resided in the county where the suit was brought, and gave the name of the street on which she lived, and it was not disputed, but her home when living with her husband was in Lake county. Her affirmative answer to a question, on cross-examination, as to whether her home was not in Lake county, where she lived with her husband, should not overbalance her other testimony as to her residence at the time she brought the suit.—Hill v. Hill, 63 Ill. App. 366, judgment affirmed (1893) 166 Ill. 54, 46 N. E. 751.

[f] (Ind. 1885) It is not a sufficient reason for wholly disregarding the testimony of a witness as to material facts that he is contradicted as to some merely immaterial or collateral matter.—Harper v. State, 101 Ind. 109.

[g] (Ky. 1894) Where one witness testifies positively as to the crime, a conviction will not be set aside though he is contradicted by two witnesses, relatives of defendant.—Gratz v. Commonwealth, 96 Ky. 162, 28 S. W. 159.

[h] (Miss. 1890) A conviction of petit larceny, resting on the unsupported testimony of one witness, which is contradicted in several material matters, which contradiction cannot reasonably be attributed to mistake on the part of such witness, cannot be sustained.—Day v. State, 7 South. 326.

[i] (N. Y. 1887) When a party is successfully impeached as to any part of his testimony which is material, other parts of his testimony, if contradicted, should be rejected.—Banta v. Naughton, 7 N. Y. St. Rep. 384.

[j] (N. Y. 1888) Though witnesses are contradicted, their testimony need not be absolutely rejected, but may be received and acted on, if, notwithstanding the contradictions, it appears not to have been intentionally false.—Blain v. Pool, 13 N. Y. St. Rep. 571.

2. CORROBORATION.

RIGHT TO CORROBORATE IMPEACHED OR CONTRADICTED WITNESS, § 1284.
TESTIMONY SUBJECT TO CORROBORATION, § 1285.
—— IRRELEVANT, COLLATERAL, OR IMMATERIAL MATTERS, § 1286.
COMPETENCY OF CORROBORATIVE EVIDENCE, § 1287.
—— FORMER STATEMENTS CORRESPONDING WITH TESTIMONY, § 1288.
EFFECT OF CORROBORATION, § 1289.

Right to corroborate unimpeached or uncontradicted witness, see ante, § 1085.

Corroboration of accomplices in criminal prosecution, see "Criminal Law," vol. 14, cc. 1809–1833, §§ 1124–1138.

—— *of testimony of female in prosecutions for incest, see* "Incest," vol. 27, cc. 47–49, § 13.

—— *of witnesses as to adultery, see* "Divorce," vol. 17, cc. 637–640, §§ 415–417.

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—— *of witnesses in trial of indictment for perjury, see* "Perjury," vol. 89, cc. 710–716, §§ 125–132.
—— *of witness in prosecution for abduction, see* "Abduction," vol. 1, cc. 393, 394, § 23.
—— *of witness in prosecution for abortion, see* "Abortion," vol. 1, c. 409, § 17 [n].
Instructions as to weight of evidence with reference to number of witnesses, see "Trial," vol. 46, cc. 1520, 1521, § 542.
—— *in criminal prosecutions as to extent of corroboration required of testimony of accomplices, see* "Criminal Law," vol. 14, cc. 2629–2631, §§ 1862, 1863.
—— *in prosecution for perjury as to number and corroboration of, see* "Perjury," vol. 89, c. 723, § 138.
Number, credibility and corroboration as determining weight and sufficiency of evidence in prosecutions under liquor laws, see "Intoxicating Liquors," vol. 29, c. 1184, § 801.
—— *of witnesses as within discretion of trial court, see* "Appeal and Error," vol. 3, c. 1676, § 3849 [a].
—— *of witnesses in criminal prosecutions, see* "Criminal Law," vol. 14, cc. 2306, 2307, § 1608.
—— *of witnesses in determining weight and sufficiency of evidence, see* "Evidence," vol. 20, cc. 3568–3571, § 2427.
—— *of witnesses necessary to prove payment, see* "Payment," vol. 39, cc. 378, 379, § 224.
—— *of witnesses necessary to show deed absolute to be mortgage, see* "Mortgages," vol. 35, c. 472, § 110.
—— *of witnesses necessary to sustain indictment for perjury, see* "Perjury," vol. 89, cc. 710–716, §§ 125–132.
—— *of witnesses requisite to prove book account, see* "Evidence," vol. 20, cc. 2307, 2308, § 1631.
Objections first made on appeal to insufficient number of witnesses, see "Appeal and Error," vol. 2, c. 1757, § 1292.
Who are accomplices within rule requiring corroboration, see "Criminal Law," vol. 14, cc. 1779–1833, §§ 1082–1138.

§ 1284. Right to corroborate impeached or contradicted witness.

[a] (U. S. 1890) Evidence is admissible in confirmation of the testimony of a person who has been convicted of an infamous crime, in such and so many parts of his narrative as may satisfy the jury that he has told the truth, but should not, perhaps, be extended to such acts in the narrative as are generally well known.—United States v. Viebusch (C. C.) 1 Fed. 213, 1 McCrary, 42.

[b] (Cal. 1871) Where the plaintiff endeavors to impeach the defendant's witnesses by the introduction of rebutting evidence, it is competent for the defendant, after the plaintiff has rested, to introduce additional testimony in corroboration.—Wade v. Thayer, 40 Cal. 578.

[c] (Ga. 1854) Where the character of a witness is impeached, the state may introduce testimony to show that the facts, to which the impeached witness testified, are true.—John v. State, 16 Ga. 200.

[d] (Iowa, 1867) In a criminal trial, the whole of the defendant's testimony was directed against the reputation for truth of the principal witness for the prosecution. *Held*, that the government could not be permitted, in rebuttal, to prove by another witness, that the facts were substantially and in detail as the witness in chief had stated them.—State v. Parish, 22 Iowa, 284.

[e] (La. 1895) Where an attempt is made to impeach a witness on cross-examination, the witness may be corroborated, though not impeached by extraneous evidence.—State v. Johnson, 47 La. Ann. 1225, 17 South. 789.

[f] (La. 1896) A contradicted witness may be corroborated as to a matter material to the issue, though the adverse party, in introducing the contradictory evidence, stated that it was not the intention to impute fraud or fabrication, or in any manner to impeach the witness.—State v. Desforges, 48 La. Ann. 73, 18 South. 912.

[g] (Md. 1872) On the trial of an action the plaintiff was introduced as a witness, and testified positively that the defendant made certain representations. The defendant, upon being called, then testified in equally positive terms that he did not make such representations. But the defendant's counsel disclaimed all purpose of impeaching the integrity of the plaintiff, only desiring to show that he was mistaken. *Held*, that the testimony of the defendant amounted to a substantial impeachment of the credibility of the plaintiff, which could not be avoided by the disclaimer, and testimony corroborative of the plaintiff's was admissible.—McAleer v. Horsey, 35 Md. 439.

[h] (Mass. 1835) In an action against a person as a partner, a witness testified in chief that he had given notice of withdrawal of defendant and of the general dissolution of the partnership, and that he was confident that all the neighborhood were notified in two days. On his cross-examination the plaintiff's counsel inquired whether he gave the same notice to the other creditors of the partnership as he had testified that he gave to the plaintiff, and witness replied affirmatively, and gave the names of several persons to whom he had given notice. *Held*, that it was not competent for the defendant to call any of the person's names in order to prove that he had received such notice from the witness, as it could have no tendency to sustain the credit of the witness to prove by other evidence a fact stated by him in regard to which there was no contradiction.—Howe v. Thayer, 34 Mass. (17 Pick.) 91.

[i] (Mass. 1862) No exception lies to the admission of evidence in corroboration of a witness who has been contradicted.—Green v. Gould, 85 Mass. (3 Allen) 465.

[j] (Minn. 1894) In ejectment, the plaintiff testified that he never signed or made the alleged assignments of a certain certificate to B. On cross-examination he admitted he forged an indorsement on the certificate in the name of his father, to whom B. had transferred, purporting to transfer it back to plaintiff. Plaintiff also introduced his brother, who testified that he forged two assignments from plaintiff to B., and signed plaintiff's name, and procured the signature of the witnesses to them. Defendant offered in evidence the alleged forged assignments from plaintiff to B. as part of his chain of title, and it was excluded on the ground that it was completely established by the evidence that the assignments were forgeries and could not be received in evidence. *Held*, that the exclusion of such assignments was error, as the evidence, offered to show they were forgeries, was itself of such a suspicious character that, though uncontradicted, the jury would be entitled to disbelieve it.—Kennedy v. McQuaid, 56 Minn. 450, 58 N. W. 35.

[k] (N. Y. 1848) Where the great delay in instituting a criminal prosecution tends to excite suspicion as to the truth of the charge and to lead to an impression unfavorable to the principal witness, the prosecutor may prove

any circumstances calculated to remove such presumptions.—People v. Lohman, 2 Barb. 216.

[l] (N. Y. 1896) It appeared that deceased had asked defendant to marry him; that, about a month prior to the homicide, deceased had enticed defendant into rooms, on pretense of looking for apartments, and had forced her; that, on a promise of immediate marriage, defendant then cohabited with deceased, begging him every day to marry her, and he promising to do so "on the next day"; that, on the morning of the crime, deceased absolutely refused to marry; that shortly afterwards defendant followed him to a saloon and urged him to fulfill his promises; that defendant left the saloon, and, on returning, demanded that deceased marry her that day; that on the latter again refusing, defendant cut his throat. *Held*, that it was error to exclude corroborating testimony on the ground that no corroboration was necessary, and then submit the question of defendant's credibility to the jury, leaving it for them to determine how far her statements of her relations with deceased should be accepted as true.—People v. Barberi, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717.

[m] (N. C. 1880) Where there is a conflict between two witnesses as to the terms of a deed and its legal effect and operation, the defendant, to sustain the credit of his witness, may show by another person that on the day when such witness saw the deed he made a statement of its provisions conforming to his testimony as given at the trial.—Roberts v. Roberts, 82 N. C. 29.

[n] (Pa. 1866) Where a pardoned convict has testified, in a criminal trial, to communications in the penitentiary between the prisoners at the bar and others, it is proper to allow him to corroborate himself by evidence that he had shown visitors how communication between the cells was possible; and that no inducements had been held out to him to testify against the defendants.—Howser v. Commonwealth, 51 Pa. (1 P. F. Smith) 332.

[o] (Tenn. 1837) A witness may be impeached as well by cross-examination as by the testimony of other witnesses; and in such case, evidence is admissible to sustain his credit.—Richmond v. Richmond, 18 Tenn. (10 Yerg.) 343.

[p] (Tex. 1885) One who, as a witness, is in the position of a stranger testifying to isolated facts, may, if his testimony is discredited on cross-examination, fortify it by sustaining testimony.—Phillips v. State, 19 Tex. App. 158.

[q] (Wash. 1896) Where the state introduces evidence to show a different state of facts from that testified to by a witness for defendant, defendant cannot put in additional testimony in support of the statements of his witness, on the ground that the state by its testimony had impeached his witness, and on that account he was entitled to support him, as evidence merely tending to establish a different state of facts from that testified to by the witness was not impeaching testimony, within the rule which allows a party to sustain a witness who has been impeached.—State v. Nelson, 13 Wash. 532, 43 Pac. 637.

§ 1285. Testimony subject to corroboration.

[a] (La. 1896) Defendant testified without objection that while confined in jail B., a friend of the prosecution, declared to him that he would make M. swear to whatever he chose against defendant. It did not appear that M. was a witness, nor that B. took part in the prosecution. *Held*, that the fact that defendant was cross-examined as to the testimony did not entitle him to introduce in corroboration testimony of one who heard B.'s threat.—State v. Monceaux, 48 La. Ann. 101, 18 South. 896.

[b] (Mass. 1890) In tort for the conversion of a horse which defendant had attached as the property of plaintiff's husband, in order to discredit the husband's testimony that he was not the owner it was shown on his cross-examination that he had included it in a mortgage given by him; but he added, without objection from defendant, that he did not know the horse was included in the mortgage, and that, as soon as he found that it was, he told the mortgagee the horse did not belong to him, and should not have been embraced in the mortgage. This was before the attachment by defendant. *Held*, that the mortgagee was properly allowed to testify in confirmation of the husband's explanation.—Hewitt v. Corey, 150 Mass. 445, 23 N. E. 223.

§ 1286. —— Irrelevant, collateral, or immaterial matters.

[a] (Mass. 1839) Where accused, for the purpose of impeaching the testimony of an accomplice, introduced a letter from him, admitting that his testimony in regard to the transaction, upon a former occasion, was false, and the attorney for the commonwealth, in order to show that the letter had been obtained unfairly, asked the accomplice certain questions, in answer to which he testified that the letter was part of a correspondence which had been carried on in jail, and stated the means by which the correspondence had been carried on, the relative position of the several rooms, and the arrangement of the prisoners therein, it was not competent to call witnesses to prove that the position of the rooms and the arrangement of the prisoners therein corresponded with the account given by the accomplice, in order to support his general credit.—Commonwealth v. Bosworth, 39 Mass. (22 Pick.) 397.

[b] (Mass. 1853) Where, in an action for damages occasioned by the overflow of plaintiff's land, a witness, testifying to the existence of a certain water course, stated that many years previous, as he was putting in a water wheel, the plaintiff's father struck him, and he still bore the marks on his arm, it was proper to refuse to permit the party calling him to show such marks to the jury, as such marks were wholly immaterial and had no tendency to confirm the witness in the matter in issue.—Ashley v. Wolcott, 65 Mass. (11 Cush.) 192.

[c] (Mo. 1885) The admission of irrelevant testimony which has a tendency to corroborate the testimony of one of the parties to the action in an immaterial and unimportant particular is error.—Brown v. Hartzell, 87 Mo. 564.

[d] (N. Y. 1863) A corroboration, to be of any avail, should be as to some matter material to the issue.—Frazer v. People, 54 Barb. 306.

[e] (N. C. 1869) Where a defendant calls for a statement from a witness for the prosecution, and then attacks him with an impeaching witness, if the prosecution attempts to corroborate the first witness, the defendant cannot object on the ground that the matter called out is collateral matter.—State v. Kirkman, 63 N. C. 246.

[f] (Vt. 1840) A witness may be cross-examined as to any collateral fact which has any tendency to test either his accuracy or veracity, but the party will be bound by the answers of the witness; but, if testimony be given without objection tending to contradict such answers, it is not then competent for the party offering the first witness to give independent proof tending to corroborate the witness as to such collateral matters.—Stevens v. Beach, 12 Vt. 585, 36 Am. Dec. 359.

§ 1287. Competency of corroborative evidence.

Competency of husband or wife, see ante, § 135.
Admissibility of memorandum to corroborate oral testimony in general, see "Evidence," vol. 20, cc. 2108–2110, § 1489.

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[a] (Ala. 1856) The testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction, without corroborating evidence; and such corroborating evidence, to avail anything, must be of a fact tending to show the guilt of one or both of the defendants.—Martin v. State, 28 Ala. 71.

[b] (Ala. 1876) The uncorroborated testimony of a witness in a criminal case, who is shown to be unworthy of credit, is not sufficient to justify conviction; and evidence to corroborate his testimony must be a fact tending to show defendant's guilt.—Porter v. State, 55 Ala. 95.

[c] (Ala. 1878) It is error to allow a witness, who confesses having written the forged instrument under the direction and at the request of the prisoner, after he has been impeached, to write in the presence of the court and jury a similar instrument, for the purpose, by comparison between the two, of sustaining such witness.—Williams v. State, 61 Ala. 33.

[d] (Ala. 1892) The statement of a witness that another had shown him the place where deceased's body had been found is not admissible, on a trial for the murder, merely to corroborate the testimony given by such other; nor is the error cured by the exclusion afterwards of the statement at the request of the prosecution, accompanied by the remark that the court still regarded it as proper, although, had the witness first stated the indications of the murder, or concealment of the body observed by him, it would then have been competent for him to have stated for the purpose of identification that the person mentioned had pointed the place out to him.—Green v. State, 96 Ala. 29, 11 South. 478.

[e] (Ga. 1894) Where one of the state's witnesses testified that he was induced by the father of defendant to testify falsely at the inquest, and the father contradicted him, a conversation between the two witnesses after the inquest is not admissible merely to corroborate the state's witness.—Evans v. State, 95 Ga. 468, 22 S. E. 298.

[f] (Mass. 1833) Where one act of adultery was proved by a witness whose credibility the defendant attempted to impeach, it was *held* that other instances of improper familiarity between the defendant and the same woman, not long before the time of the adultery so proved, might be given in evidence to corroborate the witness.—Commonwealth v. Merriam, 31 Mass. (14 Pick.) 518, 25 Am. Dec. 420.

[g] (Mass. 1856) Where a witness denies that he stated a fact as another witness has testified that he did, and testifies that he stated a different fact, evidence that the fact existed, which he has testified that he stated, is inadmissible to corroborate him.—Edgerton v. Wolf, 72 Mass. (6 Gray) 453.

[h] (Mich. 1871) The fact that evidence of a distinct offense, but of the same kind with that charged, tends to corroborate a witness who has testified to confessions of the defendant, does not render it admissible.—People v. Schweitzer, 23 Mich. 301.

[i] (Mich. 1876) A party cannot support his positive testimony of facts stated upon his own knowledge, by testifying, himself, to other consistent or corroborative facts that are immaterial in themselves, and which, like the facts sought to be corroborated, must rest entirely upon his own oath.—Anderson v. Russell, 34 Mich. 109.

[j] (Mich. 1891) Where the evidence is conflicting as to the condition of a blower in a mill at the time of an accident alleged to have happened in its use, evidence as to its condition a week afterwards is not admissible in corroboration.—Kinney v. Folkerts, 84 Mich. 616, 48 N. W. 283.

[k] (Minn. 1895) The person whom it was charged defendant induced to commit the murder testified that, shortly before the commission of the crime, defendant gave him part of the contents of a bottle of whisky, but kept the bottle, and the state showed that defendant purchased such a bottle on the day of the crime. Defendant admitted the purchase of whisky, but denied that he gave any to witness, and stated that he left the bottle in the bathroom at his home, where he believed it then to be. Thereafter the defense offered to prove, by a witness who visited the bathroom after defendant testified, that a similar bottle of whisky was found in the place mentioned by defendant. *Held*, that the offer was properly rejected.—State v. Hayward, 62 Minn. 474, 65 N. W. 63.

[l] (Minn. 1895) A witness for the state, who knew of defendant's intention to commit the crime, testified that he told defendant on a certain day that if he did not abandon his intention witness would report him; that thereupon defendant assaulted witness, and threatened him with harm; and that witness then went home, and got his revolver. *Held*, that it was proper to admit, in corroboration of that testimony, evidence of witness' wife that on the day mentioned her husband came home and got his revolver.—State v. Hayward, 62 Minn. 474, 65 N. W. 63.

[m] (N. Y. 1848) Where, in assumpsit for work, labor, and materials, a witness for the defendant had testified to the statements of the parties that the work could be done for less than the amount claimed by the plaintiff, and the plaintiff introduced evidence to discredit him, it was *held* that the defendant, for the purpose of sustaining his witness, might introduce testimony to show that the work might have been done for the amount named by the witness.—Clapp v. Wilson, 5 Denio, 285.

[n] (N. Y. 1892) Where, in an action for divorce, the co-respondent testified that she had directly charged defendant with adultery in a letter to plaintiff, the court properly admitted in evidence a subsequent letter of the co-respondent to another person, stating that she did not intend to make such charge in the letter to plaintiff, as it was proper to admit it to show that her testimony that she had charged the crime directly was true.—Crary v. Crary (City Ct. Brook.) 18 N. Y. Supp. 753.

[o] (N. Y. 1893) On a trial for murder, where a witness was called to identify watches found on defendant as the property of deceased, it was proper to ask him whether he and deceased belonged to the same post in the G. A. R., and whether he served with him in the war in the same regiment, since the evidence tended to show witness' opportunities to become acquainted with deceased's affairs, and furnished a basis on which the jury might estimate the weight to be given to his testimony.—People v. Rohl, 138 N. Y. 616, 33 N. E. 933.

[p] (N. C. 1852) A witness who was impeached, having sworn that the plaintiff had agreed to give him credit for $30, the books of the plaintiff were admitted as evidence, in corroboration of the witness, to show that the credit was given.—Fain v. Edwards, 44 N. C. 64.

[q] (N. C. 1876) In an action to recover real estate, it is not error to allow a deed for other land than that in controversy to be read in evidence to corroborate statements of witnesses.—Buie v. Carver, 75 N. C. 559.

[r] (N. C. 1887) In an action to recover possession of land, with damages for its retention, a statement of account between defendant and plaintiff bearing the signature of the former is admissible in evidence to corroborate plaintiff's testimony as to the rents and receipts from the land.—McMillan v. Baker, 97 N. C. 197, 2 S. E. 164.

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[s] (N. C. 1888) In an action to recover for lumber used in defendant's house, which plaintiff alleged he sold to the builder for defendant's use, plaintiff was asked on cross-examination why he had charged the lumber to the builder, and stated that the builder gave orders on defendant for the money. *Held*, that plaintiff had a right to sustain his statement by introducing such an order as a part of his explanation.—Wiggins v. Guthrie, 101 N. C. 661, 7 S. E. 761.

[t] (N. C. 1890) On a murder trial, a witness testified that a few weeks before the homicide he received an anonymous letter containing threats against deceased, and showing that the writer was jealous of deceased. Witness testified that defendant afterwards told him that she wrote it, and sent it to the post-office by a colored boy. The cross-examination of witness showed a purpose to impeach him, particularly to question the accuracy of his statements concerning the letter. *Held*, that the testimony of a negro boy that he took a letter for defendant to the post-office, which she told him not to let any one but a certain person see, and that this was about a month before the time testified to by the first witness, was properly submitted to the jury to corroborate the first witness.—State v. Morton, 107 N. C. 890, 12 S. E. 112, 10 L. R. A. 527.

[u] (Pa. 1811) A deed given by defendant in ejectment, after the commencement of the suit, is admissible to support a witness whose testimony had been impeached.—Richardson v. Stewart's Lessee, 4 Bin. 198.

[uu] (Pa. 1845) In a suit against the owner of a wagon to recover damages for an alleged nondelivery by his carter of certain wadding to W. & R., after the carter had proved that the wadding was consigned to C. & J. R., to whom he had delivered it, it was *held* that C. R., one of the firm, to corroborate the carter's testimony, might prove that the plaintiff was indebted to him and his partner, and that he had promised to send them wadding for the amount due them, about the time it was delivered to them.—Myre v. Ludwig, 1 Pa. (1 Barr) 47.

[v] (Pa. 1866) It is always competent for a witness to refresh his memory by memoranda made at the time of the transaction of which he speaks, and where the memorandum has been received in evidence without objection, and it recites the substance of the very transaction testified to, it is not error for the court to say that it corroborates the witness.—Selover v. Rexford's Ex'r, 52 Pa. (2 P. F. Smith) 308.

[vv] (Pa. 1896) In an action for the price of lumber sold defendant through M., a member of plaintiff firm, defendant alleged that the lumber was obtained by him from another firm, of which M. was also a member, under a special contract for its delivery in payment of a balance due to defendant from this latter firm. *Held*, that it was proper, in order to corroborate defendant's account of the transaction, to admit evidence as to the state of accounts between defendant and such firm, as well as to a previous contract for the sale of lumber by it to defendant out of which the alleged debt arose, and also of the extent to which this contract had been performed.—Hamilton v. Hastings, 172 Pa. 308, 34 Atl. 43.

[w] (S. C. 1878) Where an accomplice testified that he had paid a bribe to defendant by giving him a check on a certain bank, which had afterwards been returned by such bank to witness, it was competent for the state in corroboration to show by the books and business memoranda of the same bank a credit to defendant for like amount deposited by check two days after the alleged bribery.—State v. Smalls, 11 S. C. 263.

[ww] (Tex. 1858) It is always permissible to strengthen a witness' testimony by connected incidents showing its consistency and reasonableness.—Bruton v. State, 21 Tex. 337.

[x] (Tex. 1887) In a contest involving the identity of the grantee in a land certificate, issued by a board of land commissioners, where one of the claimants testifies that the certificate remained in his possession until the year 1867, when he sent it to a land agent in Austin, Texas, *held*, that a letter from the land agent acknowledging the receipt of the certificate is admissible as corroborative of such testimony.—Baker v. Maloney (Sup.) 4 S. W. 469.

[xx] (Tex. 1894) Testimony of an accomplice as to the details of his confession to the sheriff; that he had told him everything just as he had told it to the jury; that he had taken the sheriff to a hotel where he and defendants had stopped, and shown him the register—is an attempt to corroborate the witness, and is inadmissible on his examination in chief.—Conway v. State, 33 Tex. Cr. R. 327, 26 S. W. 401.

[y] (Tex. 1895) A check executed by plaintiff to one from whom his vendor purchased goods is admissible to corroborate plaintiff's testimony that he executed a check to the one from whom his vendor purchased, as part of the consideration of his own purchase.—Kean v. Zundelowitz, 9 Tex. Civ. App. 350, 29 S. W. 930.

[yy] (Vt. 1860) Plaintiff having testified that a certain agreement was made in the presence of H., and that H. at the time made a written statement of the mode of settlement of the parties' accounts, on the basis of which such agreement was made, it was *held* that it was competent for plaintiff to introduce in evidence, as corroborative of his own testimony, such written statement.—Norton v. Downer, 33 Vt. 26.

[z] (Vt. 1864) If the question at issue on a trial is whether there was a copartnership existing between A. and B., the plaintiff and defendant in the suit, a letter written by A. containing a statement implying the existence of such copartnership is admissible in evidence, to corroborate the testimony of A. that B. directed him to write such statement, although B. did not read the letter.—Soules v. Burton, 36 Vt. 652.

[zz] (Wis. 1881) A witness for the purpose of corroborating his testimony that he did not agree to meet defendant's agent at a certain time cannot be asked whether he made an appointment to meet other persons at that time.—Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504.

§ 1288. —— Former statements corresponding with testimony.

Witness impeached by evidence of inconsistent statements, see ante, § 1260.

[a] Declarations, verbal or written, made by a witness out of court, are not admissible in corroboration of his testimony on the trial.
—(Ala. 1876) Childs v. State, 55 Ala. 25;
(N. Y. 1869) Butler v. Truslow, 55 Barb. 293;
(Pa. 1868) Commonwealth v. Carey, 2 Brewst. 404.

[aa] (Ala. 1852) Proof of declarations, verbal or written, made by a witness out of court, is, as a general rule, inadmissible in corroboration of testimony given by him on the trial of a cause.—Nichols v. Stewart, 20 Ala. 358.

[b] (Ala. 1887) A witness cannot be corroborated by showing that he had made similar statements on a former occasion.—Fallin v. State, 83 Ala. 5, 3 South. 525.

[bb] (Ala. 1893) It is not competent to ask a witness if she had not made the same statements as now at the preliminary hearing.—Smith v. State, 103 Ala. 40, 16 South. 12.

[c] (Ala. 1894) The state's witnesses testified that at a former term of the court they were

convicted for participating in the same offense, and that they disclosed to the presiding judge defendant's participation in the crime. Such disclosure, as to defendant, was contradicted by the trial judge. *Held*, that evidence that such witnesses made statements out of court to the solicitor, who bore the title of "Judge," and who resembled the trial judge in personal appearance, was inadmissible to corroborate or fortify their testimony.—Jones v. State, 107 Ala. 93, 18 South. 237.

[cc] (Cal. 1887) It is no ground for reversal that prior declarations of the witness were given in evidence to support his testimony before it was impeached, when the record shows that evidence was subsequently introduced, which, if offered before the declarations were testified to, would have made them competent.—Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413.

[d] (Cal. 1891) In an action against an officer for the value of property wrongfully levied on, in which plaintiff claims title by purchase from the execution debtor, evidence that the execution debtor, who was a witness for plaintiff, before the trial made statements consistent with his testimony, is not admissible in rebuttal of evidence of his bad reputation for veracity.—Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310.

[dd] (Colo. 1893) In a criminal trial, the statements of a witness for the prosecution, made before the trial, in the absence of defendant, will not be admitted as evidence to confirm the testimony of such witness.—Connor v. People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295, 25 L. R. A. 341.

[e] (Conn. 1830) On the trial of an indictment for an attempt to commit rape, after the person injured had testified, the prisoner, in cross-examination, asked her many questions which tended to discredit her testimony; before any other attempt, however, to discredit her, the prosecutor offered a witness to prove that the person injured had previously told to her the same story which she had just testified to. *Held*, that this testimony was admissible to show constancy in the declarations of the principal witness.—State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90.

[ee] (Ind. 1837) A witness cannot be corroborated by evidence of previously made statements in accordance with his testimony in the absence of any attempt to impeach him by evidence of inconsistent statements.—Coffin v. Anderson, 4 Blackf. 395.

[f] (Ind. 1885) The testimony of a witness, who has been contradicted as to an alleged fact, cannot be corroborated by showing that he related the same fact in the same way before; but if he had been impeached by showing that he had related the same fact differently, then it might have been shown in corroboration that he also related it consistently with his testimony.—Hodges v. Bales, 102 Ind. 494, 1 N. E. 692.

[ff] (Iowa, 1868) When the credibility of a witness is impeached by direct testimony of his want of reputation for truth, or of his general moral character, he cannot be supported by evidence that statements of the facts made by him before the trial correspond with his evidence.—State v. Vincent, 24 Iowa, 570, 95 Am. Dec. 753.

[g] (Iowa, 1868) A defendant proposed to show by a witness, who had testified to a material transaction, for the purpose of strengthening his testimony, that immediately after the transaction he gave to several persons an account of it, corresponding with his testimony, and then the defendant proposed to prove by such persons these statements. *Held*, that the evidence was inadmissible.—Boyd v. First Nat. Bank, 25 Iowa, 255.

[gg] (Iowa, 1868) A witness for the defendant testified to a conversation with the plaintiff in regard to the subject of the suit. The defendant then proposed to prove by the witness what he thought of the transactions related by the plaintiff, and what impression the conversation made on his mind, such opinion and impression being adverse to the plaintiff. The object of this testimony was stated to be to satisfy the jury that the witness was not mistaken in his testimony. *Held* to be inadmissible.—Boyd v. First Nat. Bank, 25 Iowa, 255.

[h] (Iowa, 1886) Plaintiff was examined as a witness in her own behalf, and testified that before a mortgage was given she obtained money for her husband from the bank on whose suit the attachment issued, on which defendant seized the property; that the cashier of the bank stated to her that her husband's credit was good for a certain amount. Defendant introduced the cashier, who denied having made the statement attributed to him. Plaintiff's husband was examined in rebuttal, and was permitted to state that on her return from the bank she told him that the cashier had made the statement which she attributed to him in her testimony. *Held*, that the testimony of such husband was inadmissible, since the plaintiff testified that the cashier made the statement, and it could add nothing to her testimony that she had made the statement when not under oath.—Rhutasel v. Stephens, 68 Iowa, 627, 27 N. W. 786.

[hh] (Kan. 1884) Statements of a witness made out of court cannot be shown by another witness to support his testimony.—Chapman v. Blakeman, 31 Kan. 684, 3 Pac. 277.

[i] (La. 1895) Where the testimony of a witness was assailed as to a particular fact, similar prior statements made at an unsuspicious time were admissible to corroborate him.—State v. Dudoussat, 47 La. Ann. 977, 17 South. 685.

[ii] (Me. 1853) It is inadmissible to corroborate a witness' deposition by means of his disclosure made and sworn to before two justices.—Smith v. Morgan, 38 Me. 468.

[j] (Md. 1823) Where a witness swears to a fact, and the opposite party introduces evidence which tends substantially to defeat the credit of the witness, his testimony may be corroborated by proof of his prior declarations.—Cooke v. Curtis, 6 Har. & J. 93.

[jj] (Md. 1878) Where, on cross-examination of a state's witness, evidence is elicited tending to contradict and discredit him, statements by him substantially the same as his testimony in chief are admissible for the purpose of corroborating his testimony.—Bloomer v. State, 48 Md. 521.

[k] (Md. 1890) In an action for breach of contract, defendant and his foreman testified that it was agreed that, if plaintiff got drunk and neglected his work, he should be discharged; that he did get drunk, and was so discharged. Both these statements were contradicted, and to corroborate them defendant offered evidence that both he and the foreman had made the same declarations to another person before plaintiff's discharge. *Held*, that evidence of the foreman's declarations was admissible in support of his credibility.—Mallonee v. Duff, 72 Md. 283, 19 Atl. 708.

[kk] (Md. 1896) Where evidence has been introduced showing that a witness has fabricated his testimony to meet the exigencies of the case, the fact that he uttered the same statement shortly after the transaction, and before the motive to fabricate existed, may be shown, to support his credibility and the accuracy of his recollection.—Baltimore City Pass. Ry. Co. v. Knee, 83 Md. 77, 34 Atl. 252.

[l] (Mass. 1863) In an indictment for libel in charging the prosecutor with being licentious,

if the defendant has introduced the testimony of a married woman that the prosecutor once sought illicit intercourse with her, he cannot be allowed to prove in addition that she immediately complained thereof to her husband.—Commonwealth v. Harper, 89 Mass. (7 Allen) 539.

[ll] (Mass. 1889) Evidence of a stenographer that defendant had testified the same way in a similar suit is not competent to corroborate defendant.—Chase v. Perley, 148 Mass. 289, 19 N. E. 398.

[m] (Mass. 1893) After witnesses have testified, affidavits previously made by them, stating the same matters as those testified to by them, are not admissible in corroboration of their testimony.—Loomis v. New York, N. H. & H. R. Co., 159 Mass. 39, 34 N. E. 82.

[mm] (Mich. 1895) An answer by a witness, in response to a question as to how he remembered that the wind was blowing hard at the time of the fire, that he and another spoke about it, is admissible.—Cole v. Lake Shore & M. S. Ry. Co., 105 Mich. 549, 63 N. W. 647.

[n] (Mo. 1846) The declarations of a witness when not under oath, are not admissible to corroborate his testimony under oath.—Riney v. Vanlandingham, 9 Mo. 816.

[nn] (Mo. 1883) Where a witness' testimony is impeached by an attack made on his character, it is admissible to prove that the witness has made statements consistent with those made as a witness.—State v. Grant, 79 Mo. 113, 49 Am. Rep. 218.

[nnn] (N. Y. 1834) Evidence that a witness has on previous occasions given the same relation of facts to which he testifies on the trial of a cause is admissible where the witness is impeached either by testimony of adversaries or on cross-examination, or even on direct examination, as where he admits that he was an accomplice in the crime as to which he testifies.—People v. Vane, 12 Wend. 78.

[o] (N. Y. 1840) Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as an almost universal rule, inadmissible.—Robb v. Hackley, 23 Wend. 50; Dudley v. Bolles, 24 Wend. 465.

[oo] (N. Y. 1878) Where an attempt is made to discredit a witness on the ground that when his testimony is given his interest prompts him to make a false statement, he may show that he made similar statements before he had acquired any interest.—Herrick v. Smith, 13 Hun, 446.

[p] (N. Y. 1883) Where, on a trial, the issue of an attempt by plaintiff to suborn a witness has been gone into on both sides, the plaintiff is properly allowed to show that the very matters which the witness charged plaintiff with trying to suborn witness to testify falsely to, were what witness had himself voluntarily stated to plaintiff as the actual facts of the case.—Homer v. Everett, 91 N. Y. 641.

[pp] (N. Y. 1889) Plaintiff cannot give evidence of declarations, made by one of his witnesses before trial, in corroboration of his testimony at the trial, on the ground that certain evidence has been given to show that the witness is actuated by anger against the defendants, where it appears that such evidence was not in fact given, though defendants do not disclaim having offered it, and where it further appears that the witness has stated on the trial that he has never communicated to any one the subject-matter of his testimony.—Train v. Taylor, 51 Hun, 215, 4 N. Y. Supp. 492.

[ppp] (N. Y. 1894) Declarations made by a witness out of court are admissible to corroborate his testimony on the trial where it is charged that the witness had a motive in testifying falsely, or to contradict evidence showing that his testimony was a recent fabrication.—Baber v. Broadway & S. A. R. Co. (Com. Pl.) 9 Misc. Rep. 20, 29 N. Y. Supp. 40.

[q] (N. Y. 1895) A witness cannot be corroborated by entries in his own books.—In re Smith, 85 Hun, 359, 32 N. Y. Supp. 943.

[qq] (N. Y. 1896) A witness may, to rebut an inference sought to be drawn, that his testimony at the trial is an afterthought and a fabrication, be allowed to testify to unsworn statements of similar import made previously out of court—McLain v. British & Foreign Marine Ins. Co. (Sup.) 16 Misc. Rep. 336, 38 N. Y. Supp. 77.

[qqq] (N. C.) Where a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness consistent with his testimony on the trial.—(1849) State v. Dove, 32 N. C. 469; (1894) Same v. Staton, 114 N. C. 813, 19 S. E. 96.

[r] (N. C. 1854) When the credibility of a witness has been attacked, from the nature of his evidence, from his situation, from bad character, or from imputations directed against him in cross-examination, the party introducing him may prove other consistent statements, for the purpose of corroborating him.—March v. Harrell, 46 N. C. 329.

[rr] (N. C. 1881) Where a witness has expressed an admissible opinion, he may state in corroboration that he previously gave the same opinion to another, and especially where it is elicited on cross-examination.—Godfrey v. Maberry, 84 N. C. 255.

[rrr] (N. C.) A statement made by a witness before trial may be shown to corroborate his testimony, where an attempt is made to impeach him.—(1885) Davis v. Council, 92 N. C. 725; (1885) State v. Whitfield, Id. 831; (1887) Same v. Brewer, 98 N. C. 607, 3 S. E. 819; (1889) Same v. Ward, 103 N. C. 419, 8 S. E. 814; (1890) Same v. Jacobs, 107 N. C. 873, 12 S. E. 248; (1894) Wallace v. Grizzard, 114 N. C. 488, 19 S. E. 760.

[s] (N. C. 1887) Evidence of a previous statement by a county treasurer to another county official was admissible, as corroborative of the sworn testimony of the treasurer to the same effect.—Davenport v. McKee, 98 N. C. 500, 4 S. E. 545.

[ss] (N. C. 1892) Witnesses for the state in a trial for murder may be corroborated by showing that they made the same statements soon after the homicide that they made on the trial.—State v. McKinney, 111 N. C. 683, 16 S. E. 235.

[sss] (Ohio, 1896) The recollection of a witness concerning a fact in issue cannot be corroborated by the contents of a memorandum made by himself, long after the circumstances, showing his recollection at a former date.—Jones v. State, 54 Ohio St. 1, 42 N. E. 699.

[t] (Pa. 1823) Where a witness is impeached, evidence may be given of what he swore on a former trial of the cause to corroborate him.—Henderson v. Jones, 10 Serg. & R. 322, 13 Am. Dec. 676.

[tt] (Pa. 1887) Where it is important to know whether a statement made by a witness is of recent fabrication, it is competent to show that upon a former occasion, when there was no reason to suspect his motives, he stated the matter in the same way as upon the trial, but, where such declarations go to the substance of the action, and are made in such close connection with the bringing of a suit that they appear as if made for the purpose of accumulating testimony in support of plaintiff's claim, they cannot be given in evidence for any purpose.—Clever v. Hilberry, 116 Pa. 431, 9 Atl. 647.

[ttt] (S. C. 1817) The affidavit made by prosecutor in a criminal case of assault and battery before a magistrate may be used at the trial to support the testimony of the witness by showing what he said or swore at some other time on the same subject.—State v. Lazarus, 1 Mill, Const. 34.

[u] (S. C. 1848) Where no design to misrepresent is charged against a witness, in consequence of his relation to the party or to the cause, evidence of similar statements made by him on former occasions is not admissible to corroborate his testimony.—State v. Thomas, 3 Strob. 269.

[uu] (Tenn. 1842) Where the deposition of deceased was read against the prisoner charged with his murder, his declarations, made before the deposition and afterwards, are admissible to show that he had been consistent and uniform in his declarations.—Bostick v. State, 22 Tenn. (3 Humph.) 344.

[uuu] (Tenn. 1891) In an action against plaintiff's father-in-law and others for enticing away his wife and child, the wife testified that on one occasion she begged her husband to promise that he would not take her child away from her if she brought her home, and that he refused to so promise. The husband denied this statement in toto. *Held*, that it was competent to show by one who saw the occurrence that the wife made this same statement to the witness immediately after the occurrence.—Glass v. Bennett, 89 Tenn. (5 Pickle) 478, 14 S. W. 1085.

[v] (Tenn. 1896) Prior statements of witnesses, made in the presence of accused, though denied at the time and at the trial by accused, are admissible to support the credibility of such witnesses.—Green v. State, 97 Tenn. (13 Pickle) 50, 36 S. W. 700.

[vv] (Tex. 1880) An impeaching, but himself an unimpeached, witness, cannot be corroborated by proof of statements made by him corresponding with his testimony.—Bailey v. State, 9 Tex. App. 98.

[vvv] (Tex. 1886) A former statement of a witness to whom is imputed a design to misrepresent arising from some interested motive, made at a time when such supposed motive did not exist, is admissible for the purpose of corroborating his testimony.—Lewy v. Fischl, 65 Tex. 311.

[w] (Tex. 1889) Where the state attacks a witness' reputation for truth, defendant cannot show that the witness testified to the same facts on the examination and elsewhere as on the trial.—Thurmond v. State, 27 Tex. App. 347, 11 S. W. 451.

[ww] (Tex. 1893) Where a witness is impeached, it is proper to allow him, in corroboration of his testimony before the jury, to testify that he had made similar statements before the grand jury.—Goode v. State, 32 Tex. Cr. R. 505, 24 S. W. 102.

[www] (Tex. 1893) Statements as to the way in which an accident occurred, made by an injured person to his physician shortly after the accident, are not admissible to show that his account of the accident, as testified to by him, is not a recent fabrication, there being no pretense of a recent fabrication.—Ft. Worth & D. C. Ry. Co. v. Stone (Civ. App.) 25 S. W. 808.

[x] (Tex. 1895) Where there is evidence that the general reputation for truth and veracity of a witness for the state is bad, testimony that such witness previously made statements corresponding with her testimony is inadmissible to sustain her testimony, in the absence of evidence by the defense that she made contradictory statements with reference to the facts to which she testified.—Stanford v. State (Cr. App.) 29 S. W. 271.

[xx] (Tex. 1895) Where defendant tried to show that the testimony of a state's witness was recently fabricated, the state could show that on the night of the homicide the witness gave a similar version of the facts.—English v. State, 34 Tex. Cr. R. 190, 30 S. W. 233.

[xxx] (Utah, 1894) Prior statements of a party to an action are not admissible to corroborate his testimony when the circumstances surrounding him at the time the statements were made show that his own interests were being subserved thereby.—Silva v. Pickard, 10 Utah, 78, 37 Pac. 86.

[y] (Vt. 1839) The sayings of a witness out of court are not admissible to corroborate his testimony.—Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345.

[yy] (Vt. 1841) Where a witness is discredited by testimony against his general character, testimony tending to show that he has formerly given the same statement as that to which he now testifies is not admissible.—Gibbs v. Linsley, 13 Vt. 208.

[yyy] (Vt. 1888) When an attempt is made to discredit a witness on the ground of his relation to the party or to the cause, it is proper to show that he made a similar statement before the relation existed.—State v. Flint, 60 Vt. 304, 14 Atl. 178.

[z] (Va. 1877) On trial for larceny from the person, it is not competent to corroborate the prosecuting witness' account of the larceny by proof that, immediately after its alleged occurrence, he reported the circumstances to other persons.—Haynes v. Commonwealth, 28 Grat. 942.

[zz] (Va. 1886) Where an attempt is made to discredit a witness by showing malice on his part, growing out of his arrest for an offense, it may be shown that before his arrest his statements conformed to his testimony.—Howard v. Commonwealth, 81 Va. 488.

[zzz] (Wis. 1887) Where a conversation between plaintiff and defendant was first drawn out by cross-examination of the witness of plaintiff by defendant, defendant cannot testify as to what he said in such conversation, as a party cannot give in evidence his own declarations made out of court to support his testimony given on the trial.—Plano Mfg. Co. v. Frawley, 68 Wis. 577, 32 N. W. 768.

§ 1289. Effect of corroboration.

Effect of corroboration of witness whose testimony is in part false, see ante, § 1083.

[a] (Ga. 1855) To restore the credit of impeached witnesses, much depends on the nature as well as the extent of the corroboration. Such credit is restored to a much greater extent when the witness is corroborated as to the main fact than as to immaterial facts.—Haynes v. State, 17 Ga. 465.

[b] (N. Y. 1892) In an action for conversion against a bona fide purchaser of stolen goods, a verdict against defendant was chiefly founded on the testimony of the thief. *Held*, that he was sufficiently corroborated by the fact that the box containing the property was empty, that he had an opportunity to steal the same, and that he was caught at defendant's place of business attempting to sell a portion of the property.—Lovell v. Shea, 60 N. Y. Super. Ct. (28 Jones & S.) 412, 18 N. Y. Supp. 193.

[c] (N. C. 1878) The rule admitting former statements of an impeached witness, not made under oath, to sustain his credibility, will not be extended to confirm his statement as to the facts sworn to by him, any more than any other hearsay evidence.—State v. Parish, 79 N. C. 610.

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Women.

Admission to practice law, see "Attorney and Client," vol. 5, c. 1398, § 3 [a]; cc. 1400–1403, § 7.

Capacity to act as agent or trustee, see "Husband and Wife," vol. 26, cc. 1691, 1692, § 277.

—— *as curatrix of absentee, see* "Absentees," vol. 1, c. 419, § 3 [a].

—— *as executor or administrator, see* "Executors and Administrators," vol. 22, c. 62, § 34; cc. 97–99, §§ 71–73.

—— *as guardian, see* "Guardian and Ward," vol. 25, cc. 266–268, §§ 25–27; c. 270, § 31.

Citizenship, see "Citizens," vol. 10, c. 3, § 1 [a]; cc. 13–15, §§ 6, 7.

Eligibility to office in general, see "Officers," vol. 37, cc. 1835, 1836, §§ 24, 25.

—— *of married women, see* "Husband and Wife," vol. 26, c. 1694, § 279.

—— *to county educational offices, see* "Schools and School Districts," vol. 43, c. 2132, § 102.

Immunity from arrest, see "Arrest," vol. 4, cc. 622, 623, § 28.

—— *on execution against the person, see* "Execution," vol. 21, cc. 2127, 2128, § 1230 [l, n, o].

Importation for purpose of prostitution, see "Aliens," vol. 2, c. 198, § 111; cc. 201, 202, § 116.

Imprisonment as punishment for crime, see "Criminal Law," vol. 15, c. 1064, § 3277 [s]; c. 1109, § 3328 [c].

Jurisdiction of justices of the peace of actions by or against, see "Justices of the Peace," vol. 31, cc. 993, 994, §§ 140, 141.

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—— *by or involving participation of women, see* "Adultery," vol. 1, cc. 1995–2021; "Bigamy," vol. 6, cc. 2122–2159; "Fornication," vol. 23, cc. 1622–1629; "Incest," vol. 27, cc. 35–50; "Lewdness," vol. 32, cc. 1832–1843; "Miscegenation," vol. 35, cc. 3–5; "Prostitution," vol. 40, cc. 2929–2934.

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Right of naturalization, see "Aliens," vol. 2, c. 204, § 119 [c]; c. 205, § 122.

—— *of suffrage, see* "Elections," vol. 18, cc. 140–142, §§ 60–62.

Trust to secure passage of laws granting women political and civil rights not valid as a charitable use, see "Charities," vol. 9, c. 2119, § 34 [e].

Wood.

Custom as to measurement, see "Customs and Usages," vol. 15, cc. 1298, 1299, § 38 [o, t].

Customs duties on wood and manufactures thereof, see "Customs Duties," vol. 15, cc. 1379–1381, §§ 60–65.

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Woods and Forests.

Scope-Note.

[INCLUDES trees not grown for their fruit or other annual products; protection and promotion of the growth of such trees and of forests; and nature and incidents of rights of property in growing trees in general.

[EXCLUDES promotion of agriculture in general (see "*Agriculture*"); rights and liabilities incident to particular estates in land (see "*Life Estates*"; "*Remainders*"; and other specific heads); trees on public lands (see "*Public Lands*"); specific remedies for cutting down or injuring trees (see "*Trespass*"; "*Waste*"); and cutting, floating, etc., logs (see "*Logs and Logging*").]

Analysis.

Nature of property, § 1.
Ownership, § 2.
Effect of sale or conveyance of land, § 3.
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Offenses, § 6.
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—— *to reservation of trees on land conveyed, see* "Frauds, Statute of," vol. 23, c. 2034, § 89 [m].

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Cut timber, see "Logs and Logging," vol. 33, cc. 1515–1637.

—— *as property passing by execution sale, see* "Execution," vol. 21, c. 1413, § 751.

—— *as subject of larceny, see* "Larceny," vol. 32, cc. 1472, 1473, § 15.

—— *as subject of replevin, see* "Replevin," vol. 42, cc. 2073, 2074, § 24.

—— *included in deed as appurtenance to land, see* "Deeds," vol. 16, cc. 437, 438, § 339.

Cutting and removal of timber as constituting trespass, see "Trespass," vol. 46, cc. 258–260, § 9 [b, v, x].

—— *as constituting waste, see* "Waste," vol. 48, cc. 2119–2122, §§ 12, 13.

Cutting and removal of timber as element of adverse possession, see "Adverse Possession," vol. 1, cc. 2111–2114, §§ 112, 113.

—— *entry for purpose as constituting forcible entry, see* "Forcible Entry and Detainer," vol. 23, c. 1260, § 8.

—— *injunction against, see* "Injunction," vol. 27, cc. 1677–1682, § 105.

—— *on Indian lands, see* "Indians," vol. 27, c. 220, § 48.

Damages, admissibility of evidence of damage to timber, see "Damages," vol. 15, cc. 2262–2265, § 464.

—— *instructions as to measure of for injuries to trees, see* "Damages," vol. 15, c. 2424, § 558.

—— *measure of, for injuries to trees, see* "Damages," vol. 15, cc. 2013–2020, §§ 281–283.

—— *proximate or remote consequences of clearing land of timber, ground for, see* "Damages," vol. 15, c. 1681, § 38 [b].

Evidence to impeach tax title under which plaintiff claims in action by state for penalties for trespass on forest preserve, see "Taxation," vol. 45, c. 2127, § 1567 [ss].

Highways, cutting and removal of timber in construction, improvement, and repair of, see "Highways," vol. 25, cc. 1693–1695, §§ 337, 338.

†See Index for additional and more specific references to matter contained in this volume.

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Highways, rights as to timber and use thereof for repair or construction of highway, see "Highways," vol. 25, cc. 1612–1616, §§ 292, 293.

Justice court's jurisdiction of actions by purchaser to recover purchase price of growing timber, see "Justices of the Peace," vol. 31, c. 969, § 95.

—— *for cutting or carrying away trees or timber, see* "Justices of the Peace," vol. 31, cc. 957, 958, § 86.

Mortgage, injunction to restrain cutting of timber, see "Mortgages," vol. 35, cc. 1037, 1038, § 548.

—— *of real property as including timber thereon, see* "Mortgages," vol. 35, cc. 638, 639, § 263.

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—— *right to timber on foreclosure, see* "Mortgages," vol. 35, cc. 2572, 2573, § 1563.

—— *timber as subject of, see* "Mortgages," vol. 35, cc. 294, 295, § 9.

—— *title and rights of purchaser of mortgaged property to timber thereon, see* "Mortgages," vol. 35, cc. 1795, 1796, § 1114.

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—— *cutting and removal of timber from, see* "Public Lands," vol. 41, cc. 16–33, §§ 9–22.

—— *entries, sales, and possessory rights as to timber-culture land, see* "Public Lands," vol. 41, cc. 103–106, §§ 78–80, 82.

—— *grant to railroads of right to take timber, see* "Public Lands," vol. 41, cc. 426–428, § 283.

—— *timber on lands of United States granted in aid of railroads, see* "Public Lands," vol. 41, c. 343, § 236.

—— *timber on school lands, see* "Public Lands," vol. 41, cc. 197, 198, § 149.

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Right of tenant at will to sue stranger for cutting and carrying away trees, see "Landlord and Tenant," vol. 32, c. 571, § 509 [j].

Rights and liabilities of adjoining landowners, see "Adjoining Landowners," vol. 1, cc. 1563–1565, §§ 45–48.

Rights and liabilities of life tenant as to timber, see "Life Estates," vol. 33, cc. 45, 46, § 32; cc. 64–68, § 42.

—— *of tenant under farm lease as to use and sale of timber, see* "Landlord and Tenant," vol. 32, cc. 548, 549, § 490.

—— *of vendor and purchaser as to trees and timber, see* "Vendor and Purchaser," vol. 48, c. 251, § 147 [o]; c. 299, § 186; c. 365, § 232; cc. 572–574, §§ 399–401.

Right to trees acquired by condemnation proceedings, see "Eminent Domain," vol. 18, c. 2101, § 843; c. 2107, § 850.

Sale and conveyance of standing timber, see "Deeds," vol. 16, c. 21, § 11; cc. 480, 481, § 384; "Logs and Logging," vol. 33, cc. 1515–1530, §§ 1–12; "Property," vol. 40, c. 2922, § 4 [t].

—— *contracts for, see* "Contracts," vol. 11, cc. 985–989, § 890.

—— *duration of grant of right to cut and remove, see* "Contracts," vol. 11, cc. 1086, 1087, § 998.

—— *effect of violation of regulations as to survey of, see* "Sales," vol. 43, cc. 195, 196, § 104.

—— *evidence in action to reform contract, see* "Reformation of Instruments," vol. 42, c. 1215, § 187.

Severance of trees as affecting character of property as real or personal, see "Property," vol. 40, cc. 2923, 2924, § 8.

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Timber excepted in deed of land, see "Deeds," vol. 16, cc. 602–604, § 462.

—— *subject to dower, see* "Dower," vol. 17, c. 1131, § 27.

Title necessary to maintain replevin for cutting timber, see "Replevin," vol. 42, cc. 2095, 2096, § 47.

Turpentine trees as subject of lease, see "Landlord and Tenant," vol. 32, c. 17, § 2 [d].

—— *unlawful seizure of product by lessor, see* "Landlord and Tenant," vol. 32, c. 568, § 507.

Value of trees affecting compensation for land taken for public use, see "Eminent Domain," vol. 18, c. 1257, § 357.

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WOODS AND FORESTS.

NATURE OF PROPERTY, § 1.
OWNERSHIP, § 2.
EFFECT OF SALE OR CONVEYANCE OF LAND, § 3.
POWER TO PROTECT AND REGULATE, § 4.
STATUTORY PROVISIONS, § 5.
OFFENSES, § 6.
CRIMINAL PROSECUTIONS, § 7.

§ 1. Nature of property.

[a] Standing trees form part of the land, and are real property.

—(Ga. 1894) Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574;

(Ill. 1828) Adams v. Smith, 1 Ill. (Breese) 283; (1873) Osborn v. Rabe, 67 Ill. 108;

(N. Y. 1843) McIntyre v. Barnard, 1 Sandf. Ch. 52; (1869) Goodyear v. Vosburgh, 39 How. Prac. 377;

(Wis. 1873) Strasson v. Montgomery, 32 Wis. 52.

[b] (Mich. 1893) An interest in standing trees is an interest in the land.—Williams v. Hyde, 98 Mich. 152, 57 N. W. 98.

[c] (N. J. 1873) Trees, which are the natural and permanent growth of the soil, cannot be regarded as partaking of the character of emblements or "frustus industriales," but are a part of the inheritance, and can only become personalty by actual severance or by a severance in contemplation of law as the effect of a proper instrument of writing.—Slocum v. Seymour, 36 N. J. Law (7 Vroom) 138, 13 Am. Rep. 432.

§ 2. Ownership.

[a] The owners of adjoining tracts of land are tenants in common of trees growing on the boundary line between the tracts.

—(Iowa, 1891) Musch v. Burkhart, 83 Iowa, 301, 48 N. W. 1025, 12 L. R. A. 484;

(N. H. 1841) Griffin v. Bixby, 12 N. H. 454, 37 Am. Dec. 225;

(N. Y. 1862) Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326; (1866) Hoffman v. Armstrong, 46 Barb. 337.

[b] The ownership of a tree standing near the boundary between adjoining landowners is in the person on whose land the trunk of the tree stands, though the roots and branches extend beyond the boundary.

—(Conn. 1836) Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728;

(N. Y. 1862) Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326, affirming Relyea v. Same (1861) 34 Barb. 547; (1866) Hoffman v. Armstrong, 46 Barb. 337, affirmed (1872) 48 N. Y. 201, 8 Am. Rep. 537;

(Vt. 1865) Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645.

[c] (Cal. 1886) Branches of trees belong to the owner of the land over which they hang, though the trunks of the trees are on the land of another.—Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121.

§ 3. Effect of sale or conveyance of land.

[a] (Kan. 1868) A deed of real estate carries with it, unless expressly reserved, all growing timber thereon, whether upright or prostrate.—Cockrill v. Downey, 4 Kan. 426.

§ 4. Power to protect and regulate.

[a] (Kan. 1881) A board of county commissioners have the power, under Comp. Laws 1879, pp. 453, 454, authorizing them to "order warrants to be issued upon the county treasurer for the bounty" to one who grows an Osage orange hedge, to pay a bounty out of the general county fund to one who has grown an Osage orange hedge, in accordance with the provisions of said laws.—Marion County Com'rs v. Hoch, 24 Kan. 778.

[b] (Mo. 1891) Rev. St. § 5697, providing that persons planting prairie land with forest trees, and cultivating the same for three years, shall receive a bounty for 15 years thereafter from the county, conflicts with Const. art. 4, § 47, providing that the general assembly shall have no power to authorize any county to grant public money to any individual, etc., and with article 10, § 3, declaring that taxes may be levied and collected for public purposes only, and is void.—Deal v. Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

§ 5. Statutory provisions.

[a] (Kan. 1878) Laws 1867, p. 99, § 2, provided for the payment of an annual bounty for eight years to any one who should plant and cultivate an Osage orange or hawthorn fence. Laws 1871, pp. 211, 212, re-enacted section 2 of the former act, with the proviso that the bounty should not be allowed in any county until the people should decide by vote whether they desired such a bounty. *Held*, that the latter act cut off all claims for bounties earned after its enactment in counties that had not expressed a desire to have them continued.—Jefferson County v. Hudson, 20 Kan. 71.

[b] (Mass. 1867) Gen. St. c. 46, § 6, providing for the protection of trees standing in the public ways of any city or town, applies to trees which were standing at the time such statute took effect, and not merely to trees which were thereafter planted.—White v. Godfrey, 97 Mass. 472.

[c] (Minn. 1887) Laws 1871, c. 30, entitled "An act to encourage the planting and growing of timber and shade trees," provided for a bounty to be paid for planting and growing trees. Laws 1873, c. 19, of the same title, made a similar provision, and was almost identical with the former law. *Held*, that the law of 1873 was intended to supersede the law of 1871, and repealed it by implication.—Smith v. Nobles County, 37 Minn. 535, 35 N. W. 383.

§ 6. Offenses.

Constituting trespass, see "Trespass," vol. 46, cc. 542–556, §§ 173–185.

[a] (Mass. 1861) Cutting trees on a public burial ground for purposes of private profit, without consent of the public authorities having charge of it, is a violation of Gen. St. c. 28, § 12, which imposes a penalty for destroying trees within the limits of a burial ground, although the person who cuts them is the owner of the fee of the land, and honestly believes that his acts are lawful.—Commonwealth v. Viall, 84 Mass. (2 Allen) 512.

[b] (Mass. 1879) A. conveyed by warranty deed to a town a parcel of land within the limits of the town and contiguous to a county road. The town bought the land for the purpose of using it in straightening and grading the road and for obtaining the material to be used in the grading; but this purpose did not appear in the deed, and the purchase was not authorized by a vote of the town. The town constructed a road over the land, but did not legally lay out the road, nor was it so laid out by the county commissioners. *Held*, that an indictment under Gen. St. c. 161, § 82, against A. for cutting down a tree that stood on the land conveyed by him to the town, would lie; the deed from A. being valid, and passing the title to the land to the town.—Commonwealth v. Wilder, 127 Mass. 1.

[c] (Mo. 1881) Under a statute making it an offense to cut timber on land of another, there can be no conviction without proof of a crim-

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inal intent. One believing himself to have a right to cut cannot be punished.—State v. Kempf, 11 Mo. App. 88.

[d] (Pa. 1812) It is an indictable offense to deaden and destroy a tree standing on public ground.—Commonwealth v. Eckert, 2 Browne, 249.

[e] (Pa. 1886) Where parties have been arrested under Act March 31, 1860, for cutting timber, they will be discharged when it appears that an injunction restraining the prosecutors from cutting timber upon the same premises is still in force, since it cannot be said that defendants cut the timber, "knowing the same to be growing or standing upon the lands of another person."—Commonwealth v. Cornell, 4 Kulp, 81.

[ee] (S. C. 1839) An ordinance of the village of Moultrieville provides "that it shall not be lawful to cut down and make use of the cedars or other trees on the other end of the island, etc.; any person offending in the same shall forfeit and pay for each and every offense, etc., the sum of $5." *Held* that, if defendant cut 100 trees at one time, it is but one offense.—State v. Town Council of Moultrieville, Rice, 158.

[f] (Tex. 1875) Under Pen. Code, art. 717, providing that any person who shall knowingly cut down or destroy any tree or timber on land not his own, without the consent of the owner thereof, or shall carry away such timber, shall be punished, etc., an indictment will not lie for carrying away fence rails.—McCauley v. State, 43 Tex. 374.

§ 7. Criminal prosecutions.

[a] (Mass. 1856) A complaint on St. 1855, c. 457, for the malicious destruction of a tree, shrub or vine on the land of another, must aver an unlawful entry by the defendant on the land.—Commonwealth v. Dougherty, 72 Mass. (6 Gray) 349.

[b] (Neb. 1885) Cr. Code, § 88, makes it a crime for any one to willfully and maliciously, and without lawful authority, injure or destroy trees "standing or growing in any orchard, nursery, or grove, the property of another," to the amount in value of $35. *Held*, that a complaint and mittimus which alleged that "A. did * * * enter upon the farm of B., and cut down and destroy fruit and shade trees to the amount of $44. Said trees were grown on the farm of said B., in C. county, Neb."—were defective, because they did not allege that the trees were "the property of another."—Ex parte Eads, 17 Neb. 145, 22 N. W. 352.

[c] (N. H. 1882) In an indictment under Gen. Laws, c. 281, § 3, prohibiting the commission of "any act whereby any tree * * * shall be injured," an averment that defendant did "girdle a growing tree" does not allege an injury with sufficient certainty.—State v. Towle, 62 N. H. 373.

[d] (Tex. 1854) Under Hart's Dig. art. 493, providing that if any person shall willfully and knowingly cut down, carry away, or destroy any tree or timber on any land not his own, without first having the consent of the owner, an indictment charging defendant with having cut and carried away certain timber "on land not his own, but which was the property of R.," sufficiently describes the land from which the timber was cut.—State v. Warren, 13 Tex. 45.

Wool.

Custom as explaining contract of sale, see "Customs and Usages," vol. 15, c. 1278, § 33 [f]; c. 1286, § 34 [r].

Customs duties on wool and manufactures of wool, see "Customs Duties," vol. 15, cc. 1402–1413, §§ 97–108; c. 1461, § 176 [b]; cc. 1465, 1466, §§ 178 [o], 179 [d]; c. 1468, § 180 [g].

Words and Phrases.

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—— *in contracts, see* "Contracts," vol. 11, cc. 723–726, §§ 782, 783; cc. 923–931, § 845; cc. 964–966, § 864; cc. 1026, 1027, § 928.

—— *in deeds, see* "Deeds," vol. 16, cc. 318–323, §§ 238–254; cc. 351–359, §§ 274–292; cc. 382–431, §§ 316–335; cc. 444–585, §§ 344–454.

—— *in policies of insurance, see* "Insurance," vol. 28, cc. 842, 843, § 294; cc. 849–869, §§ 301–314.

—— *in statutory provisions, see* "Statutes," vol. 44, cc. 2817–2834, §§ 266–281.

—— *in tariff laws, see* "Customs Duties," vol. 15, cc. 1337–1347, §§ 10–18.

—— *in wills, see* "Wills," vol. 49, cc. 1048, 1049, § 956; cc. 1063–1080, §§ 972–986; cc. 1517–1520, §§ 1208–1210.

Operative words of conveyance in deeds, see "Deeds," vol. 16, cc. 58–60, §§ 55, 56.

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—— *importing warranty on sales of goods, see* "Sales," vol. 43, cc. 1018–1021, §§ 729, 730; cc. 1055, 1056, § 758.

—— *of disposition in wills, see* "Wills," vol. 49, c. 300, § 241.

—— *of donation or purchase or of limitation in wills, see* "Wills," vol. 49, cc. 1182–1187, §§ 1061–1064; cc. 1510–1513, § 1202; c. 1844, § 1350.

—— *of inheritance or perpetuity in conveyances, see* "Deeds," vol. 16, cc. 444–454, §§ 346–353; "Trusts," vol. 47, cc. 775–779, § 174.

—— *requisite or sufficient in wills to create various estates or interests, see* "Wills," vol. 49, cc. 1745–1789, §§ 1319–1331; cc. 1868–1895, §§ 1360–1367; cc. 1930–1940, §§ 1379–1386; c. 1951, § 1391; cc. 1955–2023, §§ 1393–1417; cc. 2067, 2068, § 1432; cc. 2118–2123, § 1454; cc. 2179, 2180, § 1479; cc. 2263–2265, § 1508.

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Work and Labor.

Scope-Note.

[INCLUDES obligations implied or imposed by law to pay for services rendered and materials furnished incident to the services, independent of any special relation or of any employment or promise to pay therefor; and rights, liabilities, and remedies of the parties in general.

[EXCLUDES agreements, express or implied, for hiring of services generally (see "*Master and Servant*"), or for specific work (see "*Contracts*"); recovery on quantum meruit for services rendered by particular classes of persons or incident to particular relations or occupations (see "*Attorney and Client*"; "*Physicians and Surgeons*"; and other specific heads); and proceedings in actions of assumpsit (see "*Assumpsit, Action of*").]

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—— *for cutting and removing timber, see* "Contracts," vol. 11, c. 989, § 891.

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*The subclassification is tabulated under the subheading in the column indicated.
†See Index for additional and more specific references to matter contained in this volume.

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Contracts for services to be rendered by or for insane persons, see "Insane Persons," vol. 27, cc. 2613, 2614, §§ 126, 127.
—— *payable in services, see* "Contracts," vol. 11, c. 910, § 834; cc. 1215–1225, §§ 1105–1109.
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—— *on private roads by taxpayers, see* "Private Roads," vol. 40, c. 2488, § 31.
Liability of decedents' estates for services in general, see "Executors and Administrators," vol. 22, cc. 1145–1154, §§ 732, 733; cc. 1182–1185, § 757.
—— *of guardian's sureties to account for work and labor done by ward for guardian, see* "Guardian and Ward," vol. 25, c. 837, § 603.
—— *of private parties for works constructed on their property by military authorities, see* "War," vol. 48, c. 1796, § 21.
—— *to execution of interests under contracts for services, see* "Execution," vol. 21, cc. 392, 393, § 104.
Mechanical trades and pursuits as subjects of license or tax, see "Licenses," vol. 32, cc. 2541, 2542, § 24; cc. 2569, 2570, § 54.
Operation and effect of statute of frauds as to contract of hiring, see "Frauds, Statute of," vol. 23, cc. 2317–2483, §§ 265–351.
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—— *of services by seamen, see* "Seamen," vol. 43, cc. 2613–2617, §§ 52–55.
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Preference of claim of employe as affecting validity of assignment, see "Assignments for Benefit of Creditors," vol. 4, cc. 1879, 1880, § 393.
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—— *of wages of slaves on establishing right to freedom, see* "Slaves," vol. 44, cc. 1109–1111, § 91.
Rendition of services as mode of acquiring settlement, see "Paupers," vol. 38, cc. 3176, 3177, § 61.
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—— *to compensation for services in management of mortgaged property, see* "Mortgages," vol. 35, cc. 980, 981, § 501.
—— *to exemptions of persons engaged in particular occupations, see* "Exemptions," vol. 23, cc. 30–32, §§ 24–27.
—— *to work mines, see* "Mines and Minerals," vol. 34, c. 3068, § 133.
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Services and earnings of apprentice, see "Apprentices," vol. 3, cc. 3139–3143, §§ 28, 29.
—— *of ward, see* "Guardian and Ward," vol. 25, cc. 367–370, §§ 136–141.
Services of paupers, see "Paupers," vol. 38, cc. 3354, 3355, § 199; cc. 3363–3388, §§ 209–237.
—— *of physician or surgeon, see* "Physicians and Surgeons," vol. 39, cc. 991–998, §§ 50–52.
—— *on foreclosure for which allowance may be made to attorney, see* "Mortgages," vol. 35, cc. 2773, 2774, § 1673.
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—— *on Sunday, see* "Sunday," vol. 45, c. 73, § 4.
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WORK AND LABOR.

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I. NATURE AND GROUNDS OF OBLIGATION IN GENERAL.

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§ 1. Services rendered in general.

[a] There can be no recovery for voluntary service rendered without an express promise to pay therefor, or circumstances from which a promise is implied by law.
—(Ind. 1883) Warring v. Hill, 89 Ind. 497; (Mo. 1867) Watkins v. Richmond College Trustees, 41 Mo. 302.

[b] (Ill. 1859) A party cannot force another to become his debtor by performing labor for him against his will or without his assent.—City of Alton v. Mulledy, 21 Ill. (11 Peck) 76.

[c] (Ill. 1879) Where the evidence fails to show that the work which is the foundation of the suit was done at the instance or request of the defendant, the plaintiff cannot recover.—Reed v. Baggott, 5 Ill. App. (5 Bradw.) 257.

[d] (Ky. 1895) Where a person voluntarily renders services, the law will not imply a promise to pay for them, unless the relation between the parties and the circumstances under which the services were performed are such as to show that they were for the benefit of the party receiving them, and that he knew, or had reasonable ground for believing, that the person rendering them expected to be paid therefor.—Viley v. Pettit, 96 Ky. 576, 29 S. W. 438, 16 Ky. Law Rep. 650.

[e] (La. 1827) No man shall profit by the labor of another without compensation. Neither error nor bad faith in the negotiorum gestor will prevent him from recovering the amount to which he has benefited another, if the work done were necessary and useful. "Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorem."—Police Jury v. Hampton, 5 Mart. (N. S.) 389.

[f] (La. 1855) The equitable doctrine, that one at whose expense another is benefited must be indemnified, cannot be extended to a person who intrudes his services on another against his will and the policy of a statute.—Fox v. Sloo, 10 La. Ann. 11.

[g] (Mo. 1895) Plaintiff cannot recover for work done which defendant had not ordered, and had refused, during its progress and after its completion, to pay for.—Harnett v. Christopher, 61 Mo. App. 64, 1 Mo. App. Rep'r, 272.

[h] (N. J. 1840) An action will not lie to recover for services voluntarily rendered.—Force v. Haines, 17 N. J. Law (2 Har.) 385.

[i] (N. Y. 1850) A promise to pay for services will not be implied until they have been performed, in the absence of an express contract.—Wheeler v. Cropsey, 5 How. Prac. 288.

[j] (N. Y. 1873) An obligation to pay a compensation for services rendered will not be implied, unless the circumstances are such as to show, either that there must have been a mutual understanding to that effect, or, if rendered without the party's knowledge, that the service was an act of necessity, for which he was legally bound to provide, or where it may be assumed that, if he had known of the exigency, he would have required such a service to have been performed with the understanding that he was to pay for it.—Hewett v. Bronson, 5 Daly, 1.

[k] (Ohio, 1888) Where services are rendered by a person to another with his knowledge, but without any express contract between them, such rendition is not of itself sufficient to entitle the person rendering the service to recover therefor as on an implied contract, as it should appear that the services were such as were expected to be paid for.—Harrison v. Gotleif, 8 Ohio Cir Ct. R. 191.

[l] (Or. 1887) To render one liable for services rendered him by another, he must either have requested the performance of the service, or afterwards have promised to pay for it.—Glenn v. Savage, 14 Or. 567, 13 Pac. 442.

§ 2. Nature of services.

[a] (U. S. 1883) A., without authority from the District of Columbia, dumped earth, which he desired to deposit somewhere, in an old canal which the District wanted filled. *Held* that, the service being a voluntary one, no recovery therefor could be had.—Boston v. District of Columbia, 19 Ct. Cl. 31.

[b] (La.) Services rendered voluntarily to preserve another man's property from destruction by flood are presumed to be gratuitous, and give no cause of action.—(1853) Watson v. Ledoux, 8 La. Ann. 68; (1894) New Orleans, Ft. J. & G. I. R. Co. v. Turcan, 46 La. Ann. 155, 15 South. 187.

[c] (La. 1874) Defendant, while constructing a banquette in front of his property, was officiously interfered with by the plaintiff, who was doing similar work under contract with the city. Plaintiff completed the work in spite of defendant's opposition. *Held*, that plaintiff had no cause of action against the defendant.—O'Hara v. Krantz, 26 La. Ann. 504.

[d] (La. 1882) A workman, making repairs to a building against the will and directions of the owner, is not entitled to remuneration, and has not the legal rights of a negotiorum gestor.—Succession of Mulligan v. Kenny, 34 La. Ann. 50.

[e] (Me. 1848) A town is not liable to pay a physician for his services in attending upon persons sick with a contagious disease who have ability to make payment themselves, unless he has been employed by the selectmen of the town to attend upon such persons; and it is not sufficient that the selectmen have, under the provisions of Rev. St. c. 21, taken measures to prevent the access of others to the place, and have appointed a person to superintend the house and take care of its inmates, or that the services of the physician were performed with their knowledge and assent.—Kellogg v. Inhabitants of St. George, 28 Me. (15 Shep.) 255.

[f] (Me. 1858) A physician will not be entitled to recover of a town of which he is not a resident for medical services rendered to its inhabitants while sick with smallpox, unless there had been an express contract with him for such service by the proper officers in behalf of the town.—Childs v. Inhabitants of Phillips, 45 Me. 408.

[g] (Me. 1888) The owner of a lime quarry cannot bring assumpsit against the owner of

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another quarry adjacent, but not adjoining, to recover for pumping out water that accumulated in the latter, and ran through the intervening quarry into the former, no express promise of payment being proved.—Ulmer v. Farnsworth, 80 Me. 500, 15 Atl. 65.

[h] (Mass. 1823) A town kept in repair a turnpike road laid out over a former town road, without any agreement for so doing. *Held*, that such town could maintain no action therefor against the turnpike corporation, as it was a voluntary courtesy.—Inhabitants of Roxbury v. Worcester Turnpike Corp., 19 Mass. (2 Pick.) 41.

[i] (Mass. 1861) Where a person enters into possession of land under a verbal agreement for its purchase, and cuts grass thereon, and stores it in the owner's barn, without being requested by him to do so, and the owner afterwards refuses to fulfill the contract, no action lies for the expense of cutting grass.—Cook v. Doggett, 84 Mass. (2 Allen) 439.

[j] (Mass. 1880) Plaintiff, who witnessed an accident on defendant's railway, was asked by an agent employed by defendant's superintendent to give a statement of what he knew. He replied that he must first go to the place of the accident and verify the facts, and the agent stated, "All right." Plaintiff's statement was made and used by defendant, and he sued for his services in going to the place of the accident and in making the statement. *Held*, that it was proper to charge the jury that if the plaintiff was authorized to go to the place, and believed it necessary to go there in order to make the correct statement, he was entitled to recover, though in fact it was not actually necessary.—Lovejoy v. Middlesex R. Co., 128 Mass. 480.

[k] (Mich. 1876) Where one has employed another to manufacture articles at an agreed price out of materials to be furnished by the former, the fact that he himself, without request, assists in the manufacture, will not raise an implied promise on the part of the other party to pay for such services.—Lange v. Kaiser, 34 Mich. 317.

[l] (Mich. 1877) Labor bestowed by one owner of logs afloat, in separating those of another owner which are mingled with them, and in caring for the latter's logs as incidental to the management of his own, does not give him a right of action against the other owner for compensation for the service, unless there has been a request or a promise to pay.—Peters v. Gallagher, 37 Mich. 407.

[m] (N. H. 1857) Where the value of the labor performed for a town by a pauper exceeds the amount expended for his relief, he cannot recover for the excess in an action against the town for work and labor.—Abbot v. Town of Fremont, 34 N. H. 432.

[n] (N. Y. 1822) Labor done and service rendered for one without his request or privity, however beneficial or meritorious, as in saving his property from fire, afford no ground of action.—Bartholomew v. Jackson, 20 Johns. 28, 11 Am. Dec. 237.

[o] (N. Y. 1858) A man is not entitled to a commission from the owner for informing a broker that certain lots are in the market, a purchaser for which is afterwards procured by the broker through such information. A right to a commission must be founded upon contract, express or implied.—Holley v. Townsend, 16 How. Prac. 125.

[p] (N. Y. 1889) Where an heir took decedent from the poorhouse, and cared for him before an offer by decedent's committee to pay her for caring for him was made, and she testified that she did not accept the offer, and the evidence of the price fixed for her services is indefinite, she is properly allowed for their true value, instead of a smaller sum offered to be paid by the committee.—Stephenson v. Cotter (Sup.) 5 N. Y. Supp. 749.

[q] (N. Y. 1892) An owner of a horse is not liable to one who shoes her horses without being requested to do so, or to whom no promise to pay is made.—Brennan v. Chapin (Com. Pl.) 19 N. Y. Supp. 237.

[r] (Ohio, 1859) One into whose custody a constable has placed goods seized under a writ of attachment, cannot maintain an action against the plaintiff in attachment for the care of said goods, where the services were not rendered at the request of said plaintiff in attachment.—Baker v. Campbell (Com. Pl.) 2 Ohio S. & C. P. Dec. 143.

[s] (Pa. 1858) An architect furnished a design for a structure at the request of H., who then employed defendants to make the structure in accordance with the design and according to his working drawings. H. paid plaintiff for the design, but gave him no compensation for the drawings, which formed no part of the contract between them, and defendants were not shown either to have made a request or promise to pay therefor. There was evidence that the architect usually furnishes the means of carrying his plans into execution, and that the obligation of paying for the whole ordinarily rests on the employer. *Held*, that the defendants were not liable for the drawings.—Webb v. School, 3 Phila. 125.

[t] (Pa. 1876) Work done by a private citizen on a road, before it is laid out according to law and ordered to be opened, though beneficial, affords no cause for compensation.—Bryant v. Spring Brook Tp., 5 Luz. Leg. Reg. 203.

[u] (Pa. 1890) Plaintiff, a commission merchant, who had six months before made a single sale of tobacco for defendants, and received the regular commission, received a letter of inquiry from one B. for tobacco. He went to defendants, told them of the inquiry, and, on their saying that they had tobacco for sale, wrote to B., who came to plaintiff's office. Plaintiff called one of the defendants, who was passing by, into the office, and told him B. had come to see the tobacco. Defendants sent B. where he could see the tobacco, and afterwards sold it to him. There was no express agreement that plaintiff should be paid. *Held*, in an action for commission, that the court properly charged that the mere fact that plaintiff was a commission merchant, and had made a single sale for defendants, would not authorize him to make a sale for them unless requested so to do, and that mere voluntary services performed without request would not raise an implied promise to pay.—Mayer v. Rhoades, 135 Pa. 601, 20 Atl. 158.

[v] (S. C. 1818) If one voluntarily put repairs to the house or fences of another without consulting the owner, he cannot afterwards charge him therefor.—Caldwell v. Eneas, 2 Mill, Const. 348, 12 Am. Dec. 681.

[w] (Tex. 1854) A clerk of a district court left some part of his records unfinished on his retirement from office, but had received full pay as if he had completed them, and his successor in office voluntarily made up the deficiencies. *Held*, in an action by the latter against the former for services thus rendered, that he was not entitled to recover.—Willis v. Jones, 11 Tex. 594.

§ 3. Acceptance of or assent to services.

Acceptance of work done under contract, see post, §§ 23–33.

[a] The performance and receipt of services generally raises an implied promise to compensate therefor; but this implication may be rebutted.

—(Ark. 1870) Ford v. Ward, 26 Ark. 360;

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(Ill. 1883) Tascott v. Grace, 12 Ill. App. (12 Bradw.) 639;
(Ind. 1879) Rhodes v. Matthew, 67 Ind. 131;
(N. Y. 1876) Gallaher v. Vought, 8 Hun, 87;
(Pa. 1886) Appeal of Moyer, 112 Pa. 290, 3 Atl. 811; (1886) Curry v. Curry, 114 Pa. 367, 7 Atl. 61.

[b] (U. S. 1884) Whenever one person does work or service for another with his consent, and there is no agreement as to compensation, the law implies a contract to pay what the same is reasonably worth.—Hughes v. Dundee Mortgage & Trust Inv. Co. (C. C.) 21 Fed. 169.

[c] (Ala. 1891) Where one performs labor for another with the knowledge and consent of the latter, and the latter accepts it, it is not necessary that there should have been an express contract.—Joseph v. Southwark Foundry & Machine Co., 99 Ala. 47, 10 South. 327.

[d] (Ala. 1893) Where services are rendered by one person to another, and knowingly accepted, a promise to pay therefor is presumed, unless the relation of the parties, the nature of the services, or other circumstances, are such as to rebut this presumption.—Hood v. League, 102 Ala. 228, 14 South. 572.

[e] (Ark. 1840) A. agreed with B. to build for him a mill of a certain power, and, if not of such power, no price was to be paid. No price was agreed upon, and no time fixed when the mill was to be completed. The mill, when completed, was wholly valueless for the purpose for which it was built. Thereupon A. rebuilt the mill at his own expense, which was accepted by B., and it answered the purpose for which it was intended. *Held*, that A. might recover of B. for the rebuilding on a quantum meruit.—Simpson v. McDonald, 2 Ark. (2 Pike) 370.

[f] (Ark. 1848) Where an administrator is present and witnesses the attendance of a physician upon a sick slave belonging to his intestate, and makes no objection, he is liable for the physician's bill.—Belfour v. Raney, 8 Ark. (3 Eng.) 479.

[g, h] (Ark. 1858) If plaintiff proves that he worked on the plantation of defendant as an overseer with his knowledge and consent, the law implies a contract between the parties, and the plaintiff is entitled to recover a reasonable sum for his services.—McDaniel v. Parks, 19 Ark. 671.

[i] (Cal. 1862) To fix liability on the ground of an implied contract, where one has done work and another has taken the benefit, there must not only be no restrictions imposed by the law upon the party sought to be charged against directly making a similar contract to the one implied, but he must also be in a position where he may freely elect whether or not he will accept the work, and where his election may influence the other party in reference to the work itself. The mere retention and use of the benefit of the work without these circumstances does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment.—Zottman v. City and County of San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

[j] (Ill. 1861) Where a person stands by and permits another to do work necessary and useful for him, and appropriates it, he may become liable on an implied promise to pay the value of it.—De Wolf v. City of Chicago, 26 Ill. (16 Peck) 444.

[k] (Ill. 1879) One may accept the services of another without incurring any implied liability to pay for them, where he knows at the outset that the services are rendered because of an employment by a third person, and but for such knowledge would not have accepted said services.—Morrison v. Jones, 6 Ill. App. (6 Bradw.) 89.

[l] (Ky. 1881) Where a person receives the benefit of another's services, having knowledge of the service during the time of its performance, he should pay its reasonable value to the person performing the service.—Carter v. Orme, 3 Ky. Law Rep. 56.

[m] (Ky. 1890) Where a firm accepted the services of a clerk and acknowledged that his services were valuable, the law implies a contract to pay him a reasonable compensation for his services, though there was no express contract of employment.—Norris v. Philipot, 12 Ky. Law Rep. 557.

[n] (Me. 1830) Where a person accepts or knowingly avails himself of the benefit of services done for him without his authority, he may be held to pay a reasonable compensation for them.—Abbot v. Inhabitants of Third School Dist. in Hermon, 7 Me. (7 Greenl.) 118.

[o] (Me. 1844) Where one person performs services for the benefit and with the knowledge and tacit consent of another, the law implies a promise to pay a reasonable compensation for them. Such a promise, however, is implied only when there does not appear to have been an express agreement or employment.—Weston v. Davis, 24 Me. (11 Shep.) 374.

[p] (Me. 1857) Where a person performs labor for the benefit of another under his oversight and direction, the person receiving the benefit for the labor should pay for it, and his promise to do so may be inferred.—True v. McGilvery, 43 Me. 485.

[q] (Me. 1869) An action cannot be maintained for services rendered without the knowledge or request of the defendant, though he may have verbally promised to pay for them after their rendition.—Sanderson v. Brown, 57 Me. 308.

[r] (Mass. 1814) Where work is done for the benefit of another without his express request, yet if he, knowing of the work, tacitly assent to it, an implied promise arises to pay therefor, on which an action will lie.—James v. Bixby, 11 Mass. 34.

[s] (Mass. 1871) A promise to pay reasonable expenses of keeping and repairing a boat found adrift on the water is implied when the owner of the boat takes it from the person who found it.—Chase v. Corcoran, 106 Mass. 286.

[t] (Minn. 1885) Pending negotiations for the employment of plaintiff by defendants, he rendered services to them of the nature contemplated, but no agreement as to terms was arrived at between them. *Held*, that plaintiff could recover the reasonable value of the services so rendered while in expectation of an agreement for employment.—McKee v. Vincent, 33 Minn. 508, 24 N. W. 253.

[u] (Mo. 1867) Where defendant subsequently assents to the plaintiff's services voluntarily performed in his behalf, the jury will be authorized to infer a previous request, and such assent may be inferred from the defendant's knowledge of the plaintiff's acts or his silent acquiescence.—Watkins v. Trustees of Richmond College, 41 Mo. 302.

[v] (Mo. 1890) Where a person stands by and sees another render a service beneficial to him, and knows that he is rendering it under the expectation of being paid by him for it, and fails to speak, a request for the rendering of the service may be implied, if there are no circumstances which repel such implication.—Painter v. Ritchey, 43 Mo. App. 111.

[w] (Mo. 1891) If a person stands by and allows the work to be done by another, who is acting in good faith, and afterwards takes possession of the work, and converts it to his own use, he is liable on the quantum meruit.—Thomas v. Walnut Land & Coal Co., 43 Mo. App. 653.

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[ww] (N. H. 1850) Beneficial services rendered, and the acknowledgment of them by the party benefited, together with a request by him for an account of what is due therefor, are sufficient to support assumpsit, although it appears that the services were, in the first instance, voluntary.—Hatch v. Purcell, 21 N. H. (1 Fost.) 544.

[x] (N. H. 1880) Where plaintiff performed certain services in nursing and caring for defendant's testate, *held*, that a promise to pay therefor might be inferred from the benefit received and other attendant circumstances.—Page v. Snell, 59 N. H. 531.

[xx] (N. Y. 1829) A promise to pay will be implied from an agreement of parties to abide by the decision of individuals named between them to appraise the value of certain work and services done and performed by one party for the other.—Efner v. Shaw, 2 Wend. 567.

[y] (N. Y. 1880) N., for 14 years preceding C.'s death, had charge of her business, and collected her interest and dividends, without asking or receiving compensation; but she often expressed gratitude therefor, and gave him articles of small value. *Held*, that there was an implied agreement on the part of C. to pay N. what his services were reasonably worth.—Burnett v. Noble, 5 Redf. Sur. 69.

[yy] (Or. 1896) As between strangers, where one performs services for the benefit and with the knowledge and tacit consent of another, under such circumstances as give the latter reason to believe that payment therefor is expected, a promise to pay a reasonable compensation will be implied.—Kiser v. Holladay, 29 Or. 338, 45 Pac. 759.

[z] (Pa. 1872) Where one who is not a relative and not an object of charity, but able to earn wages, is employed in the service of another for any period of time, the law implies a contract of hiring and a promise to pay.—Moreland Tp. v. Davidson Tp., 71 Pa. (21 P. F. Smith) 371.

[zz] (Tenn. 1849) It was in evidence that houses, part of the estate of a person deceased, were repaired by a carpenter, under the general superintendence of the widow of the deceased, during her occupancy thereof, which houses and real estate were subsequently assigned to her for dower; and upon presentment of such carpenter's bill to her for payment she neither disputed her liability therefor nor objected to the amount, but said "it would be paid when the administrator arrived." Upon verdict and judgment against her, *held*, that the jury might well have inferred an implied contract by her with the plaintiff for the work, and a promise to pay therefor, and that the judgment should be affirmed.—White v. Burton, 29 Tenn. (10 Humph.) 329.

§ 4. Implied request or promise to pay.

See post, § 8 [c, e].

Promise implied from relations of parties, see post, §§ 11–22.

—— *to pay implied from acceptance of or assent to services, see* ante, § 3.

[a] (Cal. 1890) In a suit to recover for work done on a public street upon an alleged parol contract, defendant, an abutting owner, testified that he never authorized the work. *Held*, that the fact that he saw the work going on upon the street without further protest raises no implied promise or liability to pay for it.—Nagle v. McMurray, 84 Cal. 539, 24 Pac. 107.

[b] (Cal. 1890) Nor can a promise be implied from the fact that defendant several times made suggestions to the workmen.—Nagle v. McMurray, 84 Cal. 539, 24 Pac. 107.

[c] (Ind. 1854) A precedent request, where work is done by one person for another, may be implied from circumstances, as where defendant completed plaintiff's canal under the direction of its engineer and his assurance that the work would be paid for, and the plaintiff accepted and is using the canal.—Trustees of Wabash & E. Canal v. Bledsoe, 5 Ind. 133.

[d] (Mo. 1853) In an action of assumpsit for services performed, a request on the part of defendant to plaintiff to perform the services must be shown.—Lynch v. Bogy, 19 Mo. 170.

[e] (Nev. 1865) Where an outgoing recorder received fees in advance for recording instruments, but the work of recordation was performed by his successor, the law raises an implied request by the former of the latter to perform the services, and an implied promise to pay him therefor.—Davis v. Thompson, 1 Nev. 17.

[f] (N. J. 1856) A law authorizing a city to do certain work upon failure of defendant to perform the same implies a request from him, sufficient to support assumpsit for the price of the work.—Treasurer of City of Camden v. Mulford, 26 N. J. Law (2 Dutch.) 49.

[g] (N. Y. 1855) Where one person performs labor for another, the law presumes a request, and a promise to pay what such labor is reasonably worth, unless it is understood that it is to be performed gratuitously, or unless it is performed under circumstances which repel the presumption of a promise that compensation shall be made.—Lewis v. Trickey, 20 Barb. 387.

[h] (W. Va. 1882) For a service rendered the law ordinarily will imply a promise of reasonable compensation, in the absence of circumstances which should vary the rule.—Hurst's Adm'r v. Hite, 20 W. Va. 183.

§ 5. Effect of request or promise to pay.

Effect of promise to pay for work performed by mistake, see post, § 6 [h].

Performance of additional or extra work under contract, see post, § 28.

Persons liable, see post, § 38.

Promise as between relatives, see post, §§ 12, 13.

Sufficiency of consideration for promise to pay for services, see "Contracts," vol. 11, cc. 224–227, §§ 252, 253.

[a] (Del. 1891) One at whose instance another performs services is liable in assumpsit on an implied contract for their reasonable value.—Nichols v. Vinson, 9 Houst. 274, 32 Atl. 225.

[b] (Ill. 1894) An architect who gratuitously furnishes plans for the erection of a church, which are not satisfactory, can recover in an action for work and labor for plans subsequently furnished at the request of the church authorities, in the absence of any agreement that he was to do so without charge.—Central Park Presbyterian Church v. Hoskins, 50 Ill. App. 674.

[c] (Ind. 1883) One who promises to pay for work done on a drain by which he is benefited may be compelled to pay therefor, without regard to the question of whether the drain was legally established by the board of commissioners or not, where the promisee did the work on the faith of such promise.—Flora v. Cline, 89 Ind. 208.

[d] (Iowa, 1871) Where one performs services for another, at his request, without any agreement or understanding as to the pay, the law implies a promise to pay the reasonable value of the services, and the same may be recovered under a quantum meruit.—Rea v. Flathers, 31 Iowa, 545.

[e] (Ky. 1834) Where work is done at the request of another, the law will imply a promise to pay for the work whatever sum the laborer deserves to have, although no price was

agreed on.—Coleman v. Simpson, 82 Ky. (2 Dana) 166.

[f] (La.) Where one renders services beneficial to another at his request, an implied contract is raised for remuneration.—(1839) Kenyon v. Berghel, 13 La. 133; (1867) Beall v. Van Bibber, 19 La. Ann. 434.

[g] (Mass. 1868) In an action on a general count with an account annexed, one mill owner may recover another's proportionate share of the cost of repairs of a reservoir dam owned in common, on his special promise to pay such share; it being for labor and materials.—Mullett v. Bemis, 100 Mass. 92.

[h] (Miss. 1873) Where the plaintiff in assumpsit proved that at the request of the defendant, though without any special contract for the amount of wages, he had been in defendant's employ for two years, the law raises an assumpsit upon the quantum meruit.—Jordan v. Foxworth, 48 Miss. 607.

[i] (Mo. 1860) Where one man at the request of another performs beneficial services for him, unless it is agreed, or it can be so inferred from the circumstances, that the services were to be rendered without compensation, the law, in the absence of any express contract, will imply a promise on the part of him for whom the services were rendered to pay for them what they are reasonably worth.—Dougherty v. Whitehead, 31 Mo. 255.

[j] (Mo. 1891) If a person requests another to perform work for him, without specifying the compensation, he is liable therefor on a quantum meruit.—Thomas v. Walnut Land & Coal Co., 43 Mo. App. 653.

[k] (N. Y. 1889) Where plaintiff sold a rocket gun to defendant, and attended a trial of the gun at the request of defendant, and there was no agreement that such service should be gratuitous, plaintiff was entitled to recover therefor.—Coston v. Morris, 51 Hun, 643, 4 N. Y. Supp. 89.

[l] (N. C. 1808) An action does not lie on a promise to pay for services which it was plaintiff's duty to perform without pay.—Sweany v. Hunter, 5 N. C. 181.

[m] (N. C. 1839) A subscription was raised for building a house for a religious society, and, on the letting of the building by certain commissioners, defendants, who were not shown to have any other concern with the transaction, declared that if, or when, the work was done according to certain specifications and accepted by the commissioners, they would pay the sum at which the building was bid off. Plaintiff became the contractor and performed the work, but it was rejected by the commissioners as failing to comply with the specifications. *Held*, that the plaintiff could not recover against the defendants for work and labor done, whatever might be their right to recover in equity in case the acceptance by the commissioners was rendered impossible by accident, or withheld through malice or fraud.—Young v. Jeffreys, 20 N. C. 357.

[n] (Pa. 1835) A father's request that a physician attend his son, then of full age, and sick at the father's house, raises no implied promise on the part of the father to pay for the services rendered.—Boyd v. Sappington, 4 Watts, 247.

[o] (Pa. 1873) Where a person performs services for another on his request, he may recover for them, no matter what his expectations were.—Thompson v. Stevens, 71 Pa. (21 P. F. Smith) 161.

§ 6. Effect of fraud, mistake, or compulsion.

[a] (Ind. 1859) One who has been convicted and sentenced to the state prison for an offense of which the court had no jurisdiction is entitled to recover from the lessee of the prison for services performed while in prison, as upon an implied contract for work and labor done.—Patterson v. Crawford, 12 Ind. 241.

[b] (Ind. 1862) Where a party has been imprisoned under a sentence of a court having no jurisdiction, he may, as to the keeper of the penitentiary who has received benefit from his labor during his confinement, maintain his suit in assumpsit; but not so in the case of parties to the confinement who have received no benefit from his labor, such as the warden.—Patterson v. Prior, 18 Ind. 440, 81 Am. Dec. 367.

[c] (Ky. 1882) Where work has been done under mutual mistake between the employer and employé, each supposing that there was a contract between them fixing the price, when in fact there was no such contract, the employé is entitled to recover what the work was reasonably worth.—Lanins v. Woods, 4 Ky. Law Rep. 865.

[d] (Mich. 1877) Plaintiff went upon the adjoining land of defendants by mistake as to boundaries, supposing he was on his own land, and cut and piled a quantity of cord wood, ready for market, which defendants afterwards took possession of and sold. *Held*, that plaintiff could not recover compensation for his labor; the identity of the trees not being destroyed nor their value greatly increased.—Isle Royal Min. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520.

[e] (Mo. 1891) A woman, born and raised a slave, was ignorant, unable to read, and for a series of years kept under strict surveillance, and in utter ignorance of her emancipation and right to her own labor, and taught to believe she was still the property of her old master, and continued to work for him, without intention to receive pay on her part, or to give on his part. *Held*, that her ignorance of her legal rights would not defeat her action for such work and labor brought after she learned of the fraudulent suppression, her right of action being founded on fraud, and not upon an implied contract.—Hickam v. Hickam, 46 Mo. App. 496.

[f] (N. Y. 1836) Where A., fraudulently representing himself to be the owner of land, induced B. to labor on it in expectation of becoming a joint owner, *held* that, on discovering the fraud, he might sue for and recover pay for his labor.—Rickard v. Stanton, 16 Wend. 25.

[g] (Or. 1886) A contractor having, by mistake, performed certain work upon a contract undertaken by another, cannot recover of the latter for the work performed unless he proves assent, either express or implied.—Rohr v. Baker, 13 Or. 350, 10 Pac. 627.

[h] (Or. 1892) Where defendant received the benefit of labor performed and materials furnished by plaintiff, and afterwards agreed to pay for the same, plaintiff may recover the value thereof, though performed by mistake, and without any request by defendant.—Forbis v. Inman, Paulson & Co., 23 Or. 68, 31 Pac. 204.

[i] (Pa. 1801) Where one does work for another by compulsion, whom he is under no legal or moral obligation to serve, the law raises a promise on the part of the person benefited to make him a reasonable recompense.—Peter v. Steel, 3 Yeates, 250.

§ 7. Services rendered under agreement with or direction of agent.

[a] (U. S. 1889) Where work is done under the direction of an agent, who has authority to direct its performance, it is immaterial whether he agrees to pay what it is reasonably worth, as the law will imply such a promise.—Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934.

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[b] (Ill. 1870) Where plaintiff was employed by defendant's agent, and defendant, seeing him at work, notified him that he would not be employed longer than that day, but he returned on the following Monday, and performed some trivial services for the agent, and stayed about the premises during the day, he was not entitled to recover therefor.—Lake v. Newhoff, 56 Ill. 295.

[c] (Mass. 1814) If an owner of property employed some person to procure work to be done thereon, to whom the workmen engaged themselves and on whose credit they performed the work, the obligation to pay rests on the person to whom the credit was given.—James v. Bixby, 11 Mass. 34.

[d] (Mass. 1895) Where one of several subscribers to the purchase of a boat, to be owned by all in proportion to their subscriptions, at the request of the agents of the subscribers, superintends its construction and expends money therein, and afterwards it is agreed between him and the other subscribers that his interest in the boat shall cease, he can recover from the other subscribers at law for the value of his services and disbursements.—Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105.

§ 8. Consideration or purpose for which services were rendered.

Admissibility of evidence, see post, § 51.
Presumptions and burden of proof, see post, § 48.

[a] (Colo. 1882) Notwithstanding the general rule that the law implies a promise to pay for services rendered, if it clearly appears that the party rendering the service agreed to look to particular funds expected to be realized from certain undertakings, and not to the other party to the contract, he cannot enforce a personal liability.—Harkinson v. Dry Placer Amalgamating Co., 6 Colo. 269.

[b] (Mass. 1840) A. and B., tenants in common of land, sold the wood growing thereon, with the proviso that it should be taken from the land within two years. The purchaser of the wood transferred his right to C., who had no notice of the proviso as to the time of taking it away. C. cut the wood, but did not remove it within two years. *Held*, that C. could not recover of the tenants in common pay for cutting the wood, upon their refusal to allow it removed.—Kemble v. Dresser, 42 Mass. (1 Metc.) 271, 35 Am. Dec. 364.

[c] (Mass. 1868) There is no implied promise that an unsuccessful bidder, who enters proposals in accordance with the terms of an advertisement for constructing a town sewer, shall be paid for his time and trouble in making the proposals.—Palmer v. Inhabitants of Haverhill, 98 Mass. 487.

[d] (Mich. 1885) An architect who volunteers his services with the chances of future employment cannot recover for preliminary sketches, which are not accepted, on the basis of a percentage on the probable cost of the building.—Scott v. Maier, 56 Mich. 554, 23 N. W. 218, 56 Am. Rep. 402.

[e] (N. Y. 1885) An implied promise to pay for services will only be held to exist where it can be seen that the services were rendered under circumstances authorizing a reasonable expectation of payment, and such an implication will not arise in favor of a corporation against certain of its stockholders by reason of experiments made for its own benefit and with its own property by some of them in regard to patents used in branches of its business, in which patents such stockholders happened to be interested financially, even though the experiments were made at the suggestion of such stockholders.—Davidson v. Westchester Gaslight Co., 99 N. Y. 558, 2 N. E. 892.

§ 9. —— Gratuitous services.

Presumption from relations of parties that services are gratuitous, see post, §§ 11–22.
Consideration for promise to pay for past gratuitous services, see "Contracts," vol. 11, cc. 331, 332, § 372.

[a] Where services are rendered with the understanding that they are to be gratuitous, no implied contract to pay therefor can be raised.
—(Ark. 1878) Osier v. Hobbs, 33 Ark. 215;
(La. 1859) White v. Jones, 14 La. Ann. 681;
(Mo. 1865) Morris v. Barnes, 35 Mo. 412;
(N. J. 1861) Davison v. Davison, 13 N. J. Eq. (2 Beasl.) 246;
(S. C. 1797) James v. O'Driscoll, 2 Bay, 101, 1 Am. Dec. 632.

[b] Where two parties render services to one another, with no present design to make charges therefor, neither can recover for the value of the services so rendered.
—(Ill. 1883) Jared v. Vanvleet, 13 Ill. App. (13 Bradw.) 334;
(Wash. 1892) Gross v. Cadwell, 4 Wash. 670, 30 Pac. 1052.

[c] (U. S. 1884) When the circumstances clearly repel the idea that work or services performed for another with his consent were done with expectation of payment, no contract to pay will be implied.—Hughes v. Dundee Mortgage & Trust Inv. Co. (C. C.) 21 Fed. 169.

[d] (Ill. 1878) Where two persons understand that they are mutually rendering and receiving favors, with no present design to make any pecuniary charge therefor against each other, the relative value of their services is immaterial, and neither can recover against the other.—Dunlap v. Allen, 90 Ill. 108.

[e] (Ill. 1878) Where one, securing aid to induce the establishment of a foundry, went to an architect to solicit aid from him, and telling him that whatever was done by the citizens of the place was to be a voluntary contribution, got him to prepare plans for the proposed foundry, the latter could not recover of him for such work, without showing an express promise to pay therefor.—Dunton v. Chamberlain, 1 Ill. App. (1 Bradw.) 361.

[f] (La.) One who renders services through a long series of years to another, relying on his generosity, but without any view to compensation, cannot, if disappointed, recover wages.—(1812) Jacob v. Ursuline Nuns, 2 Mart. (O. S.) 268; (1835) Tilghman v. Lewis' Estate, 8 La. 105.

[g] (La. 1870) Services rendered a person during his last illness as nurse and housekeeper are not deemed gratuitous, but there is an implied contract to pay a reasonable compensation therefor.—Succession of Pereuilhet, 23 La. Ann. 294, 8 Am. Rep. 595.

[h] (La. 1871) A painter agreed as a matter of friendship, without charge on his part, to have the work of painting defendant's house done. On completion of the work he furnished defendant with a memorandum of the cost of the materials and the labor employed by him. *Held*, that the refusal of the defendant to pay the bill thus presented did not create an agreement or obligation to pay additional charges for the painter's services for supervision of the work he had undertaken gratuitously.—Ayland v. Rice, 23 La. Ann. 75.

[i] (Mich. 1886) The fact that services are rendered does not raise a liability on the part of the person for whom they are rendered, even though done at his request, if the circumstances are such as to repel the inference that compensation was intended; and when performed from kindly or charitable motives, the law will not imply a promise to pay for them.—Cicotte v. Church of St. Anne, 60 Mich. 552, 27 N. W. 682.

[j] (Mo. 1877) In order to raise an implied contract to pay for labor, an intention on the part of the laborer, during his service, to charge therefor, is not necessary, if there has been nothing to justify a belief on the part of the one for whom the labor has been done that it is gratuitous.—Hay v. Walker, 65 Mo. 17.

[k] (Mo. 1895) Plaintiff cannot recover for services which he rendered without any express contract, and without any intention to charge therefor.—Kerr v. Cusenbary, 60 Mo. App. 558, 1 Mo. App. Rep'r, 237.

[l] (N. Y. 1869) Where a person plays an organ for the church services in a village, such services will be presumed to have been gratuitous, and to authorize a recovery it must be clearly shown that there was an actual employment and a promise to pay therefor.—Van Buren v. Reformed Church of Gansevoort, 62 Barb. 495.

[m] (N. Y. 1879) Where parties having money transactions to a large amount are in the habit of rendering each other mutual services not intended to be brought into their accounts, no promise to pay for them will be implied. They will be regarded as matters of mutual gratuitous accommodation, although they may not be an equal set-off.—Potter v. Carpenter, 76 N. Y. 157.

[n] (Pa. 1858) A person rendering gratuitous services in the line of his legal duty does not thereby raise an implication that they are rendered at the request of the party benefited by them.—Accommodation Loan & Saving Fund Ass'n v. Stonemetz, 29 Pa. (5 Casey) 534.

[o] (Pa. 1875) Claims for services as a nurse of decedent will not be allowed, when there is no evidence of a contract, but it appears that the services rendered were performed because of the long acquaintance and mutual friendship of the parties.—In re Abercrombie's Estate, 32 Leg. Int. 58.

[p] (Pa. 1878) The claim against a decedent's estate for services will be rejected, where no demand was ever made for compensation for such services, and it appears to have been an afterthought of the plaintiff.—In re Clark's Estate, 35 Leg. Int. 421.

[q] (S. C. 1831) Board, intended as a gratuity when it was furnished, cannot afterwards be set up as a debt.—Schnell v. Schroder, Bailey, Eq. 334.

[r] (S. C. 1886) If one attorney renders services for another, there is an implied right to compensation, although such services are sometimes rendered gratuitously from courtesy.—Graydon v. Stokes, 24 S. C. 483.

§ 10. —— Expectation of legacy.

See post, §§ 12 [t], 30 [j].

Recovery for services on breach of contract to devise or bequeath, see "Wills," vol. 49, cc. 219–224, § 177.

[a] Where services are rendered merely in expectation of a legacy, without any contract, express or implied, but relying implicitly on the testator's generosity, an action for compensation of the services cannot be maintained against the executors.
—(Del. 1855) Kennard v. Whitson, 1 Houst. 36;
(Pa. 1791) Little v. Dawson, 4 Dall. 111, 1 L. Ed. 763.

[b] (D. C. 1889) The fact that the services performed by the plaintiff were in expectation of his receiving a legacy from the person benefited by them will not deprive him of the right to bring suit for such services against the estate of such person, failing the bequest.—Robeson v. Niles, 7 Mackey, 182.

[c] (Ky. 1869) Where a party performs services for another under the expectation of receiving a legacy, without any definite agreement as to the nature and amount of the legacy, no absolute obligation is thereby created.—Myles' Ex'rs v. Myles, 69 Ky. (6 Bush) 237.

[d] (N. J. 1855) No right of action accrues, after disappointment in receiving a legacy, for services rendered in expectation of the legacy; but equity will allow a reasonable compensation for the services, if satisfied that it is equitable under the circumstances.—Grandin v. Reading's Adm'r, 10 N. J. Eq. (2 Stockt.) 370.

[e] (N. J. 1861) For services rendered without any view to compensation, except the hope of a legacy or devise, no compensation can be recovered.—Davison v. Davison, 13 N. J. Eq. (2 Beasl.) 246.

[f] (N. Y. 1835) Where a party renders services for another in the hopes of a legacy and in sole reliance upon the testator's generosity, and the party for whom the services were rendered dies without making such provision, no action lies for the services.—Martin v. Wright's Adm'rs, 13 Wend. 460, 28 Am. Dec. 468.

[g] (N. Y. 1877) Where a person renders services in the expectation of receiving a legacy, without any contract that compensation shall be made therefor, and the person for whom the services are rendered dies without making any provision, no action will lie in favor of the person rendering the services.—Shakespeare v. Markham, 10 Hun, 311.

[h] (Pa. 1793) Although services may be rendered in expectation of a legacy, yet, if done at the request of the testator, an action of assumpsit may well be supported to recover a compensation.—Roberts v. Swift, 1 Yeates, 209, 1 Am. Dec. 295.

[i] (Pa. 1807) Where the person for whom the service was done promises to pay for it, an action may be supported, though the service was done in expectation of a legacy; and it is immaterial whether the promise was made before or after the service.—Snyder v. Castor's Adm'r, 4 Yeates, 353.

[j] (Pa. 1832) Where a son continued with his father after attaining his majority, without any contract to be paid for his services, but with a view to a provision by will, he cannot support a claim against his father's estate for compensation for his labor.—In re Walker's Estate, 3 Rawle, 243.

[k] (Pa. 1882) A nephew's claim for alleged services in working on decedent's farm will be disallowed, where there was no express contract made by the decedent for the employment of his nephew, and the services were not rendered with expectation of present payment, but in hope of being remembered in the future disposition of the estate.—In re Hunt's Estate, 39 Leg. Int. 12.

[l] (Pa. 1884) Where services are rendered gratuitously under the expectation of a legacy, there is no contract, and no recovery can be allowed.—In re Graulich's Estate, 31 Pittsb. Leg. J. 341.

[m] (Pa. 1885) Where a child seeks to recover for services rendered to a parent in her lifetime towards her support and maintenance in his family, it is not sufficient to prove that he expected to be remunerated by the will, or by mere gift in her lifetime.—Appeal of Wallace, 2 Chest. Co. Rep. 403.

II. RELATIONS BETWEEN PARTIES.

IN GENERAL, § 11.
RELATIVES AND PERSONS IN FAMILY RELATION IN GENERAL, § 11½.
PROMISE OR EXPECTATION OF REMUNERATION, § 12.

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— DECLARATIONS AND STATEMENTS AS EVIDENCE OF PROMISE, § 13.
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RELATIVES AND SERVICES IN GENERAL, § 15.
GRANDPARENT AND GRANDCHILD, § 16.
PARENT AND CHILD, § 17.
PARENT AND SON-IN-LAW OR DAUGHTER-IN-LAW, § 18.
PARENT AND STEPCHILD, § 19.
BROTHERS AND SISTERS, § 20.
PERSONS LIVING TOGETHER AS HUSBAND AND WIFE, § 21.
UNCLE OR AUNT AND NEPHEW OR NIECE, § 22.

Admissibility of evidence of contract, see post, § 53.

Evidence, see post, § 51.

Presumptions and burden of proof, see post, §§ 47–49.

§ 11. In general.

[a] When the relation of parties is such as to negative the idea that services were rendered in expectation of payment, compensation cannot be recovered.

—(N. Y. 1894) In re Cooper (Sur.) 6 Misc. Rep. 501, 27 N. Y. Supp. 425;

(Pa. 1859) Appeal of Hartman, 8 Grant, Cas. 271; (1875) Neal's Ex'rs v. Gilmore, 79 Pa. (29 P. F. Smith) 421; (1895) In re Heilman's Estate (Orph. Ct.) 4 Pa. Dist. R. 571.

[b] (N. Y. 1852) Where it appears, from the conduct, situation, and mutual relations of the parties, that the payment of wages was not intended nor expected, a promise to pay for work and labor will not be implied.—Maltby v. Harwood, 12 Barb. 473.

§ 11½. Relatives and persons in family relation in general.

Liability of decedent's estate, see "Executors and Administrators," vol. 22, cc. 1148–1154, § 733.

Persons in family relation, consideration for promissory note, see "Bills and Notes," vol. 7, cc. 269–273, § 166 [b, g, mm, ww].

[a] (Ill. 1891) The fact that a woman, on the death of her father, goes to live in the family of a relative, and there performs household duties for 16 years, without any payment or settlement for services, raises such a presumption that she lived there as a member of his family that she can only recover for services by showing an express or implied contract for wages.—Collar v. Patterson, 137 Ill. 403, 27 N. E. 604.

[b] (Ind. 1892) Where plaintiff, an orphan, was from the time she was 14 years of age until she married well taken care of by decedent, who, under contract with her guardian, received her into his family as a member thereof, and treated her as such, she was not entitled to pay for services while she so stayed with him.—Reeves' Estate v. Moore, 4 Ind. App. 492, 31 N. E. 44.

[c] (Iowa, 1876) A minor who resides, without paying board, in the family of persons not related to him, cannot recover for services rendered in the family without proof of an express promise to pay.—Smith v. Johnson, 45 Iowa, 308.

[d] (Iowa, 1887) In an action for labor performed, where the person rendering the service is a member of the family of the person served, and receives support therein as a child, a presumption arises that such services were gratuitous; and, before the person rendering such service can recover, the express promise of the party served must be shown, or such facts as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor.—Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. 496, following Scully v. Scully's Ex'r (1870) 28 Iowa, 548.

[e] (Iowa, 1896) Where a person rendering services is a member of the family of the person served, and is receiving support therein, before recovery can be had an expectation that compensation should be made must be shown.—Tank v. Rohweder, 98 Iowa, 154, 67 N. W. 106.

[f] (Kan. 1889) Plaintiff, a minor, resided with defendant as a son and one of the defendant's family from the time when he was 12 to the time when he was 19 years of age. He performed services for the defendant, and the defendant furnished food, clothing, lodging, schooling, expense money, etc., to plaintiff, and it was not understood that the plaintiff should receive any special compensation for his services, nor that defendant should receive any special compensation for anything furnished by him to plaintiff, nor that any account should be kept by either with respect to any of these things, and no account was in fact kept of the same. *Held*, that the plaintiff cannot recover compensation for services.—Wyley v. Bull, 41 Kan. 206, 20 Pac. 855.

[g] (La. 1835) A clerk cannot recover on a quantum meruit, when he has served under no contract, express or implied, but depended on the beneficence of his employer, who is his relative.—Tilghman v. Lewis' Estate, 8 La. 105.

[h] (Mich. 1879) Under an arrangement by C., O., and W. that they should live together, on C.'s land, as one family, putting in their property together, O. and W. to have the property when C. was done with it, W. cannot, on withdrawing from the arrangement, recover for services rendered or articles consumed while they were living together.—Coe v. Wager, 42 Mich. 49, 3 N. W. 248.

[i] (Mo. 1888) Services rendered by a member of a family, merely with a view to, or in expectation of, the generosity of the party for whom the services were rendered, will not support an implied assumpsit.—Woods v. Land, 30 Mo. App. 176.

[j] (Mo. 1888) Family membership in itself implies that services rendered in the family are gratuitous.—Koch v. Hebel, 32 Mo. App. 103.

[k] (N. J. 1860) The law implies no promise to pay for services rendered by members of a family to each other.—Updike v. Titus, 13 N. J. Eq. (2 Beasl.) 151.

[l] (N. Y. 1867) The law will not presume a promise to pay for services as between members of the same family living together as one household.—Wilcox v. Wilcox, 48 Barb. 327.

[m] (N. Y.) Compensation for work and labor performed by a minor taken into the defendant's family will not be allowed, where the evidence shows that the plaintiff lived with the testator, and was provided and cared for by him as a member of the family, without any idea of paying or receiving wages.—(1869) Shirley v. Vail, 3 Abb. Dec. 313, note; (1870) Id., 38 How. Prac. 406.

[n] (N. Y. 1871) A person cannot recover for services rendered, where he has lived with the one from whom the compensation is claimed as a member of his family, and has been brought up, provided for, and educated as such, and that relation has continued during all the time in which such services were rendered.—Shirley v. Bennett, 6 Lans. 512.

[o] (N. Y. 1876) Where members of the same family live together, an express bargain to pay wages must be clearly proved before such claim can be allowed.—Sullivan v. Sullivan, 6 Hun, 658.

[p] (N. Y. 1876) In the case of near relatives or members of the same family, the law regards

services rendered as acts prompted by gratuitous kindness and affection.—Gallagher v. Vought, 8 Hun, 87.

[q] (N. Y. 1877) Where plaintiff frequently took the testatrix, who was boarding with his family, riding at her special request, for the benefit of her health, and it appeared that she intended to pay for the services, and directed by her will that the friends with whom she boarded be liberally paid for their services, plaintiff was entitled to receive a reasonable compensation for the services rendered.—Darling v. Halsey, 12 Hun, 90.

[r] (N. Y. 1889) While plaintiff was employed by defendant and others, as executors of a will, he performed for defendant individually, at his request, services of the same general nature as those he rendered the estate. The parties were related, but did not form one family. There was no evidence that the work was to be gratuitous. *Held*, that a verdict for plaintiff would not be disturbed.—Simonson v. Simonson, 53 Hun, 634, 6 N. Y. Supp. 130.

[s] (N. Y. 1893) Where persons live together as a family, and bear to each other a family relation, no promise to pay for services rendered by one to the other will be implied; and no action will lie unless the services were rendered at the request of the person receiving them under a promise to pay therefor, or under such circumstances as show that the party receiving them expected to pay and the other to receive pay therefor, or that the services were rendered with the understanding between the parties that compensation therefor would be made by will.—Marion v. Farnan, 68 Hun, 383, 22 N. Y. Supp. 946.

[t] (Pa.) Relationship, either by consanguinity or affinity, is a fact which tends to rebut the legal presumption of a promise to pay for personal services rendered, although, alone, it does not overcome that presumption, except in the case of parent and child.—(1862) Smith v. Milligan, 43 Pa. (7 Wright) 107; (1879) In re Hollowbush's Estate, 13 Phila. 217.

[u] (Pa. 1868) To warrant a recovery for services rendered a near relative, an express promise to pay therefor must be proved.—Neel's Adm'r v. Neel, 59 Pa. (9 P. F. Smith) 347.

[v] (Pa. 1868) One who resides with a relative, whether father, uncle, or even more remote, cannot recover for services rendered to such relative upon an implied promise to pay, such as would sustain an action between strangers. The services are presumed to have been rendered and received in consideration of the relationship.—Neel's Adm'r v. Neel, 59 Pa. (9 P. F. Smith) 347.

[w] (Pa. 1878) Where persons related by marriage live together as members of a family, there is no implied contract for wages.—In re Smith's Estate, 7 Lus. Leg. Reg. 219.

[x] (Pa. 1882) For services rendered between persons standing in family relations to each other, recovery may be had on a quantum meruit only upon proof of an actual promise to pay; but such promise may be general, specifying neither time, place, nor amount.—Appeal of Prizer, 3 Walk. 487.

[y] (Pa. 1883) The relationship between a guardian and a ward, which is so remote that the accountant is unable to define it, does not raise the presumption that the services for which compensation was claimed were voluntary.—In re Quinn's Estate, 40 Leg. Int. 120.

[yy] (Pa. 1886) Where the parties occupy toward each other a family relation, this will rebut the presumption of a contract and promise to pay for services rendered. Mere consanguinity, in the absence of a family relation, is insufficient to rebut the presumption.—Appeal of Moyer, 112 Pa. 290, 3 Atl. 811.

[z] (Pa. 1886) When the party rendering and the one accepting services are parent and child, or members of the same family, the relationship excludes the implication of a promise to pay therefor. Except in cases of parent and child, there must be evidence beyond the relationship that the creation of no debt was intended.—Curry v. Curry, 114 Pa. 367, 7 Atl. 61.

[zz] (Wis. 1888) It appeared that plaintiff, when a young girl, had entered defendant's home as a hired servant for a fixed period, and that for years after the termination of that period she remained in his family, and performed heavy work in the house and in the field without other compensation than board and clothing. *Held*, that the law will imply a promise by defendant to pay what her services were reasonably worth, in the absence of an express agreement that they were to be rendered in return for a home and support only.—McMillan v. Page, 71 Wis. 655, 38 N. W. 173.

§ 12. Promise or expectation of remuneration.

Effect of request or promise to pay in general, see ante, § 5.

Implied request or promise to pay in general, see ante, § 4.

Promise or expectation of legacy, see ante, § 10.

[a] (Cal. 1873) Where a son remains with and performs services for his father after attaining his majority, and the circumstances show that it was the expectation of both parties that the son should receive compensation, he may recover for such services.—Friermuth v. Friermuth, 46 Cal. 42.

[b] (Ill. 1887) Where a father, by request, had acted as clerk for his son during several years, and was supported out of the earnings of the business, and there was a mutual understanding, though no express contract, that he was to be so supported until his death, he was entitled to recover upon quantum meruit against his son's estate for the time he had been so employed.—Killpatrick v. Helston, 25 Ill. App. 127.

[c] (Iowa, 1888) A mother and son lived with her other sons, who were farming in partnership, receiving their board, clothes, and spending money; the mother keeping house, and the son working on the farm. It was understood that they were to receive something besides, though there was no express contract. *Held*, that they were entitled to a fair compensation.—Magarrell v. Magarrell, 74 Iowa, 378, 37 N. W. 961.

[d] (Iowa, 1894) In an action by a son to establish a claim against his father's estate, it appeared that, for eight years prior to his death, deceased was afflicted with cancer, and during the last two years required constant care; that plaintiff had ceased to be a member of the family, but about the time his father's trouble began he returned, and, with his boy, lived with his parents, who were then unable to care for themselves; that he rented the farm, and paid the rent to his father; that his mother died two years before his father; and that thereafter he personally gave to his father the constant attention which he required. *Held*, that a finding that the services of plaintiff were rendered with the expectation of deceased and plaintiff that the latter should receive compensation therefor was authorized.—Marietta v. Marietta, 90 Iowa, 201, 57 N. W. 708.

[e] (Iowa, 1895) One suing for the value of services while a minor, and living with defendant, is entitled to recover on overcoming the presumption that his services were gratuitous by evidence that it was the understanding of the parties that compensation should be paid.—Resso v. Lehan, 96 Iowa, 45, 64 N. W. 689.

[f] (Mich. 1883) A son who, at the request of his father, works a farm, and cares for his father and mother, under a promise that he shall be paid for his services, and shall have the farm at the father's death, may recover from his father's estate the value of such services, if his father makes no disposition of the farm whereby it becomes the property of the son.—Dickerson v. Dickerson, 50 Mich. 37, 14 N. W. 691.

[g] (Mo. 1888) Though family membership implies that services rendered in the family are gratuitous, a promise to pay may be implied from any facts and circumstances which in their nature justify the inference of an actual contract of hiring or an actual understanding between the parties to that effect.—Koch v. Hebel, 32 Mo. App. 103.

[h] (Mo. 1893) An agreement for compensation for services rendered by plaintiff while a member of defendant's household cannot be implied from evidence of plaintiff that, outside of having a home, she relied only on defendant's promise to give her 40 acres of land if she married to suit him.—Bittrick v. Gilmore, 53 Mo. App. 53.

[i] (N. Y. 1876) The rule that a promise will not be implied to pay for board or services rendered by members of the same family does not apply, where the understanding on both sides was that compensation should be made therefor. —Van Schoyck v. Backus, 9 Hun, 68.

[j] (Or. 1871) Where a son, on coming of age, remains with his father and works for him as an ordinary laborer, under a parol agreement that he shall receive land for his pay, and he does not receive such land, he is entitled to recover the reasonable value of his labor.—Albee v. Albee, 3 Or. 321.

[k] (Or. 1880) Plaintiff, a cousin of defendant, entered his services as a member of his family with the understanding that she was not to have pay for her services; but subsequently she expressed dissatisfaction that she was not receiving pay for her services, and defendant stated to her that he would pay her for the work. *Held*, that plaintiff was entitled to recover the reasonable value of her services thereafter rendered, notwithstanding the agreement under which the services were originally begun. —Bennett v. Stephens, 8 Or. 444.

[l] (Pa. 1793) Where a son works for his father on an express promise that he shall be put on a footing with the other children, he may recover the value of his services to that extent.—Conrad v. Conrad, 4 Dall. 130, 1 L. Ed. 771.

[m] (Pa. 1868) A parol promise by an uncle to pay his nephew wages is sufficient, in an action of assumpsit.—Neel's Adm'r v. Neel, 59 Pa. (9 P. F. Smith) 347.

[n] (Pa. 1877) Where a sister accepted the services of her brother, and promised to compensate him, an allowance of his claim against her estate will not be disturbed.—In re Mayfield's Estate, 4 Wkly. Notes Cas. 154.

[o] (Pa. 1882) Recovery may be had on a quantum meruit for services rendered between parties standing in a family relation, when the party receiving them promises generally to pay for them.—Appeal of Prizer, 3 Walk. 487.

[p] (Pa. 1888) Decedent lived with her married sister until her death, and was nursed and cared for during her illness. She stated to her sister and her husband at different times that she had no money then, but they would be paid for the work. The decedent had stated to others, but not in her sister's presence, that she expected what she left would go to her sister. *Held*, that such sister could recover on a quantum meruit for her services.—Appeal of Lindsey, 15 Atl. 434, 1 Monag. 411.

[q] (S. C. 1839) Whether a son, who continues to labor with his father after becoming of age, with the expectation that a provision for his reward will be voluntarily made by his father, can claim a compensation for his services, upon the failure of his father to make such provision—quære.—Rainsford v. Rainsford, Rice, Eq. 343.

[r] (W. Va. 1896) Where a minor, residing with a near relative other than her parents, is led to believe by the conduct and conversations of such relative that she is to receive compensation for her future services rendered in promotion of his business, in some form, and, in expectation of such compensation, she faithfully performs such services, and he afterwards discharges her without compensating her in the manner in which he led her to believe he would do, she is entitled to recover the actual value of such services, in assumpsit, though such relative testifies that such promises were made in jest, and he had no intention of recompensing her for her services, but was only acting towards her in loco parentis.—Plate v. Durst, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404.

[s] (Wis. 1876) One who, having been received in infancy into a family not of kin to her, seeks to recover for services rendered to such family, has the burden of proof to show either an express contract or surrounding circumstances from which a contract can be implied; and, if it appears that she was received as a child, she must prove an express contract for wages. The mere expectation on the one part to pay, and on the other part to receive, wages, never expressed by the parties to each other, does not constitute an express contract, though, if established by competent evidence, such expectations of the parties may sometimes give color to circumstances tending to show that they entered into an express contract.—Tyler v. Burrington, 39 Wis. 376.

[t] (Wis. 1894) Claimant, a nephew of deceased, at her request, came over from Germany, and for nine years, and until her death, lived with her, and took care of her and her property, under a parol agreement that at her death she would leave him all her property. Claimant was at the time 21 years of age, and deceased had never occupied any quasi parental relation towards him. He testified that he expected to be paid for his services, and declarations of decedent showed that she expected to pay for them by leaving claimant all her property. *Held* that the presumption, if there was one, growing out of the relation of the parties, that no compensation was intended, was rebutted.—In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74.

§ 13. —— Declarations and statements as evidence of promise.

See post, §§ 17 [ll], 55 [uu].

[a] (Ga. 1893) Mere general expressions by a father that his son had waited on him well, and that he wanted him to be well compensated for it, are not sufficient evidence of a contract, either express or implied, to pay for the services.—O'Kelly v. Faulkner, 92 Ga. 521, 17 S. E. 847.

[b] (Ky. 1892) The mere fact that a parent told his child that she should be well paid for her services rendered the family after she became of age, does not entitle her to recover therefor.—Reynolds' Adm'rs v. Reynolds, 92 Ky. 556, 18 S. W. 517.

[c] (Mass. 1882) On an issue as to whether services of a son-in-law were rendered gratuitously, evidence that the parties lived together on the father-in-law's land, that the father-in-law had said that he expected to continue to live there, that the land was to be his daughter's when he died, and that he intended to pay

his way, *held* sufficient to justify a verdict for the son-in-law.—James v. Cummings, 132 Mass. 78.

[d] (Mich. 1889) That the wife stated, in the presence of her husband, that a stepdaughter of her husband should be paid for her work, will not bind him, by his acquiescence, unless he knew that she continued her service in reliance upon it.—Harris v. Smith, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702.

[e] (Mo. 1867) In an action by a child to recover compensation for services rendered his parents, the declarations of the parents in reference to the value and importance of the services are competent evidence to go to the jury. —Hart v. Hess, 41 Mo. 441.

[f] (Mo. 1888) A claim by a son against the estate of his father for seven years' wages for work done on the latter's farm cannot be sustained when the evidence of a contract offered by the claimant consists almost wholly of declarations by decedent, made after the termination of the services, to the effect that he intended to give claimant certain land for staying with and taking care of him, and that he intended to give him something for his services, and where it also appears that, though the services ceased three years before the father's death, no payment was made or settlement demanded. —Woods v. Land, 30 Mo. App. 176.

[g] (Mo. 1893) The services of a daughter living with her father for many years after her majority are presumed to be gratuitous, and loose declarations of affection or gratitude, and the expression of an intention by the father to leave the farm on which he resides to her, will not bind his estate for such services, unless there was an understanding that the daughter was to be paid for her services.—Louder v. Hart, 52 Mo. App. 377.

[h] (N. J. 1850) Where a daughter, who was of age, remained in her father's family as housekeeper for four years after her mother's death, and her father, after the daughter's marriage, said to third persons that "she had never been paid," and that "he meant to give her an outfit," but there was no evidence of a special contract before or during the service, or of a promise to the daughter after the service, it was *held* that, in the absence of all proof of a contract, it was to be presumed that the daughter had remained an unemancipated child, and therefore not entitled to wages, and that the declarations of the father, as they referred to no precedent debt, nor period of service, did not amount to a promise to pay on an implied contract.—Ridgway v. English's Ex'rs, 22 N. J. Law (2 Zab.) 409.

[i] (N. Y. 1874) Where defendant's intestate, who was plaintiff's brother, came to plaintiff's house, and, being sick, was cared for until he died, and during his illness he spoke warmly of the plaintiff's care and of paying her for it, the plaintiff was entitled to recover for her services, without proving an express promise to pay.—Woodward v. Bugsbee, 2 Hun, 128.

[j] (N. Y. 1877) Defendant's testatrix sent for her daughter, who had a family of her own, to come and care for her. Plaintiff accordingly left her home and took care of decedent for nearly four years, during which time decedent frequently stated that plaintiff should be well rewarded therefor. *Held*, that plaintiff was entitled to recover for her services, as it was not an ordinary case of services rendered by a member of a family to another.—Markey v. Brewster, 10 Hun, 16, 70 N. Y. 607.

[k] (N. Y. 1893) In an action by an adult child for services rendered to her deceased mother, declarations by the mother showing an intention to compensate plaintiff for such services at her death, followed by a will, subsequently revoked, devising to plaintiff one-third of the property, warrant the submission to the jury of the question whether or not there was an understanding between the parties that plaintiff should be compensated for her services by will or otherwise.—Marion v. Farnan, 68 Hun, 383, 22 N. Y. Supp. 946.

[l] (N. Y. 1894) The presumption that services rendered by a daughter to her father were gratuitous is not overcome by proof of declarations by the father that claimant "ought to be paid," and that "she should be paid for what she did for him."—In re Dusenberry (Sur.) 10 Misc. Rep. 633, 32 N. Y. Supp. 820.

[m] (Ohio, 1889) Where a stepdaughter lives with her stepfather as a member of his family, and renders services for him, statements made by him to a third person, but not communicated to her, that she should be well paid and provided for in his will, are insufficient to support an inference that her services were rendered with the expectation of being paid therefor.—Hawthorne v. McClure, 2 O. C. D. 390.

[n] (Pa. 1864) In an action by a daughter to recover from her father's estate for services rendered after she became of age, declarations of the testator that his daughter should be paid for what she had worked over age are not sufficient evidence of a contract, such as will enable her to recover.—Leidig v. Coover's Ex'rs, 47 Pa. (11 Wright) 534.

[o] (Pa. 1879) Where a son seeks to recover of his father's estate for his services in nursing decedent, evidence that the decedent requested the son to be sent for, and had remarked that he should be paid for his labor, without any evidence as to the time, and price to be paid, is insufficient to show a contract by the decedent to pay for the services.—In re Hollowbush's Estate, 36 Leg. Int. 149.

[p] (Pa. 1879) Where there is no evidence of an express contract between the decedent and his son for the payment of wages, and nothing but the declarations of the decedent that he intended in the future to compensate his son by an appropriation at his death, the claim by the son for wages cannot be allowed.—In re Hess' Estate, 36 Leg. Int. 451.

[q] (Pa. 1894) A father's declaration of appreciation of the housekeeping services of his daughter, who, with her children, lived with him up to the time of his second marriage, and of an intention that she should be paid after his death, in answer to a neighbor's suggestion that he should pay her wages, are not evidence of an express contract, such as to support a claim against his estate, when said daughter has successfully objected to production of his will to show what provision he made for her.—Murphy v. Corrigan, 161 Pa. 59, 28 Atl. 947, 34 Wkly. Notes Cas. 233.

[r] (S. C. 1891) On a trial to recover for services rendered for defendant's decedent by his daughter, two witnesses testified that they had heard the father say the daughter ought to be paid for her services. Another testified that she had heard him say that she ought to have "extra pay for her services to him." *Held* insufficient to create a legal obligation, as in such cases the presumption is that the services were gratuitous, which must be overcome by proof of an express agreement to pay.—Kirkpatrick v. Gallagher, 34 S. C. 255, 13 S. E. 450.

§ 14. Particular relations and services.

[a] (Ill. 1893) Where the president of a corporation has general control of its business and affairs, he cannot recover upon an implied contract for services rendered.—Barry v. Coffeen Coal & Copper Co., 52 Ill. App. 183.

[b] (Ky. 1892) In an action against an executor to recover for attention to testator during his illness, the plaintiff and the testator being neighbors, the former is not entitled to recover,

where the circumstances, instead of being such as to imply a promise to pay for the services, wholly negatived that presumption.—Davis v. Wilson's Ex'x, 14 Ky. Law Rep. 301.

[c] (Mich. 1875) No promise to pay for services will be implied where the circumstances not only fail to indicate that they were rendered or received for compensation, but clearly repel the idea that payment was to be made or asked for; and the allowance of a claim for services as sexton of one who at the time was vestryman and some of the time a senior warden and treasurer of the society, where the evidence clearly showed that the performance of the duty was voluntary, and that it was supposed on both sides that his service was something he was spontaneously giving, from a desire to promote a cause he had at heart, and not with any intent to get money, is erroneous.—St. Jude's Church v. Van Denberg, 31 Mich. 287.

[d] (N. Y. 1848) Where the plaintiff was bound as an apprentice until his majority, and the indentures were assigned to defendant with the assent of the apprentice, who went to live with the defendant and continued to reside with him until his majority, he could not recover under the common counts for work and labor on an implied assumpsit of defendant to pay him therefor.—Williams v. Finch, 2 Barb. 208.

[e] (N. Y. 1852) Where a minor, indentured as an apprentice, serves his master until it is discovered that the indentures are void, and the apprentice is discharged, the master is not liable under any implied promise to make compensation for the services so rendered.—Maltby v. Harwood, 12 Barb. 473.

[f] (N. Y. 1890) A servant cannot recover against his master's brother for services rendered the latter while staying at his master's house, where he was employed to serve the master's family generally, and the services were trivial, and there is only vague evidence that the brother promised to pay therefor.—Reynolds v. Roosevelt, 55 Hun, 610, 8 N. Y. Supp. 749.

[g] (Pa. 1831) A child of a person, who was a registered servant, and claimed as such, and sold for a full price, cannot, after he has been discharged from servitude, recover, in assumpsit on a quantum meruit, from the person who received his services, compensation for his services.—Urie v. Johnston, 3 Pen. & W. 212.

[h] (Pa. 1878) At the age of 5, A. was indentured to B., with whom she remained as a servant for 34 years, when B. died. A. received no compensation for her services, except food, shelter, and clothing. At one time B. promised to put $3 per week away for her. B. left her legacy of $100. *Held*, that A. could not recover the value of her services for 6 years prior to B.'s death.—In re Cousty's Estate, 12 Phila. 98.

[i] (Pa. 1884) Where a neighbor renders services to another, greater than are ordinarily rendered, but makes no demand for compensation until three years after they terminated, the presumption is that they were gratuitous.—In re Graulich's Estate, 31 Pittsb. Leg. J. 341.

[j] (Pa. 1886) An apprenticed servant, remaining in the employ of her master after the term of apprenticeship has passed, does not sustain such a family relationship toward him as will rebut the presumption of a promise to pay for services rendered.—In re Ennis' Estate, 2 Del. Co. R. 498.

[k] (R. I. 1886) Plaintiff, while a minor in the reform school, was taken by defendant as an apprentice, under an invalid agreement of apprenticeship, and remained several years in defendant's service, when he absconded, was rearrested, recommitted to the reform school, and at his own request remitted to defendant's service. Sentences to the reform school were limited by law to minority. *Held*, that plaintiff could not recover for services rendered after he had reached his majority if he continued to work for defendant after arriving at 21 years of age without a specific contract, or without notice to defendant that he should expect wages.—Burrows v. Ward, 15 R. I. 346, 5 Atl. 500.

§ 15. Relatives and services in general.

Expectation of legacy, see ante, § 10.

Promise or expectation of remuneration, see ante, §§ 12, 13.

[a] (Ill. 1871) In an action to recover for work and labor, it appeared that the plaintiff was the sister-in-law of the defendant, and that she made her home at his house. *Held*, that if plaintiff did not intend to charge for the services rendered by her in the family, but regarded them as a donation or a payment for her living at the defendant's house, she could not recover.—Broughton v. Smart, 59 Ill. 440.

[b] (Kan. 1883) A. became old and infirm, and his step-granddaughter and her husband came to live with him, under an arrangement not disclosed, but not as members of his family. Thereafter, until his death, she cared for and waited on him exclusively. After his death she presented a claim for services under an implied contract. *Held*, that she was entitled to recover.—Ensey v. Hines, 30 Kan. 704, 2 Pac. 861.

[c] (N. Y. 1873) Where a relative of plaintiff's wife died suddenly in the street, and plaintiff made a search for the remains, and took them from the custody of the public authorities, and held the funeral ceremonies at his own house, he was not entitled to recover from the executor for services rendered in making the search, and in writing advertisements for the funeral, and in procuring a clergyman to officiate, but such services must be deemed to have been rendered gratuitously.—Hewett v. Bronson, 5 Daly, 1.

[d] (N. Y. 1876) Where plaintiff's mother and the defendant's wife were cousins, their relation was not such as would prevent the law from implying an agreement to pay for services rendered by the plaintiff for the defendant.—Gallaher v. Vought, 8 Hun, 87.

[e] (Pa. 1868) Where decedent was in a sick and helpless condition during the time he remained at his brother's house, his estate was liable to the claim of his brother's wife for services in caring for him during his sickness.—In re Russell's Estate, 7 Phila. 64.

[f] (Pa. 1873) The relationship of a sister-in-law to a decedent does not raise any presumption against her claim for services as housekeeper.—In re McCarty's Estate, 9 Phila. 318.

[g] (Pa. 1876) The relationship of first cousins is not such as of itself to rebut the presumption of an implied contract arising from services rendered and accepted.—Neal's Ex'rs v. Gilmore, 79 Pa. (29 P. F. Smith) 421.

[h] (Pa. 1888) The relationship of a grandnephew to a decedent is not such a relationship as will rebut the presumption of a promise to pay for services rendered the decedent.—In re Michael's Estate, 5 Pa. Co. Ct. R. 321.

§ 16. Grandparent and grandchild.

[a] (Ill. 1892) Evidence that plaintiff, defendant's wife's grandmother, who had filled the place of said wife's mother, came to live in the family at her request, sewed, washed, nursed, cared for the children, did housework, and moved from place to place with the family for 10 years, without any talk of debt between them, except money advanced by her on defendant's notes, sufficiently shows that she was regarded as a member of the family, not entitled to wages.—Teeter v. Poe, 48 Ill. App. 158.

[b] (N. Y. 1886) Where a granddaughter leaves her husband to keep house for her grandfather,

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and performs domestic services for him, she does not form one of the family, but is entitled to compensation for services rendered.—In re Wells, 4 N. Y. St. Rep. 878.

[c] (N. C. 1876) Relationship of granddaughter and grandfather does not of itself rebut the implication of his obligation to pay her what her services rendered to him in his household, where she resides, are fairly worth.—Hauser v. Sain, 74 N. C. 552.

[d] (N. C. 1887) Where a grandfather takes his granddaughter into his family, and treats her in all respects as one of his own children, a presumption arises against a promise on the part of the grandfather to pay the grandchild for services performed.—Dodson v. McAdams, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408.

[e] (N. C. 1887) A refusal to instruct the jury that if a granddaughter was simply a member of her grandfather's family, and so treated, she could not recover for work performed, where there was no agreement for pay, is error.—Dodson v. McAdams, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408.

[f] (Pa. 1853) Where a female ward lives with her grandfather, receiving her board and clothing and performing services as a domestic, there is no implied contract on which she can recover wages for her services, and the presumption is that she has received all that her services were worth.—Appeal of Grove, 10 Leg. Int. 46.

[g] (Pa. 1865) A granddaughter cannot recover wages for service against her grandfather, in whose family she has lived in that relation, in the absence of an express contract.—Butler v. Slam, 50 Pa. (14 Wright) 456.

[h] (Pa. 1884) Where a child lives with her grandfather as a member of the family, there is no implied promise that anything was to be paid for labor, unless a previous contract was shown.—In re Tubb's Estate, 3 Kulp, 418.

[i] (Pa. 1886) Decedent and his wife were aged, respectively, 85 and 75 years, and required considerable care and attention. Their children could not spare the time necessary for their comfort, and held consultations among themselves respecting the feasibility of employing some suitable person to take care of them. They finally came to the conclusion that they could themselves attend to their wants during the daytime, and that the grandson of decedent should remain with them during the nights. This understanding was carried out for four years. *Held*, that the children had not such authority to make this arrangement as would give the grandson a claim against decedent's estate, there being no evidence of a contract, either express or implied, between decedent and his grandson, and none could arise out of his acceptance of the services.—Appeal of Moyer, 112 Pa. 290, 3 Atl. 811.

[j] (Pa. 1889) Testator's granddaughter lived with him, at his request, for nine years before his death, making her home with him, and keeping his house. He maintained her, but there was no evidence that there was any express agreement as to compensation for her services, or that he ever paid her any wages. *Held*, that the granddaughter was not entitled to compensation for her household services, or for services in assisting testator about his accounts and papers, though there was evidence that testator had said that she was useful to him, and should be paid for her services, and testator's executor, who was the granddaughter's father, having paid her claim, was properly surcharged therewith.—Appeal of Barhite, 126 Pa. 404, 17 Atl. 617, 24 Wkly. Notes Cas. 64.

[k] (Vt. 1855) A granddaughter living, rather as a daughter than as a servant, with her grandfather, who supported her, and for whom she worked, must show satisfactorily, in order to recover for her services, that it was the expectation of both parties that the services created a debt.—Davis v. Goodenow, 27 Vt. (1 Williams) 715.

§ 17. Parent and child.

See ante, § 11½ [v, z].

Liability of father for services of physician attending adult son at father's request, see ante, § 5 [n].

Promise or expectation of remuneration, see ante, §§ 12, 13.

Services of daughter and son-in-law, see post, § 18.

Rights of persons in loco parentis as to services and earnings of child, see "Parent and Child," vol. 37, cc. 2258, 2259, § 162.

Services of child in general, see "Parent and Child," vol. 37, cc. 2167–2176, §§ 70–76.

[a] When a child renders service to a parent after the child is of age, but while he is a member of the parent's family, and no arrangement or agreement has been made as to payment for such services, and no circumstances are shown from which such understanding can be fairly inferred, the child cannot recover compensation for such services.
—(Cal. 1873) Friermuth v. Friermuth, 46 Cal. 42;
(Ill. 1878) Cooper v. Cooper, 3 Ill. App. (3 Bradw.) 492; (1883) Id., 12 Ill. App. (12 Bradw.) 478;
(Ind. 1864) Adams v. Adams' Adm'r, 23 Ind. 50;
(Ky. 1866) Perry v. Perry, 63 Ky. (2 Duv.) 312;
(Mo. 1896) Ronsiek v. Boverschmidt's Adm'r, 63 Mo. App. 421, 2 Mo. App. Rep'r, 817;
(N. H. 1856) Munger v. Munger, 33 N. H. 581;
(N. J. 1869) Prickett v. Prickett's Adm'rs, 20 N. J. Eq. (5 C. E. Green) 478;
(N. Y. 1851) Dye v. Kerr, 15 Barb. 444; (1867) Green v. Roberts, 47 Barb. 521; (1873) Dougherty v. Dougherty, 7 Alb. Law J. 346; (1887) In re Hughey, 7 N. Y. St. Rep. 732;
(N. C. 1891) Grant v. Grant, 109 N. C. 710, 14 S. E. 90;
(Ohio, 1887) Pollock's Ex'r v. Pollock, 2 Ohio Cir. Ct. R. 143, 1 O. C. D. 410;
(Or. 1875) Barrett v. Barrett, 5 Or. 411;
(Pa. 1852) Sanders v. Wagonseller, 19 Pa. (7 Harris) 248; (1858) Appeal of Mosteller, 30 Pa. (6 Casey) 473;
(Vt. 1845) Andrus v. Foster, 17 Vt. 556;
(Wis. 1873) Pellage v. Pellage, 32 Wis. 136; (1877) Wells v. Perkins, 43 Wis. 160.

[aa] A child cannot recover wages for services rendered his father after attaining his majority, unless he proves a contract by his father to pay for the services.
—(N. J. 1879) Smith v. Smith's Adm'r, 30 N. J. Eq. (3 Stew.) 564;
(Ohio, 1832) Willis v. Dun, Wright, 134;
(Or. 1891) Wilkes v. Cornelius, 21 Or. 348, 28 Pac. 135;
(Pa. 1843) Appeal of Candor, 5 Watts & S. 513; (1851) Zerbe v. Miller, 16 Pa. (4 Harris) 488; (1857) Hertzog v. Hertzog, 29 Pa. (5 Casey) 465; (1864) Leidig v. Coover's Ex'rs, 47 Pa. (11 Wright) 534; (1865) Gordner's Adm'rs v. Heffley, 49 Pa. (13 Wright) 163; (1866) In re Shelly's Estate, 1 Pears. 443; (1869) Id., 1 Leg. Gaz. 37; (1877) In re Foust's Estate, 6 Luz. Leg. Reg. 92; (1879) In re Dietrich's Estate, 10 Lanc. Bar, 166; (1879)

In re Hess' Estate, 12 Phila. 285; (1885) Burgess v. Burgess, 109 Pa. 312, 1 Atl. 107;

(Vt. 1872) Harris v. Currier, 44 Vt. 468;

(W. Va. 1894) Cann v. Cann, 40 W. Va. 188, 20 S. E. 910.

[b] The rule that, where services are rendered by a child to a person standing in loco parentis after the child becomes of age and while it continues to reside with the parent, without any agreement on the part of the parent to pay for such services, the law implies no obligation to pay, is not confined to cases where the actual relation of father and child has existed.

—(Ind. 1851) Oxford v. McFarland, 3 Ind. 156; (1873) Hays v. McConnell, 42 Ind. 285;

(Ky. 1843) Weir v. Weir's Adm'r, 42 Ky. (3 B. Mon.) 645.

[bb] (Ala. 1859) To support the claim of a son, made after the father's death, for services in looking after an infirm father's property for many years, the son not living at home, proof of an express contract is not necessary.—Parker's Heirs v. Parker's Adm'r, 33 Ala. 459.

[c] (Ala. 1860) The administrator was allowed for money paid a grown-up son for services in managing his father's plantation during the latter's life, upon proof of their value, and that they were rendered with the father's knowledge and approval, though no special contract was ever made about them. It appeared that the son "found" himself and his horse.—Kinnebrew's Distributees v. Kinnebrew's Adm'rs, 35 Ala. 628.

[cc] (Fla. 1884) While the presumption is that services rendered by an adult daughter to her father in his home are not to be paid for, such presumption may be overcome by the facts and circumstances of the case.—Mills v. Joiner, 20 Fla. 479.

[d] (Ga.) To entitle a son to recover against the estate of his deceased father for care bestowed upon the latter while old and infirm, it must affirmatively appear either that the services were rendered under an express contract that the son was to be paid for them, or the surrounding circumstances must plainly indicate that it was the intention of both parties that compensation should be made, and negative the idea that the services were performed merely out of filial love.—(1892) Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349; (1893) O'Kelly v. Faulkner, 92 Ga. 521, 17 S. E. 847.

[dd] (Ill. 1855) If a child remains with a parent after arriving at majority, in the same apparent relation as when a minor, the presumption is that wages are not to be paid for services rendered. This may be rebutted by proof of an express or implied contract, which latter may be shown by circumstances establishing that the parties intended a pecuniary recompense.—Miller v. Miller, 16 Ill. (6 Peck) 296.

[e] (Ill. 1872) Where a son erected a house on his father's premises in his lifetime, in a suit by the son to recover of his father's estate, his right depended on whether he expected pay at the time he placed the house on the premises and the father expected to pay.—Byers v. Thompson, 66 Ill. 421.

[ee] (Ill. 1872) The mere fact that a child, after attaining her majority, continued to reside with her parents, raises no obligation to pay for services thereafter rendered as a member of a family, and such services cannot be presumed to constitute a consideration for a note given long after.—Arnold v. Franklin, 3 Ill. App. (3 Bradw.) 141.

[f] (Ill. 1886) Where a child lives with the parents, or a parent with a child, the law does not imply a contract to pay money for support or services, and, unless it is shown that there was an express contract to pay for such services and support, a recovery cannot be had by one of the parties against the other.—Falcon v. McIntyre, 118 Ill. 292, 8 N. E. 815.

[ff] (Ill. 1891) Where a child remains with one standing in loco parentis, after having reached the age of majority, in the same apparent relation as when a minor, the presumption is that the parties do not contemplate payment of wages for services rendered; but, where there was an agreement to pay the child a certain amount on her marriage, a recovery may be had therefor.—Stock v. Stolts, 137 Ill. 349, 27 N. E. 604.

[g] (Ill. 1892) Where a daughter of age, who is earning her own living, returns home at her father's request, and assists in the work of the home, there is an implied contract to compensate her for her services.—Robnett v. Robnett, 43 Ill. App. 191.

[gg] (Ind. 1848) No compensation is due to a son for services rendered to his father after the attainment of majority, while remaining in his father's house and rendering only such services as he had previously been accustomed to render, unless there be an agreement to pay for them.—Resor v. Johnson, Ind. (1 Cart.) 100.

[h] (Ind. 1854) Where a father and adult children live together as members of a common family, there is no implied obligation to pay for service rendered on the one hand, or for board furnished on the other; but such obligation may arise from contract, and the contract may be inferred from circumstances.—House v. House, 6 Ind. 60.

[hh] (Ind. 1863) Where a daughter, after her majority, continues to live with her father, as she had done previously, and was provided with necessaries as one of the family, she was not entitled to recover for her services, unless there was an express agreement, before the services were rendered, that she should receive compensation.—Pitts' Adm'r v. Pitts, 21 Ind. 309.

[i] (Ind. 1864) Where a child continues with the parent after becoming of age, a contract to pay a reasonable compensation for its services may be inferred from circumstances tending to rebut the ordinary presumption that no wages are to be paid.—Adams v. Adams' Adm'r, 23 Ind. 50.

[ii] (Ind. 1865) A widow to whom a farm has been devised by her husband cannot, in the absence of any contract, express or implied, recover rent of the farm, or board, from a son who was a minor at the death of his father, and who took the management of and worked upon the farm; the whole family of the widow living together and upon the common earnings.—Hays v. Seward, 24 Ind. 352.

[j] (Ind. 1874) From the mere fact that a child continues to reside with his parents as a member of the family after he arrives at age, or that parents reside in the family of the child, there is no implied understanding on the part of either to pay for services rendered, or for board, lodging, or clothing furnished; but an undertaking to pay may either arise from an express contract or may be inferred from circumstances. An express contract to pay is not always necessary. The relationship merely rebuts the presumption, which would otherwise arise, that compensation was intended, and circumstances of such a nature and character as to overcome the presumption which arises from the relationship of the parties may justify the inference that compensation was intended.—Smith v. Denman, 48 Ind. 65.

[jj] (Ind. 1880) Though no contract for payment for services is implied by the fact that a son, after becoming of age, with his wife, resides with his father as members of the family,

such contract may be shown by circumstances.—Hilbish v. Hilbish, 71 Ind. 27.

[k] (Ind. 1891) In an action by an adult daughter against her father to recover for domestic services rendered while living as a member of his family, although a contract to pay for such services is essential to her recovery, an express contract need not be shown, but it may be inferred from the surrounding circumstances.—Story v. Story, 1 Ind. App. 284, 27 N. E. 573.

[kk] (Iowa, 1879) A son went to live with his aged parents, managed their farm, and took care of them for 16 years. He was not industrious or prosperous, and the farm yielded only a living for the family. The father did but little work, but the mother was quite active and useful much of the time. *Held* that, in the absence of any evidence of a contract, it will be presumed that the son's services were gratuitous.—Wilson v. Wilson, 52 Iowa, 44, 2 N. W. 615.

[l] (Iowa, 1889) Plaintiff, while unmarried, lived at home with her father, mother, and brothers, and worked with them in market gardening. With their joint earnings a farm was purchased, the deed being made out in the name of one of the brothers. Afterwards plaintiff married, and moved away, and the farm remained under the control of the grantee for 18 years, without any assertion on the part of the plaintiff that she had any interest in it. *Held* that, there being no express contract for the payment of plaintiff's services, a finding that there was no agreement to pay for such services was justified.—Spitzmiller v. Fisher, 77 Iowa, 289, 42 N. W. 197.

[ll] (Ky. 1865) In an action for services rendered by a son to his mother, evidence that the mother often declared her purpose to give him all she had, and that he inquired of her, only a few months before her death, what she intended to do for him, is sufficient to repel the presumption that he was to be paid for his services.—Perry v. Perry, 63 Ky. (2 Duv.) 312.

[m] (Ky. 1880) Where there was no expectation by either party that the son was to be paid for services rendered for his father when he had become too old and disabled to attend to business, no suit will lie against the estate.—Conover v. Conover's Adm'r, 1 Ky. Law Rep. 398.

[mm] (Md. 1894) Where a father, who has need of help on his farm, induces a son, after he has attained majority, to work thereon, and the son remained for years, rendering continuous and valuable services, a promise to pay the reasonable value thereof may be implied.—Hardy v. Hardy, 79 Md. 9, 28 Atl. 887.

[n] (Mich. 1886) In dealings between a father and son, members of the same household, furnishing board, clothes, money, and the like, there is no implied promise of payment, and an express promise must be shown or there can be no recovery.—Allen v. Allen, 60 Mich. 635, 27 N. W. 702.

[nn] (Mo. 1889) A daughter who nurses and cares for her mother during her last illness, in order to recover for such services, in the absence of an express promise, must establish an implied promise by showing an intention on her mother's part to pay, and on her own to receive payment, even though the mother left her own home and went to that of her daughter for the purpose of procuring such attention from her.—Brock v. Cox, 38 Mo. App. 40.

[o] (Mo. 1892) No presumption arises that a father promised to pay his son for assisting him with enemas after he had become old, sick, and constipated, said son being the only male member of his family living near him, though the services were rendered at the father's request, and on his objection to being served by any one else.—Penter v. Roberts, 51 Mo. App. 222.

[oo] (Mo. 1893) A son cannot recover for taking care of his infirm and demented father unless he shows a state of facts which overcomes the natural presumption that he did not intend to charge for such services.—Erhart v. Dietrich, 118 Mo. 418, 24 S. W. 188.

[ooo] (Mo. 1894) The rendition by an adult child of services to its parent, in nursing and caring for him, does not raise a legal presumption of an agreement by the parent to pay for such services.—Finnell v. Gooch, 59 Mo. App. 209, 1 Mo. App. Rep'r, 80.

[p] (N. H. 1858) When parent and child reside together as members of one family, no contract between them to pay for services, or for articles furnished for family use, will be presumed, unless there is further proof of some contract or understanding that they are to be paid or accounted for.—Seavey v. Seavey, 37 N. H. 125.

[pp] (N. J. 1869) Where children, after becoming of age, remain with their father and are supported by him, and nothing was ever said as to compensation, the presumption is that none was expected or intended, and where one of the children, who had worked away from home at times, returned on his father's statement that he would need him, and worked for and was supported by the father, an agreement by the latter to pay wages cannot be implied.—Prickett v. Prickett's Adm'rs, 20 N. J. Eq. (5 C. E. Green) 478.

[ppp] (N. J. 1879) Where a daughter and her mother, who was very old and infirm, lived together, the former might recover compensation from the estate of the latter for services which were indispensable and rendered under circumstances that raised a presumption that she was to be paid, and that her mother intended to pay her therefor.—De Camp v. Wilson, 31 N. J. Eq. (4 Stew.) 656.

[q] (N. Y. 1860) The implication of a promise to pay for services rendered and accepted—e. g., for medical attendance—is less strong when the parties, though both adults, are parent and child, than in other cases; and if, in addition, it appears that the services were rendered without expectation on either side that compensation would be made, the son rendering them cannot afterwards recover on a quantum meruit.—Moore v. Moore, 3 Abb. Dec. 303.

[qq] (N. Y. 1864) A son cannot recover for services rendered his mother while a member of his family, in the absence of any agreement for compensation.—In re Kelly's Estate, Tuck. 28.

[qqq] (N. Y. 1874) A mother resided with her son and kept house for him, and after his death she presented a claim against his estate for services rendered by her as his housekeeper. There was no agreement between them that she should be paid for the services. *Held*, that the claim was not allowable, as the law would not imply an agreement to pay wages.—Cooper v. Turner, 2 Hun, 515, 5 Thomp. & C. 711.

[r] (N. Y. 1877) The services of a daughter in caring for a sick mother for four years are not gratuitous, as having been rendered by one member of the same family and household for another, where the daughter left a family of her own, at the request of her mother, when she began to perform the services.—Markey v. Brewster, 10 Hun, 16.

[rr] (N. Y. 1882) Where a mother performs services for her son, the services rendered do not raise an implied promise to pay for them.—Terry v. Bale, 1 Dem. Sur. 452.

[rrr] (N. Y. 1889) A claim by a father against the estate of his deceased son for services in taking care of stock, and for fodder and grain for the stock, and board for the son and his employés, will be disallowed where it does not

appear that any of the items were ever presented to the son, and where there are no allusions to them on the son's books; and it appears that the father made up his charges solely from recollection, having no memoranda of the transactions; that the father and son had at least two settlements, and that a note was given by the son to the father, and money was often paid by one to the other.—In re Strickland, 5 N. Y. Supp. 854, 2 Con. Sur. 10.

[s] (N. Y. 1890) Upon her marriage plaintiff ceased to live with her parents, and became estranged from her mother. After several years the mother, who was then 80 years old, alone and helpless, sent for plaintiff to come and take care of her, and plaintiff did so for 50 weeks, and then left her. *Held*, that a promise to pay for the services would be inferred.—Wilsey v. Franklin, 57 Hun, 382, 10 N. Y. Supp. 833.

[ss] (N. Y. 1892) Plaintiff lived with and was supported by his mother, and she provided for him in her will, as for her other children. He and his wife had rendered some service in nursing and taking care of her in her old age. *Held*, that the presumption was that such service was gratuitous, and that plaintiff could not recover therefor without proof of an express employment and promise to pay.—Ulrich v. Ulrich, 60 N. Y. Super. Ct. (28 Jones & S.) 237, 17 N. Y. Supp. 721.

[sss] (N. Y. 1893) A promise to pay for services rendered to a parent by an adult child, who has been away from home, established a business, and supported himself, and then returns on the request of the parent, will be more readily inferred than where the child has continued to live with the parent after arriving at age, and has never had any other home.—Marion v. Farnan, 68 Hun, 383, 22 N. Y. Supp. 946.

[t] (N. Y. 1895) A claim by a daughter against the estate of her deceased mother for services rendered will not be allowed where it appears that claimant, before her mother's death, frequently said that she wanted to render such services in return for what her mother had done for her; that decedent had frequently declared her intention to distribute her property equally among her children; that all the children aided in taking care of her; and that shortly before her death she had given claimant a large portion of her estate.—In re Stevenson, 86 Hun, 325, 33 N. Y. Supp. 493.

[tt] (N. Y. 1895) Where a claim was made by a daughter against the estate of her deceased mother for services rendered to decedent, who lived with claimant, it cannot be presumed, as matter of law, that there was no agreement that claimant should be paid for her services.—In re Stevenson, 86 Hun, 325, 33 N. Y. Supp. 493.

[ttt] (N. C. 1832) Where a child, on arriving at full age, continues to live with and serve the parent, the relation of the parties is a circumstance from which to infer that the services were gratuitous.—Williams v. Barnes, 14 N. C. 348.

[u] (N. C. 1887) In the absence of evidence to show an agreement for compensation, express or implied, a child cannot recover for services rendered to the parent while living in the family, even though such services were rendered after the child attained majority, and were of a very burdensome and disagreeable nature.—Young v. Herman, 97 N. C. 280, 1 S. E. 792.

[uu] (Ohio, 1879) Where an adopted child, designated as the heir at law of the husband, renders services to his widow, in an action to recover from the widow for such services, the burden is on him to show an express contract; for the rule that the relation of parent and child repels the presumption that services rendered by the child after becoming of age are in expectation of payment applies to adopted children.—Finch v. Finch, 7 Ohio Dec. 673, 4 Wkly. Law Bul. 908.

[uuu] (Pa. 1832) The claims of a son for compensation for services rendered to his father after he arrives of age are not regarded favorably by the courts.—In re Walker's Estate, 3 Rawle, 243.

[v] (Pa. 1843) A child is not entitled to recover wages for services rendered from the estate of his deceased parent, except upon clear and unequivocal proof, leaving no doubt that the relation between the parties was not that of parent and child, but of master and servant.—Appeal of Candor, 5 Watts & S. 513.

[vv] (Pa. 1849) Services rendered by a son to his father, at the request of his father, on the basis of master and servant, and not on that of parent and child, constitute a good cause of action.—Steel v. Steel, 12 Pa. (2 Jones) 64.

[vvv] (Pa. 1870) The fact that decedent boarded with her son-in-law and daughter at a fixed price per annum is a strong indication, but not conclusive evidence, that services rendered her by her daughter were also upon a contract basis, and to be paid for.—Appeal of Diehl, 2 Leg. Gaz. 113.

[w] (Pa. 1874) Where a daughter sues her father's estate for wages for services, she must prove an express contract and an unequivocal acknowledgment of the existence of the debt within six years of the commencement of the suit.—Watson's Ex'rs v. Stem, 76 Pa. (26 P. F. Smith) 121.

[ww] (Pa. 1882) The law will not imply a promise on the part of a father to pay to his adult married daughter wages for services rendered while she and her husband resided with him and made part of his household.—Houck's Ex'rs v. Houck, 99 Pa. 552.

[www] (Pa. 1882) Where a son takes his parents into his house and cares for them, no contract is implied, and there can be no recovery for his services, in the absence of an express contract to pay therefor.—Appeal of Miller, 100 Pa. 568, 45 Am. Rep. 394.

[x] (Pa. 1885) Although the relation of father and son rebuts the presumption of an implied contract where one is a member of the other's family, or where the services are such as would ordinarily be rendered gratuitously as between parent and child, yet where the son had a family of his own, and lived at a distance from his father, and at the latter's request rendered services in collecting rent due to his father, *held*, that the son could recover compensation from his father's estate on an implied contract.—In re Young's Estate, 32 Pittsb. Leg. J. (O. S.) 403.

[xx] (Vt. 1844) Where a woman, after the death of her husband, returns to her father's house to reside, and continues to reside with him many years, rendering such services as are ordinarily rendered by a child in the family of a parent, it is incumbent upon her, if she would claim payment for such services after the death of her father, to show that she performed the services expecting at the time to be paid therefor, and that the father so understood it, or that he had sufficient reason to believe that she intended to charge him for such services.—Fitch v. Peckham, 16 Vt. 150.

[xxx] (Vt. 1861) In an action by a child to recover for services rendered to the parent, it is not necessary that the proof in support of the claim for payment for such services should be full, unequivocal, and conclusive; but such proof is established by a fair preponderance of the evidence.—Putnam v. Town, 34 Vt. 429.

[y] (Vt. 1861) Where the relation of a parent and child exists, and the child, after coming of age and while in the parent's family, renders services and receives support, the law will not

imply therefrom that there was a contract either that the services of the child or the support furnished by the parent should be paid for. There must be proof either of express agreement for pay, or it must be shown that both parties at the time understood that the services were to be paid for.—Putnam v. Town, 84 Vt. 429.

[yy] (Vt. 1868) There is no distinction between adopted children and other children in the application of the rule that if a child, after becoming of age, remains in the parent's service, the law will imply no promise on the part of the parent to pay for the labor, but an express promise must be proved.—Lunay v. Vantyne, 40 Vt. 501.

[yyy] (Va. 1878) In the absence of an express contract, the mere fact that a daughter renders services to her aged mother does not raise an implied contract for compensation therefor, enforceable against the estate of the mother.—Harshberger's Adm'r v. Alger, 31 Grat. 52.

[z] (W. Va. 1882) As between parent and an adult child, any claim for compensation for services must be determined from the particular circumstances of the case.—Stansbury v. Stansbury's Adm'rs, 20 W. Va. 23.

[zz] (W. Va. 1886) It being apparent that a natural son and his father dealt at arm's length as strangers, and that the son rendered valuable services to the father, *held*, that compensation was due, although there was no express contract.—Broderick v. Broderick, 28 W. Va. 378.

[zzz] (Wis. 1856) Where a son after majority continues to reside with and work for his father, there may be circumstances short of an express promise on the part of the father entitling the son to recover compensation.—Fisher v. Fisher, 5 Wis. 472.

§ 18. Parent and son-in-law or daughter-in-law.

[a] (Ind. 1851) A son-in-law, living with the parents of his wife, cannot recover for occasional services performed in that capacity, without proof of an express contract that they were to be paid for.—Oxford v. McFarland, 3 Ind. 156.

[b] (Iowa, 1876) Where a father-in-law boarded in the family of his son-in-law, the father-in-law being a man of wealth and contributing nothing by labor or money to the maintenance of the household, while the son-in-law was dependent upon his labor for his support, *held*, that the presumption did not arise that the services were gratuitous by reason of the relationship.—Rogers v. Millard, 44 Iowa, 466.

[c] (Mich. 1879) Where one living with his wife in his father-in-law's family, without paying any board, voluntarily renders services for the family, without expecting pay, he cannot recover therefor.—Coe v. Wager, 42 Mich. 49, 3 N. W. 248.

[d] (Mo. 1893) The rule that a promise to pay for care and nursing may be inferred from circumstances is not altered by the fact that such services are rendered by the daughter and son-in-law of the recipient.—Ramsey v. Hicks, 53 Mo. App. 190.

[e] (N. J. 1885) Where a son-in-law renders services to a father-in-law in his lifetime, without any agreement or expectation of compensation, and it is shown that the services are such as he would have rendered without compensation, he is not entitled, in a suit against the executor, to recover for such services.—Bonney v. Haydock, 40 N. J. Eq. (13 Stew.) 513, 4 Atl. 766.

[f] (N. Y. 1865) A laborer, hired for a certain time and for a certain price, intermarried with his employer's daughter, who was a member of her father's family, and continued to work for his wife's father for several years; the wife in the meanwhile remaining with her father and rendering services for him, and he furnishing her and the children who were the issue of her marriage with food and clothing. There was no agreement made in regard to the services of the daughter, or the food and clothing of herself and her children, or the services of her husband. *Held*, that the father was not liable for the services of his daughter, that he could not claim compensation for the food and clothing of herself and children, and that he was bound to pay her husband what his services were reasonably worth after the time for which he had been engaged had expired.—Conger v. Van Aernum, 43 Barb. 602.

[g] (N. Y. 1887) The mother-in-law of defendant remained with him seven years after his wife's death as housekeeper and took care of his young children. *Held* that, without some evidence to the contrary, it will be presumed that she remained there as a member of the family, and without any implied obligation on the part of defendant to pay her for her services.—Reid v. Farrar, 6 N. Y. St. Rep. 199.

[h] (N. C. 1896) Where a son-in-law and his family and mother-in-law for 14 years lived together as "one family" at her house, without any agreement for payment for services on either side, and no payment was made except in mutual services, he was not entitled to recover from her estate, on an implied promise, the value of his own and wife's services to her during that time.—Callahan v. Wood, 118 N. C. 752, 24 S. E. 542.

[i] (Ohio, 1832) Where a son-in-law lived in the family of his wife's father, and worked for him, assumpsit will not lie for wages, unless there was an agreement.—Lovet v. Price Wright, 89.

[j] (Pa. 1865) The relationship of father-in-law and son-in-law is not of itself sufficient to rebut the presumption of liability for services rendered by one to the other.—Appeal of Amey, 49 Pa. (13 Wright) 126.

[k] (Pa. 1871) The relationship between a father-in-law and a son-in-law is not of itself sufficient to overcome the presumption of a promise to pay for services in nursing and taking care of the father-in-law by his daughter, the wife of the son-in-law.—Schoch's Adm'r v. Garrett, 69 Pa. (19 P. F. Smith) 144.

[l] (Pa. 1873) The relationship of son-in-law is not enough in itself to rebut the presumption of a promise to pay for services, though the mutual relationship and the circumstances of the parties, aided by such relationship, may be sufficient.—In re Kendig's Estate, 1 Chest. Co. Rep. 563.

[m] (Pa. 1882) A claim for services against an estate of a decedent, by a daughter-in-law whose husband is living, cannot be sustained unless a precise and definite contract is proven by satisfactory evidence.—In re Stonaker's Estate, 1 Chest. Co. Rep. 446.

[n] (Pa. 1882) Where services are performed for a mother-in-law without any express contract for compensation, the law presumes a promise to pay what they are reasonably worth.—Smedley v. Ormsby, 13 Lanc. Bar, 136.

[o] (Pa. 1892) Where a woman spends a part of each year with her daughter for a number of years, and no demand is ever made for board or attendance, this is sufficient, in the absence of any express stipulation, to negative the presumption that services rendered principally by the daughter in her last sickness were not gratuitous; and a claim made by the daughter's husband for such services stands upon no different footing than if made by the daughter or any other member of the family.—

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In re Young's Estate, 148 Pa. 573, 575, 24 Atl. 124; Appeal of McHenry, Id.

[p] (Pa. 1892) A son-in-law cannot recover for nursing, etc., his mother-in-law, where it appears that the decedent, an aged woman, had for several years divided her time among her children, living as a member of their respective families, without paying or agreeing to pay for care and attention.—Gerz v. Weber, 151 Pa. 396, 25 Atl. 82, 31 Wkly. Notes Cas. 77.

[q] (Tex. 1871) An obligation to pay for services rendered by a son-in-law to his father-in-law is implied.—Wright's Adm'x v. Donnell, 34 Tex. 291.

[r] (Vt. 1865) Where A. upon his marriage took up his abode in the family of his father-in-law, B., no contract would be implied that he was to pay for his living or be paid for his services.—Sprague v. Waldo, 38 Vt. 139.

[s] (Va. 1825) A charge made by a son-in-law for nursing his father-in-law in his last illness, where there is no contract, express or implied, ought not to be allowed.—Williams v. Stonestreet, 3 Rand. 559.

[t] (Wis. 1896) Where a son-in-law furnished board, lodging, and services to his father-in-law, on his periodical visits with him during a period of several years, without demanding any compensation, but kept a record of the visits and services, and after his father-in-law's death, being dissatisfied with the share that was left to his wife by his father-in-law, he charged up these items, he could not enforce his claim against the estate.—In re Schmidt's Estate, 93 Wis. 120, 67 N. W. 37.

§ 19. Parent and stepchild.

Services and earnings of stepchildren in general, see "Parent and Child," vol. 37, cc. 2253, 2254, § 156.

[a] (Cal. 1857) Where plaintiff sustains to defendants the relation of stepmother, and assumes a certain position inconsistent with her claim for services, the proof should either show an express contract, or conclusive circumstances from which a contract might be justly implied, as being contemplated by the parties during the continuance of the relation.—Murdock v. Murdock, 7 Cal. 511.

[b] (Mich. 1889) Where a woman of 25 years of age has lived for 6 years with her stepmother, fom whom her father had been divorced, working as a dressmaker, and giving some of her earnings to her stepmother, and doing some of the household work, she cannot recover from her stepmother for services rendered.—Feiertag v. Feiertag, 73 Mich. 297, 41 N. W. 414.

[c] (Mich. 1889) There is no implied promise by a stepfather to pay for services rendered after she became of age by a stepdaughter, who lived in his family from the time she was 9 years old until her marriage at 26; she having performed the same duties, and lived as a member of the family, receiving her board, clothing, and money from time to time, the same after as before she became of age.—Harris v. Smith, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702.

[d] (Mo. 1856) Where a stepson continues to reside in the family of the stepfather after majority, he cannot maintain a claim against him for work and labor, as the law will not imply a contract to pay him for the services rendered.—Guenther v. Birkicht's Adm'r, 22 Mo. 439.

[e] (N. Y. 1849) Where a stepfather maintained his stepchild in his family, treating him as a member of it, the law will not imply a promise to pay for such services, and no recovery can be had therefor, unless an express promise is shown.—Williams v. Hutchinson, 5 Barb. 122.

[f] (N. Y. 1890) In an action for services rendered and for goods furnished to defendant's intestate, the fact that plaintiff was the stepson of decedent, and a member of his family, does not require him to prove an express contract by decedent to pay, but it is sufficient if he proves facts and circumstances showing that decedent expected to pay, and plaintiff to receive, the value of such services and goods.—Davis v. Gallagher, 55 Hun, 593, 9 N. Y. Supp. 11, judgment reversed (1891) 124 N. Y. 487, 26 N. E. 1045.

[g] (Ohio, 1889) A stepdaughter, residing with her stepfather as a member of his family, cannot recover for services rendered by her for him, in the absence of proof of an express promise to pay therefor, or of facts and circumstances from which such promise may be fairly inferred.—Hawthorne v. McClure, 2 O. C. D. 390.

[h] (Pa. 1850) A female, living with her stepfather while in her minority, is not entitled, after arriving at full age, to recover from him wages for services rendered without proof of a contract.—Lantz v. Frey, 14 Pa. (2 Harris) 201; 19 Pa. (7 Harris) 366.

[i] (Pa. 1867) Where a stepdaughter at the request of her stepfather gave up a lucrative occupation to attend on him, and remained with him for some time after her mother's death and until he remarried, there was sufficient evidence of value to sustain a verdict in an action for services rendered.—Mellor v. Lanagan, 6 Phila. 232.

[j] (Pa. 1883) The principles which govern cases of claims between parent and child have application in the relation of stepmother and stepson, where a family relation exists between them; but there must be proof of an express contract to pay for services before there can be a recovery.—In re Guss' Estate, 2 Chest. Co. Rep. 65.

[k] (Tex. 1896) On the trial of the right of property belonging to the community estate of decedent and his wife, between decedent's children and judgment creditors of their mother's husband by a second marriage, it was error to instruct that, as an offset to the half interest in the property claimed by the children, they should be charged with the value of their board at the home of their mother and stepfather, it appearing that the board was given to them, and while receiving it they did work about the place.—Nichols v. McCormick (Civ. App.) 35 S. W. 530.

[l] (Wis. 1877) To entitle a stepson to recover from his stepfather compensation for services rendered while the son remained a member of the father's family after attaining his majority, the jury must be satisfied by a preponderance of evidence that there was an express promise to make compensation. Such promise may be established by circumstantial evidence; but a promise must be established, as the law does not imply a contract from rendering and acceptance of service.—Wells v. Perkins, 43 Wis. 160.

§ 20. Brothers and sisters.

[a] (Del. 1860) As between brothers, the law will not imply a contract by either brother to pay for support and maintenance.—State v. Conmoway, 2 Houst. 206.

[b] (Iowa, 1870) Where a sister lived with and kept house for her brother, receiving support therefor, the law does not imply a promise on his part to pay for her services.—Scully v. Scully's Ex'r, 28 Iowa, 548.

[c] (Iowa, 1883) Where decedent went to live with his sister and family, and they lived together as one family, cultivating their adjoining farms together, and using the produce indiscriminately for common support, the sister, in the absence of an express contract to the contrary, was not entitled to recover either for

domestic services rendered deceased or for his board.—Keegan v. Malone's Estate, 62 Iowa, 208, 17 N. W. 461.

[d] (Kan. 1870) A sister resided in her brother's family, performed the usual duties of a housekeeper, and, in return, received clothing and a home for eight years. No account was kept, and no agreement was made that she should receive wages. *Held*, that the law would not imply a contract for services rendered, nor hold the brother's estate chargeable with a claim made for such services, when the claim was not made until after the brother's death.—Ayres v. Hull, 5 Kan. 419.

[e] (Mo. 1891) Where a sister lives with her brother, and occupies a family relation, keeping house for him, the implication of a promise to pay her for her services does not arise, but she must establish a contractual relation, express or implied.—Callahan v. Riggins, 43 Mo. App. 130.

[f] (N. Y. 1853) The law will not imply a contract for compensation by a decedent to his brother for services during five years, where the claimant was boarded and clothed by his brother, but there was no evidence of any agreement for compensation or demand therefor.—Bowen v. Bowen, 2 Bradf. Sur. 336.

[g] (N. Y. 1875) Where plaintiff's sister-in-law became a member of his family on the invitation of his wife, performing services in the household and receiving board for herself and children, no intimation being given that pecuniary compensation should be made, such sister-in-law did not occupy the position of a servant and was not liable to pay for board.—Van Kuren v. Saxton, 3 Hun, 547.

[h] (N. Y. 1878) A woman dwelt 23 years in her brother's house; herself, husband, and children all living with him as one family. *Held* that, in the absence of any proof of a promise by the brother to compensate her for her services in the dairy for the last six years, she could not recover therefor in an action against his administratrix.—Carpenter v. Weller, 15 Hun, 134.

[i] (N. Y. 1880) Where services are rendered by a sister residing in the family of the intestate, the law will not imply a promise to pay for them.—Keller v. Stuck, 4 Redf. Sur. 294.

[j] (Ohio, 1890) Where sisters lived together in the same family supported by the mother, and one of them was insane and under the charge of a guardian, the other was not entitled to compensation for services in caring for her insane sister, in the absence of any agreement therefor with the guardian.—In re Dunn's Estate, Prob. R. 297, reversed in Dunn's Estate v. Dunn (1890) 23 Wkly. Law Bul. 328.

[k] (Pa. 1893) Where a brother gives a helpless sister a home and cares for her as long as she lives, there is no presumption, from the relationship of the parties, that the services rendered were voluntary and without expectation of payment, but such fact must be proved by the party asserting it.—In re Shubart's Estate, 154 Pa. 230, 26 Atl. 202; Appeal of Walborn, Id.

[l] (Pa. 1895) The relationship of brother and sister is not such as involves any duty of support, or negatives the implied contract to pay for board furnished; and a sister who furnishes board to her brother is entitled to recover therefor, unless there was some understanding between the parties to the contrary.—Stafford v. Devereux, 166 Pa. 277, 31 Atl. 87.

[m] (R. I. 1893) Plaintiff's insane sister being brought by her guardian to live with plaintiff, the latter gave up her former occupation, and was constant in attendance on her sister until the latter's death, seven years later, the guardian furnishing support for both from the sister's estate. Plaintiff put in a claim against her sister's estate for her services. *Held*, that she need not prove an express promise to pay.—Fuller v. Mowry, 18 R. I. 424, 28 Atl. 606.

[n] (Tenn. 1878) Where a brother and sister lived together for many years, the sister should not be allowed compensation for her services as housekeeper, in the absence of any agreement to pay for such services, as a person should not be allowed to demand compensation for services which were rendered gratuitously at the time.—Taylor v. Taylor, 69 Tenn. (1 Lea) 83.

§ 21. Persons living together as husband and wife.

See post, § 36 [f].

Accountability of husband for increase and profit of wife's estate resulting from his skill and labor, see "Husband and Wife," vol. 26, c. 2114, § 547.

Contracts between husband and wife respecting each other's services, see "Husband and Wife," vol. 26, c. 1600, § 224.

—— *by married women to perform services and employment of servants by them, see* "Husband and Wife," vol. 26, cc. 1761, 1762, §§ 323, 324.

Earnings of husband or wife as constituting community property, see "Husband and Wife," vol. 26, c. 2639, § 911.

—— *of wife as constituting separate property, see* "Husband and Wife," vol. 26, cc. 2000–2011, §§ 459–464.

Presumptions and burden of proof as to ownership of earnings of wife, see "Husband and Wife," vol. 26, cc. 2031, 2032, § 482.

Rights and liabilities of husband as to his services in connection with wife's separate property, see "Husband and Wife," vol. 26, cc. 2107–2109, §§ 541–542.

Right to services and earnings of wife, see "Husband and Wife," vol. 26, cc. 1216–1219, §§ 11, 12.

Wife's separate estate in profits arising from husband's labor and skill, see "Husband and Wife," vol. 26, cc. 1991, 1994, § 455.

[a] (Mass. 1888) A woman who marries and lives with a man till his death cannot recover for her services in keeping his house, though she learns after his death that he had a former wife living and not divorced.—Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721.

[b] (Mo. 1845) Where a married man represents himself to be a widower, and thus induces a woman to marry him, living his first wife, such woman may recover of him for her services during such time as she may live with him.—Higgins v. Breen, 9 Mo. 497.

[c] (N. Y. 1858) A woman had lived with a man as his wife, both believing such relation to exist, and upon his death it appeared that the marriage between them was void. *Held*, there was no implied promise raised entitling her to recover for her services.—Cropsey v. Sweeney, 27 Barb. 310.

[d] (N. Y. 1892) Where a woman cohabits with a man, keeps house for him, and assists on the farm, in order to recover for the work and labor done she must prove an express contract.—Rhodes v. Stone, 68 Hun, 624, 17 N. Y. Supp. 561.

[e] (Pa. 1843) A woman living with a man in a state of concubinage cannot recover compensation for services performed for him, without proof of a contract of hiring.—Swires v. Parsons, 5 Watts & S. 357.

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§ 22. Uncle or aunt and nephew or niece.

[a] (Ill. 1889) Services rendered by those sustaining near family relations, in the absence of a contract, raise no presumption of an intention to charge or pay therefor; and therefore a claim filed by a niece against the estate of an uncle for services alleged to have been rendered him in his lifetime cannot be maintained in the absence of an express or implied contract for payment.—Patterson v. Collar, 31 Ill. App. 340, affirmed Collar v. Patterson (1891) 137 Ill. 403, 27 N. E. 604.

[b] (Ind. 1873) A girl, upon the death of her mother, was turned away from home by her father at the age of 14, and at the suggestion of her aunt and her grandmother she went to live with an uncle and aunt, with whom she remained until she was 25 years of age, when she married. She subsequently brought suit against the uncle for work and labor. No express contract to pay her was asserted, and it appeared that she was kindly treated and provided for in a better manner than she would have been if she had merely received ordinary wages. *Held*, that she was not entitled to recover for her services.—Hays v. McConnell, 42 Ind. 285.

[c] (Ky. 1843) Two nephews entered into the service of their uncle, a bachelor, and inherited his real and part of his personal estate, which exceeded greatly a reasonable compensation for their services. *Held*, that no implied contract for compensation was to be inferred.—Weir v. Weir's Adm'r, 42 Ky. (3 B. Mon.) 645, 39 Am. Dec. 487.

[d] (Mich. 1886) A niece who has been taken into her uncle's household, and treated as one of the family, cannot, in the absence of an express contract therefor, recover from her uncle's estate for domestic services rendered by her.—Robinson v. McAfee, 59 Mich. 375, 26 N. W. 643.

[e] (N. Y. 1867) Where plaintiff, at the request of her uncle, went to live in his family, and remained with him several years, rendering services without an agreement as to compensation, and it appeared that the uncle had admitted an intention to pay her something, a finding allowing her compensation for her services will not be disturbed.—Thornton v. Grange, 46 Barb. 507.

[f] (Pa. 1848) An infant, while out of place, was permitted to reside with his uncle, and during such time was provided with food and clothing, and worked in the same way as the children of the family. *Held*, that the law did not imply a contract to pay for such services of the infant.—Defrance v. Austin, 9 Pa. (9 Barr) 309.

[g] (Pa. 1862) Where a niece was taken by her uncle into his family after her mother had married a second time and died, and there was nothing to show a disposition of the stepfather to support her, such uncle was entitled to compensation for her maintenance.—In re Dunkel's Account, 1 Woodw. Dec. 58.

[h] (Pa. 1868) In the absence of proof of a previous contract, an aunt, who was an inmate of the same family in which a minor nephew resided, cannot recover for her services in attending the minor.—In re Souder's Estate, 2 Woodw. Dec. 235.

[i] (Pa. 1870) Where a nephew, on a visit to his uncle, was taken sick and remained with him for some time, the uncle was entitled to compensation, notwithstanding the relationship.—In re Eckert's Estate, 2 Pears. 476.

[j] (Pa. 1881) An aunt cannot recover for services rendered to her niece, where there was no contract to pay, and, until after the death of the niece, no intention to charge for the services.—In re Strauch's Estate, 2 Leg. Rec. Rep. 231.

[k] (Pa. 1882) The relationship of uncle and niece will not alone repel the presumption that, where services are rendered, they are to be paid for.—In re Hamway's Estate, 1 Chest. Co. Rep. 531; Mewes v. Parke, Id. 532.

[l] (Pa. 1882) The relationship of uncle and niece by marriage will not in itself repel the presumption of an implied contract to pay for services performed.—In re Walker's Estate, 14 Lanc. Bar, 64.

[m] (Pa. 1886) A claim by a nephew for services furnished a decedent will be allowed, where they were not only accepted by the decedent, but were shown to be reasonably worth the sum demanded.—In re Fox's Estate, 43 Leg. Int. 498.

[n] (Pa. 1887) Where a nephew accompanied his aunt abroad, she saying that she would make it all right with him, but he made no demand for compensation within the 18 months in which the aunt lived after her return, a claim by him against the estate for his services was properly disallowed.—In re Lally's Estate, 4 Pa. Co. Ct. R. 177.

[o] (Pa. 1889) Where a nephew, while on a visit to an aunt, rendered her valuable services, the fact of the relationship did not rebut the presumption that he acted under a promise of compensation.—In re Brown's Estate, 6 Pa. Co. Ct. R. 428.

[p] (Vt. 1845) Where defendant, from whom compensation was claimed for services, took the plaintiff, who was his niece, into his family when she was a child, to live with him until she should become of age, it was incumbent on her to show that the services were performed under such circumstances as to justify an expectation that the pecuniary compensation would be required.—Andrus v. Foster, 17 Vt. 556.

[q] (W. Va. 1893) Where a minor lives with his uncle as a member of his family, the uncle furnishing him with food, raiment, and shelter, and the minor rendering to his uncle his services, without any contract as to compensation for support or wages to be paid, the minor cannot recover the value of his services, though their value may have been greater than that of the support.—Riley v. Riley, 38 W. Va. 283, 18 S. E. 569.

III. EFFECT OF EXPRESS CONTRACT.

IN GENERAL, § 23.
NATURE AND FORM OF REMEDY AS AFFECTED BY CONTRACT IN GENERAL, § 24.
MODIFIED OR SUBSTITUTED AGREEMENT, § 24.
CONTRACT INVALID OR UNENFORCEABLE, § 25.
CONTRACT NOT FIXING AMOUNT OF COMPENSATION, § 26.
PERFORMANCE NOT ACCORDING TO TERMS OF CONTRACT, § 27.
PERFORMANCE OF ADDITIONAL OR EXTRA WORK, § 28.
RESCISSION OR BREACH OF CONTRACT BY EMPLOYER IN GENERAL, § 29.
BREACH OF CONTRACT BY EMPLOYER AFTER COMPLETION OF WORK, § 30.
PARTIAL PERFORMANCE OF CONTRACT, § 31.
—— BREACH OF CONTRACT BY EMPLOYER, § 32.
—— BREACH OF CONTRACT BY EMPLOYE, § 33.

Assent to services, see ante, § 3.
Contract as defense, see post, § 36.
Effect of fraud or mistake, see ante, § 6 [f].
Effect of request or promise to pay in general, see ante, § 5.
Implied request or promise to pay, see ante, § 4.

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Indentures of apprentices and servants, see ante, § 14.

Issues, proof, and variance, see post, § 46.

Presumptions and burden of proof, see post, §§ 47–49.

Services rendered under agreement with or direction of agent, see ante, § 7.

Amount of compensation for services rendered under contract in general, see "Contracts," vol. 11, cc. 1157–1182, §§ 1045–1070.

Contracts of employment, parol evidence, see "Evidence," vol. 20, cc. 2668–2671, § 1884; c. 2772, § 1939; cc. 2904, 2905, § 2041; cc. 2929, 2930, § 2061; cc. 2956–2958, § 2079.

Time for payment of compensation under contract, see "Contracts," vol. 11, cc. 1068–1079, §§ 980–995.

§ 23. In general.

Recovery of city officer for work and labor under contract with city, see "Municipal Corporations," vol. 36, cc. 637, 638, § 664.

[a] (Kan. 1874) While the law will sometimes imply a promise to pay for services performed, when there has been no express contract, yet it will not imply a promise on the part of one party to pay for services rendered under a direct and express contract with another.—Perry v. Bailey, 12 Kan. 539.

[b] (Mass. 1875) The general agent of the managers of a musical festival wrote plaintiff, promising, as security for the payment of services to be rendered by him, to guaranty a certain sum, provided the proceeds of the festival resulted in that amount being placed to the agent's credit, and stipulated that neither the executive committee nor any person connected with the festival, except the agent, should be responsible for the fulfillment of the contract, and that, should the festival result in a loss, the plaintiff should have no claim against the agent or anybody else connected therewith. *Held*, that plaintiff could not maintain an action against the management to recover a reasonable compensation for his services after the festival resulted in a loss.—Zerrahn v. Ditson, 117 Mass. 553.

[c] (Mo. 1886) Where a person agrees to serve another gratuitously, no promise to pay a reasonable compensation can be implied.—Suits v. Taylor, 20 Mo. App. 166.

[d] (Mo. 1887) Where one other than the owner of land makes an express agreement for the erection of buildings thereon, no agreement of the owner to pay therefor can be implied.—Kansas City Planing Mill Co. v. Brundage, 25 Mo. App. 268.

[e] (N. Y. 1867) An implied agreement to pay for materials, when not inconsistent with an existing written agreement between the parties, will sustain an action to recover the value of such materials.—Smith v. Lippincott, 49 Barb. 398.

[f] (Pa. 1858) Plaintiff boarded defendant's father at defendant's request at a fixed rate. The father having become infirm and requiring more attention, a higher rate was asked, acceded to, and paid regularly by defendant till his father's death, which occurred shortly afterwards. *Held*, that plaintiff could not recover, for nursing and other services, a compensation in addition to that paid by defendant.—Gifford v. Halfman, 3 Phila. 127.

[g] (Tenn. 1847) Where parties originally entered into a special agreement for certain services, which they afterwards abandoned, either by consent or by action, and circumstances showed that it was the intention to waive its terms, and the plaintiff proceeded to execute the work, and the defendant accepted it and derived the benefit therefrom, plaintiff was entitled to recover reasonable value for his work.—Allen v. McNew, 27 Tenn. (8 Humph.) 46.

§ 23½. Nature and form of remedy as affected by contract in general.

Nature and form of remedy in general, see post, § 34.

[a] One who performs services under a special contract cannot recover therefor on a quantum meruit.

—(U. S. 1883) Jones v. Vestry of Trinity Parish (C. C.) 19 Fed. 59;

(La. 1861) Spear v. Gardner, 16 La. Ann. 383; (1872) Walker v. Bietry, 24 La. Ann. 349; (1895) Succession of Jackson, 47 La. Ann. 1089, 17 South. 598;

(Minn. 1870) Marcotte v. Beaupre, 15 Minn. 152 (Gil. 117);

(Mo. 1833) Crump v. Mead, 3 Mo. 233; (1844) Chambers v. King, 8 Mo. 517;

(N. Y. 1820) Champlin v. Butler, 18 Johns. 169; (1855) Trimble v. Stillwell, 4 E. D. Smith, 512.

CONTRA, see

(N. Y. 1893) Gillies v. Manhattan Beach Imp. Co., 73 Hun, 507, 26 N. Y. Supp. 381;

(Wyo. 1896) Hecht v. Stanton, 6 Wyo. 84, 43 Pac. 508.

[b] Indebitatus assumpsit will lie to recover the stipulated compensation due under a special contract for work and labor, where the contract has been completely executed.

—(U. S. 1812) Brockett v. Hammond, Fed. Cas. No. 1,916 [2 Cranch, C. C. 156]; (1829) Pipsico v. Bonts, Fed. Cas. No. 11,183 [3 Cranch, C. C. 425];

(Ala. 1845) Hunter v. Waldron, 7 Ala. 753; (1891) Trammell v. Lee County, 94 Ala. 194, 10 South. 213;

(D. C. 1876) Campbell v. District of Columbia, 2 MacArthur, 533;

(Ill. 1862) Walker v. Brown, 28 Ill. (18 Peck) 378, 81 Am. Dec. 287; (1870) Jackson County v. Hall, 53 Ill. 440; (1871) Catholic Bishop of Chicago v. Bauer, 62 Ill. 188; (1876) Fowler v. Deakman, 84 Ill. 130; (1886) Michael's Bay Lumber Co. v. Jenks, 20 Ill. App. (20 Bradw.) 369; (1887) Spencer v. Dougherty, 23 Ill. App. 399;

(Ind. 1879) Shilling v. Templeton, 66 Ind. 585; (1886) Scott v. Congdon, 106 Ind. 268, 6 N. E. 625;

(Kan. 1896) Schwartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41;

(Md. 1820) Coursey v. Covington, 5 Har. & J. 45; (1853) Ellicott v. Turner, 4 Md. 476; (1855) Jenkins v. Long, 8 Md. 132;

(Miss. 1871) New Orleans, J. & G. N. R. Co. v. Pressley, 45 Miss. 66; (1888) Daniel v. Daniel, 4 South. 95;

(N. Y. 1868) Hurst v. Litchfield, 39 N. Y. 377.

CONTRA, see

(U. S. 1887) Hubbard v. New York, N. E. & W. Investment Co., 119 U. S. 696, 7 Sup. Ct. 353, 30 L. Ed. 548.

[c] Where there is a written contract to perform certain work, assumpsit for work and labor done will not lie. The plaintiff must sue upon the contract so long as the parties profess to act under it, unless for some reason an action cannot be maintained thereon.

—(Ark. 1842) Hawk v. Walworth, 4 Ark. (4 Pike) 577;

(N. Y. 1840) Ladue v. Seymour, 24 Wend. 60.

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[d] Assumpsit will not lie for labor and materials furnished under a sealed contract.
—(Ark. 1842) Hawk v. Walworth, 4 Ark. (4 Pike) 577;
(Me. 1853) Porter v. Androscoggin & K. R. Co., 37 Me. 349.

[e] (U. S. 1864) While a special contract remains executory, the party who seeks compensation for work done under it must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue either on it, or in indebitatus assumpsit, relying, in this last case, upon the common counts; and in either case the contract will determine the rights of the parties.—Dermott v. Jones, 69 U. S. (2 Wall.) 1, 17 L. Ed. 762.

[f] (U. S. 1823) Assumpsit will not lie for work and labor done in the lifetime of defendant's intestate under a special contract for payment by the conveyance of land, without showing fraud in the making of such contract.—Powling v. Varnum, Fed. Cas. No. 11,364 [2 Cranch, C. C. 423].

[g] (Ala. 1852) When an overseer, by agreement with his employer, is to receive a certain portion of the crop raised as compensation for his services, he cannot recover in assumpsit for work and labor done.—Anderson v. Rice, 20 Ala. 239.

[h] (Ark. 1847) The action of assumpsit affords a complete remedy on an account for work and labor, and in the absence of any peculiar facts a party cannot resort to equity for relief.—Wolf v. Irons, 8 Ark. (3 Eng.) 63.

[i] (D. C. 1876) A party who has fully performed a special contract may recover a judgment in an action of assumpsit on the common counts; but he is restricted in his evidence, as to the amount of his claim, to the terms of such contract, and it is erroneous, in such case, to make allowances on the principle of a quantum meruit, unless for the performance of work, or for materials not provided for in the contract.—Campbell v. District of Columbia, 2 MacArthur, 533.

[j] (Ind. 1891) In an action on a note given for services to be performed, there can be no recovery on a quantum meruit.—Schaffner v. Kober, 2 Ind. App. 409, 28 N. E. 871.

[k] (Ky.) Indebitatus assumpsit for work and labor will not lie where the plaintiff was to be paid in specific articles, and not in money.—(1826) Cochran v. Tatum, 19 Ky. (3 T. B. Mon.) 404; (1829) Id., 24 Ky. (1 J. J. Marsh.) 394.

[l] (Ky. 1853) When there is a special agreement, the action must be founded on it, unless for some reason it cannot be maintained thereon.—Western v. Sharp, 53 Ky. (14 B. Mon.) 177.

[m] (Me. 1877) Where there was an express contract, plaintiff cannot abandon it, and recover on an implied contract for the value, until he proves the contract, or gives secondary evidence of its terms, and shows an excuse for the departure from them.—Holden Steam Mill Co. v. Westervelt, 67 Me. 446.

[n] (Md. 1801) Where there is a special agreement for the construction of a house, a recovery cannot be had on the general counts for work and labor.—Hannan v. Lee, 1 Har. & J. 131.

[o] (Md. 1823) Where a party declares on a special contract and fails to prove it, but proves an agreement and the work done according to the terms of it, it raises a duty for which a general indebitatus assumpsit will lie.—Speake v. Sheppard, 6 Har. & J. 81.

[p] (Md. 1860) Where there is a special contract, the plaintiff cannot recover in assumpsit for work and labor, unless the work under the contract was fully performed and accepted by defendant, or the contract was abandoned by mutual consent.—Denmead v. Coburn, 15 Md. 29.

[q] (Mass. 1855) Under St. 1852, c. 312, § 2, providing that a count on an account annexed may be used when one or more items are claimed, either of which would be correctly described by any one of the common counts, money due on a special contract, which has been fully performed, may be recovered under a count on an account annexed.—Morse v. Potter, 70 Mass. (4 Gray) 292.

[r] (Mass. 1882) If a written contract for work to be done is fully performed, the stipulated price may be recovered in an action upon a common count or an account annexed.—Simmons v. Lawrence Duck Co., 133 Mass. 298.

[s] (Mo. 1833) One who has a covenant for payment of work and labor cannot abandon it and resort to assumpsit.—Crump v. Mead, 3 Mo. 233.

[t] (Mo. 1858) No recovery can be had against a county on a quantum meruit for erecting a courthouse for the county, as recovery must be had under a special contract in conformity with the statute.—Wolcott v. Lawrence County, 26 Mo. 272.

[u] (Mo. 1889) In an action for services rendered at defendants' request, plaintiff's evidence tended to show that he was to buy the farm, on which the labor was expended, for money advanced by defendants, and move on it, and cultivate it, and have half of it. Defendants' evidence was that plaintiff was to buy the farm, and move on it, yielding defendants a certain rental while they allowed him to live on it. *Held* that, as plaintiff's evidence showed that his rights were based on an express contract, the action on implied assumpsit for the reasonable value of his services would not lie.—Clarke v. Kane, 37 Mo. App. 258.

[v] (Mo. 1892) The rule permitting an action of assumpsit on a quantum meruit in case of a specific contract is not limited to "building contracts," the only exception being contracts for personal labor for a specified term.—Moore v. H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975.

[vv] (N. H. 1849) Under a contract providing that for labor and material to be expended by plaintiff upon lands belonging to defendant plaintiff should be paid as much as the improvements he makes upon the land should be worth, he cannot recover therefor in an action of indebitatus assumpsit, if the contract contain a condition upon the happening of which he is to receive no compensation.—Streeter v. Sumner, 19 N. H. 516.

[w] (N. Y. 1817) Where a special contract is still subsisting, the party cannot recover under the common counts compensation for work and labor which he performed under the special agreement.—Clark v. Smith, 14 Johns. 326.

[ww] (N. Y. 1848) In an action for work and materials, where it appears that they were furnished pursuant to a contract, the plaintiff must prove the terms of the contract. He cannot, in the first instance, abandon it entirely, and recover on a quantum meruit, without any proof of its terms, its fulfillment, the deviations, if any, and the extra work.—Smith v. Smith, 3 N. Y. Super. Ct. (1 Sandf.) 206.

[x] (N. Y. 1854) Where a claim is for patterns made pursuant to a contract, a complaint for work, labor, and material is the proper form for the action, rather than for goods sold and delivered.—Prince v. Down, 2 E. D. Smith, 525.

[xx] (N. Y. 1860) The existence of a written contract is sufficient answer to an action upon

a quantum meruit for work and material.—Alger v. Raymond, 20 N. Y. Super. Ct. (7 Bosw.) 418.

[xxx] (N. Y. 1863) The count of indebitatus assumpsit for work and labor, used prior to the Code of Procedure, was always sufficient to authorize a recovery for work and labor performed under a contract not under seal, unless the party performing the work and labor had failed to fulfill the contract; and the Code has not changed the former rule of pleading that a party who has wholly performed a special contract on his part may count upon the implied assumpsit of the other party to pay the stipulated price, and is not bound to declare specially upon the agreement.—Hosley v. Black, 28 N. Y. 438, 26 How. Prac. 97.

[y] (Pa. 1857) An action for work on a quantum meruit cannot be sustained, where there is no express abandonment of the written contract by the parties thereto.—McGrann v. North Lebanon R. Co., 29 Pa. (5 Casey) 82.

[yy] (Pa. 1874) Where a plumber agreed to do certain work as cheap or cheaper than any one else, the agreement was not such a special contract as required a declaration specifically framed, as a declaration in the common counts would be proper.—Kline v. Foster, 1 Walk. 250.

[z] (S. C. 1803) Assumpsit for work and labor will not lie, where there was a contract under seal, though the parties had agreed to waive it and referred the matters in dispute to arbitration, but the arbitrators had made no award.—Hurt v. Davis, 1 Brev. 304.

[zz] (Vt. 1849) When parties have made a special contract for the performance of labor, so long as the parties profess to proceed under the contract, no recovery in indebitatus assumpsit can be had for any labor performed under it, but the remedy must be by an action upon the contract.—Camp v. Barker, 21 Vt. 469.

§ 24. Modified or substituted agreement.

Performance of additional or extra work, see post, § 28.

Discharge of sureties of building contractor by modification of contract by including additional work, see "Principal and Surety," vol. 40, c. 1838, § 165.

[a] Plaintiffs had agreed under seal to perform certain work under a penalty, and were afterwards released by defendant by parol from a further performance under the agreement, who promised them that, if they would go on and complete the work, he would pay them for their labor. *Held*, that plaintiffs might recover in assumpsit on the substituted agreement.
—(Mass. 1830) Munroe v. Perkins, 26 Mass. (9 Pick.) 298, 20 Am. Dec. 475;
(N. Y. 1817) Lattimore v. Harsen, 14 Johns. 330.

[b] (Ala. 1837) Where a contract for the erection of a building was so materially varied and the labor so greatly increased that plaintiffs could not perform it until several months after the expiration of the day appointed, the plaintiffs must resort to their remedy on the parol agreement, making the covenant inducement to the action.—McVoy v. Wheeler, 6 Port. 201.

[c] (Ala. 1853) When parties subsequently vary their written contract for the building of a house so as to require more work and materials, and an alteration in the structure, and a longer time for its completion, the workman is not obliged to sue on the original contract, but may recover on a quantum meruit.—Hutchison v. Cullum, 23 Ala. 622.

[d] (Cal. 1856) Where the terms of a special contract have been varied by a subsequent agreement, an action for the amount due should be in assumpsit.—Reynolds v. Jourdan, 6 Cal. 108.

[e] (Ill. 1875) Assumpsit will lie to recover under a parol agreement made subsequent to a written contract under seal, and providing for additional work not contemplated in such contract.—Daegling v. Schwartz, 80 Ill. 820.

[f] (Md. 1854) A contractor agreed to construct a section of railroad, and after part of the work was done a parol modification was made, by which the estimates were to be paid to the contractor according to his expenses until the work was completed; the understanding being that he was not to lose his per cent. on the work already done, and was to be protected from further loss, and save in such particulars the contract was to stand. *Held* that, the company having released the contractor by consent from the completion of the work under the contract, he could sue in assumpsit for work done.—Baltimore & O. Ry. Co. v. Resley, 7 Md. 297.

[g] (Mich. 1881) Where a person engaged to cut and skid logs, and put them into a river, is directed to cut no more, and to put the logs cut into a creek, and there is nothing to show what relation the cutting and skidding bear to the whole work, an action will lie on a quantum meruit, since the mode of performance is so changed that the contract price for what has been done cannot be determined.—Boyce v. Martin, 46 Mich. 239, 9 N. W. 265.

[h] (Minn. 1870) In an action upon a quantum meruit for services rendered as an architect, defendant set up a special contract, and payment of amount therein agreed. On the trial plaintiff offered evidence to show that after the contract, but before performance, the plans and character of the work were entirely changed, and no price fixed upon, and that services were rendered under the new arrangement. *Held* sufficient to authorize plaintiff to show the value of such services.—Marcotte v. Beaupre, 15 Minn. 152 (Gil. 117).

[i] (N. H. 1870) Where work is done under a special agreement, and there is a deviation from the original plan, the party is entitled to his quantum meruit for the extra labor performed.—Wheeden v. Fiske, 50 N. H. 125.

[j] (N. Y. 1859) In a case where the contract was indefinite in the first place, and constant alterations were made, the evidence did not establish a special contract, and the builder is entitled to recover on a quantum meruit.—Smith v. Coe, 2 Hilt. 365.

[k] (N. Y. 1860) A city advertised for the grading of a street according to certain specifications, and a written contract was made between a contractor and the city street commissioner, variant from that arising from the city's proposal and specifications, which alone was authorized by the city. The contractor performed a large amount of work, but failed to perform the contract made by the advertised specifications and his acceptance of the proposal. The contractor sued the city for compensation for the work done. *Held*, that the work could not be held to have been performed under any contract, but was done at large, and that there was no ground for a quantum meruit, since there was nothing from which a request could be implied to do the work otherwise than according to the authorized or substituted contract.—Bonesteel v. City of New York, 22 N. Y. 162.

[l] (N. Y. 1866) In an action for services, it appeared that plaintiff agreed with his father to remain and work for him, and should be paid therefor by he and his brother having the farm at his father's death. The parties made a new arrangement whereby plaintiff was to remain on the farm as long as defendant lived, and he and his brother were to have the farm at the defendant's death; they to support their mother and pay certain legacies. *Held*, that the plaintiff was to perform the service until de-

fendant's death, and was not at liberty, because his services were to be paid for in land, to cease to labor for the defendant in his lifetime and to recover for the services theretofore rendered.—Campbell v. Campbell, 65 Barb. 639.

[m] (Ohio, 1832) Where plaintiff contracted to clear certain timber land for the defendant at a certain price per acre, but was excused from complete performance by the defendant, who then finished the work himself, plaintiff was entitled to compensation for the value of the work done.—Newman v. McGregor, 5 Ohio (5 Ham.) 349, 24 Am. Dec. 293.

[n] (Ohio, 1832) Where plaintiff agreed to perform certain work, to be paid for in wheat at a certain price per bushel, and was excused from a complete performance by the defendant, who, however, refused to make the settlement demanded by the plaintiff, on the ground that it was unreasonable, plaintiff was entitled to recover the value of his services in money.—Newman v. McGregor, 5 Ohio (5 Ham.) 349, 24 Am. Dec. 293.

[o] (Pa. 1889) Where a contract for the construction of a railroad did not simply contemplate that certain work should be done as well as other work, and it was done better by requirement of the engineer, the contract will be deemed abandoned as to prices fixed, and plaintiff can have recovery as on a quantum meruit.—McCauley v. Keller, 130 Pa. 53, 18 Atl. 607, 17 Am. St. Rep. 758.

§ 25. Contract invalid or unenforceable.

Invalidity of indenture of apprentice, see ante, § 14 [e].

Recovery for services rendered under contract voidable under statute of frauds, see "Frauds, Statute of," vol. 23, cc. 2450–2455, §§ 330, 331; c. 2469, § 342 [b].

[a] (Idaho, 1896) There can be no recovery under a quantum meruit for legal services rendered municipal corporations under a contract which the corporation had no authority to make.—Hampton v. Logan County Com'rs, 43 Pac. 324.

[b] (Ind. 1880) A recovery for the reasonable value of work done upon a quantum valebat presupposes an implied contract, and such recovery cannot be had if the alleged express contract was void as against public policy.—Stropes v. Greene County Com'rs, 72 Ind. 42.

[c] (Me. 1837) Where labor has been performed under a special contract, which is so uncertain and unintelligible that it cannot be understood, the law will imply a promise to pay the fair value of the services.—Cobb v. Stevens, 14 Me. (2 Shep.) 472.

[d] (Mass. 1878) In an action on an account annexed for work and labor, an unwritten special contract was shown by the evidence, under the terms of which plaintiff was to do certain work and receive in payment a lot of land, to be selected by him out of a number of lots which defendant owned, and part payment was to be taken in blacksmith work from a certain firm of blacksmiths. Plaintiff refused to accept payment as the contract provided. *Held*, that he could not rely on the fact that the contract was not in writing.—Riley v. Williams, 123 Mass. 506.

[e] (Mich. 1888) An action for work done and materials furnished to defendants by reason of a fraudulent contract made by them, and a failure to perform by a fraudulent execution of it, is not an action for nonperformance of a contract, and the rights of the parties are not determined by their contract relations, nor the measure of damages fixed by the prices stipulated therein.—Bush v. Brooks, 70 Mich. 466, 38 N. W. 562.

[f] (Mich. 1891) There is no ground for a recovery on the quantum meruit, on the theory that the minds of the parties had not met and consequently that there was no contract, where plaintiff and defendant, though they differed, each testified that there was a contract for a certain amount, and plaintiff knew at the time, and after he received a first payment from defendant, that the latter claimed that the contract was for a smaller amount than that claimed by plaintiff.—Shaw v. Armstrong, 88 Mich. 311, 50 N. W. 248.

[g] (Minn. 1876) Defendant's agent made a contract in behalf of his principal, which defendant afterwards refused to sign; plaintiff, in ignorance thereof, going on and doing the work thereunder. *Held*, that plaintiff might, on learning of defendant's refusal, stop work and recover on a quantum meruit for the value of the work done.—Hawkins v. Lange, 22 Minn. 557.

[h] (N. Y. 1827) Where defendant agreed to convey certain land to plaintiff if he served him until his majority, and defendant refused to convey the land and alleged that the contract was void, the plaintiff might elect to consider the contract as rescinded and recover for his services.—Burlingame v. Burlingame, 7 Cow. 92.

[i] (Tex. 1894) In an action against a bank for the reasonable value of services, a contract executed by the receiver of the bank may be proved, though it is invalid, by reason of the receiver's want of authority to agree to pay a fixed amount, and the reasonable value of the services may be recovered though the contract itself cannot be enforced.—Henrietta Nat. Bank v. Barrett (Civ. App.) 25 S. W. 456.

[j] (Vt. 1887) Plaintiff worked for defendant about one year without any special contract as to compensation; then the parties entered into a permanent contract as to his past and future earnings, but, by a failure to understand each other, the minds of the parties never met. *Held*, that plaintiff could recover, in assumpsit, what his services were reasonably worth.—Tucker v. Preston, 60 Vt. 473, 11 Atl. 726.

§ 26. Contract not fixing amount of compensation.

Additional or extra work similar to work under contract, see post, § 28.

[a] (Colo. 1894) Where a contract for services is proved, it is not necessary to show a fixed price for such services, but recovery may be had on a quantum meruit.—Button v. Higgins, 5 Colo. App. 167, 38 Pac. 390.

[b] (Md. 1813) Where the plaintiff agreed with the defendant to build him a house, and that after it should be built, if they should disagree as to the plaintiff's bill, two workmen should be selected to value the work, and they were selected and did value it, the court properly refused to instruct the jury that the action ought to have been brought on the special agreement.—Mudd v. Mudd, 3 Har. & J. 438.

[c] (Mass. 1849) If two persons enter into an agreement in writing under seal with a third that the latter shall sell and convey to one of them a certain lot of land at a specified price, to be paid for in part by the work of the other, which he binds himself to perform, and in part by the grantee, without any stipulation that the latter shall pay the former for the work so done, the law implies a promise, on his part, to pay a reasonable compensation therefor.—Blaisdell v. Gladwin, 58 Mass. (4 Cush.) 373.

[d] (Mich. 1874) Where persons who contract to erect a building know that their employer understands that they are undertaking the job at a fixed price, which they have given him as

their estimate of the cost, they will be estopped from asserting, after completion of the work without undeceiving their employer, that there was no price fixed between them, and claiming that they are entitled to the market value for the work.—Davis v. Bush, 28 Mich. 432.

[dd] (Mo. 1859) Contractors were to be paid at a certain rate for all excavations of earth done under the contract. Unexpectedly to both contracting parties, the contractors, in fulfilling their contract, met with a large amount of indurated earth and cemented gravel, which they excavated. *Held* that, the price to be paid for the excavation of such material not being provided in the contract, the contractors were entitled to recover what the work was reasonably worth.—Shephard v. St. Charles Western Plank Road Co., 28 Mo. 373.

[e] (N. Y. 1834) Where a person engaged to excavate rock at a given sum per cubic yard, and to do ordinary excavation at another sum, in the course of the work excavated a large quantity of hard pan, for which no provision was made, and it was conceded that compensation was due beyond the ordinary price, he can recover upon a quantum meruit.—Dubois v. Delaware & H. Canal Co., 12 Wend. 334, affirmed Delaware & H. Canal Co. v. Dubois (1835) 15 Wend. 87.

[f] (N. Y. 1871) Plaintiff refused to limit the expenses for the repair of a vessel to any fixed sum. Afterwards defendant wrote to plaintiff, directing him to make the repairs and to observe the strictest economy, stating that if he exceeded a certain sum to advise him. The vessel was in worse condition than supposed, and defendant was so informed. The plaintiff's bill was double the amount named in the defendant's letter. *Held*, that the completion of the repairs named in the letter was the primary intent of the contract, without any condition other than the observance of the strictest economy, and plaintiff was entitled to recover the amount of his bill.—Carll v. Spofford, 45 N. Y. 61.

[g] (N. Y. 1875) Plaintiff, without any contract as to the price to be paid, published in his newspaper certain advertisements, the matter for which was sent to him by the defendant's officers on slips printed in the English language and in type of a larger size than that ordinarily used in the plaintiff's paper. The plaintiff, in endeavoring to imitate in the German text, in which language his paper was printed, the size of the English type in which the slips were printed, caused the advertisements to occupy a larger space than they would have occupied, if printed in the ordinary type used in his paper. *Held*, that the plaintiff was entitled to be paid, not for the space that the advertisements actually occupied, but only for the space that they would have occupied if they had been printed in the ordinary type of the paper.—Mierson v. City of New York, 6 Daly, 74.

[h] (N. Y. 1878) The board of commissioners of the New York sinking fund, having passed a resolution employing plaintiff to make a certain appraisal of property, required the comptroller to make arrangements with him for his fees. The plaintiff arranged with the comptroller to leave the amount of his compensation to him, on the comptroller's promise that it should be liberal and satisfactory. The comptroller failed to fix the amount for the services. *Held*, that plaintiff was entitled only to such sum as the jury should find was a reasonable compensation for the services performed.—Bleecker v. City of New York, 7 Daly, 439.

[i] (N. C. 1881) Plaintiff, a physician, made no charge upon his books for the services rendered defendant and for which suit was brought. Defendant claimed that they were intended to be and were gratuitous, and the jury found that defendant employed plaintiff, whose services were rendered without any express agreement to pay a definite sum. *Held*, that the law implied a promise to pay what they were reasonably worth.—Prince v. McRae, 84 N. C. 674.

[j] (Ohio, 1876) Upon one's performance of a verbal agreement made by her when 11 years old to work for a man until 18, *held*, that she might maintain an action on the quantum meruit.—Towsley v. Moore, 30 Ohio St. 184, 27 Am. Rep. 434.

[k] (Pa. 1874) An agreement by plaintiff to do work on a house as cheap or cheaper than anyone else will do it, is not such a special contract as requires a special declaration in an action for labor and material, but plaintiff may recover in an action of general indebitatus assumpsit.—Kline v. Foster, 1 Walk. 250.

[l] (Tex. 1866) In the absence of any evidence of the terms of a contract for the location of a land certificate, the only assumpsit implied by law therein is for the payment in money of the reasonable value of the services rendered.—Ross' Heirs v. Mitchell, 28 Tex. 150.

[m] (Wis. 1891) In an action against a railroad company for services, it appeared that plaintiff was appointed in writing an inspector of watches for defendant, conditioned that he should examine all watches presented to him accompanied with a written request from defendant's superintendent and certified to the superintendent that the watch was or was not up to the standard required by the company; that he would loan free of charge to each of defendant's employés, who should leave his watch for cleaning or repairing, a watch of the required standard until he had cleaned the employé's watch; that, whenever an employé took his watch elsewhere for repairs or cleaning, defendant would examine such watch as the employé proposed to carry in the mean time, charge him 25 cents, and indorse on his certificate to the company the words "Borrowed watch;" that he would keep a record book containing a description of watches examined for employés, furnish each employé a rate card for noting variations, and copy the weekly rating of each watch in his record book, and furnish a transcript thereof to the general inspector every three months, or oftener, if required; that, in case a certified watch did not come up to the standard, he should report the fact, withdraw the certificate of acceptance, and report the withdrawal. *Held*, that the services which were unprovided for in the contract as to compensation were separate services rendered to defendant, which the law implies a promise to pay for at their reasonable worth.—Link v. Chicago & N. W. Ry. Co., 80 Wis. 304, 50 N. W. 335.

§ 27. Performance not according to terms of contract.

[a] A recovery may be had for work and labor, when the defendant has accepted the work, though it does not amount to a complete performance of the special contract.

—(Ala. 1842) Thomas v. Ellis, 4 Ala. 108, (1849) Merriweather v. Taylor, 15 Ala. 735;

(Md. 1833) Watchman v. Crook, 5 Gill & J. 239;

(Mass. 1847) Snow v. Inhabitants of Ware, 54 Mass. (13 Metc.) 42; (1864) Cardell v. Bridge, 91 Mass. (9 Allen) 355;

(Mo. 1862) Dutro v. Walter, 31 Mo. 516;

(N. C. 1844) Clayton v. Blake, 26 N. C. 497.

[b] Where a special agreement for work is entered into, and the work is performed, but not pursuant to the agreement, the party perform-

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ing it may recover for it on a quantum meruit count for the work performed.
—(Ill. 1875) Taylor v. Renn, 79 Ill. 181;
(Ind. 1825) Cranmer v. Graham, 1 Blackf. 406;
(Ky. 1893) Kiel v. Kline, 15 Ky. Law. Rep. 158;
(Mass. 1852) Gleason v. Smith, 63 Mass. (9 Cush.) 484, 57 Am. Dec. 62;
(N. Y. 1825) Jewell v. Schroeppel, 4 Cow. 564;
(Tenn. 1847) Allen v. McNew, 27 Tenn. (8 Humph.) 46.

[c] (Ala. 1838) Where plaintiff undertakes to do work by a fixed time or in a particular manner, but fails to perform it within the time, or according to the manner agreed, he cannot recover on the special contract; but, if the work done was of value to defendant, plaintiff may recover on a quantum meruit for work and labor.—Gazzam v. Kirby, 8 Port. 253.

[d] (Ala. 1859) If work is done under a special contract, but not in a workmanlike manner, and is, nevertheless, accepted and used by the employer, and is of any value to him, the workman is entitled to recover its reasonable value, not exceeding the price stipulated in the special contract.—English v. Wilson, 34 Ala. 201.

[e] (Ind. 1851) Where one has entered into a special agreement to perform work for another and furnish materials, and work is done and materials furnished, but not in the manner stipulated in the contract, yet, if they are accepted and used by the other party, he is answerable to the amount whereby he is benefited, on an implied promise to pay for the value he has received, though no action can be maintained on the special contract.—McKinney v. Springer, 3 Ind. 59, 54 Am. Dec. 470.

[f] (Ind. 1853) Where one party to a contract has not complied with its terms, but, professing to act under it, has done for the other party something of value, no action will lie on the contract, but the party thus benefited will be liable on the quantum meruit, in an amount not, however, to exceed that agreed on for performance of the contract.—Major v. McLester, 4 Ind. 591.

[g] (Iowa, 1864) A party to a contract, who has not performed it fully, may recover upon a quantum meruit so much of the contract price as remains after deducting what it will cost to make and complete the contract as he agreed.—McClay v. Hedge, 18 Iowa, 66.

[h] (Ky. 1828) Where in a contract the covenant to build a house in a plain, strong, workmanlike manner is a condition precedent to the covenant to pay the price, or a failure to execute a small part of the work in the manner stipulated, when the greater part had been performed according to contract, the party is relegated to the quantum meruit.—Morfort v. Martin, 22 Ky. (6. T. B. Mon.) 609, 17 Am. Dec. 168.

[i] (Ky) Where work was not such as the contract prescribed that it should be, and defendant accepted it and used it, he must pay what it was worth to him, not exceeding the reasonable value of the material and labor.—(1887) Farnan v. Lexington Ice Manufactory, 9 Ky. Law Rep. 621; (1891) Lexington Ice Mfg. & Storage Co. v. Farnan, 13 Ky. Law Rep. 270.

[j] (Ky. 1887) Plaintiff undertook to build a house for defendant according to specifications, but the contract did not identify any papers containing the specifications agreed on. Plaintiff and the agent of defendant had agreed on specifications, and the agent delivered to his principal what purported to be a duplicate of the original, which was delivered to plaintiff; but the duplicate did not correspond to the original, because of certain interlineations made in the original, which were not in the copy. *Held* that, as defendant did not agree to pay the contract price for a house built according to the specifications delivered to the plaintiff, the plaintiff may recover on a quantum meruit.—Wybrant v. Brands, 9 Ky. Law Rep. 682.

[k] (Ky. 1893) Where a person desired to have a house built, and contracted for particular materials, and for the doing of the work in accordance with certain plans, the contractor had no right to substitute other materials and change the plan; and where the contractor has made such change, in arriving at the difference in the value of the house as built and as it should have been built under the contract, the cost of taking out all the work and material which was not done according to the contract, and having it done over, should be ascertained.—Kiel v. Kline, 15 Ky. Law Rep. 158.

[l] (Me. 1839) Where a contract for the construction of a building is abandoned by the parties, and a building is constructed by one of the parties to the contract for the other party and two other persons, the price for the building is not to be ascertained in an action for the work and labor from that fixed in the written contract.—Tebbetts v. Haskins, 16 Me. (4 Shep.) 283.

[m] (Md. 1860) C. agreed with a city to build an arch over D.'s raceway, and afterwards, by agreement between them and the city, the contract price was to be paid by the city to D., who was to have the arch done in a superior manner, and to pay any additional expenses incurred in building it. C. built the arch, and it fell in, either because it was too weak, or because the city contractor, over whom neither C. nor D. had any control, improperly dumped the filling on it. *Held*, that C. could recover for the value of any of his materials used in rebuilding the arch.—Denmead v. Coburn, 15 Md. 29.

[n] (Mass. 1817) Where a person who has contracted to erect a bridge in a particular manner executes it so unfaithfully that, though it served its intended use for a time, it was finally carried away because of the defect in its structure, he could not recover on a quantum meruit, because the defendant received no benefit from his labors.—Taft v. Inhabitants of Montague, 14 Mass. 282, 7 Am. Dec. 215.

[nn] (Mass. 1828) Plaintiff constructed a house for defendant on a contract, and put in workmanship and materials varying from the contract. Defendant was present and objected at times to parts of the work, but continued to give directions, and ordered some variations from the contract. After the work was done he refused to accept, but plaintiff had no knowledge that he intended to refuse it until after it was finished. *Held*, that plaintiff was entitled to recover on a quantum meruit for his labor.—Hayward v. Lennon, 24 Mass. (7 Pick.) 181, 19 Am. Dec. 269.

[o] (Mass. 1829) An action may be maintained on an implied promise for labor done under a special contract, which has not been performed in accordance with its terms, where the work performed is of benefit to the defendant.—Smith v. First Congregational Meeting House, 25 Mass. (8 Pick.) 178.

[oo] (Mass. 1851) Where plaintiff agreed to construct a house for defendant, but, the work not being completed at the stipulated time, the defendant directed the plaintiff to discontinue, and the contract was not completed, the plaintiff was entitled to recover on common counts for work and labor, deducting all damages to defendant from the failure to comply with the contract.—Bassett v. Sanborn, 63 Mass. (9 Cush.) 58.

[p] (Mass. 1860) Where plaintiff agreed with a town to build a road in accordance with the

order of the county commissioners and to the acceptance of the commissioners, and left the road without willful default, believing it to be completed as required by his agreement, he was entitled to recover from the town the fair value to it of his labors and materials.—Walker v. Inhabitants of Orange, 82 Mass. (16 Gray) 193.

[pp] (Mass. 1865) Where labor has been performed in the erection of a building under a written promise to pay a certain sum therefor, provided the roof does not leak around the belfry and that the plastering on the church proves not to be injured by frost, the acceptance of such written promise will not prevent a recovery for the value of the labor on a quantum meruit.—Thompson v. Purcell, 92 Mass. (10 Allen) 426.

[q] (Mass. 1865) Commissioners appointed to partition realty may recover, if they act faithfully, full compensation for their services, though in making such partition they innocently departed from and acted in violation of the directions of the warrant under which they acted, and their report was not accepted and partition was not made, and their charges and expenses were not allowed by the judge appointing them.—Potter v. Hazard, 93 Mass. (11 Allen) 187.

[qq] (Mass. 1867) Where a contract is made for certain work to be done to the acceptance of the county commissioners, and the commissioners fail to accept the work, the plaintiff on a quantum meruit may recover such sum as the benefit of the work he has done in compliance with the terms of the contract is reasonably worth to the defendant, not exceeding the contract price.—Atkins v. Barnstable County, 97 Mass. 428.

[r] (Mass. 1872) Where a person who has contracted to grade certain land in a certain manner has honestly endeavored to fulfill the contract, and has substantially done so with substantial benefit to the landowner, he may recover what his work is fairly worth, though he has failed to fulfill the contract in some particulars.—Powell v. Howard, 109 Mass. 192.

[rr] (Mass. 1873) A plaintiff may recover under a count on an account annexed for work done in building a house under a special contract, which he has substantially performed.—Cullen v. Sears, 112 Mass. 299.

[s] (Miss. 1843) If A. undertakes to do a piece of work in a workmanlike manner, and "as well as any other mechanic could," and the work, when completed, will not answer the purpose for which it was designed, he cannot recover in an action for work and labor done.—Lefiore v. Justice, 9 Miss. (1 Smedes & M.) 381.

[ss] (Mo. 1821) Where plaintiff produced a covenant for work to be done in a particular manner, to be completed by a certain day, and to be paid for in property at a fixed price, and it appeared that the work was not done according to the time contracted for, the plaintiff might recover on a quantum meruit.—Labeaume v. Hill, 1 Mo. 42.

[t] (Mo. 1857) Where a person agrees to construct a road, and fails to complete it in the manner prescribed in the contract, he can only recover, if at all, on a quantum meruit.—Barcus v. Hannibal, R. C. & P. Plank Road Co., 26 Mo. 102.

[tt] (Mo. 1895) A building contractor must show a substantial compliance with the terms of the special contract before he can recover for work done and materials furnished thereunder; but he may recover on a quantum meruit if his services and the improvements made are of some value to the owner who retains and uses them, even though they are not in strict compliance with the terms of the contract.—Freeman v. Ayler, 62 Mo. App. 613, 1 Mo. App. Rep'r, 582.

[u] (N. H. 1832) W. agreed with the town of S. to make a highway in a particular manner, for which he was to receive a certain price. He made the highway, but not according to contract. *Held*, that he might recover on a quantum meruit count as much as his labor had been worth to the town.—Wadleigh v. Town of Sutton, 6 N. H. 15, 23 Am. Dec. 704.

[uu] (N. Y. 1830) Where one party is prevented by the other from performing a contract for labor within the time stipulated by his agreement, and afterwards does the work agreed on, but at an enhanced expense, he may sue for indemnity in a general count, and need not bring his action on the agreement.—Dubois v. Delaware & H. Canal Co., 4 Wend. 285.

[v] (N. Y. 1837) Where work done under a special agreement is not finished at the time agreed, but is proceeded in afterwards, with the assent of him for whom it is done, indebitatus assumpsit lies for the work done; but the plaintiff is confined to the agreed rate of compensation, when neither party is the faulty cause of the delay, if no intimation were given during the progress of the work that a different rate would be insisted on.—Merrill v. Ithaca & O. R. Co., 16 Wend. 586, 30 Am. Dec. 130.

[vv] (N. Y. 1840) Indebitatus assumpsit lies for work done, though under a special contract, where it was not done within the time or in the manner specified, if it was done with the approbation of the defendant.—Ladue v. Seymour, 24 Wend. 60.

[w] (N. Y. 1853) Where plaintiff contracted to erect a building, and constructed it in so unskillful a manner that it could not be made safe without rebuilding a considerable portion of it, he was not entitled to recover compensation for the work performed by him.—Pullman v. Corning, 9 N. Y. (5 Seld.) 93, 14 Barb. 174.

[ww] (N. Y. 1875) Where a contract requires that the work shall be completed on a certain date and paid for at completion, and it is not completed within the time limited for its performance, but is proceeded with afterwards with the assent of the party for whom it is being done, a recovery may be had for the work done according to the rate of compensation fixed by the contract.—Dillon v. Masterton, 39 N. Y. Super. Ct. (7 Jones & S.) 133.

[x] (N. Y. 1876) Where work has not been done according to the plans, any injurious departure therefrom will affect the quantum of recovery, but will not prevent recovery for what the services were worth.—Payne v. Hodge, 7 Hun, 612, 71 N. Y. 598.

[xx] (Ohio, 1883) One who paints another's house, but not in a proper manner, under an agreement that he is to receive therefor a stated sum if he paints the house in a proper manner, and half that sum if not, cannot recover on a quantum meruit against the owner, who has paid him half the amount as agreed.—Ginther v. Shultz, 40 Ohio St. 104.

[y] (Or. 1879) Where one performs services under a special contract, but full compliance therewith becomes impracticable, and the service has been of value to the party for whom it was rendered, the party performing it may recover for his services.—Steeples v. Newton, 7 Or. 110, 33 Am. Rep. 705.

[yy] (Pa. 1859) If a mechanic fails to comply with his agreement in making a structure, and furnishes weak or worthless materials, he cannot recover for his labor by showing that the plan under which he was to do the work was defective, and that the structure would have been of no value had he performed according to the agreement.—Loundsberry v. Eastwick, 3 Phila. 371.

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[z] (Vt. 1836) Where labor is performed on land under a special contract, but not strictly according to the terms of the contract, the party performing it may recover only what the labor is worth.—Dyer v. Jones, 8 Vt. 205.

[zz] (Vt. 1839) In contracts for labor, where the plaintiff is not guilty of a willful deviation from the terms of the contract, but fails to fulfill them, and has performed work beneficial to the defendant, he is entitled to recover under the general counts for work and labor.—Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363.

§ 28. Performance of additional or extra work.

Effect of modification of contract, see ante, § 24.
Extra work caused by modification of contract, see ante, § 24.
Compensation for extra work under contract in general, see "Contracts," vol. 11, cc. 1183–1207, §§ 1071–1097.

[a] (Ala. 1847) Where a sealed contract is executed for building a house, and additional work is done, for which no price is agreed on, a quantum meruit will lie for the work so added.—Aikin v. Bloodgood, 12 Ala. 221.

[b] (Ala. 1853) Where a written contract for the building of a house is subsequently varied by the parties, so as to require a greater amount of work and materials, as well as an alteration in the structure and a longer time for its completion, the workmen may recover on a quantum meruit for work and labor.—Hutchison v. Cullum, 23 Ala. 622.

[c] (Ala. 1891) Where a building contract provides that no extra work shall be paid for, unless a separate estimate in writing shall have been submitted prior thereto, the contractors can recover for extra work furnished under a promise by the owner to pay therefor.—Davis v. Badders, 95 Ala. 348, 10 South. 422.

[d] (Del. 1855) Services in the way of assiduous nursing and attention to a boarder, if performed with the intention of charging additionally for them, furnish a ground of action.—Kennard v. Whitson, 1 Houst. 36.

[e] (Ga. 1886) One who orders another to cut off a hydrant cannot be required to pay for other and additional work done, but not ordered.—Vason v. Strauss, 75 Ga. 833.

[f] (Ill. 1869) Where a mechanic agreed to do certain work on the representation of a person for whom the work was to be done as to the character of the work, and did not personally examine into the character of the work to be done, but sent his man to execute it, the want of notice, before proceeding with the labor, that it was more expensive than represented, would not prejudice the mechanic's right to recover, in an action for the work performed, the actual value of the work done in excess of the price agreed on.—Martine v. Nelson, 51 Ill. 422.

[g] (Ill. 1878) Where a contractor agreed to erect a building for defendant, under a contract which contemplated employment of other persons, and the part of the work proving defective was taken out, and replaced by a person who had been working for the contractor, the defendant was not liable to such person for the work merely because defendant saw him at work and made no objection, but told him to hurry the work, supposing it done under and for the contractor.—Campbell v. Day, 90 Ill. 363.

[h] (Ind. 1891) Where, after part performance, the parties disagree as to a contract, and defendants refuse to pay for the work unless plaintiff performs it according to their interpretation, plaintiff, after the work is accepted, can recover on a quantum meruit for the additional work.—Gastlin v. Weeks, 2 Ind. App. 222, 28 N. E. 331.

[i] (Ky. 1822) Where a carpenter agrees to erect a building for a specified sum, but additions are made by consent, he is entitled to recover for work and labor performed only for the excess.—Wright v. Wright, 11 Ky. (1 Litt.) 179.

[j] (Ky. 1873) Where a contract stipulates that no work shall be considered extra, unless ordered in writing and indorsed by the architect, and extra work is done at the instance of the owner, from which a benefit is derived, it must be regarded as an independent contract, for which a recovery may be had.—Escott v. White, 73 Ky. (10 Bush) 169.

[k] (La.) One who permits materials to be furnished for and work to be done on his premises, though not included in a contract for other work done at the same time, must pay for the benefit received.—(1841) Giraghty v. Saulet, 18 La. 539; (1844) Hillman v. Cage, 6 Rob. 499.

[l] (Md. 1874) Where a plaintiff renders services in addition to those contemplated in a special contract, the jury, in an action therefor, may infer an agreement to pay for them.—Spencer v. Trafford, 42 Md. 1.

[m] (Mass. 1832) Where the work proved much greater than plaintiff had estimated, and he received the whole contract price during the time he worked, but failed to complete the contract, *held*, that he could have no further claim on a quantum meruit.—Phelps v. Sheldon, 30 Mass. (13 Pick.) 50, 23 Am. Dec. 659.

[n] (Mo. 1845) Where defendants, having a contract for the erection of a building, sublet it to the plaintiffs, who undertook to perform the work in the same manner that the defendants had stipulated to do it, the defendants cannot be subjected to a charge for additional compensation without an agreement to pay therefor, as the law will not imply a promise by them to pay therefor, as no benefit resulted to them.—Medlin v. Brooks, 9 Mo. 106.

[o] (Mo. 1850) Indebitatus assumpsit lies to recover for extra work not embraced in a special contract, and done upon the subject of that contract, although the special contract has not been wholly executed.—Powell v. Buckley, 13 Mo. 317.

[p, q] (N. Y. 1864) An action by a servant to recover extra compensation under an agreement with defendant's agent, whose acts, to be valid, were subject to the approval of defendant's general agent, cannot be maintained, where plaintiff, though notified by the general agent of the disapproval of such contract, continued in the employment on the terms proposed by defendant and accepted his monthly wages.—McGovern v. Western R. Co., 28 How. Prac. 493.

[r] (N. Y. 1888) Where defendant had stated that there would be changes in the plans, on which plaintiff's estimates for certain work were based, and that he need not estimate beyond a certain amount of materials, *held*, that plaintiff could recover on a quantum meruit for additional materials.—Isaacs v. Smith, 55 N. Y. Super. Ct. (23 Jones & S.) 446.

[s] (Pa. 1836) An apprentice cannot maintain an action against his master to recover compensation for extra work done by him during his apprenticeship, though the work was done under a promise to pay for it.—Bailey v. King, 1 Whart. 113, 29 Am. Dec. 42.

[t] (Pa. 1857) Where a person agrees to perform certain services for a definite period at a stipulated salary, and continues the service beyond the period agreed on, in the absence of any new contract, the presumption is that he continued under the same contract.—Wallace v. Floyd, 29 Pa. (5 Casey) 184, 72 Am. Dec. 620.

[u] (Pa. 1883) Where a person continues in an employment after the expiration of the term, and the nature of the services is greatly changed from that which the parties had in view when the hiring took place, compensation can be recovered on a quantum meruit.—In re Gochamer's Estate, 5 Lanc. Law Rev. 224.

[v] (Pa. 1888) A claim for services rendered to a decedent in his lifetime over and above the contract with decedent can only be successfully made by proving an independent agreement for such compensation.—In re Robinson's Estate, 45 Leg. Int. 226.

[w] (S. C. 1821) A workman, employed to do a particular job, who adds extra work without consulting his employer, cannot recover for such extra work.—Hort v. Norton, 1 McCord, 22.

[x] (Tex. 1892) The expense of the time and services of the president of a corporation which had agreed to erect an ice plant for defendant, given after the completion of the contract, at the request of the other party to the contract, is a proper charge against him.—Alamo Mills Co. v. Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. 1097.

§ 29. Rescission or breach of contract by employer in general.

See post, § 31 [a].

[a] (Ala. 1845) Plaintiff agreed with defendant for a reward dependent on his success to attend at Washington and do certain things in reference to a controversy about a private land claim pending before congress between defendant and another. Plaintiff attended two sessions of congress, when the matter was compromised between defendant and the other party. *Held* that, if plaintiff was not privy to the compromise, he could not be required to prove that he could have performed his undertaking, as that had been rendered impossible by the act of defendant; and if plaintiff assented to the compromise, and did not abandon his claim for services rendered, the law would imply a promise from defendant to pay the value of the services, to be admeasured by the contract, not to exceed the stipulated amount.—Hunt v. Test, 8 Ala. 713, 42 Am. Dec. 659

[b] (Ill. 1859) Where plaintiff has suffered damages by breach of a contract over and above the price of the work fixed by it, he may recover for such breach; but that cannot influence the price he shall recover for the work he has actually done.—Folliott v. Hunt, 21 Ill. (11 Peck) 654.

[c] (Ill. 1872) Where a contract for certain work provided that for certain causes the defendant might declare it forfeited, in which event defendant was to be exonerated from all liability, and the contract was terminated improperly, plaintiff was entitled to recover in an action for work done outside of the contract by the defendant's direction.—Sanger v. City of Chicago, 65 Ill. 506.

[d] (Ind. 1892) Defendant's intestate agreed, if plaintiff would take care of him and his house and property, to convey to her his farm at the end of a year. Plaintiff performed her part of the contract, but deceased died before the end of the year without having made the conveyance. *Held*, that plaintiff could recover on a quantum meruit for services rendered in pursuance of the contract.—Smith v. Lotton, 5 Ind. App. 177, 31 N. E. 816.

[e] (Md. 1855) Where a special contract to pay a certain sum for services provides that the defendant may dismiss the plaintiff at any time during the year on giving a month's notice, and the latter is dismissed, the plaintiff must recover on the contract, and cannot resort to a quantum meruit.—Jenkins v. Long, 8 Md. 132.

[f] (Mass. 1826) Plaintiff agreed that his minor son should work for defendant nine months, defendant to give him therefor certain chattels, which were delivered forthwith, but were to remain the property of defendant until the services were performed. Plaintiff sold the chattels to a stranger, and the boy was afterwards wrongfully discharged by defendant before the expiration of the term. *Held*, that there was a rescission of the written contract, entitling plaintiff to recover on a quantum meruit for the services performed.—Hill v. Green, 21 Mass. (4 Pick.) 114.

[g] (Mass. 1865) Where plaintiff was ready to perform his duties as a minister during the whole time for which he was settled, and he was prevented from performing them by the act of the defendants, he could sue on an account annexed; nothing remaining to be done under the contract but the payment of the money.—Johnson v. Trinity Church Soc., 93 Mass. (11 Allen) 123.

[h] (N. J. 1859) Where, under an indebitatus count for services performed, it appears that the plaintiff has been legally discharged and has not performed the services for which he claims compensation, he cannot recover.—Bernard v. City of Hoboken, 27 N. J. Law (3 Dutch.) 412.

[i] (N. Y. 1860) Where a party contracts to work for another for a certain time, and is discharged by his employer, he may treat the contract as rescinded, and immediately sue on a quantum meruit for the work actually performed.—Colburn v. Woodworth, 31 Barb. 381.

[j] (Pa. 1884) A person who is discharged from employment without cause, and prevented from performing his contract, cannot recover on the common counts for the time he was prevented from working, as the declarations should set out the special agreement, with an averment of the plaintiff's readiness to perform, as an excuse for want of performance.—McQuicken v. Timony, 2 Chest. Co. Rep. 249.

§ 30. Breach of contract by employer after completion of work.

See ante, § 25 [h].

Nature and form of remedy for recovery of compensation on performance in general, see ante, § 23½.

[a] (Ala. 1843) If a contract is entered into for the purpose of professional services, the value of which is to be ascertained by arbitration, and the party for whom they are rendered refuses to have them arbitrated, assumpsit will lie for a quantum meruit.—Bank of State v. Martin, 4 Ala. 615.

[b] (Ga. 1859) Where A. sold land to B., to be paid for in work, which B. presently performed, if A. refuses to convey, B. can recover pay for his work.—Leach v. Rogers, 28 Ga. 247.

[c] (Ill. 1893) Where a person employs an architect to make sketches for a proposed building, it being understood that plans and specifications in accordance therewith will be drawn, if the sketches are satisfactory, and such person makes no objection to the sketches, he is liable for what the work is reasonably worth, even though he never constructs the building.—Waggeman v. Richardson, 47 Ill. App. 219.

[d] (Mass. 1838) Plaintiff at defendant's request prepared certain building plans, and defendant's builder, by his direction, took the plans to make an estimate of the cost of the building, made an estimate of them, and delivered them to the defendant. The defendant concluded not to build by such plans, and plaintiff sued for the labor performed in preparing the designs. *Held* that, the plans having been delivered to the defendant, plaintiff was en-

titled to recover compensation for the services. —Kutts v. Pelby, 37 Mass. (20 Pick.) 65.

[e] (Mass. 1867) One performing work for the benefit of the county under a contract requiring the acceptance of the commissioners may, on a quantum meruit count, recover the reasonable value of the work, not exceeding the contract price, where the commissioners refuse acceptance.—Atkins v. Barnstable County, 97 Mass. 428.

[f] (Mich. 1888) Where, by a written contract, one party agrees to furnish to the other monthly estimates of the amount of his work, and, when the whole is completed, to furnish a final estimate of the whole work, and fails to furnish estimates for the last two months' work, or to make any final estimate at all, such neglect is a failure to perform which will warrant the other in disregarding the contract, and suing on a quantum meruit.—Bush v. Brooks, 70 Mich. 446, 38 N. W. 562.

[g] (Minn. 1858) In an action on quantum meruit for services rendered, it appeared that they were rendered under a special contract, by which plaintiff was to render the service, to be paid for by defendant by furnishing her a room and board, and that he had failed to comply with his part of the contract during a portion of the time while such services were being rendered. *Held*, that the plaintiff, not having rescinded upon failure of defendant to perform, had no remedy upon a quantum meruit, but should have sued upon the special contract.—Bond v. Corbett, 2 Minn. 248 (Gil. 209).

[h] (Minn. 1886) Plaintiffs having performed services for defendant under a special agreement that they should receive therefor an annual pass over the defendant's road, and defendant having then refused to give the pass, plaintiffs may recover upon the quantum meruit for their services; the value of such a pass being deemed to be impossible of proof, or of estimation as a measure of damages.—Brown v. St. Paul, M. & M. Ry. Co., 36 Minn. 236, 31 N. W. 941.

[i] (N. Y. 1833) Where a special contract is entered into in respect to work, and the work is performed, the party entitled to compensation may recover under the common counts, though the evidence does not support any special count in the declaration setting forth the contract.—Feeter v. Heath, 11 Wend. 477.

[j] (N. Y. 1864) Where services are rendered pursuant to an understanding that compensation shall be made by will, and the party receiving the services dies without making the compensation, the party rendering them is entitled to compensation out of the estate for the value of the services.—Robinson v. Raynor, 28 N. Y. 494.

[k] (Pa. 1845) Where labor has been performed under an agreement to be paid by the employer's note, and there has been a refusal to deliver the note at the time specified in the agreement, the laborer may maintain a special assumpsit, for not delivering the note, immediately on the refusal.—Huston v. Mehaffey, 2 Clark, 525.

[l] (Tex. 1876) One who labors on property under an agreement with the owner that he shall be compensated out of the proceeds of the property when sold, the object of the labor being to enhance the salable value, may, on the owner's withdrawal of the property from sale, recover a reasonable compensation for his labor. —Fayette County v. Faisin's Ex'r, 44 Tex. 585.

[m] (Vt. 1860) Defendant agreed with plaintiffs that, if the latter would build one-half of the division fence between them, he would build the other half, or pay the plaintiffs for one-half of the fence which they should build. Plaintiffs built one-half of the fence, but defendant neglected to build any portion of the other half. *Held*, that plaintiffs could recover half the expense of the fence built by them, under the general counts in assumpsit for work, labor, and materials furnished.—Strong v. Slicer, 33 Vt. 466.

[n] (Va. 1858) An agreement between a railroad company and a contractor provided that the amount of work done was to be determined, without right of appeal, by the estimate of the engineer of the company. The engineer returned an estimate which was false and fraudulent. *Held* that, such estimate not being within the terms of the contract, the contractor was entitled to recover generally in assumpsit for the value of the work.—Baltimore & O. R. Co. v. Polly, 14 Grat. 447; Same v. Laffertys, Id. 478.

[o] (Wis. 1886) Where labor is performed under a contract that it is to be paid for by a conveyance of land, and the employer afterwards refuses to convey, the employé's action is on the special contract, and an action will not lie on the common count for work and labor. —Cameron v. Austin, 65 Wis. 652, 27 N. W. 622.

§ 31. Partial performance of contract.

Allegation as to partial performance of contract, see post, § 41 [uu].

Performance of extra work on contract not fully executed, see ante, § 28.

Rate of compensation for partial performance of contract, see "Contracts," vol. 11, cc. 1813–1815, § 1507.

Rights and liabilities on partial performance of contract for services, see "Contracts," vol. 11, cc. 1779–1815, §§ 1493–1507.

[a] Where an express contract under which services are rendered is rescinded before completion, an action may be brought on a quantum meruit.

—(Md. 1843) Howard v. Wilmington & S. R. Co., 1 Gill, 311;

(Mass. 1882) Simmons v. Lawrence Duck Co., 133 Mass. 298;

(Minn. 1870) Marcotte v. Beaupre, 15 Minn. 152 (Gil. 117).

[b] (U. S. 1886) Where a contractor agrees to erect a building, to be paid for as the work progresses, on certificates signed by the supervising architect, and the architect fraudulently refuses to sign a certificate, and the contractor is unable to finish the building, he may recover of the owner on a quantum meruit for the work actually done, although there was no collusion between the architect and such owner. —Batchelor v. Kirkbride (C. C.) 26 Fed. 899.

[c] (Ala. 1842) Where a person agrees to serve another as an overseer for a year, and the overseer dies during the year, his personal representatives cannot recover, in an action for work and labor, a pro rata compensation for the time he serves.—Givham v. Dailey's Adm'x, 4 Ala. 336.

[d] (Ala. 1845) Plaintiff repaired defendant's gin under an agreement that plaintiff should have as compensation all he could obtain for the gin above $50. After he had retained the gin for some time without selling it, he surrendered it to defendant, who demanded it or $50, saying, "if you do not give me one or the other, we will have to settle it some other way." *Held*, that defendant's reception and retention of the gin must be deemed to have been with mutual assent, and plaintiff could not recover for the repairs, unless it was shown that defendant sold, or might have sold, it for more than said sum.—Hayden v. Boyd, 8 Ala. 323.

[e] (Ala. 1891) Where a contract for a building is not entirely performed, but the owner moves in before completion, and remains in pos-

session after it is finished, he is liable for the labor and materials on an implied contract.—Davis v. Badders, 95 Ala. 348, 10 South. 422.

[f] (Conn. 1849) Where defendant engaged plaintiff to make a particular article for him out of materials furnished, and during the progress of the work and before it had assumed the character contracted for the work was stopped, plaintiff cannot maintain against defendant a general action for work and labor done and materials furnished; his remedy being a special action for refusing to accept the article.—Allen v. Jarvis, 20 Conn. 38.

[g] (Ill. 1871) In an action under the common counts to recover for work done by plaintiff for defendant, it appeared there was a special contract in writing for the performance of the work, and the work had been only partially completed. There was no abandonment of the contract by mutual consent, and no rescission thereof by any act of defendant. *Held*, that the rights of plaintiff should be determined by the contract alone. He could not recover under the common counts the price of the work already performed. The mere facts that the parties had had an accounting, showing the amount due plaintiff, and that defendant expressed an intention to send plaintiff some money, were not enough to warrant an action for the amount thus found due.—Phelps v. Hubbard, 59 Ill. 79.

[h] (Ill. 1871) Where there has been only part performance of a contract, and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had for the contract price of the service performed under an indebitatus assumpsit.—Catholic Bishop of Chicago v. Bauer, 62 Ill. 188.

[i] (Ill. 1888) A recovery cannot be had, under the common counts in assumpsit for work and labor, of the contract price for sinking a well under a special contract, until such contract has been fully performed.—Wilderman v. Pitts, 29 Ill. App. 528.

[j] (Ky. 1887) Where a party has performed a part of his contract, but has failed to perform the residue, he is not in all cases without a remedy; for, though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract and give him a remedy on quantum meruit.—Tandy's Assignee v. Hatcher, 9 Ky. Law Rep. 150.

[k] (Mass. 1832) Where a person undertakes to perform an entire work at a stipulated price, and fails to perform it, but receives the whole contract price, he can have no further claim on the ground of quantum meruit, though the work performed is beneficial to the other party.—Phelps v. Sheldon, 30 Mass. (13 Pick.) 50, 23 Am. Dec. 659.

[l] (Mass. 1841) Where an entire contract is made for labor on a large number of articles in the process of manufacture, to be paid for when finished, the owner cannot be held as trustee of the labor until the work is performed on all the articles, as no pro rata wages were earned on the contract.—Robinson v. Hall, 44 Mass. (3 Metc.) 301.

[m] (Mass. 1846) Plaintiff agreed to work for defendant, and that, if he should be dissatisfied and wish to leave the service, he would give defendant notice and work for him four weeks after the notice. After plaintiff had begun to work he became sick and unable to work, and left defendant without giving notice, and remained sick for some time. *Held*, that plaintiff was entitled to recover a proper compensation for the work which he had done, as the notice required applied to a voluntary leaving of the service, and not to leaving because of sickness.—Fuller v. Brown, 52 Mass. (11 Metc.) 440.

[n] (Mass. 1854) Where the owner entered and occupied a house, which was nearly completed when it was destroyed, the workman was entitled to recover for the work done when the owner took possession, in an action for labor performed.—Lord v. Wheeler, 67 Mass. (1 Gray) 282.

[o] (Mass. 1876) Where a building was destroyed without the plaintiff's fault, so that he could not complete his contract, he was entitled to recover under a count for work and materials furnished.—Cleary v. Sohier, 120 Mass. 210.

[p] (Mass. 1887) In a suit for the services of plaintiff's minor son, defendant, a dentist, set up an oral contract with plaintiff that the son should go to work for two years in defendant's office, and receive instruction, etc., defendant to instruct him, and at the end of the two years pay his tuition fees at a dental college. The son worked for defendant in his office for about a year, remained away about seven months, on account of illness, and continued on under the agreement for two months more, when the agreement was abandoned, and he was paid three dollars per week for some weeks, both being done at his request. *Held* that plaintiff might recover upon quantum meruit, notwithstanding the contract.—Freeman v. Foss, 145 Mass. 361, 14 N. E. 141, 1 Am. St. Rep. 467.

[q] (Mo. 1835) Where work is done under a special agreement, the agreement must be complied with before the party can recover, whether all the work be done, or only a portion of it.—Helm v. Wilson, 4 Mo. 41, 28 Am. Dec. 336.

[r] (Mo. 1845) A person who is prevented by the other party from completing a contract is entitled to recover as if the contract were completed, and cannot abandon it and sue on a quantum meruit.—Little v. Mercer, 9 Mo. 218.

[s] (Mo. 1849) Defendant promised plaintiff, who was going abroad for his family, that, if he would bring with him defendant's son, who lived some distance from where plaintiff's family resided, he would pay him a certain sum, and pay the expenses of the son. Plaintiff went for the boy, but his mother refused to let him leave. *Held* that, plaintiff being prevented from complying with the contract by the defendant's wife, he could maintain assumpsit for services and work and labor in endeavoring to get the son.—Lemp v. Streiblein, 12 Mo. 456.

[t] (Mo. 1882) One who under a contract is doing woodwork in a building destroyed by fire while under control of the owner may recover on quantum meruit for the work done prior to the time of the fire.—Haynes v. Second Baptist Church of St. Louis, 12 Mo. App. 536.

[u] (Mo. 1886) A contractor cannot recover on a quantum meruit for a part performance of a subsisting and continuing contract.—O'Brien v. Mayer, 23 Mo. App. 648.

[v] (N. Y. 1882) Plaintiff was employed to perform certain work on defendant's premises, and it was to be inspected and accepted before being paid for. Neither the time during which the agreement was to run, nor the amount of the work to be performed under it, was fixed. While the work was in its usual condition, but not accepted, and some unfinished, the premises were destroyed without any fault of plaintiff. *Held*, that plaintiff was entitled to recover the value of the work he had performed before the premises were destroyed.—Whelan v. Ansonia Clock Co., 27 Hun, 557.

[w] (N. Y. 1884) Plaintiff agreed to varnish clock cases for defendant. Payment was made at stated intervals for work completed and inspected. Defendant's factory burned down with some cases neither finished nor inspected, but on which plaintiff had done work. In an action for work alleged to have been done and per-

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formed by plaintiff for defendant, *held*, that plaintiff could recover for the work done, and upon a quantum meruit for that unfinished, whether he be deemed defendant's servant or a contractor, since defendant was under an implied obligation to furnish cases so that plaintiff could complete his contract.—Whelan v. Ansonia Clock Co., 97 N. Y. 293.

[x] (Ohio, 1844) Where, in a contract to do certain work, it is agreed that it may be abandoned at the discretion of a certain person named, where such discretion is improperly exercised, a percentum of the price which had been retained under the contract until the completion of the work may be recovered on the common counts for work and labor.—Easton v. Pennsylvania & O. Canal Co., 13 Ohio, 79.

[y] (Tenn. 1835) Where the time for the performance of a special contract has expired, and it was partly performed in labor, the person performing the labor may recover of the party benefited so much as he deserves for his labor.—Elliott v. Wilkinson, 16 Tenn. (8 Yerg.) 411.

[z] (Tenn. 1842) Where a special agreement is abandoned, compensation for part performance may be recovered, equal to and limited by the value and extent of the benefit conferred. —Porter v. Woods, 22 Tenn. (3 Humph.) 56, 39 Am. Dec. 153.

[zz] (Wis. 1867) Plaintiff contracted to drill a well for defendant at a certain rate per day, payable on its completion, but by reason of sickness plaintiff was unable to fully perform his contract. *Held*, that a recovery for the work done could be had on a quantum meruit. —Green v. Gilbert, 21 Wis. 395.

§ 32. —— Breach of contract by employer.

[a] A party who has contracted to perform work for another may recover for work done on a quantum meruit on breach of the contract by such other party and preventing plaintiff from performing his part of the contract.
—(Ill. 1837) Butts v. Huntley, 2 Ill. (1 Scam.) 410; (1848) Webster v. Enfield, 10 Ill. (5 Gilman) 298;
(Ind. 1825) Cranmer v. Graham, 1 Blackf. 406; (1828) Hoagland v. Moore, 2 Blackf. 167;
(Iowa, 1859) Dibol v. Minott, 9 Iowa, 403;
(Ky. 1830) Morford v. Ambrose, 26 Ky. (3 J. J. Marsh.) 688; (1873) Escott v. White, 73 Ky. (10 Bush) 169;
(La. 1859) Brown v. The Laura Snow, 14 La. Ann. 848;
(Md. 1850) Rodemer v. Gonder, 9 Gill, 288; (1852) Bull v. Schuberth, 2 Md. 38; (1859) Given v. Charron, 15 Md. 502;
(Mich. 1890) Mooney v. York Iron Co., 82 Mich. 263, 46 N. W. 376; (1893) Hemminger v. Western Assur. Co., 95 Mich. 355, 54 N. W. 949;
(Mo. 1871) McCullough v. Baker, 47 Mo. 401; (1896) Boyle v. Clark, 63 Mo. App. 473, 2 Mo. App. Rep'r, 859;
(N. Y. 1885) Gerhardt v. Amman, 2 City Ct. R. 104;
(Vt. 1860) Chamberlin v. Scott, 33 Vt. 80.
CONTRA, see
(U. S. 1808) Young v. Preston, 8 U. S. (4 Cranch) 239, 2 L. Ed. 607;
(Conn. 1849) Allen v. Jarvis, 20 Conn. 38;
(Ky. 1850) Rankin v. Darnell, 50 Ky. (11 B. Mon.) 30, 52 Am. Dec. 557.

[b] (Ala. 1854) Where a person contracts to serve another for a year at a stipulated sum, payable monthly, and is discharged without any fault of his own before the expiration of the year, he may consider the contract as rescinded, and sue for unliquidated damages for its breach. —Fowler v. Armour, 24 Ala. 194.

[c] (Ala. 1854) Where an employer discharges a workman on discovering a violation of the contract, and the work is used by the employer and is of value to him, the workman may recover its value on a quantum meruit for work and labor done.—Kirkland v. Oates, 25 Ala. 465.

[d] (Ill. 1872) Where a contract for certain work provided that for certain causes the defendant might declare it forfeited, in which event the defendant was to be exonerated from all liability, and the contract was terminated improperly, plaintiff might recover for all work done under the agreement.—Sanger v. City of Chicago, 65 Ill. 506.

[e] (Ill. 1873) Where plaintiff was employed by defendant for three years, and he performed services under the contract for ten months, when he was discharged without cause, he could recover under the quantum meruit what the services by him and the expenses incurred by him were reasonably worth, and was not bound by the contract as to his compensation.—William Butcher Steel Works v. Atkinson, 68 Ill. 421, 18 Am. Rep. 560.

[f] (Ill. 1883) Where a party was to work up a trade in a certain article, for which he was to have the exclusive right in a certain territory, and after he had bestowed labor in successfully working up an extensive trade the other party refused to comply with his part of the contract, the former was entitled to recover on a quantum meruit the amount expended by him in working up a trade and the value of his time and services.—Frazer v. Howe, 106 Ill. 563.

[g] (Ill. 1888) Where a suit is brought to recover for work done under a special contract, the contract must govern as to the value of the work, notwithstanding the contractor may have been prevented from completing it by the wrongful act of the other party to the contract.— Clark v. Scanlan, 33 Ill. App. 48.

[h] (Ind. 1829) Where one entered upon land under a parol contract for a written lease for seven years, and was to make improvements thereon, and after he had done part of the work the other party refused to execute the lease and expelled him from the land, he could maintain indebitatus assumpsit for the work performed. —Alcorn v. Harmonson, 2 Blackf. 235.

[i] (Ky. 1873) Where defendant completes a contract, and puts it out of the power of the plaintiff to do so, a recovery may be had on a quantum meruit, as if the work had been completed by plaintiff, but not in a workmanlike manner.—Escott v. White, 73 Ky. (10 Bush) 169.

[j] (Me. 1858) Defendant had contracted to sell to plaintiff a house, to be paid for in labor by plaintiff, which plaintiff, with defendant's knowledge and without objection from defendant, put in repair. Plaintiff also performed labor for defendant in payment therefor, and was afterwards prevented from completing the contract through defendant's fault. *Held*, that since, in such case, plaintiff was entitled to treat the contract as rescinded, he could recover on the common counts.—Wright v. Haskell, 45 Me. 489.

[k] (Md. 1880) Defendant being unable to make payments as the work progressed, the plaintiff retired from the work by defendant's consent, with the understanding that he was to be paid for what he had done. Plaintiff signed an agreement releasing defendant from further liability on the contract. After such paper was signed, the actual amount due plaintiff was ascertained by arbitration, and defendant failed to comply therewith. *Held* that, the written contract having been abrogated by consent, the matter stood as if the plaintiff had done all he was to do, and was entitled to maintain his ac-

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tion for what he had done.—McLaughlin v. Reinhart, 54 Md. 71.

[l] (Mass. 1823) Where plaintiff has partially performed a parol agreement relating to an interest in land, and the defendant wrongfully expels him from the land, he may recover for the work and labor performed for the defendant.—Kidder v. Hunt, 18 Mass. (1 Pick.) 328, 11 Am. Dec. 183.

[m] (Mass. 1858) Where work is performed according to a special contract after the contract has been terminated by the employer, it cannot be recovered for on quantum meruit without proof of a new engagement.—Hyland v. Giddings, 77 Mass. (11 Gray) 232.

[n] (Mass. 1871) Plaintiff agreed to cultivate defendant's land for two years for a share of the crop, both parties understanding that the crop would be larger the second year than the first. At the end of the first year defendant paid plaintiff his share of that year's crop, and refused to let him cultivate for the second year. *Held*, that the plaintiff was entitled to recover for work done in cultivating the land.—Williams v. Bemis, 108 Mass. 91, 11 Am. Rep. 318.

[o] (Mass. 1872) Where plaintiff agreed to work for defendants by a contract which provided that, as security for its fulfillment, they might keep back part of his wages until it was fulfilled to their entire satisfaction, and they wrongfully discharged him without any breach of the contract by him, they could not withhold any part of his wages under the pretense that he had not worked to their satisfaction.—Sloan v. Hayden, 110 Mass. 141.

[p] (Mich. 1859) An article was ordered of a manufacturer at a specified price, there being in effect an agreement for a sale, and work was done and materials used towards its construction, but before it was completed the order was countermanded, and the materials remained in the manufacturer's hands. *Held*, that the manufacturer could not recover on the common counts the value of such labor and materials, but should sue on the special contract, and claim his damages for the breach, as for being wrongfully prevented from performing it.—Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716.

[q] (Mich. 1876) After one had worked several months for another at the latter's request, his employer agreed to pay him at a certain rate for his services and hire him for a year at the same rate, but shortly afterwards the employer hired another. *Held*, that the employé could recover the value of his services under a common count in assumpsit, less what had been paid him under the contract, and it was not necessary to bring action on the contract.—McQueen v. Gamble, 33 Mich. 344.

[r] (Mich. 1879) Where one enters upon the performance of a special contract for service, and performs the same, so far as he is able, without co-operation on the part of the defendant, who fails or refuses to perform, recovery can be had upon the common counts for the work done.—Mitchell v. Scott, 41 Mich. 108, 1 N. W. 968.

[s] (Minn. 1871) Where a party to a contract has so acted upon it that he cannot be placed in statu quo, and is prevented by the other party from completing the same, he may sue for work done and materials furnished on quantum meruit and quantum valebant, and refer to the contract as furnishing a basis from which the reasonable value of work and material may be ascertained.—Siebert v. Leonard, 17 Minn. 433 (Gil. 410).

[t] (Mo. 1872) A simple breach of contract will not authorize a person employed to stop work and recover for the unperformed work, but it may justify him in abandoning his contract and entitle him to recover for the work already done.—Fitzgerald v. Hayward, 50 Mo. 516.

[u] (N. Y. 1857) Where a person has been employed under a contract and wrongfully discharged, he can maintain no action for work and labor, unless the work has been actually performed, as his remedy was either an action for damages for the breach of the contract or for the contract price.—Wiseman v. Panama R. Co., 1 Hilt. 300.

[v] (N. Y. 1880) Plaintiff's mother agreed with defendant to furnish money to bring the plaintiff from a foreign country, receive him into his family, and educate him. Defendant furnished the money and received him into his family; but the plaintiff left him after several years, claiming that defendant had not fulfilled the agreement, and sued to recover for his work and labor performed for the defendant. *Held* that, if the defendant did not comply with the agreement, plaintiff could recover what the services rendered were fairly worth, over and above all that he had received from defendant.—Lind v. Sullestadt, 21 Hun, 364.

[w] (Tex. 1870) A contract provided that plaintiff should give his services, and defendant should furnish machinery and subsistence for workmen, in a joint enterprise of boring oil wells, and that plaintiff should have one-eighth and defendant seven-eighths of the profits. Held, that on a breach of the contract by refusal of defendant to furnish such machinery and subsistence plaintiff could recover on a quantum meruit.—Devoe v. Stewart, 32 Tex. 712.

§ 33. —— Breach of contract by employé.

[a] (Ala. 1834) Where a person, in consideration of work and labor to be performed by another, covenants to convey land to him, and the grantee, ascertaining that he has no title, abandons the contract before its completion, he cannot recover on a common count for the work actually performed.—Reeves v. Wallace, 1 Port. 116.

[b] (Ala. 1842) Where a person engages to serve another for a year, and leaves his employ during the year without his consent, he cannot recover, in an action for work and labor, compensation for the services actually rendered.—Pettigrew v. Bishop, 3 Ala. 440.

[c] (Ala. 1842) Where defendant agreed to employ plaintiff for a year, plaintiff had no right to leave his employ before the expiration of the period, and, if he did so, he was not entitled to recover compensation.—Norris v. Moore, 3 Ala. 676.

[d] (Ala. 1847) Where plaintiff contracted to bore a well at the rate of $1 a foot for the first 500 feet, $2 for the next 100 feet, $5 for the next 100 feet, and $8 per foot for the remaining distance necessary to obtain water, the well to be put in the same finished order as the contractor's best finished wells, and payment to be made on a certain date, plaintiff could not abandon the work so long as it was practicable for him to continue boring and the other party was willing he should continue; and therefore, having discontinued or abandoned the contract, he could not recover for the work done.—Stewart v. Weaver, 12 Ala. 538.

[e] (Ala. 1851) Where a person, after commencing certain work, abandons it before it is finished without sufficient cause, he cannot recover for the work and labor done.—Hawkins v. Gilbert, 19 Ala. 54.

[f] (Ill. 1880) Where a party refuses to perform his contract, or by his act incapacitates himself from performing, such refusal authorizes the other party to recover for his services

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already performed on a quantum meruit.—Shaffner v. Killian, 7 Ill. App. (7 Bradw.) 620.

[g] (Ky. 1880) Where a building was abandoned before completion, the appropriation of the work of the contractor by the owner imposed a liability to pay for it what it was reasonably worth, and waived the right to object that payment was only to be made on completion of the contract.—Lewis v. Evans, 1 Ky. Law Rep. 349.

[h] (La. 1866) Where a person has hired his services for a fixed period, and leaves his employer before the expiration of the time, he cannot recover wages for the period which he has served without showing that he has a cause of complaint against his employer.—Callehan v. Stafford, 18 La. Ann. 556.

[i] (Mass. 1806) Where a person contracting to perform certain work voluntarily leaves it unfinished, he can have no action against his employer for the part performed.—Faxon v. Mansfield, 2 Mass. 147.

[j] (Mass. 1824) Where an infant made a special agreement to labor for a certain time for certain wages, and before the expiration of the time he voluntarily left his employer, the special contract being avoided, he was entitled to recover on a quantum meruit for the services performed.—Moses v. Stevens, 19 Mass. (2 Pick.) 332.

[k] (Mass. 1837) Where a person, having agreed to work for another for a definite period, voluntarily leaves his service without the consent of the other and without his fault before the expiration of the term, he cannot recover on a quantum meruit for the labor actually performed by him.—Olmstead v. Beale, 36 Mass. (19 Pick.) 528.

[l] (Mass. 1837) Where a minor, after his father's death, enters the service of a ship, and the contract is legally avoided by his desertion of the ship before the completion of the voyage, he may recover on a quantum meruit for the services performed.—Vent v. Osgood, 36 Mass. (19 Pick.) 572.

[m] (Mass. 1847) Where a person agrees to work for another for seven months, and leaves the service without good cause before the time expires, he is not entitled to recover anything for his services.—Davis v. Maxwell, 53 Mass. (12 Metc.) 286.

[n] (Mass. 1872) An infant, who has contracted with manufacturers to work for them for a certain period, can avoid the contract and sue on a quantum meruit for the work and labor performed.—Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580.

[o] (Mich. 1876) One who, by his contract, is to receive payment in something else than money, cannot, where he has broken his contract, sue upon the quantum meruit, and recover the value of the labor performed under the contract, and thereby convert into cash payments what, according to his agreement, is payable in something else. The express contract is not to be disregarded in such case.—Roberts v. Wilkinson, 34 Mich. 129.

[p] (Pa. 1884) Where a niece left decedent's home and went to her own home, having voluntarily put an end to her contract, compensation for services previously rendered could only be recoverable under a quantum meruit on an implied contract.—In re Heathcote's Estate, 15 Wkly. Notes Cas. 532.

[q] (Tenn. 1854) Where plaintiff contracted to labor on defendant's farm for eight months for a stipulated price, and after laboring part of the time voluntarily abandoned his employer without his consent, he can recover nothing for the time he served.—Hughes v. Cannon, 33 Tenn. (1 Sneed) 622.

IV. ACTIONS.

(A) IN GENERAL, §§ 34-40.
(B) PLEADING, §§ 41-46.
(C) EVIDENCE, §§ 47-55.
(D) AMOUNT OF RECOVERY, §§ 56-58.
(E) TRIAL, JUDGMENT, AND APPEAL AND ERROR, §§ 59-65.

Action between partners for compensation for services, see "Partnership," vol. 38, cc. 821, 822, § 169.

—— *of debt on quantum meruit, see* "Debt, Action of," vol. 15, cc. 2721–2725, §§ 12, 16.

—— *on ditch certificates for work, see* "Drains," vol. 17, cc. 1664, 1665, § 103.

Actions for services of child, see "Parent and Child," vol. 37, cc. 2177–2185, §§ 77–85.

Agricultural lien for services, see "Agriculture," vol. 2, cc. 80–83, §§ 20–22.

Constitutionality of statutes making homesteads subject to labor liens, see "Homestead," vol. 25, c. 2255, § 129 [c, d, e].

Contracts for personal services as subjects of protection and relief by injunction, see "Injunction," vol. 27, cc. 1705–1711, §§ 117–119.

Election between action to recover value of labor and other remedies, see "Election of Remedies," vol. 18, c. 33, § 14 [g].

Enforcement against homestead of liability for work and labor in improving the same, see "Homestead," vol. 25, cc. 2286–2290, §§ 154, 155.

Exemption against claim for wages, see "Exemptions," vol. 23, cc. 119, 120, § 95.

Insurer's liability for wages of vessel's crew, see "Insurance," vol. 28, cc. 2098, 2099, § 1253.

Intervention in attachment to enforce claims of laborers, see "Attachment," vol. 5, c. 1092, § 1004.

Liens for work and materials, see "Mechanics' Liens," vol. 34, cc. 2083–2826.

—— *on logs, lumber, or mills for work and labor, see* "Logs and Logging," vol. 33, cc. 1585–1626, §§ 54–108.

Maritime liens for work and labor, see "Maritime Liens," vol. 34, cc. 12–182.

Priorities and payment of claims for services against decedent's estate, see "Executors and Administrators," vol. 22, cc. 1436, 1437, § 956.

—— *between landlord's lien and laborers' or mechanics' liens, see* "Landlord and Tenant," vol. 32, cc. 1093, 1094, § 1008.

—— *between liens for work and labor furnished railroad and mortgages, see* "Railroads," vol. 41, cc. 2206–2212, §§ 563–567.

—— *of claims against receivers of corporation for wages of employés, see* "Corporations," vol. 12, cc. 2302–2304, § 2285.

Priority between landlord's lien and lien for labor, see "Landlord and Tenant," vol. 32, c. 1435, § 1390.

—— *of claims for wages of employés against insolvent estates, see* "Insolvency," vol. 28, cc. 232, 233, § 185.

Recovery of damages for breach of contract in action for services, see "Damages," vol. 15, c. 2209, § 429 [l].

Right to trial by jury in proceedings to collect wages, see "Jury," vol. 31, c. 278, § 104 [o].

Security for costs in suit for personal labor, see "Costs," vol. 13, c. 426, § 419 [h].

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Services to decedent's family, priority as claim against estate, see "Executors and Administrators," vol. 22, cc. 1452, 1458, § 980.
Wages as preferred claim to proceeds of execution, see "Execution," vol. 21, cc. 1744–1756, §§ 960–962.

(A) IN GENERAL.

NATURE AND FORM OF REMEDY, § 34.
CONDITIONS PRECEDENT, § 35.
DEFENSES, § 36.
PERSONS ENTITLED AND PARTIES, § 37.
PERSONS LIABLE, § 38.
TIME TO SUE AND LIMITATIONS, § 39.
DEFECTS, OBJECTIONS, AND WAIVER, § 40.

Recovery by contractor with city on quantum meruit, see "Municipal Corporations," vol. 36, cc. 675, 676, § 698.

§ 34. Nature and form of remedy.

As affected by contract, see ante, § 23½.
Remedy by action of book account or book debt, see "Account, Action on," vol. 1, c. 702, § 44 [j]; cc. 710–712, § 52; cc. 716, 717, § 60 [e, h, i, k, t]; c. 725, § 72 [f]; c. 726, § 73 [d].
—— *by action on account, see* "Account, Action on," vol. 1, cc. 670–672, §§ 1 [k], 2 [f], 3 [d]; c. 680, § 12 [l].
—— *by action on verified account, see* "Account, Action on," vol. 1, c. 694, § 31 [j, l, n]; c. 698, § 37 [k].
Work on streets by inhabitants in general, see "Municipal Corporations," vol. 36, cc. 1982–1984, §§ 1452, 1453.

[a] (Ala. 1877) The compensation of a probate judge for recording a conveyance is a fee, and not costs, and may be recovered from the party for whom service is rendered in an ordinary action for labor done.—Tillman v. Wood, 58 Ala. 578.

[b] (Del. 1891) One at whose instance another performs services is liable in assumpsit on an implied contract for their reasonable value.—Nichols v. Vinson, 9 Houst. 274, 32 Atl. 225.

[c] (Iowa, 1871) One who performs services, for another at his request, without any agreement or understanding as to the pay, may recover the reasonable value of the same under a quantum meruit.—Rea v. Flathers, 31 Iowa, 545.

[d] (N. J. 1840) Indebitatus assumpsit will not lie for services voluntarily rendered.—Force v. Haines, 17 N. J. Law (2 Har.) 385.

[e, f] (Pa. 1849) A claim for fees earned by a plaintiff's intestate, who was an alderman of Philadelphia, may be recovered in assumpsit for work and labor.—Harris v. Christian, 10 Pa. (10 Barr) 233.

[g] (Vt. 1864) The common count for work and labor and materials furnished is not adapted to a claim for unfinished work not delivered.—Allen v. Thrall, 36 Vt. 711.

§ 35. Conditions precedent.

[a] (Ill. 1880) Where a party, contracting with another for the erection of a house, agrees to accept an order on a third person as a part payment, and was induced to accept such third person by the fraudulent misrepresentations of the debtor, he cannot, on a partial failure of payment by such third person, recover from the original debtor in an action of assumpsit for labor, without returning what he had already received thereon.—Besley v. Dumas, 6 Ill. App. (6 Bradw.) 291.

[b] (Ind. 1823) Where work is done under an oral agreement that the employer shall pay for it by conveying certain land when he should acquire the title thereof, though he is not legally bound to convey the land, yet an action will not lie to recover of him pay for the work, until notice is given to him that the work is completed, and he thereupon fails to convey.—Johnson v. Moore, 1 Blackf. 253.

[c] (N. H. 1855) In an action of assumpsit for services, no notice is required before commencing the suit.—Wilson v. School Dist. No. 4 in Chester, 32 N. H. 118.

[d] (Pa. 1793) Before commencing suit for services of uncertain value, the price therefor should be fixed and demanded of the defendant.—Parr v. Jones, Add. 138.

§ 36. Defenses.

[a] (U. S. 1836) The defendant's male slave, being, by consent of the plaintiff and defendant, at the plaintiff's house, upon a visit to his wife, who was the slave of the plaintiff, was taken suddenly ill of the smallpox, and, after being nursed three weeks by the plaintiff, died at her house. The defendant, as soon as he knew of the sickness of his slave, offered to remove him to his own house, but the plaintiff would not consent to the removal. *Held*, that the plaintiff could not recover for nursing the slave.—Manning v. Cox, Fed. Cas. No. 9,042 [4 Cranch, C. C. 693].

[b] (Ala. 1838) In an action for work and labor, if the work was so badly done as to be of no value, plaintiff cannot recover even for materials furnished.—Gazzam v. Kirby, 8 Port. 258.

[c] (Ala. 1849) Where an overseer, employed at a stipulated price per annum, was sick a portion of the time, and the employer has been injured by the imperfect performance of the overseer's undertaking, the damages may be recouped, so as to compensate the injury.—Jones v. Deyer, 16 Ala. 221.

[d] (Ark. 1842) In an action for compensation for labor done by plaintiff in building a mill, where defendant proved that the mill, when built, was valueless, *held* that an offer to do work is a representation by the person offering that he has ability and skill sufficient to do it, and raises an implied agreement to do it in a workmanlike manner, and it is not necessary that he should covenant expressly to use such skill, and plaintiff is not entitled to recover where he failed to do the work in a workmanlike manner.—McDonald v. Simpson, 4 Ark. (4 Pike) 523, 38 Am. Dec. 45.

[e] (Ky. 1840) A mechanic, who constructed a cylinder according to the directions of his employer in a skillful and workmanlike manner, is entitled to a reasonable reward for his labor, though the cylinder wholly failed to perform its intended office.—Ricketts v. Sisson, 39 Ky. (9 Dana) 358, 35 Am. Dec. 141.

[f] (La. 1871) The fact that the nurse or housekeeper lived with the man she was nursing as his concubine does not impair her claim for remuneration, unless, perhaps, where it be shown that concubinage was the motive and cause of their living together in the first instance, and that the services rendered were merely incidental to that mode of living.—Succession of Pereuilhet, 23 La. Ann. 294, 8 Am. Rep. 595.

[g] (Md. 1850) Where plaintiff has performed a part of a special contract according to its terms, and is prevented by defendant from performing the residue, defendant cannot set up a special contract to defeat a recovery for the work actually done.—Rodemer v. Gonder, 9 Gill, 288.

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[h] (Mass. 1855) Under the statute of frauds, providing that no action shall be brought on an oral agreement not to be performed within a year from the making thereof, such an agreement for services cannot be said to be any defense to an action on a quantum meruit for services performed under it.—King v. Welcome, 71 Mass. (5 Gray) 41.

[i] (Mass. 1878) To an action on the quantum meruit by the keeper of attached property against the officer employing him, it is no defense that the officer has no claim against another for the performance of the services. The compensation is determined by the value of the services, and not by the amount of benefit, which the officer receives.—Stowe v. Buttrick, 125 Mass. 449.

[j] (Mass. 1883) A manufacturer of machines for one who is required by the contract to pay for their manufacture is not deprived of the right to maintain an action for the repairs of machines which are returned and repaired after being delivered to purchasers by the mere fact that such repairs are made after the termination of the contract under which they were manufactured.—Boston & F. Iron Works v. Montague, 135 Mass. 319.

[k] (Mich. 1876) In an action under a common count for services rendered, a defendant is not at liberty, for the purpose of turning the plaintiff out of court, to set up and claim the benefit of an express contract, which he concedes he refused to regard and expressly repudiated.—McQueen v. Gamble, 33 Mich. 344.

[l] (Mich. 1883) One who was sued for work and labor done on his sawmill claimed recoupment for the breach by plaintiff of an alleged contract of warranty of a certain sawdust elevator to be put into the mill. It appeared that defendant had suggested to plaintiff the use of a Garland chain, and plaintiff had replied that he could put in a bevel gear that would work better; that he proceeded with the manufacture of the shafting, pulley, and gearing, and other machinery, pertaining to the elevator, but delivered it at his own shop to defendant, who put it up himself, though he repeatedly warned plaintiff that, if it did not work well, plaintiff would be responsible. *Held*, that this did not tend to prove the contract alleged in the claim of recoupment.—Hudnett v. Comstock, 50 Mich. 596, 16 N. W. 157.

[m] (Mo. 1887) One who agrees to make certain articles out of the employer's materials, each to be paid for at a certain price, when finished, cannot recover on a quantum meruit for work done on such of the articles as he left in an unfinished condition.—Gruetzner v. Aude Furniture Co., 28 Mo. App. 263.

[n] (N. Y. 1840) Where plaintiff in assumpsit relies on the common counts for work done, and it appears that there was a written contract, damages to defendant from the want of strict performance on the part of plaintiff may be set up.—Ladue v. Seymour, 24 Wend. 60.

[o] (N. Y. 1842) A person who has served another in expectation of a testamentary provision, and to whom the testator subsequently devises a portion of his estate, cannot maintain a suit for such services against the executors.—Eaton v. Benton, 2 Hill, 576.

[p] (N. Y. 1855) Where an employer expected and agreed to render an equivalent for services, it is no answer for him to say that he agreed to pay some person who has no legal claim to the service or the compensation, especially unless he shows that he has paid that person.—Lewis v. Trickey, 20 Barb. 387.

[q] (N. Y. 1878) In an action by an attorney for alleged services, it is a good defense that the part taken by plaintiff was simply as a friend, and not as a retained attorney or legal adviser; that there was a mutual interchange between plaintiff and defendant of kindly offices, without expectation of payment; and that plaintiff did receive from defendant benefits, advantages, accommodations, and loans and room at reduced prices, and services, which were the consideration for the services rendered by plaintiff without charge.—Young v. Hunt, 72 N. Y. 604.

[r] (N. Y. 1878) Where one has manufactured goods under a contract with another, and has shipped them to the latter according to his request, the loss of the goods in transit is no defense to an action for the labor and materials used in their manufacture, unless such loss resulted from the negligence of the plaintiff.—Higgins v. Murray, 73 N. Y. 252.

[s] (Ohio, 1878) Where defendant agreed with plaintiff to credit plaintiff's work and materials on notes which defendant held against plaintiff, but refused to comply therewith, plaintiff may maintain an action against defendant for such work and materials, and defendant cannot set up that the work and materials constituted a payment of the notes pro tanto.—Wisner v. Engel, 1 Cleve. Law Rep. 18, 4 Ohio Dec. 91.

[t] (Pa. 1848) The overseers of the poor of a town cannot recover on quantum meruit compensation for the services of a negro during the time he was held in servitude by the defendant, it not appearing that defendant knew that she was entitled to her freedom.—Overseers v. Cline, 9 Pa. (9 Barr) 217.

[u] (R. I. 1887) One who has assumed a contract between plaintiff and another, and afterwards rescinded it, while plaintiff was ready to perform, cannot set up the contract to defeat an action for work and labor.—Duggan v. McCarthy, 13 Atl. 400.

[v] (S. C. 1868) In an action for work and labor, it is a good defense to show that the work has been so carelessly and wrongly done that the employer is injured by it, and that it is necessary that it should be done over again.—Ervin v. Epps, 15 Rich. Law, 223.

[w] (Tenn. 1842) Where plaintiff sues to recover for work and labor performed, and defendant has been damaged by plaintiff's nonperformance of his part of the agreement, such damage may be offset against plaintiff's verdict.—Whitaker v. Pullen, 22 Tenn. (3 Humph.) 466.

[x] (Tex. 1858) If a surveyor surveys land pointed out by the owner of the certificate, both believing the land to be within the surveyor's district, the fact that it is not does not deprive him of his right to compensation.—McCulloch v. Twitty, 22 Tex. 70.

[y] (Wis. 1854) Defendant may always show want of benefit in defense to an action for services, and, if it be total, he will entitle himself to a verdict.—Cole v. Clarke, 3 Wis. 323.

[z] (Wis. 1854) The implied promise, which supports a quantum meruit count for work and labor, rests on the benefit received thereby by the defendant. Mere labor and mechanical skill will not entitle a plaintiff to recover, if, through his want of judgment or experience, no benefit has resulted to the defendant thereby.—Cole v. Clarke, 3 Wis. 323.

[zz] (Wis. 1879) The fact that plaintiff was negligent and unskillful in his employment will not prevent his recovering what his services were really worth.—McCormick v. Ketchum, 48 Wis. 643, 4 N. W. 798.

§ 37. Persons entitled and parties.

Rights of action by husband or wife for lost services of wife resulting from personal injuries, see "Husband and Wife," vol. 26, cc. 2419–2422, § 768.

—— *or both for wife's personal services, see* "Husband and Wife," vol. 26, cc. 2408–2410, § 762.

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[a] (Ala. 1845) Plaintiff, who sues for the use of another for work and labor done by the party for whose use the suit was brought, could not recover the price of it, unless he stood in such a relation that the right to compensation inured to him.—Mooney v. Ivey, 8 Ala. 810.

[b] (Ill. 1881) A person employed by a firm as a bookkeeper and accountant may recover on common counts for services rendered to another at his request out of business hours, and for services during business hours performed by him with the permission of the firm employing him, though it is claimed his earnings belonged to the firm.—Wallace v. De Young, 98 Ill. 638, 38 Am. Rep. 108.

[c] (N. H. 1882) Defendant, being in the employ of W., was taken sick, and plaintiff was called to attend her as a physician. W., without defendant's request, paid the bill, with the intention of deducting it in the settlement with defendant for her labor. In an action brought by defendant for her labor, W. attempted to set off the bill paid to plaintiff. The set-off was disallowed on the ground that the item was not one of mutual account, nor in the same right with defendant's claim. *Held*, that W. might maintain an action of assumpsit in plaintiff's name for the amount thus paid by him.—Wallace v. Moulton, 62 N. H. 692.

[d] (N. Y. 1855) Where payment is to be made for labor, the law will give it to him who performs it, unless some other person can show a better title.—Lewis v. Trickey, 20 Barb. 387.

[e] (Pa. 1856) Where work is performed by partners, an assumpsit on a quantum meruit can only be sustained in their names, though the contract for the work was made by the party bringing the suit before the partnership commenced.—Schnader v. Schnader, 26 Pa. (2 Casey) 384.

§ 38. Persons liable.

See ante, § 5 [n].

Joint or several liability for work and labor under a contract under seal of one defendant, see "Contracts," vol. 11, c. 814, § 780 [c].

Liability of wife for labor in cultivation of land, see "Husband and Wife," vol. 26, cc. 2229, 2230, § 639.

—— *for work and labor, see* "Husband and Wife," vol. 26, cc. 2185, 2186, § 601.

[a] (Ala. 1880) Where A. works on B.'s plantation with the latter's consent, there is no implied promise by B. to pay for such work, unless such plantation was being cultivated by B. and in his interest.—Wood v. Brewer, 66 Ala. 570.

[b] (Ark. 1854) Where work is done for E. at the request of C., the common indebitatus count will be supported in an action of assumpsit against C.—Clark v. Roop, 15 Ark. 172.

[c] (Ind. 1862) Where a party has been imprisoned under a sentence of a court having no jurisdiction, he may, as to the keeper of the penitentiary, who has received benefit from his labor during his confinement, maintain his suit in assumpsit, but not so in the case of parties to the confinement who have received no benefit from his labor, such as the warden.—Patterson v. Prior, 18 Ind. 440, 81 Am. Dec. 367.

[d] (Ind. 1877) A city is liable as for work and labor to one who publishes a list of delinquent taxpayers upon request of the proper authorities.—City of Evansville v. Thayer, 59 Ind. 324.

[e] (Me. 1853) A. being sick, B. requested C. to take care of him; C. well knowing that B. acted only as the friend and agent of his neighbor, A. *Held*, that C. could sustain no action against B. for his services, and that the fact that A. and B. were partners made no difference.—Batchelder v. McKenny, 36 Me. 555.

[f] (Md. 1860) A defendant, who purchases a steamboat and has her repaired with the expectation of selling her to an association of which he and the plaintiff expect to become members, is liable for the repairs, unless by agreement the credit was to be given to the association.—Wells v. Turner, 16 Md. 133.

[g] (Md. 1860) If a party orders work to be done, it is immaterial for whose benefit it may be intended. He must pay for it, unless credit therefor be given to another.—Wells v. Turner, 16 Md. 133.

[h] (Mass. 1836) Where a third person takes possession of a shop and exercises his trade under an agreement that he shall have the profits of his labor, to be appropriated in the payment of the shop, and that, whenever he has paid a certain sum, the defendants will convey the shop to him, and that he shall deliver a monthly account of work done, and keep the books in the defendants' name, the defendants will not be liable for work and labor performed in the shop by plaintiff on such third person's application; there being no evidence that the plaintiff was hired on the defendants' credit.—Anderson v. Fuller, 35 Mass. (18 Pick.) 572.

[i] (Mass. 1841) Where selectmen without authority apply for a jury to reduce damages estimated by county commissioners upon the laying out of a town way, and a warrant is issued to an officer requiring him to summon a jury and determine the matter of complaint, and he performs the services, he may maintain an action against the selectmen to recover for such services.—Baker v. Thayer, 44 Mass. (3 Metc.) 312.

[j] (Mass. 1878) An insurance company, under a power in a mortgage from M., sold and conveyed certain land to B., its treasurer, who thereupon held the title merely in trust for the company. M., not knowing of the sale, applied to the company to arrange for certain repairs which the premises needed, and was referred to B., who agreed that M. should make the repairs and the company thereafter take a mortgage for a certain sum on the land, the old mortgage meanwhile to remain as it was. After M. had done the work he discovered the fact of the sale under the mortgage. *Held*, that M. could not maintain an action against B. for the cost of the work.—Meserve v. Bacon, 125 Mass. 499.

[k] (Miss. 1852) A clerk at whose request a printer advertises the sale of judgments for costs is liable to the printer, or a quantum meruit, for the expense of the advertising.—Buckingham v. Smith, 23 Miss. (1 Cushm.) 521.

[l] (N. Y. 1854) Where an architect performs work and labor on a building under the direction of two persons, an action will lie against them jointly, though no partnership exists between them in either the land or the building.—Beach v. Raymond, 2 E. D. Smith, 496.

[m] (N. C. 1848) Where A. employs B. to do work for C. and for C.'s benefit, the law will not imply a promise by A. to pay for the same; and B. cannot recover of A. therefor upon the common count for work and labor done.—Mosby v. Hunter, 31 N. C. 119.

[n] (Ohio, 1842) Where a subscription is made for the construction of a road, when the road is completed, the person by whom it was constructed may recover from the subscribers on the common counts for work and labor.—Sperry v. Johnson, 11 Ohio, 452.

[o] (Pa. 1795) A collector of the customs is not liable to pay a measurer's fees for his services, unless he employs him.—Pinchon v. Delaney, 2 Yeates, 22.

[p] (Tex. 1892) Where plaintiff agreed to furnish defendant with machinery for manufactur-

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ing ice, and a man was sent by plaintiff to repair the plant, which was injured after it had been completed and turned over to defendant, the latter is liable for his services.—Alamo Mills Co. v. Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. 1097.

[q] (Vt. 1802) General assumpsit for work done will not lie, where defendant promised to pay for it under the contract of another, though it was done upon defendant's buildings and for his eventual benefit.—Sherman v. Stanton, 1 Tyler, 350, 4 Am. Dec. 724.

[r] (Wis. 1877) One with whose knowledge and consent services are procured to be performed by a third party, or who accepts or knowingly avails himself of the benefit of services performed for him without his authority or request, becomes liable therefor.—Wheeler v. Hall, 41 Wis. 447.

§ 39. Time to sue and limitations.

Accrual of right of action on accounts for services rendered, see "Limitation of Actions," vol. 33, c. 501, § 287.

—— *on continuing contract of employment, see* "Limitation of Actions," vol. 33, cc. 484–486, § 274.

—— *on contract of employment in general, see* "Limitation of Actions," vol. 33, cc. 435–438, § 246.

—— *on implied contracts for services rendered, see* "Limitation of Actions," vol. 33, c. 471, § 267.

—— *on severable contract of employment, see* "Limitation of Actions," vol. 33, cc. 497, 498, § 283.

Application of general statutes of limitation to actions on contracts of employment, see "Limitation of Actions," vol. 33, cc. 246–248, § 92.

Cessation or completion of work as determining when limitations begin to run against right to enforce mechanic's lien, see "Mechanics' Liens," vol. 34, cc. 2643–2645, §§ 462, 463.

[a] (Ill. 1878) Where materials are furnished from time to time, under a special contract to furnish the iron work necessary for a building, and the special contract is abandoned before its full performance by reason of the destruction of the building in an incomplete state, in an action as on a quantum meruit the statute of limitations will begin to run as against each item or parcel from the time of its delivery.—Schillo v. McEwen, 90 Ill. 77.

[b] (N. Y. 1816) Where a father promised to reward his son for his services by providing for him in his will, an action by the son before the death of the father to recover for his services was premature.—Patterson v. Patterson, 13 Johns. 379.

[c] (Pa. 1845) Where one has performed work and labor under an agreement, to be paid therefor by note of the party employing him, and there had been a refusal to deliver the note at the time specified in the agreement, indebitatus assumpsit will not lie for the work and labor until after the time when the note would have matured, if it had been given.—Huston v. Mehaffey, 2 Clark, 525.

[d] (Pa. 1878) Where an action was brought in 1873 to recover services which were rendered by plaintiff in 1861, the demand, if there was no special contract, was barred by limitations.—Pollock v. Ray, 85 Pa. 428.

§ 40. Defects, objections, and waiver.

[a] (La. 1853) When the particular items of the work sued for are known to defendant, and he does not ask in his answer for a detailed bill thereof, he cannot ask for it afterwards.—Chapman v. Hart, 8 La. Ann. 35.

[b] (Nev. 1868) Where a complaint for work and labor omits to allege specifically the value of the same or a promise to pay, and defendant, without demurring, answers, denying the indebtedness and admitting the services performed, the defects in the complaint are cured.—McManus v. Ophir Silver Min. Co., 4 Nev. 15.

[c] (N. Y. 1806) In assumpsit for labor done, the want of an averment that the labor was actually performed will, after judgment, be presumed to have been supplied by proof.—Owens v. Morehouse, 1 Johns. 276.

[d] (N. Y. 1883) In an action to recover for services as upon a quantum meruit, plaintiff is not concluded as to the value of the service by the amount originally claimed in the complaint, which has been amended by increasing the amount, nor by discrepancies between different bills of particulars furnished.—Sherwood v. Hauser, 94 N. Y. 626.

[e] (S. C. 1812) A declaration was indebitatus assumpsit for work, labor, etc., and quantum meruit; and defendant pleaded that there was a special agreement, and that plaintiff had violated it, and concluded to the country, upon which plaintiff joined issue. *Held*, that the plea and issue precluded the defendant from excepting to the declaration.—Stoll v. Ryan, 1 Tread. Const. 96.

[f] (Wis. 1881) Objection could not be made to the introduction of evidence because of the insufficiency of a complaint alleging that defendant was indebted to plaintiff in a specified sum for work done at his request between named dates, and that, though often requested to pay the same, he refused to do so, when the answer merely set up a counterclaim, without demanding a bill of particulars.—Bue v. Ketchum, 51 Wis. 324, 8 N. W. 231.

(B) PLEADING.

DECLARATION, COMPLAINT, OR PETITION, § 41.
PLEA OR ANSWER AND SUBSEQUENT PLEADINGS, § 42.
ISSUES, PROOF, AND VARIANCE, § 43.
—— EVIDENCE ADMISSIBLE UNDER PLEADINGS, § 44.
—— DEFENSES AND SET-OFF, § 45.
—— EXISTENCE OR DENIAL OF SPECIAL CONTRACT, § 46.

Defects, objections, and waiver, see ante, § 40.

Bill of particulars as to services rendered, see "Pleading," vol. 39, cc. 2339, 2340, § 960; cc. 2367, 2368, § 983.

Description of services and purpose of furnishing in declaration or complaint in suit to enforce mechanic's lien, see "Mechanics' Liens," vol. 34, cc. 2685–2688, § 499.

Statement of cause of action in actions in justice court for services rendered, see "Justices of the Peace," vol. 31, cc. 1261–1265, §§ 310–313.

§ 41. Declaration, complaint, or petition.

[a] In the declaration in an action for services rendered it is necessary to allege that the services were rendered at defendant's request.—(Me. 1820) Jewett v. Inhabitants of Somerset County, 1 Me. (1 Greenl.) 125;
(N. Y. 1810) Comstock v. Smith, 7 Johns. 87;
(Ohio, 1871) Carey v. Post, 2 Cin. R. 62.

[b] (U. S. 1808) In an action of assumpsit the declaration is sufficient where it alleges for labor and services generally.—Edwards v. Nichols, Fed. Cas. No. 4,296 [Brunner, Col. Cas. 43].

[c] (Ala. 1888) Where plaintiff agreed to serve defendant for 12 months, and was to receive a part of the net proceeds of the business during that time, a declaration stating that he was prevented by sickness from discharging his duty under the contract for the space of 4 months, and claiming the part of the net proceeds which accrued during the 8 months, is insufficient, as it assumes, as a consequence of the inability of plaintiff to render the services, that the mode of ascertaining his compensation was changed. —Greene v. Lintum, 7 Port. 133, 31 Am. Dec. 707.

[d] (Ala. 1851) Where a plaintiff sues for the work and labor of her minor, she must aver in the statement of her cause of action that the father was dead, or that she was entitled to the minor's services as guardian or otherwise.—Jones v. Buckley, 19 Ala. 604.

[e] (Cal. 1874) An allegation that the defendant on a certain day was indebted to the plaintiff in a certain sum for work and labor before that time performed for him at his request states a cause of action.—Pavisich v. Bean, 48 Cal. 364.

[f] (Cal. 1894) In an action for services, a complaint which alleges that defendant is indebted to plaintiff in a certain sum on account of work, labor, and services performed at the request of defendant, and that he has not paid therefor, is sufficient as against a general demurrer.—Smith v. Waite, 103 Cal. 372, 37 Pac. 232.

[g] (Conn. 1808) A declaration for services performed or labor done generally, without any particular specification, is good.—Edwards v. Nichols, 3 Day, 16, Fed. Cas. No. 4,296.

[h] (Ind. 1857) Where a complaint counts upon the orders of a board of commissioners for the payment of money for the construction of a bridge out of a certain fund, and the action of the board thereon, it cannot be regarded as a count for work and labor. — Union County Com'rs v. Mason, 9 Ind. 97.

[i] (Ind. 1874) A complaint in general form for work and labor is not rendered demurrable by the fact that it sets out the manner of the employment and character of the work with unnecessary particularity, where the facts stated do not show a special contract, nor increase defendant's liability beyond such general employment.—Ft. Wayne, J. & S. R. Co. v. McDonald, 48 Ind. 241.

[j] (Ind. 1884) A common count for indexing records for a county board not in the office of the board, which failed to allege that the services were requested, was insufficient.—Hoffman v. Lake County Com'rs, 96 Ind. 84.

[k] (Ind. 1893) In an action against an estate for services rendered the intestate, the complaint alleged that plaintiff, when young, entered the family of deceased, his uncle, and worked without compensation, till he was 21 years old, under an agreement between plaintiff's father and deceased that the latter would raise plaintiff as his son, and provide for him by his will, which he failed to do, and that plaintiff's services were worth $5,000. *Held*, that the complaint is for the recovery of the value of the services on a quantum meruit, and not for a recovery on the special contract.—Puterbaugh v. Puterbaugh, 7 Ind. App. 280, 33 N. E. 808.

[l] (Kan. 1888) A petition, reciting a contract void as being incapable of performance within one year, is not demurrable where the other facts stated therein are sufficient to warrant a recovery upon the implied contract for the value of the work performed.—Wonsettler v. Lee, 40 Kan. 367, 19 Pac. 862.

[m] (Kan. 1895) A petition alleging that defendant is indebted to plaintiff in a certain sum for services performed by plaintiff for defendant at the latter's special instance, and that the same is due and unpaid, and containing an itemized statement of the services, and the value claimed for them, is not open to an objection to the introduction of evidence under it on the ground that it fails to state a cause of action, in that it does not allege the value of the services, or that defendant derived benefit from them.—Connecticut Mut. Life Ins. Co. v. Barnes, 2 Kan. App. 642, 42 Pac. 938.

[n] (Ky. 1894) In an action to recover for services rendered in selling certain property for defendant, it was sufficient to allege that the services were rendered with defendant's consent, and that he accepted the benefit of them. —Viley v. Pettit, 96 Ky. 576, 29 S. W. 438, 16 Ky. Law Rep. 286.

[o] (Minn. 1861) A complaint, alleging a written contract between the parties under which work was done at times and places named, the value of the work, the amount paid, and the balance unpaid, with a proper demand for judgment for the balance, is sufficient.—Nash v. Murnan, 6 Minn. 577 (Gil. 411).

[p] (Minn. 1871) A complaint set forth that plaintiff and defendant entered into a sealed agreement for the erection of a building for defendant at a specific price, according to plans and specifications; that no plans and specifications were furnished, and that performance according thereto was practically abandoned; that plaintiff did the work as directed, under the immediate direction and supervision of the defendant, frequently protesting that it was insecure, and, when nearly completed, the building, without plaintiff's fault, fell to the ground. Judgment was demanded for the unpaid balance of the contract price, less the value of the work yet to be done when the building fell. *Held*, that the action was upon a quantum meruit, the contract being referred to for the purpose of determining the reasonable value of the work, and fully stating the origin of the plaintiff's cause of action.—Siebert v. Leonard, 17 Minn. 433 (Gil. 410).

[q] (Mo. 1866) Where a party, after alleging a contract and stating its terms, abandons the contract price and seeks a recovery on a quantum meruit, he must show a reason for such abandonment.—Stoddard v. Murdock, 37 Mo. 580.

[r] (Mo. 1876) Where the petition in an action to recover for work and materials furnished declares only on the contract, the plaintiff cannot recover judgment on a quantum meruit. —Eyerman v. Mt. Sinai Cemetery Ass'n, 61 Mo. 489.

[s] (Mo. 1891) In an action for labor and materials done and furnished defendant, plaintiff may count specially on the contract, and also on quantum meruit for the same cause of action, and go to the jury on both counts.—Globe Light & Heat Co. v. Doud, 47 Mo. App. 439.

[ss] (N. J.) A declaration is bad, if no time is therein stated when the services were performed.—(1824) Gordon v. Myers, 8 N. J. Law (3 Halst.) 69; (1828) Vanguilder v. Stull, 10 N. J. Law (5 Halst.) 233.

[t] (N. J. 1854) A state of demand for work and labor must state by whom the work and labor was performed.—Erving v. Ingram, 24 N. J. Law (4 Zab.) 520.

[tt] (N. J. 1860) A declaration for "seven days' work done by his (the plaintiff's) son, J. M., harvesting and haying at $1.25 per day—$8.75," is good, and properly claims for work done by the plaintiff by his son.—Brown v. Ramsay, 29 N. J. Law (5 Dutch.) 117.

[u] (N. J. 1894) Where the declaration alleges the breach of an express contract for certain service at a stipulated price, and does not con-

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tain a quantum meruit count, it is error to instruct the jury that the plaintiff may recover what his service was reasonably worth.—Martinez v. Runkle, 57 N. J. Law (28 Vroom) 111, 30 Atl. 593; Runkle v. Martinez, Id.

[uu] (N. Y. 1859) Where a party sues for work and labor, if there is a special contract, not completed or executed as to its terms, the plaintiff should state it, or refer to it, in his complaint, and allege a partial performance. If he fails to do so, the defendant may set it up, and it will be a good defense.—Atkinson v. Collins, 30 Barb. 430.

[v] (N. Y. 1884) The Code allows a statement of each cause of action, although arising out of one transaction. If one count is upon an agreed price, and another upon a quantum meruit, "unnecessary repetition" cannot be charged.—Longprey v. Yates, 31 Hun, 432.

[vv] (N. Y. 1885) A complaint, alleging that plaintiff agreed to do certain plastering for $85 per floor, and that he performed the work, and that defendant became indebted to him in the sum of $202, "and that the work was reasonably worth the sum," was broad enough to allow recovery on the common counts for work and labor done.—Gerhardt v. Amman, 2 City Ct. R. 104.

[w] (N. Y. 1887) A plaintiff, suing for services, alleging that they were reasonably worth a certain sum, and that defendant agreed to pay it, cannot be required to make his complaint more definite by electing between a quantum meruit and the specific agreement.—Goets v. Van Au, 12 Civ. Proc. R. 104.

[ww] (N. Y. 1891) A complaint which alleges that plaintiffs and another performed certain labor for and supplied materials to the defendants at their request, and that plaintiffs' colaborer assigned his rights against defendants to them, and that defendants had received moneys to the use and benefit of the plaintiffs, which they failed to pay over, shows a sufficient cause of action against the defendants.—Hodge v. Drake, 60 Hun, 577, 14 N. Y. Supp. 355.

[x] (N. C. 1892) Where the complaint alleged that defendant was indebted in a specific sum for work and labor, which defendant promised to pay, and which was due before suit commenced, it is sufficient to warrant a recovery either on express contract or on a quantum meruit.—Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 16 S. E. 415.

[xx] (Pa. 1896) A statement of a claim for work done and materials supplied must aver the amount or sum that each item is reasonably worth.—Murphy v. Taylor, 173 Pa. 317, 33 Atl. 1041, 37 Wkly. Notes Cas. 437.

[y] (S. D. 1892) A complaint alleging that defendant is indebted to plaintiff in the sum of $200 for work and labor performed by him for defendant during the year 1888 at defendant's request, for which work and labor said defendant agreed to pay plaintiff the sum of $200, but that defendant has not paid said sum, or any part thereof, states a sufficient cause of action, although subject to a motion to be made more definite and certain.—Busta v. Wardall, 3 S. D. 141, 52 N. W. 418.

[yy] (Tenn. 1871) A declaration for labor and materials furnished, alleging that defendant on a certain day, "by his certain account for work and materials rendered and proven, and now shown to the court, became liable to said plaintiff" in a certain sum, is not sufficient.—Stover v. Allen, 53 Tenn. (6 Heisk.) 614.

[z] (Tex. 1896) That part of a petition in an action to recover divers sums on account of the construction of a railroad, reciting: "At the special instance and request of defendants, plaintiff did work on said line of railway on the * * * dates set out in Exhibit C, which is filed herewith and made a part hereof, which said work consisted in building and repairing bridges, packing up track, loading and unloading pile timber, hauling iron, and repairing cars, as fully set out in said exhibit, in the aggregate to $135.67; that defendants thereafter received and accepted said work, and became liable to the plaintiff for the reasonable value thereof, to wit, the sum of $135.67"—is sufficiently certain in its allegations to present a good cause of action without any reference to the exhibit.—Laing v. Hanson (Civ. App.) 36 S. W. 116.

[zz] (Wash. 1895) The complaint, in an action to recover the balance due for work performed, need not allege a demand.—Robertson v. Woolley, 12 Wash. 326, 41 Pac. 48.

§ 42. Plea or answer and subsequent pleadings.

[a] (Ind. 1880) Plaintiff sued to recover for services rendered in preparing and amending articles of incorporation for a ditch company. The answer alleged that plaintiff guarantied that he would make said articles perfect and sufficient in law, but that the same had been, in a suit by certain third parties against said company, adjudged insufficient. It did not appear that plaintiff had any notice of such suit. *Held*, that the answer was insufficient for want of a direct averment that such articles were defective or insufficient.—Burns v. Stanley, 72 Ind. 350.

[b] (Ind. 1880) In a suit for services rendered by plaintiff for defendants in preparing and amending articles of incorporation for a certain ditch company, an answer averring that plaintiff was employed by such company after its incorporation, and that others than defendants are members, and are solvent and within the jurisdiction, without averring that the work which plaintiff was employed to do by the company was the same as that sued for, is insufficient on demurrer.—Burns v. Stanley, 72 Ind. 350.

[c] (Ind. 1883) To a common count for work done, defendant pleaded that he took plaintiff, a destitute child, as an act of charity and without contract, and provided for and educated him as a member of his family. *Held*, that the plea was bad in bar as not denying the implied contract, and bad as set-off, as it appeared that the acts of defendant were gratuitous.—Gerard v. Dill, 96 Ind. 476.

[d] (N. Y. 1852) In an action for work, etc., where the answer merely denies the allegations in the complaint, the defendant cannot, on the trial, insist upon an award of arbitrators as a bar to the action.—Brazill v. Isham, 1 E. D. Smith, 437, affirmed (1854) 12 N. Y. (2 Kern.) 9.

[e] (N. Y. 1864) In an action for work and labor performed, the answer, after admitting the performance, set forth in defense that the defendants, during the time of performance, had paid certain sums of money to the plaintiff in part payment for his services, and claimed that the sums so paid constituted a counterclaim against the plaintiff. *Held*, that the facts pleaded constituted a defense of payment only, and not a counterclaim, and therefore, though there was no reply, that the whole answer did not stand admitted.—Burke v. Thorne, 44 Barb. 363.

[f] (Or. 1879) An answer to a complaint for services rendered, denying that the defendants promised to pay a reasonable sum for such services, but not denying that the services were performed for defendants, raises no issue to be tried by a jury.—Louis v. Brown, 7 Or. 326.

[g] (Pa. 1896) In an action for work done and materials supplied, the affidavit of defense is sufficient if it alleges that defendant has a just, full, and true legal defense to the whole of plaintiff's claim, and that she made a con-

tract with plaintiff for the work and materials to be furnished, for a certain sum, payable on completion of the work, and that since the completion of the work she has always been ready and willing to pay him said sum, but that he always refused to accept it.—Murphy v. Taylor, 173 Pa. 317, 33 Atl. 1041, 37 Wkly. Notes Cas. 437.

[h] (S. C. 1896) In an action for labor performed, an answer admitting that the labor was performed, but alleging payment, and denying that defendant owed plaintiff the amount sued for, or any part thereof, does not admit that the sum sued for is due plaintiff, so as to entitle him to judgment.—Young v. Green, 46 S. C. 12, 23 S. E. 981.

[i] (Va. 1858) In assumpsit on the common count for work and labor, defendant, after pleading the general issue, pleaded specially that the action was founded on a special contract, subject to a condition precedent which had not been performed by the defendant. *Held*, that the special plea amounted to the general issue and must be rejected.—Baltimore & O. R. Co. v. Polly, 14 Grat. 447; Same v. Laffertys, Id. 478.

§ 43. Issues, proof, and variance.

[a] (Iowa, 1872) In an action on an account for work and labor performed, the plaintiff cannot recover on facts showing a guaranty by defendants that other parties would pay for the work.—Packard v. Snell, 35 Iowa, 80.

[b] (Ky. 1825) Counts for work and labor done by plaintiff "on defendant's walls" were not supported by evidence of work and labor done at the plaintiff's request on the farm of and for the benefit of another; but the count, to support such evidence, must have been special.—Scott v. Messick, 18 Ky. (2 T. B. Mon.) 80.

[c] (Ky. 1827) A count in indebitatus assumpsit for work done on defendant's wall is supported by proof of work on another's wall at defendant's request.—Scott v. Messick, 20 Ky. (4 T. B. Mon.) 535.

[d] (Ky. 1866) In an action for services alleged to have been rendered in 1863, it appeared that the services were rendered in 1864. *Held*, that this variance was not sufficient ground for a nonsuit, and that the evidence would support a verdict of the jury in favor of the plaintiff.—Gentry v. Doolin, 64 Ky. (1 Bush) 1.

[e] (Me. 1855) In an action by a deputy sheriff, with a count on an account annexed and for services performed, the account annexed was, "Your proportion of costs and expenses of suit, W. v. N." *Held*, that plaintiff might recover under "services performed" for the service of a writ in another action.—Nutt v. Merrill, 40 Me. 237.

[f] (Mass. 1827) A count for services rendered by a settled minister is supported by proof of preaching in private houses to such as chose to attend; the parish having prevented his preaching in the meeting house.—Thompson v. Catholic Congregational Soc. in Rehoboth, 22 Mass. (5 Pick.) 469.

[g] (Mass. 1874) A count on an account annexed for "labor" cannot be established by proof that, during a former partnership between the parties, defendant had not fulfilled his promise to employ some one to offset the services of an employé furnished by plaintiff.—Dodd v. Tarr, 116 Mass. 287.

[h] (Mass. 1875) A declaration for work performed for the defendant is not supported by a promise by defendant to see plaintiff paid for the work which he originally agreed to perform for another person.—Hogan v. Coleman, 119 Mass. 96.

[i] (Miss. 1844) In assumpsit for labor done, the allegation of the time of the promise is immaterial, and need not be proved as laid.—Hill v. Robeson, 10 Miss. (2 Smedes & M.) 541.

[j] (N. H. 1847) A declaration in general assumpsit for "ironing a wagon" is not supported by evidence that defendant had promised to do such work for plaintiff and had failed to do so.—Smith v. Mudgett, 20 N. H. 527.

[k] (N. H. 1856) A plaintiff, by limiting his claim to services performed between certain dates, may make those dates material, so that he cannot claim for services before or after.—Manchester & L. R. R. v. Fisk, 33 N. H. 297.

[l] (N. Y. 1834) Where an item in a bill was, "To 12,000 yards of hard-pan excavation, $3,600," the plaintiff was not held to 30 cents per yard, but was allowed to recover beyond that price; the defendant having come to trial prepared to contest the value of the work, thereby showing that he had not been misled.—Dubois v. Delaware & H. Canal Co., 12 Wend. 334.

[m] (N. Y. 1885) Where one who has performed work under a special contract sues for the price without setting up the contract, he must show performance, although the answer admits that he performed certain work, and merely denies allegations of value.—Farley v. Browning, 13 Daly, 85.

[n] (N. Y. 1887) A complaint alleged "that the plaintiff did between the years 1881 and 1885, at the request of said defendant, certain work, labor, and services, * * * of the value of $2,550." Then followed an allegation that no part of the claim had been paid and that demand had been made. The answer admitted that plaintiff performed certain work, labor, and services during the times mentioned, but averred that plaintiff's services had been fully paid for, etc., and demanded dismissal of the complaint. *Held*, that the only issue raised was that of payment.—McElroy v. Brooklyn Underground R. Co., 12 N. Y. St. Rep. 586.

[o] (N. Y. 1889) In an action on an alleged contract for plaintiff's services in the purchase of bonds, whereby plaintiff was to receive half the profits, the court found there was no contract, and that plaintiff rendered no services for which defendant promised, expressly or impliedly, to pay. Plaintiff made no request to amend his complaint so as to recover for the value of his services, and offered no evidence but in support of the alleged contract. *Held*, that he could not recover on the quantum meruit.—Rubino v. Scott, 118 N. Y. 662, 22 N. E. 1103.

[p] (N. C. 1853) To recover on the common counts for materials furnished and work done, it must be shown that the materials were received or used by defendant, and the work of value to him.—Byerly v. Kepley, 46 N. C. 35.

[q] (N. C. 1886) Under a complaint alleging employment and the rendition of services, plaintiff may recover on the special contract or on the common count.—Lewis v. Albemarle, & R. R. Co., 95 N. C. 179.

[r] (Tex. 1882) Where plaintiff sued for the value of services "as per contract," but the evidence showed that the services were rendered without any contract, it was error to permit a recovery on a quantum meruit.—Jones v. Brazile, 1 White & W. Civ. Cas. Ct. App. § 299.

[s] (Wis. 1873) Under a pleading in an action to recover for services alleged to have been rendered by plaintiff for defendant, averring that such services were rendered "within six years last past," plaintiff cannot recover for services rendered more than six years before the commencement of the action.—Paine v. Trumbull, 33 Wis. 164.

§ 44. —— Evidence admissible under pleadings.

Admissibility of evidence of defense and set-off, see post, § 45.

[a] (Ala. 1837) Where a declaration contains a count on a special agreement and on a quan-

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tum meruit for work and labor, and plaintiff waives the special agreement and proceeds to trial on the common counts, evidence may be offered in support of the common counts, over objection that plaintiff admitted that there was a special contract.—Blair v. Asbury, 4 Port. 435.

[b] (Ala. 1860) Where a bill of particulars, in an action for work and labor done, contains an item for work done on a granary, evidence is admissible to prove that the plaintiff put up a threshing machine in a shed on the side of the granary, consisting of a shaft made fast to the building and cogwheels to move it, and to show the value of such machinery, when the testimony does not operate as a surprise upon the adverse party.—Robinson's Adm'rs v. Allison, 36 Ala. 525.

[c] (Cal. 1864) In an action to recover for services, work, and labor performed under a contract, plaintiff, under an allegation of services performed by himself, may prove and recover for services rendered by an engineer under him, unless it appears by the nature and terms of the employment that the services of plaintiff himself were contracted for, and that no other person could under the agreement fill his place.—Leet v. Wilson, 24 Cal. 398.

[d] (Ind. 1841) In an action for work and labor performed for defendant on the "W. & E. Canal," evidence of work done on an extension of that canal is admissible, although the part extended is not uniformly called by the same name.—Ball v. McCall, 5 Blackf. 496.

[e] (Ind. 1864) Under a complaint for work and labor and service performed in the general language of the common count, and a bill of particulars in the language, "A. to B., Dr., to service, work, and labor," evidence is admissible to show that the services were rendered by plaintiff as foreman and general manager, and what their value thus rendered was; and such value can be deduced from all the circumstances of the case, including the success or failure to make money by such services.—Adams v. Adams' Adm'r, 23 Ind. 50.

[f] (Ind. 1893) In an action against an estate for services rendered the intestate, the second count of the complaint alleged that plaintiff lived till he was 26 years old with deceased, who then contracted to convey to plaintiff 80 acres of land if plaintiff would assist him in building a house on the land, and occupy it, and divide the crops with deceased, which contract plaintiff performed on his part, but deceased, dying, failed to convey the land; that plaintiff then sued defendant, as sole heir of deceased, to quiet title to the land, and obtained judgment that two thirds of the land was his, and one third belonged to defendant, as heir, and that, by reason of the failure of deceased to convey the land, he had lost title to one third thereof, valued at $1,667, which was due to him from the estate. *Held*, that the court properly admitted in evidence the pleadings and judgment in the suit to quiet title, since such evidence showed that defendant was the sole heir of deceased, and that all the debts except the one in suit were paid, and therefore tended to prove the averment in the present suit that plaintiff had been deprived of one third interest in the land.—Puterbaugh v. Puterbaugh, 7 Ind. App. 280, 33 N. E. 808.

[g] (La. 1840) In an action for work according to a bill of prices agreed on and extra work, plaintiff may prove the value of the whole work.—Collings v. Hamilton, 14 La. 339.

[h] (La. 1855) Where a person is sued for services of a certain amount, he may, under the general issue, prove a special contract to show their value.—Budreaux v. Tucker, 10 La. Ann. 80.

[i] (Miss. 1831) A complainant cannot, on a count for work and labor, introduce evidence as to the materials furnished.—Richardson v. Oneal, 1 Miss. (Walk.) 469.

[j] (Mo. 1889) In an action for materials furnished and work done without any special contract or separate price for any of the items, an objection does not lie to the introduction of any evidence under the petition because there is not attached thereto an account stating separately the value of each item.—N. O. Nelson Mfg. Co. v. Mitchell, 38 Mo. App. 321.

[k] (N. Y. 1829) Evidence of work done in 1820 could not be given under a bill of particulars specifying items of work for which a recovery was claimed, to which was attached the date of April 20, 1821.—Burr v. Baldwin, 2 Wend. 580.

[l] (N. Y. 1895) Proof of the value of services is not admissible in an action on a special agreement to pay a certain sum for the services.—Marston v. Baerenklau (City Ct. N. Y.) 11 Misc. Rep. 620, 32 N. Y. Supp. 785, judgment affirmed (Com. Pl. 1895) 13 Misc. Rep. 13, 33 N. Y. Supp. 994; Robinson v. Hunt, 88 Hun, 285, 34 N. Y. Supp. 794.

[m] (N. C. 1881) In an action to recover for services rendered, it was competent for plaintiff to prove that he was in the service of defendant for a longer period than that charged in his account, and to explain that the excess was the equivalent of time lost while he was in the defendant's employment.—McPeters v. Ray, 85 N. C. 462.

[n] (Ohio, 1854) Under a count alleging that in consideration of labor heretofore performed defendant promised to pay, etc., without averring a request, or that the promise was after the claim had been barred by the statute of limitations, evidence of the bar and the subsequent promise is admissible.—Haymaker's Ex'rs v. Haymaker, 4 Ohio St. 272.

[o] (Vt. 1895) In an action for deceit against one who induced plaintiff to marry him by false representations that he was single, and to live with him thereafter for over 30 years as his wife, where the complaint alleged that during such time defendant, with the aid of plaintiff's services, accumulated considerable property, evidence of defendant's wealth was admissible to show the value of such services.—Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

§ 45. — Defenses and set-off.

Set-off and counterclaim in general, see ante, § 36.

[a] (Ala. 1859) In an action to recover the value of work and labor done, defendant is entitled under the general issue to recoup the damages caused by the workman's breach of contract in his manner of performing the work, under Laws 1853–54, p. 60, providing that in all cases of defamation, or of injuries to the person or to real or personal property, a plea of not guilty puts in issue all the material allegations of the complaint, and in all suits where the defendant relies on a denial of the cause of action set forth he may plead the general issue.—English v. Wilson, 34 Ala. 201.

[b] (Cal. 1859) In a suit for services on a quantum meruit, negligence in performing them may be shown, under a denial that they were of the value alleged.—Bridges v. Paige, 13 Cal. 640.

[c] (Ind. 1891) In an action for services rendered, defendant may show, under an answer of general denial, that the services were rendered for a third person, for whom defendant was agent.—Gray v. Taylor, 2 Ind. App. 155, 28 N. E. 220.

[d] (La. 1873) Though plaintiffs sued for the value of work as a whole, without stating any specific value on his separate items, and defendant substantially accepted in his answer

the issue presented, it was competent for defendant to show by witnesses the separate value of each of the items which made up the aggregate work, in order that the correctness of the judge's charge might be properly arrived at. —Gordy v. Veazey, 25 La. Ann. 518.

[e] (Md. 1859) To a quantum meruit, under nonassumpsit, without a special plea, evidence that defendant supported plaintiff's family during the service sued for is admissible.—Brooke v. Quynn, 13 Md. 379.

[f] (Mass. 1863) The defense that an action for work and labor was prematurely commenced is not open, unless set up in the answer; and if the declaration contains two counts, the first of which is founded upon a special contract, by the terms of which nothing was due at the commencement of the action, and the second is a general count for work and labor, defendant cannot avail himself of the contract in defense to the second count, unless he sets it up in the answer.—Reed v. Inhabitants of Scituate, 89 Mass. (7 Allen) 141.

[g] (Mass. 1878) In an action under a count annexed for services, the defendant may, under the general denial in his answer, introduce evidence of the plaintiff's negligence and want of skill.—Caverly v. McOwen, 123 Mass. 574.

[h] (N. H. 1858) Upon the general issue to quantum meruit against an administrator for services rendered by plaintiff and his family while residing on the intestate's farm under agreement with him, benefits derived from the farm by plaintiff may be credited as payments for his services, without any set-off to plaintiff's demand being filed.—Ham v. Goodrich, 37 N. H. 185.

[i] (N. Y. 1854) Where the answer to a count on a quantum meruit set out a special contract for work, labor, and materials, while the proof was for work and labor only, this is not a variance affecting the substance of the defense, and is not material under the Code.—Cobb v. West, 11 N. Y. Super. Ct. (4 Duer) 38.

[j] (N. Y. 1855) Defendant, in a quantum meruit for work and labor, is entitled, under an answer containing a general denial of the complaint, to introduce evidence that the work was unskillfully done, or that it is worth less than the amount claimed.—Raymond v. Richardson, 4 E. D. Smith, 171.

[k] (N. Y. 1855) Where, in an action for work and labor on a building, the defendant specifies various defects in the work, and alleges generally that it was not performed in a workmanlike manner, he may prove defects other than those specially stated in the answer.—Trimble v. Stilwell, 4 E. D. Smith, 512.

[l] (N. Y. 1869) Plaintiff, in a complaint to recover for services rendered, alleged that defendant was indebted to him for such services in a certain amount, being the balance remaining due after sundry payments made by defendant; but the extent or value of the services was not stated. The answer was merely a general denial. *Held*, that defendant, upon these pleadings, should be allowed to prove payments made to plaintiff on account of the services alleged. The issue involved was not merely as to the agreement and the time which plaintiff worked, but necessarily as to the different payments made, so as to determine what, in fact, was the balance of defendant's debt.—Quin v. Lloyd, 41 N. Y. 349.

[m] (Or. 1871) Where, in an action for work and labor, the defendant seeks to show that the plaintiff did not labor diligently, he must raise the question by his answer.—Albee v. Albee, 3 Or. 321.

[n] (Pa. 1848) In assumpsit for work and labor done, under a plea of the general issue without notice of special matter, the defendant may prove that the work was done in an unworkmanlike manner.—Gaw v. Wolcott, 10 Pa. (10 Barr) 43.

[o] (Wash. 1895) In an action for services rendered, defendant cannot, under a denial that the services were of the value alleged, or of any value, show that the services were not rendered.—Buddress v. Schafer, 12 Wash. 310, 41 Pac. 43.

§ 46. —— Existence or denial of special contract.

[a] On a quantum meruit for services, plaintiff cannot recover on proof of a special agreement for the services.

—(Md. 1808) Cushman v. Sims' Adm'r, 2 Har. & J. 352;

(N. Y. 1827) Davenport v. Wheeler, 7 Cow. 231.

[b] (U. S. 1803) Upon general indebitatus assumpsit for a certain sum for work and labor, there must be evidence of an express promise to pay a certain sum.—Farrell v. Knapp, Fed. Cas. No. 4,684 [1 Cranch, C. C. 131].

[c] (Ala. 1846) Where plaintiff declares on the common counts for work and labor, he cannot recover, if it is proved that there was a special contract between the parties that plaintiff should receive a part of the crop, although the precise terms of the contract are not shown. —Snedicor v. Leachman, 10 Ala. 330.

[d] (Cal. 1894) In an action for services rendered by plaintiff's assignor, the complaint alleged that they were rendered at the special request of defendant. Defendant, in its answer, admitted that the services were rendered, and set out a copy of the agreement between such assignor and its manager. *Held*, that it was not error to admit such agreement in evidence against an objection by the defendant.—Caffrey v. Omilak Gold & Silver Min. Co., 36 Pac. 888, 652.

[e] (Ind. 1879) Where work has been done and materials furnished under a special contract, the contract having been fully performed in an action upon the common counts, the special contract and the performance thereunder may be proved.—Shilling v. Templeton, 66 Ind. 585.

[f] (Kan. 1896) The indebitatus common count may be declared on, and a recovery thereunder had, in an action brought to recover money due plaintiff for personal services rendered under a contract fully performed on his part, nothing remaining to be done except payment by defendant; and a cause of action may be established by evidence of either a special or an implied contract.—Schwartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41.

[g] (Kan. 1896) When the petition in an action brought to recover money due plaintiff for personal services rendered under a contract fully performed on his part, nothing remaining to be done except payment by defendant, consists of only the indebitatus count, and plaintiff introduces evidence to prove the reasonable value of the services performed, defendant may show, under a general denial, that the amount or value of the services was fixed by a special contract; and, if a special contract is proven, it governs as to the amount which plaintiff can recover.—Schwartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41.

[h] (La. 1833) In an action on a quantum meruit for work, defendant may prove a contract signed by plaintiff and a third person, to prove the former's assent to do the work for less than demanded.—Foster v. Kokernot, 5 La. 260.

[i] (Me. 1848) Plaintiff declared only upon an implied contract for services performed, and the proof was that they were performed under a special contract and for a person other than de-

fendant, who had no connection with the transactions until long afterwards. *Held*, that plaintiff could not recover by proof of a promise by defendant to pay such debt, and that there ought to have been a count upon the promise to pay the debt of the other person.—Parker v. Emery, 28 Me. (15 Shep.) 492.

[j] (Me. 1862) In an action to recover for labor done, if defendant, in the specification of his grounds of defense, does not deny the performance of the labor, but admits it, and alleges a special contract and payment, plaintiff will not be required to offer proof of its performance, to entitle him to some portion of the damages claimed, unless defendant shall establish by evidence some ground of defense.—Skillings v. Norris, 50 Me. 72.

[k] (Mass. 1868) In an action for services rendered, plaintiff, without being first compelled to elect whether he would rely on an implied contract, may offer evidence of an express agreement, and at the same time show that the services were rendered under such circumstances as to imply an agreement.—Packard v. Reynolds, 100 Mass. 153.

[l] (Mich. 1879) A declaration on the common counts will not support a claim to recover for six months' services at $125 upon evidence of an express agreement for two years' employment at $1,500 a year if satisfactory to the employer.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

[m] (Minn. 1894) In an action on a quantum meruit for work performed, defendant cannot, under a mere denial, avail himself of an express contract as to the price as a defense to the action.—Register Printing Co. v. Willis, 57 Minn. 93, 58 N. W. 825.

[n] (Mo. 1852) A written agreement, not under seal, and having been executed, need not be declared upon, but may be given in evidence in an action of assumpsit for services rendered under it.—Carroll v. Paul's Adm'r, 16 Mo. 226.

[o] (Mo. 1896) The disclosure of a special contract at the trial of an action on a quantum meruit will not defeat the action, but will merely limit the amount of recovery.—Henderson v. Mace, 64 Mo. App. 393, 2 Mo. App. Rep'r, 1009.

[p] (N. Y. 1885) One suing for the price of work done under a special contract must prove the performance of the contract, even though he does not set it up.—Farley v. Browning, 15 Abb. N. C. 301.

[q] (N. Y. 1888) In an action for work performed, it is not error, under a general denial, to reject evidence offered by defendant to show that plaintiff was hired and had been paid by defendant's contractor.—Fox v. Turner, 49 Hun, 610, 2 N. Y. Supp. 164.

[r] (N. C. 1889) Where a complaint alleges that defendant is indebted to plaintiff $1,440 "for services performed as clerk in defendant's store at $20 a month," giving the time of employment, plaintiff may prove services either on special contract or the quantum meruit, within Code, § 260, providing that pleadings shall be liberally construed, with a view to substantial justice.—Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566.

[s] (Pa. 1889) Under a quantum meruit for literary services rendered, no recovery can be had on proof that defendant's testator was to publish a book to be written by plaintiff, the profits to be divided between them after the cost of publication was paid.—Appeal of Keyser, 124 Pa. 80, 16 Atl. 577, 23 Wkly. Notes Cas. 201.

[t] (Vt. 1844) Under a plea of the general issue in indebitatus assumpsit for work and labor for defendant's father, defendant may show, as tending to prove that there was no contract of employment between plaintiff and her father, that when she came to reside in her father's family she brought with her several small children, who were maintained in the father's family at his expense.—Fitch v. Peckham, 16 Vt. 150.

[u] (Va. 1811) In general assumpsit for services rendered, plaintiff cannot show that defendant had employed him and was to pay him a certain quantity of tobacco.—Brooks v. Scott's Ex'r, 2 Munf. 344.

(C) EVIDENCE.

PRESUMPTIONS AND BURDEN OF PROOF, § 47.
— CONSIDERATION FOR AND PURPOSE OF SERVICES, AND RELATIONS BETWEEN PARTIES, § 48.
— REBUTTAL OF PRESUMPTIONS ARISING FROM RELATIONS BETWEEN PARTIES, § 49.
ADMISSIBILITY, § 50.
— GRATUITOUS SERVICES AND RELATIONS BETWEEN PARTIES, § 51.
— AMOUNT OF COMPENSATION AND VALUE OF SERVICES, § 52.
— SPECIAL CONTRACT, § 53.
— SKILL OF PLAINTIFF AND SUFFICIENCY OF PERFORMANCE, § 54.
WEIGHT AND SUFFICIENCY OF EVIDENCE, § 55.

Declarations and statements of employer who is related to employé as evidence of promise or expectation of remuneration, see ante, § 13.

§ 47. Presumptions and burden of proof.

[a] (Cal. 1861) In an action for work and labor, where defendant denies a portion of the items alleged, the burden is on plaintiff to establish the same.—Caulfield v. Sanders, 17 Cal. 569.

[b] (Cal. 1890) On a quantum meruit for services defendant has the burden of proving a special contract as to time and price under which he alleges the work was done.—Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659.

[c] (Ill. 1871) When plaintiff declares generally for work and labor done and materials furnished, and defendant files the general issue, with notice that he will insist on the trial that the work was performed under a written contract, the burden of proof is not thrown upon plaintiff to show an abandonment of the special contract until defendant has proved the averment in his notice.—Robinson v. Parish, 62 Ill. 130.

[d] (Mich. 1879) In an action on the common counts for labor performed, to which the general issue was pleaded, the burden was on plaintiff to show that he did the work, and the contract under which it was done; and an instruction was properly refused that, "if plaintiff has proved his services at defendant's request he has established a prima facie case, and the burden is on defendant to show the work was done under special contract, and not as claimed by plaintiff."—Berringer v. Lake Superior Iron Co., 41 Mich. 305, 2 N. W. 18.

[e] (Pa. 1883) An aged lady resided with her nephew for a considerable period prior to her death. Settlements were made monthly for her board, except for the month running at her death. On her decease, the wife of the nephew presented a claim for nursing during her sickness. *Held* that, as no claim was made prior to her death, the presumption was that the settlements were in full of all demands.—In re Springer's Estate, 2 Chest. Co. Rep. 44.

[f] (Pa. 1883) Where a claim for services is against the estate of a decedent, and the evidence does not show a demand in his lifetime, there is a presumption of payment.—In re Dunwoody's Estate, 40 Leg. Int. 416.

[g] (Pa. 1883) Where a claimant has rendered services to a decedent, and no demand has been made for a long period of time, the law presumes a payment.—In re Kelly's Estate, 14 Wkly. Notes Cas. 423.

[h] (Pa. 1887) Where claims for services alleged to have been rendered are delayed in their presentation as legal demands until after the death of the alleged debtor, every fair intendment will be made against them.—In re Hollin's Estate, 44 Leg. Int. 48.

§ 48. —— Consideration for and purpose of services, and relations between parties.

[a] (Cal. 1863) The legal presumption that a person enjoying the benefit of another's services is bound to pay for them may be rebutted by proof of a special agreement to pay therefor in a particular manner, or that the services were intended to be gratuitous, or even by particular circumstances, from which the law would raise the counter presumption that the services were not intended to be a charge against the party benefited thereby.—Moulin v. Columbet, 22 Cal. 508.

[b] (Ill. 1878) There is no legal presumption of an intent to charge for services rendered, or to be charged for those received, by one who goes to live in another's family with the understanding that he is to go and come and work as he pleases, and be treated and entertained as a member of the family.—Dunlap v. Allen, 90 Ill. 108.

[c] (Ill. 1879) Where services are rendered at the request of another, the burden of proof falls on the party who declares that by agreement there was to be no compensation.—Doggett v. Ream, 5 Ill. App. (5 Bradw.) 174.

[d] (Ill. 1891) Where there is no relationship between parties, one of whom performs a service for the other, the presumption is that it is to be paid for, and the burden will be upon the one receiving the service to show that it was agreed to be performed without remuneration.—Linn v. Linderoth, 40 Ill. App. 320.

[e] (Ill. 1896) In an action for work, labor, and services performed, the party affirming that a certain compensation was agreed upon for such work, labor, and services has the burden of proving the same.—Howard v. Gobel, 62 Ill. App. 497; Gobel v. Howard, Id.

[f] (La.) Services, proved to have been useful and laborious, rendered to a sick person by a nurse, who visited him at his request, defraying herself the expenses of conveyance to his residence, will not be presumed to have been gratuitous.—(1844) McManus v. Lemee, 9 Rob. 115; (1846) Camfrancq v. Pilie, 1 La. Ann. 197.

[g] (Me. 1869) Where valuable services are rendered for another at his request or with his consent, he has the burden of proof where he affirms, to avoid payment therefor, that they were a gratuity, or that the person performed them only with the expectation that he would receive a portion of the other's property by will.—Rumrill v. Adams, 57 Me. 565.

[h] (Neb. 1881) In an action for work and labor, the answer admitted the performance of the same, but alleged that the services were to be rendered gratuitously. *Held*, that the burden was on defendant to prove that all the services were gratuitous.—Ewarth v. Nier, 11 Neb. 441, 9 N. W. 569.

[i, j] (Pa. 1870) Where a child claims services against his father's estate, the presumption is against him, and the onus is on the child to show a contract to pay wages.—Titman's Adm'r v. Titman, 64 Pa. (14 P. F. Smith) 480.

[k] (Pa. 1878) The implied assumpsit to pay for the performance of labor may be rebutted by any proof that shows an intention to give and receive without compensation, without regard to the mere question of relationship.—In re Cousty's Estate, 35 Leg. Int. 198.

[l] (Pa. 1880) Though relationship, except in case of parent and child, does not itself rebut the presumption that a promise to pay is intended where personal services are rendered, it tends to rebut such presumption, and, if accompanied by other evidence, is sufficient.—Appeal of Horton, 94 Pa. 62.

[m] (Pa. 1881) Where a person serves in the capacity of a servant, and no demand for wages is made for a considerable period after such service, the presumption is that the wages have been paid, or that the service was to be performed without pay.—Appeal of McConnell, 97 Pa. 31.

[n] (Pa. 1881) An executor made a claim against the estate for services rendered the testator. The claimant was a son-in-law of the testator, in his employ, and in the employ of the firm of which the testator was the principal partner, at an adequate salary, and lived in a house of the testator without rent, and made no claim for the services during the testator's life. *Held*, that any presumption that the services were rendered on a promise of payment was strongly rebutted.—Appeal of Welch, 1 Penny. 9.

[nn] (Pa. 1884) Where no demand is made for 20 years by a sister of a brother for services in furnishing him board, there can be no presumption that any compensation was intended.—In re Picken's Estate, 14 Wkly. Notes Cas. 407.

[o] (Pa. 1885) Where a claim is made for wages, and there is no evidence of any demand in the lifetime of the alleged debtor, it will be presumed that the services were rendered gratuitously, or that payment was made as it became due.—In re Larkin's Estate, 16 Wkly. Notes Cas. 541.

[p] (S. C. 1848) In an action of general indebitatus assumpsit for services rendered defendant's testatrix in her lifetime, the law will not presume a promise to bequeath a legacy to plaintiff in payment of such services.—Hunter v. Hunter, 3 Strob. 321.

[q] (Vt. 1883) Where one living in defendant's family as a member thereof left the same with an agreement that the family relations had ceased, and in a few weeks returned and resumed the relations formerly existing, and afterwards sued defendant for household services performed on her return, the burden is on her to produce evidence enough to establish an express contract on the part of defendant to pay therefor, and to overcome the presumption that she was at work for her support.—Ashley v. Hendee, 56 Vt. 209.

[r] (Wis. 1891) Where a contract did not provide compensation for certain services separate from those for which compensation was provided, the burden is on the person receiving the benefit of such services to show that they were to be performed gratuitously.—Link v. Chicago & N. W. Ry. Co., 80 Wis. 304, 50 N. W. 335.

§ 49. —— Rebuttal of presumptions arising from relations between parties.

[a] (Md. 1893) Appellant had lived with her grandfather since she was four years old, and after majority continued in his family, rendering the same services as before. He never paid her any wages, nor promised her any. Two witnesses testified that he had said he intended to pay her, and would see her well paid. Litigation having arisen respecting his estate during his life, she accepted a settlement with the rest of the heirs, but afterwards filed a claim for wages for over nine years. Though her

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grandfather was still alive, she obtained no indorsement of the claim from him. *Held*, that she had not overcome the presumption that her services were gratuitous.—Bixler v. Sellman, 77 Md. 494, 27 Atl. 137.

[b] (Mo. 1888) Where the persons occupy a family relation, as that of father and son, the presumption of law is against the existence of a contract to pay for services rendered, and to overcome such presumption and establish the contrary the evidence must be clear and satisfactory.—Woods v. Land, 30 Mo. App. 176.

[c] (N. Y. 1867) When a relative, more distant than a child, goes to live with a person at his request, the presumption that such relative lives with the person as a member of the family, and not as a servant, is less strong than in the case of a child; and slight circumstances will be sufficient to overcome it.—Thornton v. Grange, 66 Barb. 507.

[d] (N. Y. 1894) The presumption that services rendered to decedent in his last illness by his daughter were gratuitous is overcome where it appears that the daughter was married, and at the beginning of her father's sickness left her home, and at his request stayed with him until he died, and he said that she should be paid for it.—In re Strickland's Estate (Sur.) 10 Misc. Rep. 486, 32 N. Y. Supp. 171.

[e] (N. C. 1887) Where a grandfather takes his granddaughter into his family, a presumption arises against a promise to pay for the services performed, and such presumption is not overthrown by occasional declarations of the grandfather that she was a good girl and should be paid for her services.—Dodson v. McAdams, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408.

§ 50. Admissibility.

[a] (U. S. 1803) The plaintiff's own oath is not evidence in an action for work and labor, unless made within one year from the date of the articles charged.—Farrell v. Knapp, Fed. Cas. No. 4,684 [1 Cranch, C. C. 131].

[b] (Cal. 1891) A tenant, in an action against his landlord for money expended and work done, testified that he was induced to go on the land by the verbal promise of the landlord that he would give him a five-year lease, and that after his removal he refused to execute it, but told him to go on and cultivate the land, and that he would pay him for the work. *Held* not inadmissible, as proving a lease for more than one year that is not in writing, where the tenant claimed nothing under a lease, and the testimony was intended only to explain how he came to be upon the land.—Salle v. Mayer, 91 Cal. 165, 27 Pac. 513.

[c] (Ill. 1844) Defendant contracted to sell certain land, and bound himself to make certain improvements. Having failed to make such improvements, the matter was submitted to arbitrators, and an award was made, and defendant, refusing to comply therewith, sued in ejectment and dispossessed plaintiffs. The plaintiffs sued defendant in assumpsit on the common counts for work and labor and for money lent, and to recover back the payments they had made on the original contract, on the ground that it was abandoned. *Held*, that the proceedings in the ejectment suit were admissible to show an abandonment of the contract by the defendant.—Bannister v. Read, 6 Ill. (1 Gilman) 92.

[d] (Ill. 1895) Plaintiffs, who had purchased a machine for sinking wells, brought an action to recover for services in sinking a well, it appearing that the well was the first one sunk with the new machine. *Held*, that evidence showing that when the machine was bought they made offers to put down the first well for the cost of the tubing and pump was competent.—Devine v. McMillan, 61 Ill. App. 571.

[e] (Iowa, 1895) Where defendant, in an action by a minor for services, alleges that the services were to be paid for by his care and education of plaintiff, evidence as to amount of clothing furnished, of plaintiff's ability for work, and the amount and quality of his work, is admissible.—Resso v. Lehan, 96 Iowa, 45, 64 N. W. 689.

[f] (Iowa, 1895) Where one who took a minor to live in his family is sued by the minor for services, evidence as to how long plaintiff was with the person from whom defendant received him, what efforts had been made to get him a home, and whether plaintiff considered himself defendant's adopted son, are immaterial.—Resso v. Lehan, 96 Iowa, 45, 64 N. W. 689.

[g] (Iowa, 1895) In an action by a minor for services, evidence that defendant promised to give plaintiff a sum of money, and a team and harness, if he continued to live with him till a certain time, is admissible to show that he expected to pay for plaintiff's services.—Resso v. Lehan, 96 Iowa, 45, 64 N. W. 689.

[h] (Md. 1889) In an action on the common counts by a man of limited means against the executors of a wealthy person to recover for services during a period of 25 years, on which nothing had been paid, defendants may show that plaintiff, at a time when testator owed him a large sum, applied to testator for, and obtained, on behalf of his firm, a loan of less than half the amount he asserted to be due him, for which he gave the firm note, with interest.—Stoner v. Devilbiss, 70 Md. 144, 16 Atl. 440.

[i] (Md. 1889) The exclusion of evidence that testator had good business qualifications, and was strong, mentally and physically, is not error, where plaintiff does not rely on proof to the contrary to establish his employment, and one of his own witnesses has testified to the same facts.—Stoner v. Devilbiss, 70 Md. 144, 16 Atl. 440.

[j] (Md. 1889) Evidence that said firm was indebted, during the time said services were rendered, to others besides defendants' testator, is incompetent.—Stoner v. Devilbiss, 70 Md. 144, 16 Atl. 440.

[k] (Mass. 1855) In an action for work and labor a timebook kept by defendant of the days on which the plaintiff worked is not admissible, with defendant's suppletory oath, to show that the plaintiff did not work on certain days.—Morse v. Potter, 70 Mass. (4 Gray) 292.

[l] (Mass. 1861) In an action to recover the price of labor, in which the defense is that the labor was performed on the credit of a third person, evidence of an offer by such third person, after the commencement of the action, to pay the plaintiff for the same, is incompetent.—Larry v. Sherburne, 84 Mass. (2 Allen) 34.

[m] (Mich. 1867) Plaintiff, having maintained for some years a set of range lights and stakes on certain flats to aid vessels in navigating a channel, relying on such compensation as he could obtain from vessel owners, brought suit against defendant for the value of such services rendered to his tugboat for the season of 1864, and offered evidence that defendant was the owner of steam tugs engaged in towing vessels through such channel, and had paid $25 for the use of such lights for the season of 1863. *Held*, that the testimony relating to the payment by defendant of the $25 was competent, as it tended to show that defendant had been fully informed at to the nature of plaintiff's services, and had acknowledged their value and a willingness to pay for them.—Strong v. Saunders, 15 Mich. 339.

[n] (Mich. 1890) In a suit for services on defendant's farm, in the absence of testimony to show how much of the work of clearing the farm was done by plaintiff, it was error to al-

low him to state how much clearing was done on defendant's farm while he was there.—Alderton v. Wright, 81 Mich. 294, 45 N. W. 968.

[o] (Nev. 1872) In an action for labor performed for an association of lessees of a mill, leases and contracts under which the lessees prosecuted the work are admissible in evidence to show the character of the association and establish their interest in the labor on which the plaintiff was employed.—Fulton v. Day, 8 Nev. 80.

[p] (N. H. 1875) In assumpsit to recover the price of manufacturing shoes, in which it appears that defendant had never directly employed plaintiff, nor held out any person as his agent, but that a third person carried the materials to plaintiff, and employed him to manufacture the shoes and return them to defendant, the latter may properly be permitted to show that he employed such third person to manufacture the shoes for him, and paid him therefor.—Caverly v. Balcom, 55 N. H. 566.

[q] (N. J. 1859) In an action to recover for services rendered in attending a horse, evidence that plaintiff had claimed and received an interest in the earnings of the horse is competent.—Dennis v. Van Vay, 28 N. J. Law (4 Dutch.) 158.

[r] (N. J. 1864) In an action for services in keeping a horse, against two persons as joint owners, evidence that the shoeing of the horse has been charged to one of the defendants alone by a third person is not admissible to prove that there is no joint liability.—Dennis v. Van Voy, 31 N. J. Law (2 Vroom) 38.

[s] (N. Y. 1888) In an action against a father's executors to recover for work, it appeared that plaintiff lived for many years with his family on the farm and in the house of his father; that he worked some on the farm, but was away the larger portion of the time; that he built additions to the house, and occupied them himself, and paid for many articles brought to and used on the farm; and that he ate at his father's table most of the time, furnishing much of the provisions, and paid his father for the produce of the farm while residing thereon. *Held* that, as he failed to establish a promise of payment, the questions as to how much and whose money he expended for the benefit of the testator were immaterial, and were properly excluded.—Havens v. Havens, 50 Hun, 605, 3 N. Y. Supp. 219.

[t] (N. Y. 1891) In an action for repairs to the engine of defendant's yacht made at the request of its engineer, where the engineer has testified that he returned the first bill rendered by plaintiff for corrections, which were made so that the bill as rendered the second time was correct, it is not error to allow him to testify that an indorsement on the face of it to that effect was in his handwriting.—Avery v. Starbuck, 127 N. Y. 675, 27 N. E. 1080, affirming (1889) 57 N. Y. Super. Ct. (25 Jones & S.) 597, 5 N. Y. Supp. 779.

[u] (N. Y. 1895) In an action to charge defendant with the value of services rendered on premises in possession of defendant's lessee, the lease is admissible to show the relation of defendant to the premises, and to the work done by plaintiff.—Miller v. Lawrence (Com. Pl.) 13 Misc. Rep. 130, 34 N. Y. Supp. 161.

§ 51. —— Gratuitous services and relations between parties.

[a] (Ill. 1892) In an action by a divorced wife for services rendered her husband after the divorce, where the defense is that they were rendered gratuitously, evidence that a son of the parties living with the husband asked her to come and do the housework is admissible on showing that the son acted with his father's knowledge and consent.—Fagan v. Fagan, 46 Ill. App. 202.

[b] (Ind. 1885) Where a woman sues a claim for services, consisting of nursing her father-in-law, evidence that she and her husband lived in the father's house as members of his family is admissible.—Johnson v. Johnson, 100 Ind. 389.

[c] (Iowa, 1887) In an action against an executor to recover for work and labor performed by plaintiff for her deceased father after she had attained her majority, the will of the decedent, executed after the alleged services had been performed, showing that the testator had bequeathed to each of his children, including plaintiff, a certain sum, and the balance of his estate to grandchildren, is not admissible to show that decedent had no intent or expectation to pay the plaintiff for her services.—Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. 496.

[d] (Mass. 1895) Where, in an action for services rendered, defendant sets up that the services were gratuitous, plaintiff may show that when he entered on the work he was engaged in a business in which he was earning from $3 to $10 a day, and that he expected to be paid.—Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105.

[e] (Mich. 1882) To show that services rendered to a city were gratuitous, evidence is not admissible that the person rendering the services did not make claim for compensation to persons who were without authority to pay him or to make a binding agreement that he should be paid.—McBride v. Grand Rapids, 49 Mich. 239, 13 N. W. 581.

[f] (Mich. 1889) In an action of assumpsit for services by a stepdaughter against her stepmother, evidence that plaintiff did not know that she was entitled to her wages after she came of age is incompetent.—Feiertag v. Feiertag, 73 Mich. 297, 41 N. W. 414.

[g] (Mo. 1883) In an action for services by one who was claimed by the defense to have rendered them as a member of the family, the will of the head of the family, leaving plaintiff considerable property, is admissible in support of the claim.—Cowell v. Roberts' Ex'r, 79 Mo. 218.

[h] (N. H. 1895) In an action for services, where plaintiff claimed that defendant promised to pay therefor, and defendant claimed that the services were rendered without expectation of payment, evidence may be admitted of the extent of defendant's farm, for the purpose of showing the necessity of his employing assistants.—Mudgett v. Emerson, 67 N. H. 234, 30 Atl. 343.

[i] (N. Y. 1890) In an action for services rendered by plaintiff to her deceased grandfather, declarations of decedent that plaintiff "had not been paid, but should be paid," are admissible in connection with the evidence of the original request for such services.—Walters v. Mayhew, 55 Hun, 612, 8 N. Y. Supp. 771.

[j] (Vt. 1844) In an action for services rendered by a daughter to her father, the last will of the father, together with a prior one executed by him, each containing bequests to the plaintiff, are admissible in evidence to show the understanding of the parties as to payment, in connection with evidence of admissions made by the plaintiff that no contract was made in relation to the services and no account kept, and that she was satisfied with the provision made for her by the will.—Fitch v. Peckham, 16 Vt. 150.

§ 52. —— Amount of compensation and value of services.

Special contract, see post, § 53.

Account books as evidence, see "Evidence," vol. 20, cc. 2042-2044, § 1450.

—— *of mechanics as evidence, see* "Evidence," vol. 20, c. 2019, § 1484.

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Evidence of value of services in general, see "Evidence," vol. 20, cc. 356-360, §§ 254, 255.
Expert evidence, see "Evidence," vol. 20, cc. 3382, 3383, § 2331.
Opinion evidence, see "Evidence," vol. 20, cc. 3283, 3284, § 2272.

[a, b] (Colo. 1896) In an action for work and labor, on an issue as to the value of services, the employer's testimony as to what such services would be worth in the community was properly rejected.—Andrews v. Johnston, 7 Colo. App. 551, 44 Pac. 73.

[c] (Conn. 1848) In assumpsit for labor and materials furnished in building a house for defendant, defendant claimed that the labor and materials were furnished under a special contract, and it appeared that a bill of particulars exhibited by plaintiff referred to such contract. *Held*, that evidence on plaintiff's behalf to prove the value of the labor and materials was admissible on the question of damages.—Bishop v. Perkins, 19 Conn. 300.

[d] (Conn. 1874) Where plaintiff sued for services in purchasing a mill for the defendant, and he was not a real estate broker, and no agreement was made as to the amount of his compensation, in an action for work and labor to recover what the services were reasonably worth, the evidence of a real estate broker as to the commission that he charged for such a service, and as to what he would have charged in the case at issue, was admissible.—Elting v. Sturtevant, 41 Conn. 176.

[e] (Iowa, 1882) In an action for work and labor performed, the usual and customary price of the labor can only be shown by evidence of the wages actually paid at the same time and place for similar labor, either under express or implied contracts; and an instruction to the effect that proof of such contracts would not establish the reasonable value of plaintiff's labor was properly refused.—Jenks v. Knotts Mexican Silver Min. Co., 58 Iowa, 549, 12 N. W. 588.

[f] (Iowa, 1888) In a suit for the reasonable worth of services on a farm, evidence showing how much stock and how large a farm the defendant had is not competent.—Stanley v. Barringer, 74 Iowa, 34, 36 N. W. 877.

[g] (Iowa, 1896) Evidence that plaintiff boarded himself when he worked for intervener is admissible on the value of the services performed for intervener.—Kassing v. Walter, 65 N. W. 832.

[h] (Kan. 1893) In an action for services rendered, in order that a witness may testify as to the value of such services, their rendition need not be conclusively shown; but it is sufficient if there is evidence tending to establish the claim.—St. Louis & S. F. R. Co. v. Kirkpatrick, 52 Kan. 104, 34 Pac. 400.

[i] (Ky. 1809) On a quantum meruit for services as a clerk, evidence of what other clerks had received for similar services is admissible.—Murray v. Ware's Adm'r, 4 Ky. (1 Bibb) 325, 4 Am. Dec. 637.

[j] (Ky. 1832) On a quantum meruit for services, evidence of what a third person charges is not competent, as the inquiry should be directed to the value of the services rendered by such person.—French v. Frazer's Adm'r, 30 Ky. (7 J. J. Marsh.) 425.

[k, l] (Ky. 1895) On an issue as to the value of plaintiff's services performed in repairing machinery sold by defendant to an ice company, testimony by the president of the ice company as to the loss sustained by it by reason of defendant's failure to repair the machinery prior to plaintiff's employment, and that plaintiff successfully repaired the machinery, is competent.—Hercules Iron Works v. Dugan, 33 S. W. 204.

[m] (Md. 1892) In an action for a balance due for work and materials, defendants offered to prove that persons of experience had made estimates in writing of what their price would be for similar work and materials, which was much less than that charged by plaintiff. *Held*, that the estimates were properly excluded.—Morris v. Columbian Iron Works & Dry Dock Co., 76 Md. 354, 25 Atl. 417, 17 L. R. A. 851.

[n] (Mass. 1810) On a quantum meruit count for services, an offer of defendant to pay a certain sum to any one who would perform them is proper evidence for ascertaining what is a reasonable compensation.—Symmes v. Frazier, 6 Mass. 344, 4 Am. Dec. 142.

[o] (Mass. 1865) In an action to recover for labor in erecting a building, evidence of the comparative value of the services of an architect and joiner is incompetent.—Shepard v. Ashley, 92 Mass. (10 Allen) 542.

[oo] (Mich. 1882) Plaintiff agreed to work for defendant for specified wages and "good farmer's living," as long as the parties should agree. *Held*, that plaintiff, in a suit on the common counts to recover for his services, might show the value of the services rendered and the quality of the living.—Shulters v. Searls, 48 Mich. 550, 12 N. W. 697.

[p] (Mich. 1885) In assumpsit for labor and materials furnished, evidence that plaintiff charged defendant therefor the same prices as he did others does not tend to prove the reasonable value of the work and materials.—Richmond v. Atkinson, 58 Mich. 413, 25 N. W. 328.

[pp] (Mich. 1887) In an action of assumpsit, when plaintiff gives evidence to prove that he had performed work and labor for defendant, it is proper to ask him how much his services were worth.—McDonald v. McDonald, 67 Mich. 122, 34 N. W. 276.

[q] (Mich. 1889) In an action of assumpsit for services by a stepdaughter against her stepmother, evidence as to what plaintiff earned at dressmaking before she came to live with her stepmother was incompetent.—Feiertag v. Feiertag, 73 Mich. 297, 41 N. W. 414.

[qq] (Mich. 1895) Where a conveyance of land by a father to his child for services is void, because it includes the homestead of the grantor, the value of the land is admissible to prove the value of the services.—Sammon v. Wood, 107 Mich. 506, 65 N. W. 529.

[r] (Mo. 1888) In an action to recover compensation for services rendered, where the evidence shows that no charge was intended when the services were performed, evidence of the value of such services, or of a custom among other persons having reference to compensation for them, is irrelevant.—Hoolan v. Bailey, 30 Mo. App. 585.

[rr] (Mo. 1894) In an action to recover on a quantum meruit for services in nursing a sick person, evidence of the loathsome nature of the disease is admissible in determining the compensation to be paid; but plaintiff is not entitled to show damages to his residence resulting from such disease.—Crowe v. Gallenkamp, 58 Mo. App. 396.

[s] (N. H. 1855) In an action for services in building a railroad, entries in the contractor's books of prices paid to his workmen are not evidence against him of the prices he was to receive. If the question is of the reasonable value of his services, they are admissible, because they tend to show the worth of one item of his claim; that is, of the labor employed.—Currier v. Boston & M. R., 31 N. H. (11 Fost.) 209.

[ss] (N. H. 1862) In assumpsit for nursing and taking care of defendant in sickness, it is material that plaintiff and his wife took the principal care, that plaintiff's wife was the prin-

cipal nurse, that this care and treatment was kind and considerate, and that defendant was dangerously ill and in a critical situation; and evidence on these points is relevant.—Smith v. Smith, 43 N. H. 536.

[t] (N. H. 1864) Where the value of services in obtaining subscriptions to an enterprise is drawn in question in an action to recover for the labor performed, the correspondence between plaintiff and others interested in the subject was admissible as bearing on the extent of the services.—Low v. Connecticut & P. R. R., 45 N. H. 370.

[tt] (N. Y. 1850) A special agreement, made between a father and his minor daughter for services, where the daughter continued such services after her majority, whether void or not, is admissible upon the question of damages in a suit by the daughter against the executors of her father's estate to recover the value of such services.—Fort v. Gooding, 9 Barb. 371.

[u] (N. Y. 1871) In an action on a quantum meruit for services performed under a contract void by the statute of frauds, the rate of compensation fixed by the agreement during the whole term of the contract is not even prima facie evidence as to the value of the services, where at the commencement of the term of service the plaintiff was ignorant of the business in which he was employed, and ordinary skill therein was only acquired by instruction and practical experience for a considerable time.—Galvin v. Prentice, 45 N. Y. 162, 6 Am. Rep. 58.

[uu] (N. Y. 1873) In an action to recover for work and labor as a carpenter and joiner, it was not error to admit evidence tending to prove what the services of good carpenters and joiners were worth at the time and place of performing the work, and that plaintiff was a good and fast workman, as he was presumptively entitled, in the absence of any special agreement as to the rate of wages, to recover according to the ruling price of wages at the time and place for workmen of like character.—Major v. Spies, 66 Barb. 576.

[v] (N. Y. 1887) In an action for the value of services as a nurse, evidence of a scale of charges for nursing, fixed by the nurses of a hospital in the city where plaintiff's services were rendered, is inadmissible.—De Witt v. De Witt, 46 Hun, 258.

[vv] (N. Y. 1896) Evidence as to the amount of profits earned by plaintiff in his own business while attending to defendant's business was immaterial.—Wiley v. Goodsell, 3 App. Div. 452, 38 N. Y. Supp. 376.

[w] (Ohio, 1894) In an action to recover on a quantum meruit for the value of services, evidence of the pecuniary condition of defendant, in that he was a very wealthy man, was not competent, unless it would show that the usual price varies with the ability to pay for the service.—Saffin v. Thomas, 4 O. C. D. 438.

[ww] (Ohio, 1895) In an action for services as a housekeeper, evidence of the declarations of defendant as to the compensation he intended to give the plaintiff is admissible to show the value of the services.—Berry v. Collins, 9 Ohio Cir. Ct. R. 656.

[x] (Ohio, 1895) In an action for services rendered as a housekeeper, evidence as to the bad condition and insufficient accommodations of the house is admissible as affecting the question of the value of the services.—Berry v. Collins, 9 Ohio Cir. Ct. R. 656.

[xx] (Pa. 1844) In an action to recover for labor done, in the absence of proof of a specific contract as to the price, proof of what others received for the same kind of labor is competent.—Holman v. Fesler, 7 Watts & S. 313.

[y] (Pa. 1872) In an action for services for nursing, it is proper to ask a witness whether plaintiff's appearance did not show her constitution to be broken down by her duties, since, if the services performed were of such a character as were injurious to plaintiff's health, it was a fair element to be considered in determining what her services were worth.—Thompson v. Stevens, 71 Pa. (21 P. F. Smith) 161.

[yy] (Pa. 1879) In the absence of any agreement as to the price to be paid for services, evidence of their value is competent.—In re Wells' Estate, 13 Phila. 250.

[z] (S. C. 1892) In an action for the balance of an account for laying brick in building a mill, and for superintending the building of a smokestack of such mill, on the issue as to the value of plaintiff's services on the smokestack defendant can show the difference in price per thousand paid for laying bricks in the smokestack and in the mill.—McGee v. Wells, 37 S. C. 365, 16 S. E. 29.

[zz] (Tex. 1848) In an action for work and labor by a carpenter, he charged his work by the day, and proved his skill as a workman and the customary price paid for carpenter's work by the day. *Held*, that under such circumstances the defendant could offer evidence to show that, from the plaintiff's habits respecting his industry, his work was not worth as much per day as other carpenters.—Yeiser v. Ward, 3 Tex. 430.

§ 53. —— Special contract.

[a] (Cal. 1894) Where the contractor sues on quantum meruit, because of the contract having been wrongfully rescinded, the contract is admissible in evidence as proof of the value of the work, but is not conclusive on that point.—Adams v. Burbank, 103 Cal. 646, 37 Pac. 640.

[aa] (Colo. 1890) In an action for work and labor performed, it appeared that plaintiff was in the employ of one M., who had agreed to pay him $3.50 per day, and that M. made an assignment, and his wife, the defendant, purchased the stock at the sheriff's sale, and continued the business in her name, with her husband as her agent. Plaintiff continued to labor for her, charging the same price per day for such labor, which was paid. *Held*, on a dispute subsequently arising as to wages, defendant claiming that the contract with her husband was not binding on her, that plaintiff was properly allowed to testify to the contract with defendant's husband, made prior to the time that she succeeded to the business.—McQuown v. Cavanaugh, 14 Colo. 188, 23 Pac. 341.

[b] (Ill. 1842) In an action by two for work and labor done and materials furnished, a written contract, signed by one of the plaintiffs and all the defendants, for the performance of the same labor, is admissible as a memorandum or proposition of what the defendants considered it worth.—Reed v. Phillips, 5 Ill. (4 Scam.) 39.

[c] (Ill. 1889) In an action of assumpsit to recover for services rendered on an express contract, questions as to the gross cost of doing the work are irrelevant.—Anheuser-Busch Brewing Co. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575, affirming (1870) 29 Ill. App. 316.

[d] (Ind. 1886) In an action upon the common count for work and labor done, evidence as to an agreement by defendant to pay for certain work at a certain price may be admissible, as tending to show the reasonable value of the work.—Scott v. Congdon, 106 Ind. 268, 6 N. E. 625.

[e] (Ind. 1891) In a proceeding to establish a claim against an estate for personal services rendered to the decedent, where it appears that the claimant was the decedent's niece, and a

member of his family, evidence that she went to live with the decedent on account of his promise to make a will in her favor is admissible in order to rebut the presumption that her services were rendered gratuitously, although the promise was not kept, and was void under the statute of frauds.—Nelson v. Masterson, 2 Ind. App. 524, 28 N. E. 731.

[f] (Ind. 1895) In an action on the quantum meruit for services in effecting a sale, an agreement allowing plaintiff "the usual commission of from 10 to 15 per cent." is admissible to prove the value of the services.—Jenney Electric Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

[ff] (La. 1832) A contract to perform work, afterwards so altered as to require double the quantity of materials, is admissible to establish the value of the work.—Courcelle v. Lausans, 3 La. 361.

[g] (Mo. 1885) In an action for the reasonable value of his services, evidence of a special contract to pay for the services at a certain rate is admissible.—Crump v. Rebstock, 20 Mo. App. 37; Floerke v. Teuscher Distilling Co., Id. 76.

[h] (Neb. 1889) In an action upon the quantum meruit for compensation for services performed upon the request of the defendant, which employment is denied by such defendant, it is not error to permit the plaintiff to testify that the defendant represented that the services would be worth a certain sum, and that he would guaranty the payment of that sum, etc., the offer as to price not having been accepted by the plaintiff. Such evidence does not tend to establish an express contract as to the price to be paid.—Walker v. Turner, 27 Neb. 103, 42 N. W. 918.

[i] (Neb. 1896) In an action for work and labor performed under a special contract, the defense alleged was that such services were, by agreement, performed as an equivalent for the plaintiff's board and lodging during the period named. *Held*, that evidence that, on or about the date of the agreement alleged by the defendant, a third person, in defendant's presence, offered to employ plaintiff for wages, was rightly admitted on the reasonableness of plaintiff's claim, and corroborative of his testimony.—Blomgren v. Anderson, 48 Neb. 240, 67 N. W. 186.

[j] (Ohio, 1851) Where persons agree on the 18th of April, in writing, to perform certain work by August 1st, and the written contract is signed by the parties, and is also signed by a surety as such, for the performance of the work, and afterwards the work, having been commenced, is suspended at the instance of the party for whom it was contracted to be done, with the intention not to have the work completed, and again resumed, a month after the time fixed by the contract for the completion of the work, at the instance of the party for whom the work was by the contract to be done, upon his promise to pay, over and above the contract price, the additional cost of the work, in consequence of an increase in the price of wages and materials, and, the work being finished in January following, suit is brought, not on the contract, but for the work and labor, the original contract is competent evidence for the plaintiffs, and it is no objection that the surety is not a party plaintiff.—Kugler v. Wiseman, 20 Ohio, 361.

[k] (Pa. 1866) Where, in assumpsit to recover the value of work and labor and material furnished by the plaintiff, there was a special contract, it should first have been proved, and then the fact showing its alteration or abandonment, and the latter was not properly admissible as rebutting testimony.—Boyle v. McKinley, 6 Phila. 172.

[l] (S. C. 1844) In assumpsit, plaintiff's first witness testified that defendant had made a written contract with a third person, under which the work of plaintiff was to be done, and that defendant asked plaintiff to do the work. *Held*, that plaintiff was not obliged to produce the written agreement, which was not in his possession, but might prove what the work was aliunde.—Coles v. Holmes, 2 Speers, 360.

[m] (S. C. 1848) In an action of assumpsit for services rendered defendant's testatrix in her lifetime, evidence of a promise to bequeath a legacy to plaintiff in payment thereof is not admissible.—Hunter v. Hunter, 3 Strob. 321.

[n] (Tex. 1891) In an action to recover for labor and material, it is not error to admit in evidence the contract by plaintiff with a subcontractor to do part of the work.—Maverick v. Maury, 79 Tex. 435, 15 S. W. 686.

[o] (Va. 1858) In an action of assumpsit on the common count for labor, a defendant has no right to arrest the plaintiff in the course of making out his case by an offer to show that the work was done under a special contract; it not having appeared, from anything proved by the plaintiff, that there was any such contract.—Baltimore & O. R. Co. v. Polly, 14 Grat. 447; Same v. Lafferty's, Id. 478.

§ 54. —— Skill of plaintiff and sufficiency of performance.

[a] (Ga. 1885) In an action on account for services rendered in managing defendant's business for a number of years, it is proper to admit testimony tending to rebut plaintiff's claim of skill and efficiency in the management of the business and operations connected therewith.—Dalton v. Drake, 75 Ga. 115.

[b] (Mass. 1865) In an action to recover for labor in erecting a building, evidence of the general character and skill of the plaintiff as a workman is competent.—Shepard v. Ashley, 92 Mass. (10 Allen) 542.

[c] (N. H. 1843) Where a party seeks to recover the value of his labor, he may offer evidence to show that he possessed skill and experience in the particular trade or business in which he was employed; and to rebut this the other party may introduce evidence to show that the party rendering the service was habitually intemperate.—Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501.

[d] (N. J. 1840) In assumpsit for work and labor, it is competent for the defendant to show that the services have not been performed in the manner agreed upon.—Marshall v. Hann, 17 N. J. Law (2 Har.) 425.

[e] (N. Y. 1817) In an action for labor, the defendant may show that the work was not done faithfully, in order to reduce the amount of the plaintiff's recovery.—Grant v. Button, 14 Johns. 377.

[f] (Pa. 1852) In an action on the common counts for work and labor in the construction of a furnace, evidence that another furnace, constructed by the plaintiff according to his own plan, was unskillfully constructed, is not admissible as showing plaintiff's want of skill.—Waugh v. Shunk, 20 Pa. (8 Harris) 130.

§ 55. Weight and sufficiency of evidence.

Weight and sufficiency of evidence as to ownership of wife's earnings, see "Husband and Wife," vol. 26, cc. 2049, 2050, § 494.

—— *of performance of services as to showing payment of debt, see* "Payment," vol. 39, cc. 894, 895, § 235.

—— *on disputed claims for services against decedents' estates, see* "Executors and Administrators," vol. 22, cc. 1389–1395, § 903½.

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[a] (Ala. 1886) Defendant authorized plaintiff to do certain work, and agreed to pay him for it, provided "the King boys," three brothers living near by, would not do it. Plaintiff applied to one of the brothers, who refused to do the work. *Held*, that he must show that he applied to the others also, or an excuse for not doing so, such as their absence, or known unwillingness to do the work, and that the statement of the one brother to him that one of the others was away, and that the third would not do it, was incompetent.—Jackson v. Bush, 82 Ala. 396, 1 South. 175.

[b] (Ala. 1890) In a suit for work and labor done under a contract to milk defendant's cows and care for his stock, where defendant pleads as set-off damages for loss of stock through plaintiff's neglect, testimony of defendant and other witnesses that, in their opinion, the cattle died because of plaintiff's neglect, without stating particular acts of neglect, is not sufficient to sustain the plea.—Krou v. Verkentoren, 90 Ala. 113, 7 South. 428.

[c] (Ala. 1891) In assumpsit by a detective against a railroad company for services in ferreting out thefts from defendant's cars, a letter written by defendant's superintendent to the detective, stating that proof that the car breakers stole defendant's goods would have to be furnished before defendant would pay any bill, was not at variance with his testimony that by the contract compensation was contingent upon the arrest and conviction of thieves who had stolen from defendant's cars.—Louisville & N. R. Co. v. Morgan, 95 Ala. 608, 10 South. 834.

[d] (Cal. 1859) In a suit to recover for services for half a year under a contract to work a whole year, some proof of a promise on the part of defendant to settle with plaintiff is sufficient evidence of an agreement to apportion the contract to sustain a verdict for plaintiff.—Hogan v. Titlow, 14 Cal. 255.

[e] (Cal. 1892) Where a written contract for furnishing materials and erecting buildings is void for failure to record it, as required by Code Civ. Proc. § 1183, and the party furnishing such materials and erecting such buildings brings an action on an implied contract for the value thereof, such unrecorded contract is not conclusive evidence of the value of the labor and materials.—Rebman v. San Gabriel Valley Land & Water Co., 95 Cal. 390, 30 Pac. 564.

[f] (Cal. 1895) In assumpsit for the value of services in permanent improvements of a vineyard, defendant admitted the improvements, but claimed that they were made by plaintiff as lessee. There was evidence that defendant persuaded plaintiff, his son-in-law, to take the vineyard instead of leasing other land, saying that he did not know whether any profit could be made out of it or not, but that plaintiff would lose nothing by it; that he told plaintiff and others that he intended to give the vineyard to his daughter, and advised plaintiff to make improvements; that, until the death of his wife, plaintiff worked part of the time for defendant, but most of the time in improving the vineyard, paying out above receipts $2,900; that, after the death of the wife, defendant demanded $1,000 for rent, and that plaintiff leave the premises with all the improvements. *Held*, that plaintiff should recover for his services and the improvements.—Buhman v. Becker, 42 Pac. 28.

[g] (Ill. 1872) In an action against a railroad company to recover for work done, it appeared that the contract for the work was made by one acting as agent of the company, that plaintiff did the work and the company afterwards made beneficial use of it, that the chief engineer laid out the work, and that an assistant engineer signed a voucher therefor, naming plaintiff as contractor. *Held*, that the facts were sufficient to establish an implied promise to pay what the work was reasonably worth.—Rockford, R. I. & St. L. R. Co. v. Wilcox, 66 Ill. 417.

[h] (Ill. 1895) In an action for work done, evidence of the foreman of the men who were employed that he went to the place where the men were at work, in the morning, and again in the afternoon, nearly every day, to see what they had done, and made up the account of their work from time sheets furnished by the men themselves, was insufficient to show the amount of labor actually performed.—Noonan v. Spoor, Mackey & Co., 61 Ill. App. 232.

[i] (Ill. 1895) In an action for services rendered, where the defendant alleged that plaintiff lived with him as a member of his family, and was not entitled to payment for services, evidence that defendant charged plaintiff, in his books of account, with money obtained from him for clothing and other necessaries, is sufficient to rebut the allegation that plaintiff was a member of the family.—Miller v. Cinnamon, 61 Ill. App. 429.

[j] (Iowa, 1888) In an action for services rendered on a farm, when plaintiff testifies that during the time he worked for defendant he had a good home, good and sufficient clothing, medicine, and doctor's attendance, and had spending money, and that when he left he was satisfied with what he had got, a verdict in favor of plaintiff is against the evidence.—Stanley v. Barringer, 74 Iowa, 34, 36 N. W. 877.

[k] (Kan. 1887) In an action of assumpsit for services by a niece against her uncle, evidence that defendant charged plaintiff for the time she was absent from her ordinary work, and with articles of clothing furnished her, and with other items, tends to show that he regarded and treated her as a servant, as distinguished from a relative living in the family.—Shane v. Smith, 37 Kan. 55, 14 Pac. 477.

[l] (Ky. 1889) Where, in an action for services rendered the defendant, with whom plaintiff lived from the time she was 15 until she reached her majority, the evidence is sufficient to authorize the submission to the jury of the question whether the services were rendered without expectation of payment, a verdict for the plaintiff will not be set aside as against the evidence.—Meith v. Stuckenborg, 11 Ky. Law Rep. 235.

[m] (La. 1869) Distinct proof of valuable services rendered and accepted should be required from an agent who seeks to recover compensation without proving any express employment.—Wood v. McCranie, 21 La. Ann. 557.

[n] (Me. 1863) A party cannot recover under a general count for labor performed under a contract, unless he proves that he attempted in good faith, and did all he reasonably could, to perform it in all respects, or some sufficient reason for the want of performance.—Veazie v. City of Bangor, 51 Me. 509.

[o] (Me. 1879) Circumstantial evidence is sufficient to prove a request, so as to enable a person to recover on an implied contract for services rendered.—Hill v. Packard, 69 Me. 158.

[oo] (Mass. 1886) In an action for labor and services rendered, where plaintiff seeks to recover what they are reasonably worth, he cannot do so if the whole evidence leaves it in doubt whether they were not gratuitously rendered. Defendant, by asserting that they were so rendered, and offering to prove it by legal evidence to that effect, meets the prima facie case of plaintiff, and the issue is then to be determined upon the whole evidence.—Phipps v. Mahon, 141 Mass. 471, 5 N. E. 835.

[p] (Minn. 1873) A schedule to a complaint for work and labor done contained an item for 2,800 yards of excavation done in January, 1869. Plaintiff testified that the work was to be measured by the engineer of the railroad

company. His measure was to be taken as correct, and he was to be paid according to such estimate;" and further, "that he [plaintiff] thought he did about 2,800 yards on that section in January—he guessed at it." Defendant testified that nearly all the work done on that section was performed before January, and what was done afterwards was included in the December estimate. *Held*, that plaintiff's evidence was too vague and indefinite to support referee's finding that he had done 2,800 yards of grading in January.—Schwerin v. De Graff, 19 Minn. 414 (Gil. 359).

[pp] (Minn. 1893) In an action for repairs made in 1889 on an artesian well dug by plaintiff for defendant in 1886, where plaintiff proves the performance of the labor and that the materials were furnished as alleged, in 1889, at defendant's request, he is entitled to recover unless defendant establishes by a preponderance of evidence that the work was done under the original contract.—Gates v. Banholzer, 53 Minn. 514, 55 N. W. 597.

[qq] (Mo. 1873) Although, where work is done or services performed under a special contract, if plaintiff has fully performed the contract on his part, and nothing remains but a duty on the part of defendant to pay the price agreed on, plaintiff is not bound to sue on the written contract, but may use the common counts in assumpsit, still, when the contract is produced on the trial, plaintiff will be required to prove that he has performed it on his part, and that by its terms defendant has become bound to pay the price agreed on; and, if any fact necessary to create a liability on the part of defendant to pay is wanting, plaintiff cannot recover.—Stout v. St. Louis Tribune Co., 52 Mo. 342.

[qq] (Neb. 1888) Plaintiff, when 16 years of age, went to reside with defendant, his brother, under an agreement to continue in his service until he was 21 years old. He remained in the service until seven months before reaching his majority, when he left. In an action to recover for the value of his services, plaintiff testified that defendant was to give him a good span of horses, harness, and wagon when he became of age, while defendant testified he was merely to feed and clothe him, and send him to school during each winter. *Held*, that a verdict for the value of a span of horses, harness, and wagon was supported by the weight of evidence.—Burkholder v. Burkholder, 25 Neb. 270, 41 N. W. 145.

[r] (Neb. 1893) In an action for services rendered defendants in the milling business, it appeared that plaintiff was the son of one of defendants, and until he worked in defendants' mill had never had any experience in the business. A number of witnesses testified to statements made by plaintiff that he was merely looking after his father's interests in the business, and statements to the same effect by the father. Plaintiff denied recollection of most of the statements attributed to him. *Held*, that the evidence showed that the services were rendered to plaintiff's father, and not to the firm.—Glade v. White, 36 Neb. 172, 54 N. W. 259.

[rr] (N. H. 1835) Evidence that a party, who had sown grain on the land of another under an agreement that he should have a share of the crop, afterwards agreed to give up his interest to the owner of the land on a promise to pay for what he had done, will not sustain an action for work and labor performed for the owner, since plaintiff, having performed the labor, had an interest in the crop, but no claim against the owner for anything which had been done.—Moore v. Ross, 7 N. H. 528.

[s] (N. H. 1856) Where the relation of parent and child is shown to exist, in an action for services, the law will not presume any other; and in order to establish the existence of an inferior relation, entitling the child to compensation, there must be sufficient proof that the parties understood the inferior relation to subsist between them at the time, and acted with reference to it.—Munger v. Munger, 33 N. H. 581.

[ss] (N. Y. 1846) In an action for work, labor, and services, plaintiff, with other evidence, relied on a sealed note, found among the papers of defendant's intestate, but which had not been delivered, by which he in terms promised to pay to plaintiff $2,000, "for value received, and justly and truly due her for services rendered me during my illness." *Held*, that this was very slight evidence, as an admission, of the fact stated, and, the other proof in the case showing that nothing was then due plaintiff, that she was not entitled to recover.—Robinson v. Cushman, 2 Denio, 149.

[t] (N. Y. 1860) Where defendant in an action on a quantum meruit shows the existence of a written contract, plaintiff must prove all its contents in case of its loss, so as to show full performance on his part.—Alger v. Raymond, 20 N. Y. Super. Ct. (7 Bosw.) 418.

[tt] (N. Y. 1888) Evidence that plaintiff lived for many years with his family on the farm, and in the house, of his father; that he worked some on the farm, but was away most of the time at work at his trade; that he built additions worth several hundred dollars to the house, and occupied them himself; that he paid for many articles used on the farm; ate at his father's table, furnishing much of the provisions; and paid his father for produce of the farm while living there—will not support an action against the father's executors for the price of the work and materials, as an express promise of payment, or circumstances equivalent thereto, is necessary to establish a liability.—Havens v. Havens, 50 Hun, 605, 3 N. Y. Supp. 219.

[u] (N. Y. 1890) In an action by a stepson for services rendered to the defendant's intestate, the fact that plaintiff gave decedent a note for money received of the decedent does not disprove an agreement between them that plaintiff was to be paid for his services, where decedent stated that he did not want a note, and plaintiff insisted on giving it, because it would be useful when they came to settlement.—Davis v. Gallagher, 55 Hun, 593, 9 N. Y. Supp. 11; judgment reversed (1891) 124 N. Y. 487, 26 N. E. 1045.

[uu] (N. Y. 1890) In an action by a stepson for services rendered to the defendant's intestate, evidence that decedent was paid for the education and maintenance of plaintiff during his minority, that plaintiff worked for him during such time, and until he was about 23 years old, when they had a settlement, and that decedent had stated, after the settlement, that he owed plaintiff for his work and for matters existing between them, was sufficient to show that both parties intended that plaintiff should be paid for his services.—Davis v. Gallagher, 55 Hun, 593, 9 N. Y. Supp. 11, judgment reversed (1891) 124 N. Y. 487, 26 N. E. 1045.

[v] (N. Y. 1895) Evidence that defendant received plaintiff's bill for the services sued for, and promised to pay it when able, is sufficient proof that the services were rendered, and that the value thereof was satisfactory to defendant, where no evidence is introduced by defendant.—Norwood v. Hickok (City Ct. N. Y.) 14 Misc. Rep. 236, 35 N. Y. Supp. 713.

[vv] (N. Y. 1896) In an action by a corporation for work and material furnished defendant, it appeared that the order was given by defendant to his debtor, with the understanding that the value of the work and material was to be credited on his bill; that defendant did not know plaintiff, or intend to contract with it; and that such debtor died during the performance of the work, without having disclosed any

agency, and defendant had no reason to suspect there was any. There were circumstances justifying findings that such debtor did not contract as agent, but as principal, and that, if any labor or material came from plaintiff, defendant was unaware of it at the time, and it must have been furnished under some arrangement by which such debtor should pay for it. *Held*, that a judgment for defendant was proper. —Richard Taylor Co. v. Cannon (Sup.) 37 N. Y. Supp. 648.

[w] (N. Y. 1896) In an action to recover on a quantum meruit for services rendered, it appeared that defendant, on account of sickness, was in need of some one to conduct his business, and that plaintiff, under a request from defendant's brother-in-law, assumed charge of the business during defendant's sickness, defendant executing to him powers of attorney to sign, accept and indorse all checks, notes, and drafts. *Held*, that a finding that the services were rendered under an implied contract for compensation was warranted.—Wiley v. Goodsell, 8 App. Div. 452, 38 N. Y. Supp. 376.

[ww] (Or. 1887) In a suit on two causes of action, one for tools purchased for use in performing the contract and one for the value of work, for the performance of which plaintiff obtained the tools, evidence as to what tools plaintiff so obtained is material only so far as it tends to show what plaintiff did in performing the work, and is not competent to charge defendant with the expense of obtaining the tools.—Keller v. Bley, 15 Or. 429, 15 Pac. 705.

[x] (Pa. 1879) Evidence that a claimant performed certain services for the decedent for more than a year, and that the services were of a certain value, is sufficient to support the claim for compensation for work performed for the decedent, in the absence of any proof of an agreement as to the amount of the wages. —In re Wells' Estate, 36 Leg. Int. 286.

[xx] (Pa. 1892) Evidence that a father agreed to compensate his son with money or land, if he would work the father's farm until the latter could get out of debt, and that the son did so work, but had never been compensated therefor, although at one time the farm was surveyed and a portion of it run off for him, is sufficient to sustain a recovery by the son in an action for such compensation.—McLaughlin v. McLaughlin, 145 Pa. 582, 23 Atl. 400.

[y] (S. C. 1844) Where plaintiff sues for extra compensation on a quantum meruit, and shows a written contract covering the work done, he fails to make such a case entitling him to recover, unless he shows that his verbal evidence went to construe the written contract, so as to entitle him to regard the work as extra.—Nesbitt v. Louisville, C. & C. R. Co., 2 Speers, 697.

[yy] (Tenn. 1895) On quantum meruit for services three witnesses testified that defendant took plaintiff to live with him for his board and clothes. Plaintiff testified that he was to receive a horse, saddle, and bridle. *Held*, that plaintiff could not recover.—Capps v. Groseclose, 95 Tenn. (11 Pickle) 329, 32 S. W. 199.

[z] (Vt. 1861) In order to sustain a claim for services rendered by a child, it is not necessary that the proof of the understanding between the parties should be unequivocal and conclusive. It is sufficient if it is established by a fair preponderance of the evidence.—Putnam v. Town, 34 Vt. 429.

[zz] (Wis. 1879) A person employed to keep the account books of another may recover the balance due for his services on other proof than the condition of the books, though the books were so negligently and unskillfully kept as not to show the state of the accounts between the parties.—McCormick v. Ketchum, 48 Wis. 643, 4 N. W. 798.

(D) AMOUNT OF RECOVERY.

IN GENERAL, § 56.
EFFECT OF EXPRESS CONTRACT, § 57.
INADEQUATE AND EXCESSIVE ALLOWANCE, § 58.

Right to reasonable value in general, see ante, §§ 1–10.

§ 56. In general.

Measure of damages for failure to perform work and labor, see "Damages," vol. 15, cc. 2037–2041, § 292.

Value of work performed as measure of damages for breach of contract for services where performance is prevented, see "Damages," vol. 15, cc. 2074–2076, §§ 330, 331.

[a] In an action for work, labor, and services, where the proof shows that no compensation was agreed upon, plaintiff will, upon proof, be entitled to a reasonable sum for the services performed.

—(Ill. 1858) Frazer v. Gregg, 20 Ill. (10 Peck) 299; (1885) City of Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263; (1896) Howard v. Gobel, 62 Ill. App. 497; Gobel v. Howard, Id.;

(Ky. 1836) Chiles Ex'rs v. Craig, 34 Ky. (4 Dana) 544;

(Mo. 1853) Crole v. Thomas, 19 Mo. 70;

(Tex. 1881) Deball v. James, 1 White & W. Civ. Cas. Ct. App. § 91.

[b] In assumpsit for services, where their value is not proved, the verdict can be only for nominal damages.

—(Ark. 1848) Belfour v. Raney, 8 Ark. (3 Eng.) 479;

N. Y. 1888) Gill v. New York Cab Co., 48 Hun, 524, 1 N. Y. Supp. 202.

[c] (Cal. 1870) In an action to recover wages for work and labor, interest can only be recovered from the time of filing the complaint.—McFadden v. Crawford, 39 Cal. 662.

[d] (Ill. 1858) In an action for work and labor, plaintiff is entitled to recover the price fixed by contract, if there was one; if not, then what his services were reasonably worth.—Fraser v. Gregg, 20 Ill. (10 Peck) 300.

[e] (La. 1845) In the absence of any contract, plaintiff, claiming for surveys as to whose value the witnesses differ, will be allowed the compensation fixed by law.—McCollam v. Beattie, 9 Rob. 474.

[f] (La. 1861) In a suit on a quantum meruit, the lowest sum that the evidence will justify does not necessarily mean the lowest that has been mentioned by any of the witnesses. It is the evidence, taken as a whole, that is submitted to the consideration of the judge.—Holley v. Borland, 16 La. Ann. 186.

[g] (Me. 1852) It is not a rule of law that a person who performs services faithfully and with competent skill is not entitled to the same compensation as one having more skill or learning, who performed the same services no better.—Stockbridge v. Crooker, 34 Me. 349, 56 Am. Dec. 662.

[h] (Mass. 1846) A father forbade a manufacturing company to employ his minor daughter any further, and gave to them a notice that, if they continued to employ her, he would demand a certain sum per week for her labor, without any deduction on any account, and also directed them not to pay or allow her anything on account of her labor. *Held*, that the father, in an action to recover for her labor subsequently done, was entitled to recover only so much as her labor was reasonably worth, de-

ducting the price of board provided for her, without any deduction for clothing.—Adams v. Woonsocket Co., 52 Mass. (11 Metc.) 327.

[i] (Mich. 1895) In an action to recover the reasonable value of services rendered in giving information leading to the arrest of criminals, it is not competent for plaintiff to base his judgment as to the value of his services on the fact that specific rewards may have been offered in cases more or less similar.—Foley v. Platt, 105 Mich. 635, 63 N. W. 520.

[j] (N. Y. 1886) Where a bookkeeper was engaged to examine defendant's books in preparation for an action at law contemplated by the defendant, in an action by the bookkeeper to recover for his services, it was error to charge that the amount recoverable might be based on the use defendant intended to make of the work and purpose he had in view for having it done, instead of basing it on the work performed, the time consumed in performing it, and the reasonable value of plaintiff's services.—Carples v. Rosenbaum, 1 N. Y. St. Rep. 631.

[k] (N. Y. 1889) Where an heir took decedent from the poorhouse and cared for him before an offer by decedent's committee to pay her for caring for him was made, and she testified that she did not accept the offer, and the evidence of the price fixed for her services was indefinite, interest on her claim should be disallowed.—Stephenson v. Cotter (Sup.) 5 N. Y. Supp. 749.

[l] (N. Y. 1895) In an action for work done and materials furnished by plaintiff's assignor in engraving and supplying bonds for defendant, the preliminary cost of engraving the plate from which the bonds are to be printed constitutes part of the value of the work, and a recovery can be had therefor without delivery of the plate.—Purdy v. Nova Scotia Midland Ry. & I. Co. (Com. Pl.) 11 Misc. Rep. 406, 32 N. Y. Supp. 157.

[m] (N. Y. 1895) One who agrees to furnish labor for another, no price being fixed, is entitled to a profit thereon, and is not limited in his recovery to the amount which he paid the workmen.—Marshall v. Cohen (Com. Pl.) 11 Misc. Rep. 397, 32 N. Y. Supp. 283.

[n] (Ohio, 1834) Where no price is fixed for work, the rule is to take the common price at the time and place of performance.—Bagley v. Bates, Wright, 705.

[o] (Pa. 1827) A tradesman, removing from one place to another, and there doing work without any agreement about the price, can claim only at the rate of the latter, and not of the former, place.—Gracy v. Bailee, 16 Serg. & R. 126.

[p] (S. C. 1823) In an action for work and labor, no more can be recovered than the value of the services rendered, exclusive of interest.—Farrand v. Bouchell, 1 Harp. 83.

[q] (Tenn. 1853) In an action to recover a quantum meruit for services in teaching defendant the art and mysteries of psychology and clairvoyance, the measure of damages is not what the defendant gained, but what the plaintiff deserved for his services.—Edington v. Pickle, 33 Tenn. (1 Sneed) 122.

§ 57. Effect of express contract.

[a] (Conn. 1856) In determining the amount of the plaintiff's compensation, all the circumstances under which the services were rendered are to be taken into consideration, and, among them, the existence and terms of the contract.—Clark v. Terry, 25 Conn. 395.

[b] (Ill. 1862) Where it appears that a specific sum was agreed upon as a rate of compensation for services, no term of service being agreed upon, a recovery may be had, in an action of assumpsit for work and labor, at the rate agreed upon, for the service rendered.—Pfund v. Zimmerman, 29 Ill. (19 Peck) 269.

[c] (Ind. 1858) In the absence of other evidence, the price may be the measure of damages, in an action on the count for work and labor, where the special contract was not fulfilled.—Wolcott v. Yeager, 11 Ind. 84.

[d] (Ind. 1864) The price for work done, in part under a special contract and in part under a parol modification thereof, should be controlled by the special contract, so far as it is done in pursuance of it.—Garver v. Daubenspeck, 22 Ind. 238.

[e] (Mass. 1852) Where plaintiff contracted to build a dam according to specifications, and, acting in good faith, built a dam not in accordance with the contract, the jury, in an action for work done, should deduct from the contract price so much as the dam built was worth less than the dam contracted for.—Gleason v. Smith, 63 Mass. (9 Cush.) 484, 57 Am. Dec. 62.

[f] (Mass. 1873) Where a plaintiff sues for work done under a contract, which he has substantially performed, the measure of damages is the contract price, deducting the diminution in value of the building to defendant caused by deviations from the contract.—Cullen v. Sears, 112 Mass. 299.

[g] (Mich. 1887) In an action to recover for sawing lumber, some of which was sawed by a circular saw, and some by a band saw, where defendant refuses to pay more than the regular rate for sawing by circular saw, an instruction requiring the plaintiff to make out his case before the jury, either by proving an original understanding that band sawing was to be done at a higher price, or that it was subsequently mutually understood that the higher price was to be given, and telling them that if the contract was in the first instance to saw with the circular saw, and there was a subsequent arrangement to have a part of it cut with the band saw, defendant should pay for this what band sawing was worth, is not erroneous.—Torrent v. Damm, 66 Mich. 105, 33 N. W. 49.

[h] (N. Y. 1835) Where a carpenter agrees to build a house according to certain plans for a specific amount, but the plan is abandoned, so that it is impossible to trace the contract in the work done, the measure of compensation is the value of the work, as if no contract had been entered into.—Hollinsead v. Mactier, 13 Wend. 276.

[i] (N. C. 1851) Where work done under a contract is not completed within the time, and is carried on with the assent of the parties, the contractor is confined in a quantum meruit to the contract price.—Fanner v. Francis, 34 N. C. 282.

[j] (Or. 1879) Where a party rendering services fails to fully comply with the agreement under which they were to be rendered, his recovery for such services should be their reasonable value, deducting therefrom any damages which the other party has sustained by reason of failure to comply with the contract.—Steeples v. Newton, 7 Or. 110, 33 Am. Rep. 705.

[k] (Pa. 1890) A contract for the construction of three curves on defendant's cable railroad was awarded to plaintiff at a specified price per lineal foot. These curves were to be solid curves, composed of heavy boxes, bolted end to end. Subsequently defendant changed its plans so as to lengthen the three curves into one; and, instead of placing the boxes end to end, they were placed 4½ feet apart, with filling pieces between. *Held*, in assumpsit for the price of the work, that it was proper to instruct that plaintiff was not confined to the actual value of the filling pieces, but was entitled to the contract price therefor, if there was an agreement, express or implied, when the change in the contract was made, that the filling pieces should be regarded as part of the curved work, to be paid for at the contract price.—Marshall

Foundry & Const. Co. v. Pittsburgh Traction Co., 138 Pa. 266, 22 Atl. 23.

[l] (Tenn. 1878) Where plaintiff has constructed a house not in accordance with the contract, and claims recovery on the ground of acceptance in its defective form by the defendant, he may recover the value of the house at the time received, and not the value of the materials, as such, put into the building, nor of the work done on it.—Parker v. Steed, 69 Tenn. (1 Lea) 206.

[m] (Vt. 1868) In an action to recover for labor done under a contract which provided that plaintiffs should furnish their own tools, it appearing that plaintiffs had used tools of defendant, expecting to pay for their use, and that they had given credit for the same in their specification, *held*, that they should be bound by such credit, although until the commencement of the suit the defendant had not intended to claim it.—St. Martin v. Thrasher, 40 Vt. 460.

§ 58. Inadequate and excessive allowance.

[a] (Ill. 1868) A verdict for $3,411.60, for 14 months' board and nursing, is excessive, though the patient had ulcers requiring to be washed and dressed daily.—Lockwood v. Onion, 48 Ill. 325.

[b] (Ill. 1870) In an action for board and services rendered a decedent, it appeared that the latter boarded with plaintiff for some 14 months, and except the last month he was able to attend to his business. He was kindly attended, and was at times very unpleasant on account of the character of his disease. *Held*, that an allowance of $3,900 was so excessive as to call for a reversal of the judgment.—Lockwood v. Onion, 56 Ill. 506.

[c] (Ill. 1875) In an action to recover on a quantum meruit for services rendered deceased, a verdict for $1,420 was excessive, where it appeared that such services consisted in nursing deceased for two years before his death, without any special contract as to compensation; that, with the exception of several visits with deceased to other cities for treatment, the services rendered did not prevent plaintiff from attending to his own business, until a few months prior to decedent's death; and that plaintiff had received from deceased himself over $3,000.—Darling v. McDonald, 77 Ill. 520.

[d] (Ind. 1892) Where there was evidence from which the jury might have found that the drilling of two holes 35 feet deep was worth $140, a verdict for $125 was not excessive.—Nicholl v. Pressler, 3 Ind. App. 324, 29 N. E. 611.

[e] (Ind. 1892) In an action to recover for services while living with defendant on a farm for six and a half years preceding plaintiff's majority, there was evidence that defendant agreed to pay him a reasonable price therefor, that he was boarded and comfortably clothed by defendant, and worked about the farm as is customary for boys of his age, and in the winter went to school three or four months, occasionally dropping out to help at farm work. *Held*, that a verdict of $500 was not excessive.—Loy v. Petty, 3 Ind. App. 241, 29 N. E. 788.

[f] (Ind. 1893) In an action for services, there was evidence that plaintiff and her husband took defendant's father to board; that he became afflicted with a gangrenous foot; and that, on defendant's promise to pay her what it was reasonably worth, plaintiff nursed and waited on the patient for about three weeks, and provided for him until his death. *Held*, that a verdict for $125 is not excessive, though plaintiff was not a trained nurse, and was without any other experience than that which comes to the average woman, 36 years of age.—Storms v. Lemon, 7 Ind. App. 435, 34 N. E. 644.

[g] (Ind. 1895) In an action for services rendered in keeping house for and nursing decedent for five years before her death, where it appears that the disease with which decedent was afflicted rendered the services very disagreeable, a verdict for $666 is not excessive.—Wetzel v. Kellar, 12 Ind. App. 75, 39 N. E. 895.

[h] (Iowa, 1889) In an action for work and labor in prospecting for coal and for breach of contract, a finding of the jury of a certain amount due plaintiff on one count cannot be held excessive on the ground that a payment on that count is shown and admitted, where it is not admitted that the payment was to apply on the claim set up in that count.—Miller v. Brown, 42 N. W. 561.

[i] (Iowa, 1891) Where, in an action for services rendered in drilling prospect holes for coal, plaintiff claims $707, but his undisputed testimony as to the depths of the holes, and the price per foot, shows that he is only entitled to $533, of which he admits having received $350, a verdict for $357 is excessive.—Miller v. Brown, 82 Iowa, 79, 47 N. W. 895.

[j] (Ky. 1840) An allowance of $6,000 for the services of a civil engineer in making a survey, maps, profiles, and estimates for a railroad from Grand Gulf to Jackson, Miss., a distance of about 60 miles, all expenses borne, requiring two months' labor, is excessive.—Moore v. Martin, 40 Ky. (1 B. Mon.) 97.

[k] (La. 1844) A judgment for $428 for medical attendance and medicines furnished decedent in his last illness during one month, although a large one, will not be disturbed, where it appears that plaintiff rendered decedent unusual and exclusive attention night and day during his last illness, remaining with him all the time, with the exception of a few days, neglecting all other business, and traveling a distance of 20 miles in going to and from his residence to that of decedent.—McManus v. Lemee, 9 Rob. 115.

[l] (La. 1845) In an action to recover for services in guarding property from trespassers, one witness testified that he would have charged $50 per month for such services. Another witness testified that, if a man employed to render them had attended to nothing else, he might have been entitled to $30 per month, but that a man situated as plaintiff was, who went over the land once a month, should not receive more than $15 per month. *Held*, that a judgment for the latter amount will not be disturbed.—Succession of Milne, 12 Rob. 329.

[m] (Minn. 1891) In an action for services rendered defendant in attending to and protecting his interests in the estate of his deceased son, it appeared that such services consisted almost entirely of correspondence with various persons, the nature and extent of which were given in evidence. The only testimony as to the value of the services was that of plaintiff, who claimed they were worth $50. *Held*, that a verdict for that amount in plaintiff's favor would not be set aside as unsupported by the evidence.—Svanoe v. Larson, 47 Minn. 7, 49 N. W. 388.

[n] (N. Y. 1889) In an action for the value of certain "reproduction" engraving work, where the evidence shows that 40 cents per inch was the usual and reasonable compensation for engraving the original work, and that reproduction required less labor and skill, at which rates the value of the work sued for would be about $75, a judgment for $150 and costs cannot be sustained.—Phillips v. Munsey (Com. Pl.) 3 N. Y. Supp. 530.

[o] (N. Y. 1892) In an action by an accountant against an executor for services rendered him in preparing accounts of the estate, the accounts were exhibited to the jury, and testimony given by expert accountants that the usu-

al compensation for such services was from $20 to $25 per day. Plaintiff claimed to have spent 75 days in preparing the accounts, though his testimony in that respect was vague. *Held*, it was competent for the jury to say, from an inspection of the accounts, whether 75 days, of from 6 to 8 hours each, were reasonably required in preparing the same, and that a verdict of $1,500 for plaintiff should not have been set aside as excessive.—Douglass v. Leonard (Com. Pl.) 17 N. Y. Supp. 591, reversing (City Ct. N. Y. 1891) 14 N. Y. Supp. 274.

[p] (N. Y. 1893) In an action for services rendered by plaintiff's assignor to defendant, it appeared that the assignor and defendant were both lawyers, and occupied the same office, and that they took some business together under the agreement to divide the proceeds. Defendant testified that all the services rendered by plaintiff's assignor were under that agreement. The amount of the claim was $1,870, including a charge of $1,200 in a case in which defendant testified that they received $210 under an agreement of which plaintiff's assignor had knowledge, and that he received half of that sum. This was not denied. *Held*, that a verdict for $1,000 was excessive, since it must have included some portion of the $1,200 item.—Lynch v. Lerche, 73 Hun, 553, 26 N. Y. Supp. 96.

[q] (Pa. 1850) Nine hundred dollars damages for extra services rendered in a last illness, which was not a long one, are exorbitant.—Fisher v. Keyser, 7 Leg. Int. 114.

[r] (Tex. 1889) Where the only evidence as to the value of defendant's services in doing certain work is that it took 13 days' labor of himself and team, and was worth $2 per day, it is error to allow him only $16.—Fagan v. Whitcomb (App.) 14 S. W. 1018.

(E) TRIAL, JUDGMENT, AND APPEAL AND ERROR.

QUESTIONS FOR JURY, § 59.
—— VALUE OF SERVICES, § 60.
—— CONTRACT IMPLIED FROM RELATIONS OF PARTIES, § 61.
DISMISSAL, NONSUIT, AND DIRECTION OF VERDICT, § 62.
INSTRUCTIONS, § 63.
JUDGMENT, § 64.
APPEAL AND ERROR, § 65.

§ 59. Questions for jury.

Commencement, completion, or character of work as question of law or fact in suit to enforce mechanic's lien, see "Mechanics' Liens," vol. 34, cc. 2757, 2758, §§ 585–587.

[a] (Ill. 1870) Where defendant, in an action for work and labor, defends on the ground that the work was so unskillfully done that he suffered damage thereby, whether the presence of the defendant while the work was being done and his failure to complain amounted to a waiver of such defects was for the jury, and not for the court.—Garfield v. Huls, 54 Ill. 427.

[b] (Mich. 1889) Plaintiff testified that, while he was filling the office of judge, defendant came to him and said that if he was not reelected he wanted him to go to L. to look after his mining interests, sell mining stock, etc.; that he would make it more profitable to plaintiff than the judgeship; and that a few days after his term expired, when defendant asked him if he was ready to go to L., he replied that he was. Plaintiff then went to L., made himself acquainted with the business men there, and made inquiries about the mine in which defendant was interested, but did not go to see it. He received one letter while there from defendant, asking him to gather up all the news he could in regard to how his mining interests were being conducted. Defendant testified that he had simply told plaintiff that he thought he would do well in L., and that if he should go there he would give him business; but had no intention of making any contract with him. There was some other testimony that defendant had said he was glad plaintiff was going to L.; that he wanted such a man to look after his business. *Held*, in an action of assumpsit for services in going to L. to look after plaintiff's interest, that the question as to whether there was a contract of employment was properly left to the jury.—Parrish v. Bradley, 73 Mich. 610, 41 N. W. 818.

[c] (Mo. 1889) Plaintiff, having recovered judgment against defendant for miscellaneous services rendered during a specified period, afterwards sued for other services, of the same character, alleged to have been rendered during the same period. There was no evidence for what particular services defendant was employed. *Held* that, whether the former recovery covered part or all of the services sued for was a question of fact for the jury, and a request by plaintiff for an instruction that the jury should not be influenced by the record in the former case unless they believed that the "value of plaintiff's services" sued for was included in that case was properly refused.—Green v. Von Der Ahe, 36 Mo. App. 394.

[d] (Mo. 1895) Plaintiff was employed to find some one who would build a hotel on defendant's land. During his endeavors in that direction, it was learned that A. would lease the land on certain conditions, but would not erect the hotel thereon, and thereafter the efforts of plaintiff, with the assent of defendant, were confined to effecting the lease, and removing obstructing conditions in the way thereof. *Held*, that it was a question for the jury whether there was an implied contract to pay plaintiff for his services in effecting the lease.—Kerr v. Cusenbary, 60 Mo. App. 558, 1 Mo. App. Rep'r, 237.

[e] (N. J. 1895) Where there is some evidence of work done and materials furnished, raising an implied contract to pay what they were worth, and some evidence from which a jury could infer their value, it is not error to submit the case to the jury; and, if the verdict upon such evidence is excessive, correction must be sought under a rule to show cause.—King v. Holbrook, 58 N. J. Law (29 Vroom) 369, 33 Atl. 965.

[f] (N. Y. 1842) Plaintiff was a clerk in a sugar refinery of B. Defendants were B.'s factors, and, as such, made him advances, and held some machinery of the refinery in pledge. Subsequently B. became insane, and defendants told the superintendent of the establishment to continue the work, employing the necessary hands. He retained plaintiff as clerk. *Held*, in an action by plaintiff for work and labor, that defendant's liability to him was a question for the jury.—Colgan v. Aymar, Hill & D. Supp. 27.

[g] (N. Y. 1893) In an action by an adult child for services rendered to her deceased mother, evidence that plaintiff had left home and engaged in business; that the mother, who was an invalid, left the residence of one of her other children with the express intention of going to see whether plaintiff would come and live with her at her homestead and keep house for her; and that thereafter plaintiff gave up her business, and lived with her mother until her death,—warrants the submission to the jury of the question whether or not plaintiff returned to her mother and commenced housekeeping at her request.—Marion v. Farnan, 68 Hun, 383, 22 N. Y. Supp. 946.

[h] (Vt. 1883) Plaintiff, claiming to have worked for defendant for wages, and not mere-

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ly as a member of his family for support, testified that he told her to stay and he would do well by her, that he wanted her to work for him, that he was going to pay her. *Held*, that there was sufficient evidence to go to the jury. —Ashley v. Hendee, 56 Vt. 209.

§ 60. —— Value of services.

[a] (Ky. 1829) In assumpsit for work and labor, the jury, from their knowledge of the value of labor, may find a verdict for the price of work done, although there was no evidence of its worth at the time and place the work was done.—Craig v. Durrett, 24 Ky. (1 J. J. Marsh.) 365, 19 Am. Dec. 103.

[b] (Ky. 1860) In an action of assumpsit for labor, the jury, or the judge, if a jury has been waived, may, in the absence of evidence of the value of such labor, or where the testimony leaves uncertain the amount plaintiff is entitled to recover, find a verdict for the price, from their own knowledge of the worth of the labor. —Baum v. Winston, 60 Ky. (3 Metc.) 127.

[c] (Mo. 1876) In an action for compensation for services, if plaintiff proves services rendered upon request, but rests without adducing evidence of their value, the jury may, of their own knowledge, estimate the value.—Darby v. Knapp, 2 Mo. App. 486.

[d] (N. C. 1860) It is the province of a jury, in an action of assumpsit for work and labor, to affix a value to services, according to their nature and extent, as proved; and it is not necessary for witnesses to estimate their value in money.—Madden v. Porterfield, 53 N. C. 166.

[e] (Ohio, 1894) In an action on a quantum meruit for services in doing chores at irregular intervals when called upon, without a hiring for a specific period, plaintiff is not required to present evidence of the value of such services, as the jury may fix the value according to their own judgment and knowledge on the subject.—McIntyre v. Garlick, 8 Ohio Cir. Ct. R. 416.

[f] (Vt. 1844) If plaintiff show to the jury that he has performed services for defendant, but his testimony leaves uncertain the amount which he is entitled to recover therefor, this will not preclude his right of recovery, but the jury may allow him such sum as they deem the services reasonably worth.—Mattocks v. Lyman, 16 Vt. 113.

§ 61. —— Contract implied from relations of parties.

[a] (Ark. 1891) Plaintiff, who was left an orphan without means, when ten years old was taken into the family of defendant, not of kin to her, where she continued to live some three years after attaining her majority. *Held*, in an action for value of services during the three years, that, while plaintiff had the burden of showing an implied promise, it was proper to instruct the jury that if, under all the circumstances of the case, including the relation of parties, the services were of such a nature as to lead to a reasonable belief that the parties understood there should be pecuniary compensation, they should find an implied promise, since in all such cases it is a question for the jury whether the services were rendered under an implied contract.—Hogg v. Laster, 56 Ark. 382, 19 S. W. 975.

[b] (Ill. 1895) Where the services sued for were rendered by plaintiff while she was a member of the family of defendant, who was her cousin, it is proper to instruct the jury that they are authorized to find whether there was a contract, express or implied, to pay for plaintiff's services.—Heffron v. Brown, 155 Ill. 322, 40 N. E. 583, affirming (1894) 54 Ill. App. 377.

[c] (Ind. 1893) In an action against the estate of a decedent for services, it appeared that plaintiff had been fed, clothed, and sent to school until 12 years old, but from that time was compelled to perform all the menial duties incident to housekeeping, besides caring for decedent's wife, who was sick for many years. Witnesses testified that plaintiff was well treated, and was taken to be one of the decedent's family, while others, though vouching for the good treatment, testified as to the duties imposed and services exacted. *Held* a question for the jury whether the services were rendered under an implied promise to pay, or solely as a member of decedent's family; and for this purpose they might take into consideration decedent's condition in life, his habits and manner of living, as well as his treatment of plaintiff with reference to other members of the family or other hired help.—Henzler's Estate v. Bossard, 6 Ind. App. 701, 33 N. E. 217.

[d] (Ky. 1836) A negro, who was emancipated by the last will of his master, remained with and labored for the defendant during the period of a controversy as to the validity of the will. After the will was established, he sued the defendant for the value of his labor, and proved the above facts, and that the defendant had said, though not to the plaintiff, that if the will was established he would pay him for his services. *Held*, that the jury might infer a contract from the evidence, and that the court ought not to instruct the jury to find for the defendant.—Black v. Meaux, 34 Ky. (4 Dana) 188.

[e] (Mass. 1833) Whether, in an action by an adult daughter, who continued to reside in her father's family and to be supported by him, to recover for the performance of such useful services as is customary for a daughter to perform, the law raises the presumption that she was entitled to compensation, and throws the burden of proof on defendant to show that they were performed without any view to such compensation, is a question of fact.—Guild v. Guild, 32 Mass. (15 Pick.) 129.

[f] (Mich. 1895) In an action by a daughter to enforce a claim against her father's estate for services, where there is evidence that they were valuable, that the father frequently stated that he intended to pay her for them, that he deeded his farm to her for them, and that the deed was void because his wife had not joined therein, the question whether the services were rendered and accepted with the understanding that they should be paid for should be submitted to the jury.—Sammon v. Wood, 107 Mich. 506, 65 N. W. 529.

[g] (Mo. 1854) Where a mother-in-law performed menial services in the house of her son-in-law, it is for the jury to say whether there was an implied contract for compensation.—Smith v. Myers, 19 Mo. 433.

[h] (Mo. 1867) Where a child resided with his parents and rendered them service after coming of age, *held*, that it was a question for the jury to decide, taking into consideration the circumstances of the case, whether an implied contract for compensation existed.—Hart v. Hess, 41 Mo. 441.

[i] (Mo. 1888) In an action by a daughter against her father's estate for services rendered decedent in his lifetime, the evidence showed that, while plaintiff was away from home working for herself, her mother was taken sick; that plaintiff then returned home, whether at her parents' request did not appear, and cared for her parents until their death; and that the father had on several occasions spoken of compensating plaintiff for her services. *Held*, that it presented a case to go to the jury on the question of an implied promise to pay. —Koch v. Hebel, 32 Mo. App. 103.

[j] (Mo. 1894) Evidence sufficient to raise a presumption that services by a child were rendered and received with the expectation that they would be paid for by the parent requires

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a submission to the jury of the issue as to whether the parent is liable, under an implied promise, for such services.—Finnell v. Gooch, 59 Mo. App. 209, 1 Mo. App. Rep'r, 30.

[k] (Pa. 1862) Where decedent, who had been boarding with his tenant and paying therefor, became dissatisfied and went to live with his son-in-law, saying he would board nowhere else, and that he had enough to pay for his boarding, the question as to whether the son-in-law was entitled to recover for the services rendered and board furnished was for the jury.—Smith v. Milligan, 43 Pa. (7 Wright) 107.

[l] (Pa. 1868) In an action of assumpsit, brought by a nephew to recover against his uncle's administrator for labor performed for the uncle, it is for the jury to say whether, upon all the facts, a promise to pay wages is established.—Neel's Adm'r v. Neel, 59 Pa. (9 P. F. Smith) 347.

[m] (R. I. 1853) As a general rule of law, the request to perform a given service implies on the part of the person making the request a promise to pay for such service when performed; yet circumstances in the case, or certain relationship between the parties, may prevent such promise from being necessarily implied, and the jury must determine from the evidence whether the party making the request has given the other party cause to think he should be remunerated.—Partlow v. Cooke, 2 R. I. 451.

§ 62. Dismissal, nonsuit, and direction of verdict.

[a] (La. 1836) Plaintiff, who, in an action for work done, neither proves that it was beneficial to defendant, nor that there was a contract as alleged, must be nonsuited.—Duffy v. Byrne, 9 La. 211.

[b] (Me. 1858) In assumpsit on an account for work and labor performed under a written contract, a nonsuit may properly be ordered if the contract is not proved.—Webber v. Inhabitants of School Dist. No. 9 in Shapleigh, 45 Me. 299.

[c] (Mich. 1889) Defendant and plaintiff had been old friends. Defendant kept a livery stable. Several years ago plaintiff, having no home, came to defendant's house, bringing with him his horse, which defendant said he would keep for his use, and that plaintiff could stay with him, and help around the stable. He stayed six months, and, after being gone some time, defendant saw him, and asked him if he did not want to come up and stay with him, and help him, to which he replied, "All right." He came and stayed about four years, doing chores around the stable. Nothing was said as to payment. He purchased clothes on defendant's credit, and whenever he wanted money he asked defendant for it, and received it. He went on a visit to his daughter, and when he left no settlement was had or claim made for one, but defendant gave him $25, and told him if he did not like it to come back, and he could have a home as long as he liked. After about six months he returned, and, as he testified, "went to living with defendant as before," and stayed over two years. *Held*, in an action of assumpsit for work and labor, that the court properly charged that there was no agreement, express or implied, to pay for the services rendered during the last two years, and directed a verdict for defendant.—Covel v. Turner, 74 Mich. 408, 41 N. W. 1091.

[d] (Mich. 1894) Where, in an action against a father-in-law for services, there is evidence that plaintiff and her husband lived with defendant before the husband's death, and performed services without any agreement for payment, and after his death defendant allowed plaintiff to remain on the same terms as before, a refusal to direct a verdict for defendant is error.—Harris v. Harris, 106 Mich. 246, 64 N. W. 15.

[e] (Mo. 1885) One suing for the reasonable value of services will not be nonsuited on the introduction of evidence that the services were performed under contract at a stipulated price.—Floerke v. Teuscher Distilling Co., 20 Mo. App. 76.

[f] (Mont. 1889) In an action for work done for defendants in digging a well, where the complaint contains the quantum meruit count, it is error for the court to take the case from the jury, and dismiss the suit, on the theory that the suit was on a contract under which plaintiffs were to be paid if they found water, and otherwise not.—Littrell v. Wilcox, 9 Mont. 97, 22 Pac. 503.

[g] (N. Y. 1827) Where a declaration contains special and general counts in assumpsit for work and labor, and the proof received under the former count varies, but would have supported the common counts, plaintiff was properly nonsuited, where he did not insist on the common counts.—Hatch v. Adams, 8 Cow. 35.

[h] (N. C. 1892) In an action for removing material of an old bridge to the place where a new one was constructed by plaintiff for defendant under a written contract, it appeared that the claim for such removal was entirely separate and independent of the written contract. There was no allegation or proof that the work of removing such material was performed at the request or for the benefit of defendant, or that it accepted or took benefit by the same. *Held*, that plaintiff was not entitled to recover, and a judgment of nonsuit was proper.—Foy v. Craven County Com'rs, 111 N. C. 129, 15 S. E. 944.

[i] (Pa. 1896) Where plaintiff claimed for work done and labor performed, evidence showing that he was the contractor furnishing the laborers to perform the work warrants a judgment of nonsuit.—Diller v. Frantz (Com. Pl.) 17 Pa. Co. Ct. R. 306, 5 Pa. Dist. R. 180.

[j] (Wash. 1895) On trial of an action for labor performed in driving piles, where it was not shown that defendant requested the work to be done, but it appeared that defendant erected a mill on the piles, it was proper to deny a nonsuit.—Maney v. Hart, 11 Wash. 67, 39 Pac. 268.

[k] (Wash. 1896) In an action for labor performed by plaintiff in and about a certain mine, it appeared that plaintiff, while in charge of such mine in behalf of others than defendant, received from defendant one letter, among others received during an extended correspondence, in which defendant, referring to a portion of the services, stated that, if certain other parties did not pay for them, he would have to. Such correspondence showed that, after the receipt of such letter, plaintiff was maintaining the same relations with the parties who placed him in charge of the mine as before; that defendant's statement in such letter was on the theory that the mine itself would be responsible for the work, and defendant, having an interest therein as mortgagee, would eventually have to pay in order to enjoy his property in the mine. *Held*, that a nonsuit was properly directed.—Bunker v. Blair, 14 Wash. 106, 44 Pac. 122.

§ 63. Instructions.

See post, § 65 [b, g].

[a] (Cal. 1887) Where, under a complaint for services rendered, plaintiff was entitled to recover such a sum as defendant had agreed to give for his services, or, if no price was agreed upon, then such sum as his services were reasonably worth, the court instructed the jury that, "though the plaintiff has brought suit for a certain sum, you are authorized to bring in

a verdict for such a sum as you may think his services were reasonably worth, if you find he is entitled to anything." *Held* no error.—Manning v. Dallas, 73 Cal. 420, 15 Pac. 34.

[b] (Cal. 1887) The court refused to give the following instruction: "If from the evidence you find that the compensation M. was to receive from D. for his services was to be at the entire discretion of D., then I charge you that you must render a verdict for the defendant, no matter what you may think his services are worth;" but instructed the jury that, "when services are rendered upon an understanding that the remuneration is to be at the discretion of the employer, no action is maintainable for the value of such services." *Held*, that whatever error there may have been in the court's refusal to give the former instruction was cured by the giving of the latter.—Manning v. Dallas, 73 Cal. 420, 15 Pac. 34.

[c] (Ill. 1858) It is erroneous to give an instruction to the jury, in an action to recover for work and labor, which excludes from their consideration all proof of a special contract set up in defense.—Lee v. Quirk, 20 Ill. (10 Peck) 392.

[d] (Ill. 1882) In an action against an estate for keeping the children of the deceased, an instruction that before plaintiff could recover he must show that at the time of rendering the services he expected pay, and actually did charge the same to the defendant, is erroneous, as it was not necessary that he keep an account and charge each item.—McCleery v. McLean, 11 Ill. App. (11 Bradw.) 44.

[e] (Ill. 1883) In an action for labor performed for defendant, it is error to modify a requested instruction denying plaintiff a recovery, unless the defendant accepted the work and made use of the building, in which case the plaintiff could recover the value of the work done, where there was no evidence of any such acceptance.—Coggeshall v. Mates, 13 Ill. App. (13 Bradw.) 117.

[f] (Ill. 1886) In assumpsit to recover the value of work done, an instruction: "The value or no value of the job to the defendants is of no consequence to you. Whether it be of value or not to them is wholly immaterial in the case. If they ordered it, they should pay for it," is not erroneous as intimating that, if appellants ordered the work, they must pay the price asked.—Kirk v. Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815.

[g] (Ind. 1891) Where defendants, in an action for work and labor, alleged in their answer that plaintiff was indebted to a person named, and that they had paid the said indebtedness at plaintiff's request, and upon his agreement that they should have credit therefor, it was proper to charge that they were not entitled to credit unless plaintiff made the request and agreement as stated; and, if they consider the charge not sufficiently full, it is their duty to ask an additional charge.—Gastlin v. Weeks, 2 Ind. App. 222, 28 N. E. 331.

[h] (Ind. 1892) Plaintiff in an action for services rendered had lived with defendant as a member of his family for nearly 20 years. *Held*, that defendant could not complain of an instruction to the jury that "if plaintiff, at the request of defendant, performed for him labor and services, the law implied a promise on his part to pay for the same what it was reasonably worth," where a following instruction was that "if plaintiff lived in the family of defendant, and was provided for by him as one of his family, and without any contract for wages for her services, or any understanding between them to that effect, then she cannot recover."—Knight v. Knight, 30 N. E. 421.

[i] (Ind. 1895) In an action on the quantum meruit for commission in effecting a sale, an instruction requiring the jury to assess the commission according to the preponderance of the evidence if they find for plaintiff is proper, though the evidence shows a sale to a different vendee than the one alleged in the complaint.—Jenney Electric Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

[j] (Md. 1869) In an action on a contract for work, labor, and materials, the evidence showed that the materials used in the manufacture of the articles in dispute were furnished in part by the plaintiffs and in part by the defendant. The prayer of the defendant was that the court would instruct the jury that the mere retention of the manufactured articles by him was no evidence of acceptance, if the jury should find that in the process of manufacture the materials of the defendant were blended with the work, labor, and materials of the plaintiffs. *Held*, that the court properly refused such prayer, because it omitted to submit to the jury the question whether the materials of the defendant were so blended with those of the plaintiffs that they could not be separated.—Johnson v. Harvey, 30 Md. 259.

[k] (Md. 1869) In an action on a contract for work, labor, and materials, the evidence showed that the materials used in the manufacture of the articles in dispute were partly furnished by plaintiffs and partly by defendant. Defendant requested a charge that the mere retention of the manufactured articles by him was no evidence of the acceptance, if the jury should find that in the process of manufacture the materials of the defendant were blended with the work, labor, and materials furnished by the plaintiffs. *Held*, where the evidence also showed that by the course of dealing between the parties the imperfect articles were to be returned, the request was properly refused.—Johnson v. Harvey, 30 Md. 259.

[l] (Md. 1888) In an action on the common counts for money due plaintiff under a contract of employment, and also for money expended by him, on evidence that plaintiff, while in the employment of defendant, made a new engagement with it, and thereupon expended money, and rendered services for it, at its request, a charge that plaintiff could not recover anything if he was at one time employed by defendant, and afterwards entered into a new engagement with it, is properly refused, since, apart from such hypothesis, there was evidence on which he could recover on a quantum meruit.—Public Grain & Stock Exch. v. Patrick, 14 Atl. 522.

[m] (Md. 1892) In an action to recover for services rendered as nurse to an invalid aunt, an instruction that, if certain facts should be found, the jury might find an implied promise to pay, without stating that, if the facts were so found, plaintiff would be entitled to recover, but merely that "plaintiff was entitled to recover what * * * the services were worth," although not critically accurate, was not misleading.—Bouic v. Maught, 76 Md. 440, 25 Atl. 423.

[n] (Mass. 1858) Where, in an action to recover for work under a special contract, the jury were instructed that if the work had been only partially done, and the defendant had availed himself of the plaintiff's work, the plaintiff was entitled to recover what the work was reasonably worth, it was ground of exception that the court omitted to instruct, further, that the plaintiff must have intentionally failed to finish the work, and that they should deduct what it would cost the defendant to finish it according to the contract.—Veazie v. Hosmer, 77 Mass. (11 Gray) 396.

[o] (Mich. 1884) Where, in an action for a balance due for services, plaintiff and others in his behalf testified as to the value of the services, and defendant merely testified as to what the services were, and put in evidence a bill rendered, there was no error in an in-

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struction that no evidence of value had been given by defendant, and that they might base their verdict on the testimony given if they were satisfied with it.—Gartner v. Beller, 54 Mich. 333, 20 N. W. 65.

[oo] (Mich. 1889) Where plaintiff sued her stepmother for services rendered, by a declaration containing only common counts in assumpsit, and there was some evidence as to money received by defendant from plaintiff's earnings, an instruction that, if defendant deceived plaintiff as to her legal rights and thereby obtained possession of plaintiff's earnings, plaintiff was entitled to recover such money, was inapplicable to the case, and should have been refused.—Feiertag v. Feiertag, 73 Mich. 297, 41 N. W. 414.

[p] (Mich. 1889) The refusal of an instruction that the burden of proof was on plaintiff in a suit for services to establish everything necessary to a recovery was not error, where the court charged that plaintiff must show his right to recover by a fair preponderance of evidence, to show the work he did, and its value, and to show what understanding defendant had of the matter, and that he received the benefit of it.—Bonner v. Runals, 76 Mich. 136, 42 N. W. 1087.

[pp] (Mich. 1890) Plaintiff, in an action of assumpsit for work and labor, claimed that defendant, his uncle, agreed to pay him, as a laborer on his farm, the same wages that other men received, and also to pay his wife for housekeeping. Defendant testified that plaintiff came to him, and said he was going to get married, and that he told plaintiff that, if he was going to marry any kind of a "smartish" woman, he could "fetch" her to defendant's house, and she could do work for both of them, and plaintiff could work on his own farm, and that plaintiff said he ought to know how smart she was, for they were raised together, and that no more was said. *Held*, that it was error to instruct that, if the jury found defendant's version to be correct, they should say what that talk meant, as, under defendant's version, he was entitled to a verdict.—Alderton v. Wright, 81 Mich. 294, 45 N. W. 968.

[q] (Minn. 1893) In an action by a son for work performed for his father while he still continued a member of his family though he had reached his majority, a request by defendant to charge that "the evidence must be clear, direct, and certain" was properly refused, since it might have misled the jury into supposing that, in order to justify a finding that there was an agreement to pay, it must have been directly testified to by some witness who heard it made.—Donahue v. Donahue's Estate, 53 Minn. 460, 55 N. W. 602.

[qq] (Miss. 1843) In assumpsit for work and labor, a charge was given to the jury that "absolute proof that the work was done is not necessary; the jury must weigh the testimony, and form their own conclusion, from that, whether it was done." *Held* that, although the first clause was incorrect if taken alone, it was so qualified by the latter clause that the whole, taken together, was unobjectionable.—Dickson v. Moody, 10 Miss. (2 Smedes & M.) 17.

[r] (Mo. 1821) Where, in assumpsit for caring for defendant's child, there was some evidence to show an agreement that the services were gratuitously performed, it was error to instruct that defendant was liable, unless he showed a positive agreement that the services were a gratuity.—Coleman v. Roberts, 1 Mo. 97.

[rr] (Mo. 1852) Judgment will be reversed, where the court instructed the jury, in an action for work and labor on a quantum meruit, plaintiff having fixed a price per week for his services in his account filed, that he had alleged and must prove a contract for that sum.—Waldstein v. Bredell, 17 Mo. 352.

[s] (Mo. 1894) A charge, in an action to recover for work and materials, authorising the recovery for the real value of such work and materials, and another authorising the recovery for their reasonable value to the defendant, were not inconsistent.—Heman v. Compton Hill Imp. Co., 58 Mo. App. 480.

[ss] (N. Y. 1874) Where a complaint was in form on a quantum meruit, the allegation being that the sum named was what the plaintiffs reasonably deserved for their services, and the evidence showed that the price was agreed on, and there was no other evidence on the subject of what the services were worth, it was proper to instruct that the jury could not find a verdict for less than the full amount claimed.—Ludlow v. Dole, 1 Hun, 715.

[t] (N. Y. 1886) A bookkeeper, not an expert, was employed to examine the books of a party to a pending suit, so as to be able to give testimony for his employer. *Held*, in his action for his compensation, that the jury were improperly told that they might consider that the work was intended to form the basis of testimony, or that it was material that a large amount was involved, and that the success of the defendant was a matter of importance to him, since it is only in cases where professional services or skill of a high order is required that such rule applies, the general rule being reasonable pay for the work.—Carples v. Rosenbaum, 13 Daly, 494.

[tt] (N. Y. 1889) Defendant was plaintiff's brother-in-law, and came habitually to plaintiff's house, staying for periods ranging from a few days to several weeks. Plaintiff's evidence tended to show that the circumstances were such that the law would imply a promise by defendant to pay board. On all the evidence it might be inferred that plaintiff had no intention of charging defendant for board. The court charged that, if there was no expectation or promise to give or receive pay, plaintiff could not recover. *Held*, that it was not error to charge, at defendant's request, that the law does not imply a contract between relatives, with the qualification that this was not one of that class of cases.—White v. Knowles, 52 Hun, 612, 6 N. Y. Supp. 579.

[u] (N. Y. 1891) An instruction to the jury, which charges "that whenever a man, without the invitation of another, renders services or makes an offer to render services to another, and the other stands by and accepts the efforts of the first person, and uses whatever service is bestowed, the law infers a promise upon the part of the man who has received the benefit to pay for that benefit such sum as is fair and reasonable," is inapplicable to a case in which voluntary services were rendered by the plaintiff's steam fireboats in extinguishing a fire in the defendant's warehouse, which was largely insured, and filled with goods belonging to others.—Merritt v. American Dock & Trust Co., 59 N. Y. Super. Ct. (27 Jones & S.) 83, 13 N. Y. Supp. 234.

[uu] (N. Y. 1892) In an action by a son against the executor of his mother for services rendered the latter in her lifetime, a charge that "children are bound to take care of their parents in their old age," and "the consequence" of that rule, and of the promptings of filial affection, is "that the presumption of law is against such a claim as has been advanced in this action," is reversible error, as tending to prejudice the jury, in determining the fact of such an agreement, there being evidence that deceased had requested the services, and agreed to pay therefor.—Ulrich v. Ulrich, 136 N. Y. 120, 32 N. E. 606, 1015, 18 L. R. A. 37, reversing (1892) 60 N. Y. Super. Ct. (28 Jones & S.) 237, 17 N. Y. Supp. 721.

[v] (N. Y. 1892) Nor was such error cured by a subsequent instruction that if plaintiff had

overcome the presumption by proof he might recover.—Ulrich v. Ulrich, 136 N. Y. 120, 32 N. E. 606, 1015, 18 L. R. A. 37.

[vv] (N. C. 1848) Plaintiff contracted to work for defendant for six months at $8 per month. The defendant, at the expiration of four months, refused to pay the hire of those months, alleging that he was not bound to pay until the expiration of the six months, upon which plaintiff refused to work any longer. He subsequently agreed to clear three acres of land in place of the two months' additional work, but the clearing was not done according to the agreement. *Held*, that an instruction that the work done in clearing the land was necessarily beneficial was erroneous.—Dover v. Plemmons, 32 N. C. 23.

[w] (Ohio, 1894) Where plaintiff sues for services rendered under an implied contract, and defendant alleges a special contract, but admits the services, it is proper to charge that defendant, in order to limit a recovery by the special contract, must establish such contract by a preponderance of the evidence.—Sanns v. Neal, 52 Ohio St. 37, 38 N. E. 881.

[ww] (Or. 1896) In an action for services rendered for defendant under an alleged contract, in the sale of merchandise which defendant had taken possession of under a chattel mortgage securing a note signed by plaintiff and the mortgagor, an instruction basing plaintiff's right to recover on a conversion of the goods by defendant, and on their value, instead of on the question of the employment of plaintiff by defendant, is erroneous.—Dooley v. First Nat. Bank, 29 Or. 277, 45 Pac. 780.

[x] (Pa. 1867) In an action to recover for services, where no express promise to pay a specific sum was proved, the mere fact that defendants paid another party a certain sum for rendering similar services is not sufficient to warrant the judge in charging the jury that it was probable the defendant promised to pay the sum to plaintiff.—Bickham v. Smith, 55 Pa. (5 P. F. Smith) 335.

[xx] (Pa. 1876) In actions for claims against the estates of decedents for services by members of their family, the courts should instruct the jury with great precision and positiveness as to the evidence necessary to constitute a contract.—Neal's Ex'rs v. Gilmore, 79 Pa. (29 P. F. Smith) 421.

[y] (Pa. 1896) In an action against decedent's estate for compensation for services rendered by plaintiff while living in decedent's family from childhood to maturity, it was error to charge: "If she [plaintiff] worked faithfully and honestly, what were her services worth to this old man and woman? On your oaths and consciences, on the spirit of honor and fairness, on the spirit of right and justice, what ought she to get from this estate?"—this setting up a wrong standard by which to estimate her wages.—Kauss v. Rohner, 172 Pa. 481, 33 Atl. 1016, 51 Am. St. Rep. 762.

[yy] (Tex. 1896) In an action for medical services it appeared that plaintiff was not in the actual practice of medicine; that he was closely related to defendant's family, and the families of the parties were on the most intimate terms; that most of the time plaintiff made defendant's home a general stopping place for rest, etc.; and that it was under such circumstances that plaintiff prescribed for defendant's family. The court charged that, if plaintiff's demand was just, he was entitled to recover, and that, if it was not just and due, but was contrary to law and equity, the jury should find for defendant. *Held*, that it was error to refuse a special charge asked by plaintiff on the question of implied contract.—Bonner v. Bradley (Civ. App.) 36 S. W. 1014.

[z] (Wash. 1893) In an action for services rendered as a surveyor, it was alleged as a defense that the survey made by plaintiff was not correct. Plaintiff testified that defendant gave him the starting point, and told him to survey from that. *Held*, that the court did not err in charging that, if they believed plaintiff's testimony, he had a right to rely on defendant's representations as to the starting point, but, if they did not believe it, then they must determine whether the survey was correctly made.—Graves v. Smith, 7 Wash. 14, 34 Pac. 213.

[zz] (Wis. 1877) In an action by a son for services rendered after maturity for his father, who claimed that the son had lived in his family, receiving board and clothing as a member thereof, an instruction that if the jury found, from the preponderance of the evidence, that the father agreed to pay the son for his services, the latter was entitled to recover, is erroneous, as justifying the jury in believing that the father could be held liable on an implied contract.—Wells v. Perkins, 43 Wis. 160.

§ 64. Judgment.

Amount of recovery, see ante, §§ 56–58.

[a] (Miss. 1873) Where plaintiff in assumpsit proved that at the request of defendant, though without any special contract for the amount of the wages, he had been in defendant's employ for two years, upon demurrer to the evidence, the judgment will be quod recuperet, and a writ of inquiry to ascertain the amount will be issued.—Jordan v. Foxworth, 48 Miss. 607.

§ 65. Appeal and error.

[a] (Ind. 1857) Where the evidence in a suit for work and labor showed the rendering of services under such circumstances that the law would have implied no promise to pay for them, and the plaintiffs relied upon an express agreement to take the case out of the rule, and offered testimony tending to prove it, a verdict for the plaintiffs will not be disturbed on appeal.—Littler v. Smiley, 9 Ind. 116.

[b] (Ind. 1891) In an action on a common count for the reasonable value of labor, plaintiff testified that he had contracted with defendant to do certain ditching for eight cents per cubic yard. The court charged that if the jury found that plaintiff had worked at an "agreed price" they should be governed thereby, and also that if they found that there was no contract as to price they should be governed by what the work was reasonably worth "as proven." *Held* harmless error, where the evidence showed that defendant paid eight cents to others for like work, and no other sum was mentioned during the trial.—Garrigan v. Dickey, 1 Ind. App. 421, 27 N. E. 713.

[c] (Ind. 1891) Where, in an action for work and labor the rendering of the services is proved, and the evidence is conflicting as to whether the services were paid for by support and clothing furnished to the plaintiff by the defendant while a member of plaintiff's family, a verdict for the plaintiff will not be disturbed on appeal, as contrary to the evidence.—Chamness v. Cox, 2 Ind. App. 485, 28 N. E. 777.

[d] (N. Y. 1879) H., two days before his death, requested R., his confidential clerk, to bring to H.'s house a box of money and valuable papers, and thereupon to take charge thereof and put it in a safe deposit, all of which R. did, and, upon the appointment of the administratrix, eight days after H.'s death, delivered her the box. R. sued her for such services, claiming compensation as upon a quantum meruit, besides his salary of $60 per month, but on the trial set up no claim to special employment, and was nonsuited. *Held*, on appeal, that, even if such employment were valid, plaintiff was entitled only to compensation for the eight days at $60

per month, and, as he made no such claim, the maxim "de minimis non curat lex," applies, and the judgment will be affirmed.—Ross v. Hardin, 79 N. Y. 84.

[e] (N. Y. 1896) In an action to recover on a quantum meruit for services rendered, it appeared that defendant, on account of sickness, was in need of some one to conduct his business, and that plaintiff, under a request from defendant's brother-in-law, assumed charge of the business during defendant's sickness, defendant executing to him powers of attorney to sign, accept and indorse all checks, notes, and drafts. *Held*, that the fact that the referee erred in determining that plaintiff did not render any material services before delivery of the powers of attorney was not prejudicial to defendant.—Wiley v. Goodsell, 3 App. Div. 452, 38 N. Y. Supp. 376.

[f] (N. Y. 1896) Where the amount allowed by the referee for the services was not excessive in any view of the case, error in regard to the amount of profits earned for defendant in the business was not prejudicial to defendant.—Wiley v. Goodsell, 3 App. Div. 452, 38 N. Y. Supp. 376.

[g] (Ohio, 1854) Upon two counts of a declaration for work and labor—the first averring the liability, the intervention of the statute of limitations, and a subsequent promise to pay within six years before the commencement of the action; the second, averring a promise to pay in consideration of work previously done by the plaintiff, but without averring a request by the defendant's testator—the court charged that a recovery might be had on the second count, not for the labor, but upon the promise made in consideration of such labor. *Held*, on appeal, that the charge was no ground for reversal; the jury having in effect found a request under the first count, and it not appearing that the jury could have supposed the court intended to charge that no original request was necessary.—Haymaker's Ex'rs v. Haymaker, 4 Ohio St. 272.

Workhouses.

Almshouses or poorhouses, see "Paupers," vol. 38, cc. 3127, 3128, § 21; cc. 3353, 3354, § 198.
Jails or prisons, see "Prisons," vol. 40, cc. 2387–2456.

Working Days.

For loading or unloading vessel, see "Shipping," vol. 44, cc. 724–729, §§ 589–592.

Works.

Contracts for construction of buildings and other works, see "Contracts," vol. 11, cc. 956–985, §§ 861–889.
Public improvements by municipalities and contracts therefor, see "Municipal Corporations," vol. 36, cc. 688–792, §§ 711–761; cc. 947–1089, §§ 850–913.
Works of necessity or charity on Sunday, see "Sunday," vol. 45, cc. 87–94, §§ 14–20.

Worship.

Constitutional guaranty of religious freedom, see "Constitutional Law," vol. 10, cc. 1479–1483, § 152.
Disturbance of or interference with religious assemblage or worship, see "Disturbance of Public Assemblage," vol. 17, cc. 335–352; "Religious Societies," vol. 42, cc. 1652, 1653, § 195.
Mode of public worship, see "Religious Societies," vol. 42, c. 1652, § 194.

Wounding.

See "Assault and Battery," vol. 4, c. 995, § 84.

Wrappers.

Color of wrappers of goods as subject of trademark, see "Trade-Marks and Trade-Names," vol. 46, cc. 30, 31, § 20.
Imitation of wrappers as infringement of trademark, see "Trade-Marks and Trade-Names," vol. 46, cc. 105–108, § 74.
—— *or fraudulent use of wrapper as constituting unfair competition, see* "Trade-Marks and Trade-Names," vol. 46, cc. 122–126, § 83.

Wrecking Trains.

See "Railroads," vol. 41, cc. 2449, 2450, § 780; cc. 2453–2455, §§ 785, 786 [a, b, h, l].

Wrecks.

Abandonment of wrecked vessels and cargoes, see "Abandonment," vol. 1, c. 7, § 6.
Effect on right to charter money or other compensation, see "Shipping," vol. 44, cc. 186–188, §§ 190, 191.
—— *to wages of master, see* "Shipping," vol. 44, cc. 310, 311, § 299.
—— *to wages of seamen, see* "Seamen," vol. 43, cc. 2732, 2733, § 161.
Liabilities for loss of or injury to tow caused by striking or running on wreck, see "Towage," vol. 45, cc. 3171–3175, § 20.
Obstruction of navigation by wreck, see "Navigable Waters," vol. 37, c. 62, § 66.
Operation and application of customs laws to wrecked goods, see "Customs Duties," vol. 15, c. 1480, § 189; cc. 1587, 1588, § 290.
Ownership and rights of property, see "Navigable Waters," vol. 37, cc. 251, 252, § 248; "Shipping," vol. 44, cc. 822–824, §§ 663–666.
Plundering or stealing from wreck, see "Conspiracy," vol. 10, c. 1134, § 41 [f]; "Shipping," vol. 44, cc. 824, 825, § 667.
Sale of cargo of wrecked vessel, see "Shipping," vol. 44, cc. 301, 302, § 284.
Salvage, see "Salvage," vol. 43, cc. 1779–1977.

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Writing.

See, also, cross-references under "Written Instruments," vol. 50, cc. 1858–1861.

Comparison of handwriting, see "Criminal Law," vol. 14, cc. 1555–1558, § 892; c. 1735, § 1047; cc. 1776, 1777, § 1080; "Evidence," vol. 20, cc. 1013–1022, §§ 681–682; c. 2241, § 1591; cc. 2262–2270, §§ 1602–1606; cc. 3496–3516, §§ 2381–2391.

Expert and opinion evidence as to handwriting, see "Criminal Law," vol. 14, c. 1735, § 1047; cc. 1741–1743, § 1055; cc. 1776, 1777, § 1080; "Evidence," vol. 20, cc. 3181–3192, §§ 2210–2213; cc. 3253, 3254, § 2247; c. 3329, § 2299; cc. 3335–3337, § 2307; cc. 3351–3354, § 2315; cc. 3528, 2529, § 2399.

Necessity and sufficiency of writing to constitute advancement, see "Descent and Distribution," vol. 16, cc. 1739–1741, § 405.

—— *appointment or authorization of agent or attorney, see* "Principal and Agent," vol. 40, cc. 662–671, §§ 16–25; cc. 1158–1165, §§ 378–390; cc. 1316–1318, § 531; c. 1337, § 549.

—— *assignment, see* "Assignments," vol. 4, cc. 1213–1242, §§ 67–84.

—— *assignment for benefit of creditors, see* "Assignments for Benefit of Creditors," vol. 4, cc. 1754–1805, §§ 212–298.

—— *assignment, grant, or surrender of estate or interest in land, see* "Frauds, Statute of," vol. 23, cc. 2049–2080, §§ 97–112.

—— *award of arbitrators, see* "Arbitration and Award," vol. 4, cc. 206–210, §§ 255–260.

—— *chattel mortgage, see* "Chattel Mortgages," vol. 9, cc. 2344–2408, §§ 83–140.

—— *composition deed or agreement, see* "Compositions with Creditors," vol. 10, cc. 880–889, §§ 4–14.

—— *compromise agreement, see* "Compromise and Settlement," vol. 10, c. 952, § 15.

—— *conditional sale, see* "Sales," vol. 43, cc. 1684–1686, §§ 1348–1351.

—— *contracts, see* "Contracts," vol. 11, cc. 155–187, §§ 144–219; "Frauds, Statute of," vol. 23, cc. 1839–2483, §§ 1–351.

—— *conveyance of personal property, see* "Frauds, Statute of," vol. 23, cc. 2131–2195, §§ 140–186; cc. 2202–2316, §§ 192–264; "Sales," vol. 43, cc. 789–798, §§ 574–576½.

—— *conveyance of real property, see* "Deeds," vol. 16, cc. 51–185, §§ 50–148; "Frauds, Statute of," vol. 23, cc. 2019–2130, §§ 82–139; cc. 2196–2202, §§ 188–191.

—— *conveyance of vessel, see* "Shipping," vol. 44, cc. 75, 76, §§ 84–86.

—— *dedication of real property to public use, see* "Dedication," vol. 15, cc. 2776–2887, §§ 12–63.

—— *easement, see* "Easements," vol. 17, cc. 1761–1775, §§ 35–41; "Frauds, Statute of," vol. 23, cc. 2042–2047, §§ 94, 95.

—— *execution of power, see* "Powers," vol. 40, cc. 565–571, §§ 121–127.

—— *gift of real property, see* "Gifts," vol. 24, cc. 2522–2526, §§ 43–48.

—— *guaranty, see* "Frauds, Statute of," vol. 23, cc. 1852–1982, §§ 13–58; cc. 2244–2256, §§ 216–218; "Guaranty," vol. 25, cc. 34–37, §§ 10–12.

—— *insurance, see* "Insurance," vol. 28, cc. 726–759, §§ 203–230; cc. 2998–3006, §§ 1851–1856.

—— *lease, see* "Frauds, Statute of," vol. 23, cc. 2035–2042, §§ 90–93; "Landlord and Tenant," vol. 32, cc. 64–108, §§ 50–97.

—— *license, see* "Frauds, Statute of," vol. 23, cc. 2047–2049, § 96; "Licenses," vol. 32, cc. 2608–2618, §§ 96–104.

—— *mortgage, see* "Mortgages," vol. 35, cc. 477–484, §§ 114–124.

—— *notice in general, see* "Notice," vol. 37, cc. 1475, 1476, §§ 19–21.

—— *notice to creditor by surety to proceed against principal, see* "Principal and Surety," vol. 40, cc. 2056–2058, § 344.

—— *notice to indorser of nonpayment and protest of bill or note, see* "Bills and Notes," vol. 7, cc. 1531–1547, §§ 1129–1137.

—— *partnership, see* "Partnership," vol. 38, cc. 458–480, §§ 1–12.

—— *ratification of act of agent, see* "Principal and Agent," vol. 40, cc. 1434–1436, § 635.

—— *release, see* "Release," vol. 42, cc. 1306–1316, §§ 6–17.

—— *renewal of debt barred by statute of limitations, see* "Limitation of Actions," vol. 33, cc. 1078–1086, §§ 593–596.

—— *renewal of debt discharged in bankruptcy, see* "Bankruptcy," vol. 6, cc. 851–852, § 860.

—— *sale of goods, see* "Frauds, Statute of," vol. 23, cc. 2131–2195, §§ 140–186; cc. 2202–2316, §§ 192–264; "Sales," vol. 43, cc. 117–125, §§ 54–59.

—— *sale of lands, see* "Frauds, Statute of," vol. 23, cc. 2080–2130, §§ 113–139; "Vendor and Purchaser," vol. 48, cc. 50–61, §§ 24–32.

—— *shipping articles, see* "Seamen," vol. 43, cc. 2571, 2572, §§ 12, 13; cc. 2576–2584, §§ 19–24.

—— *stipulation, see* "Stipulations," vol. 44, cc. 3047–3058, §§ 5–21.

—— *trust, see* "Trusts," vol. 47, cc. 381–406, §§ 25–33.

—— *warranty on sale of goods, see* "Sales," vol. 43, cc. 1006–1015, §§ 720–725.

—— *will, see* "Wills," vol. 49, cc. 282–403, §§ 226–335.

Reduction to writing of depositions, see "Depositions," vol. 16, cc. 1104–1109, §§ 147–154; cc. 1146–1149, § 182.

—— *of evidence in probate proceedings, see* "Wills," vol. 49, c. 872, § 765.

—— *of holographic or nuncupative will, see* "Wills," vol. 49, cc. 403–438, §§ 336–367.

—— *of instructions to jury, see* "Trial," vol. 46, cc. 1472–1480, §§ 514–523; cc. 1778, 1779, § 682; cc. 1782, 1783, § 685; c. 1799, § 693; also, "Criminal Law," vol. 14, cc. 2746–2751, §§ 1948–1958.

—— *of requests or prayers for instructions, see* "Trial," vol. 46, cc. 1719, 1720, § 648; also, "Criminal Law," vol. 14, c. 2813, § 2007.

—— *of verdict or findings, see* "Trial," vol. 46, cc. 1920, 1921, § 758; c. 2194, § 922.

Requirements of statute of frauds, see "Frauds, Statute of," vol. 23, cc. 1839–2526.

Writing on newspaper mailed without paying letter postage, see "Post Office," vol. 40, c. 306, § 47.

Written confessions of accused, see "Criminal Law," vol. 14, cc. 1906–1908, §§ 1208–1211.

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Writs.

Authority of clerk to issue, see "Clerks of Courts," vol. 10, c. 73, § 16; cc. 145–148, § 95; "Process," vol. 40, c. 2518, § 11.

—— *of United States commissioner to issue, see* "United States Commissioners," vol. 47, cc. 1980–1983, § 8.

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